

JERSEY / JUDGMENT

AG -v- F [2016] JRC 089E (22 April 2016)

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JUDGMENT

THE Commissioner: 1. Late on Friday 22 nd April, 2016, I refused two applications made by the defence in relation to expert evidence which are to some extent connected and I now give my reasons. 2. In my judgment dated 7 th April, 2016, (AG-v-F

[2016] JRC 079) I refused the defence application to admit the evidence of Dr David La Rooy, a chartered psychologist who is expert in human memory, on the basis that it did not come within the narrow parameters laid down in the English Court of Appeal decision of R v X

[2005] EWCA Crim 1812 . I did, however, say this at paragraphs 24 and 25:- "24 However, I recommend that Dr La Rooy (and the prosecution expert, Dr Tully) should attend the trial to hear the evidence that the complainant actually gives, for this reason, in that in her interviews with the police, the complainant makes references to:- (i) "Memories popping up" (ii) To not remembering everything "yet". (iii) To blocking out memories which re-occur. (iv) To not having all of her memories "yet". (v) To her having counselling which had unblocked a memory leading to further allegations. It is possible, therefore, that her evidence may comprise, in part, repressed or recovered memories and, if so, it may be that expert evidence might be helpful to the jury in that limited respect. I note that in the trial in the case of R v X , the defence was given leave to use expert evidence on false memory syndrome." 3. The two experts have sat in on the evidence of Witness 1 (and Witness 2) and the defence have renewed their application following a further short report from Dr La Rooy, in which he essentially rehearses his previous opinion and reports his conclusion that Witness 1's testimony is unreliable. He says the jury should have psychological expert evidence in the same four areas established by scientific research, namely infantile amnesia, recall delay, repressed and recovered memory and false memory. In his earlier report and in his amended report he makes no reference to the scientific research - indeed in the amended report he only says this in relation to repressed and recovered memory:- "Repressed and recovered memory: The concept of repressed and recovered memories is often used to explain how serious allegations made in historic sexual abuse cases only gradually come to light as well to account for the 'snowballing' of new allegations. There is a complete lack of scientific support for the concept of repressed and recovered memories and in my view they are a 'red flag'. Memory experts generally agree, given the considerable uncertainty surrounding the

reliability of recovered memories that they should not be used as the sole basis of legal decision making in the absence of corroboration." 4. The defence say that all of the matters I had flagged in the earlier judgment have featured during the trial and they rely on the following in support of an application to admit the evidence of Dr La Rooy:- "5 The defence rely on the following in support of the application to admