49/76

SUPREME COURT OF VICTORIA

R v O'CALLAGHAN

Gowans J

26 February 1976 — [1976] VicRp 43; [1976] VR 441

EVIDENCE – PSYCHOLOGIST'S OPINION THAT RECORDS OF INTERVIEW WITH ACCUSED NOT CREDIBLE – ADMISSIBILITY OF EXPERT OPINION EVIDENCE – WHETHER MATTERS WITHIN THE PROVINCE OF THE JURY – WHETHER OPINION EVIDENCE ADMISSIBLE.

On a *voir dire* as to the admissibility of a confession made by the accused, a report by a psychologist was tendered to indicate that the answers alleged to have been made by the accused were inconsistent with the results of the psychological testing by the expert and the assessment of his personality. The report was objected to on the basis of being an expression of opinion as to credibility.

HELD: Evidence of the psychologist rejected.
1. The content and nature of an ordinary written record cannot be made the subject of expert opinion; that is for the jury. Neither can the behaviour of ordinary persons.

2. The matters that the jury were called upon to determine in the present case with regard to the evidence of the police, and the denials and suggestions of the accused either that the evidence was false or that the document produced was a concoction, were matters well within the province of the jury, without the help of the psychologist.

GOWANS J: ... The position ultimately reached involved the taking of two steps: (1), there was a statement of the impression received by the witness from a perusal of the written documents which constituted the records of interview; and, (2), there was an opinion expressed as to the likelihood of the accused having produced the answers recorded in those documents. The first matter did not in itself constitute an expression of opinion requiring the expertise of a psychologist. But it may perhaps be taken as a statement of a reason, itself within the capacity of any ordinary person, for the expression of the ultimate opinion itself. In effect, that ultimate opinion is that the evidence given by the police that the accused did make the answers attributed to him in the records of interview is not credible and that the accused's contention that that evidence is false and that the records of interview are a concoction is probably true.

It may be that that opinion is a relevant one. But the question is whether it is an admissible one as falling within the role allotted to opinion evidence. The basis of the opinion is that the witness's assessment of the accused's personality is that he is an ordinary man, not exhibiting any peculiarities of intelligence or personality, and that such a person is not likely to have produced (as the police say he did) the answers in the documents which the witness had read which, on the witness's interpretation of them, showed marked differences in the manner and content of the responses recorded.

The content and nature of an ordinary written record cannot be made the subject of expert opinion; that is for the jury. Neither can the behaviour of ordinary persons. In this connection I refer to what was said by the High Court in *Transport Publishing Company Pty Ltd v Literature Board of Review* [1956] HCA 73; (1956) 99 CLR 111 at pp118-9; [1958] ALR 177. The question there before the court concerned the tendency of certain literature to deprave or corrupt particular persons. In dealing with the subject, the High Court said this: —

> "But on the question of the tendency of the literature to deprave or corrupt any such persons important distinctions must be observed. For the question necessarily has two aspects or falls into two parts. One is the content and nature of the literature and the other concerns the characteristics of the persons themselves.
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> "With reference to the second of these it may be said at once that ordinary human nature, that of

people at large, is not a subject of proof by evidence, whether supposedly expert or not.

"But particular descriptions of persons may conceivably form the subject of study and of special knowledge. This may be because they are abnormal in mentality or abnormal in behaviour as a result of circumstances peculiar to their history or situation. It is an illustration far away from the subject in hand but it appears that the manner in which men pursuing a special vocation would reason about a matter of business may be the subject of evidence. Thus it happens to have been a question much controverted whether persons skilled in marine insurance could be called, when the question is the materiality of a non-disclosure alleged to avoid a policy, in order to prove how the fact if disclosed would influence an underwriter. Practice has established the admissibility of such evidence: see *Halsbury*, 2nd ed., vol.18 par.373, p272; *Arnold on Marine Insurance*, 14th ed. (1954) vol. 2, s626, p626. But before opinion evidence may be given upon the characteristics, responses or behaviour of any special category of persons, it must be shown that they form a subject of special study or knowledge and only the opinions of one qualified by special training or experience may be received. Evidence of his opinion must be confined to matters which are the subject of his special study or knowledge. Beyond that his evidence may not lawfully go. As to the first of the two aspects or parts of the question", (and I interpolate, that refers to the content and the nature of the literature) "opinion evidence is not admissible. The contents and nature of the literature the court can see for itself and must judge accordingly: see *Galletly v Laird* (1953) Sess Cas (JC) 16."

But apart from this, the likelihood or otherwise of the police evidence or the accused's assertion being true is a matter well within ordinary human experience, and the issue is only one of credibility. In this connection I refer to the following passage in *R v Turner* [1975] QB 834; [1975] 2 WLR 56; [1975] 1 All ER 70. In that case the accused faced a charge of killing a girl with a hammer. His defence was provocation. He claimed he had been very upset by a disclosure which she had made. He said his hand had come across the hammer which was down by the side of the seat and he hit her.

"He said: 'It was never in my mind to do her any harm. I did not realise what I had in my hand. I knew it was heavy....When I realised it was a hammer I stopped.'" (WLR p58).

The defendant's credit as a witness was an important issue. After the defendant had given evidence his counsel told the judge he wanted to call a psychiatrist. He explained why. He said: (*ibid.*)

"First of all, it may help the jury to accept as credible the defendant's account of what happened and, second, it may tell them why this man was provoked."

The judgment of the Court of Appeal reads, (WLR p60): —

"Before this court Mr Mildon submitted that the psychiatrist's opinion as to the defendant's personality and mental make-up as set out in his report was relevant and admissible for three reasons: first, because it helped to establish lack of intent; secondly, because it helped to establish that the defendant was likely to be easily provoked; and thirdly, because it helped to show that the defendant's account of what had happened was likely to be true. We do not find it necessary to deal specifically with the first of these reasons. Intent was not a live issue in this case. The evidence was tendered on the issues of provocation and credibility. The judge gave his ruling in relation to those issues. In any event the decision which we have come to on Mr Mildon's second and third submissions would also apply to his first.

"The first question on both these issues is whether the psychiatrist's opinion was relevant. A man's personality and mental make-up do have a bearing upon his conduct. A quick-tempered man will react more aggressively to an unpleasing situation than a placid one. Anyone having a florid imagination or a tendency to exaggerate is less likely to be a reliable witness than one who is precise and careful. These are matters of ordinary human experience. Opinions from knowledgeable persons about a man's personality and mental make-up play a part in many human judgments. In our judgment the psychiatrist's opinion was relevant. Relevance, however, does not result in evidence being admissible: it is a condition precedent to admissibility. Our law excludes evidence of many matters which in life outside the courts sensible people take into consideration when making decisions. Two broad heads of exclusion are hearsay and opinion. As we have already pointed out the psychiatrist's report contained a lot of hearsay which was inadmissible. A ruling on this ground, however, would merely have trimmed the psychiatrist's evidence; it would not have excluded it altogether. Was it inadmissible because of the rules relating to opinion evidence?

"The foundation of these rules was laid by Lord Mansfield in *Folkes v Chadd* (1782) 3 Doug KB 157 and was well laid: the opinion of scientific men upon proven facts may be given by men of science

within their own science. An expert's opinion is admissible to furnish the courts with scientific information which is likely to be outside the experience and knowledge of a judge or a jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.

"What, in plain English, was the psychiatrist in this case intending to say? First, that the defendant was not showing and never had shown any evidence of mental illness, as defined by the *Mental Health Act* 1959, and did not require any psychiatric treatment; secondly, that he had had a deep emotional relationship with the girl which was likely to have caused an explosive release of blind rage when she confessed her wantonness to him; thirdly, that after he had killed her he behaved like someone suffering from profound grief. The first part of his opinion was within his expert province and outside the experience of the jury but was of no relevance in the circumstances of this case." (The evidence of the psychologist in this case that the accused was a normal person could be of no relevance without the rest of his opinion, and the accused would be assumed to be a person of ordinary personality and intelligence.)

"The second and third points dealt with matters which are well within ordinary human experience. We all know that both men and women who are deeply in love can, and sometimes do, have outbursts of blind rage when discovering unexpected wantonness on the part of their loved ones; the wife taken in adultery is the classical example of the application of the defence of 'provocation': and when death or serious injury results, profound grief usually follows. Jurors do not need psychiatrists to tell how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life. It follows that the proposed evidence was not admissible to establish that the defendant was likely to have been provoked. The same reasoning applies to its suggested admissibility on the issue of credibility. The jury had to decide what reliance they could put upon the defendant's evidence. He had to be judged as someone who was mentally disordered. This is what juries are empanelled to do. The law assumes they can perform their duties properly. The jury in this case did not need, and should not have been offered, the evidence of a psychiatrist to help them decide whether the defendant's evidence was truthful."

In my view the matters that the jury are called upon to determine with regard to the evidence of the police, and the denials and suggestions of the accused either that the evidence is false or that the document produced is a concoction, are matters well within the province of the jury, without the help of the psychologist.

In my opinion the authorities which I have quoted require me to reject the evidence which has been tendered and I reject it accordingly. Ruling accordingly.

Solicitor for the Crown: John Downey, Crown Solicitor.
Solicitor for the accused: George Madden, Public Solicitor.
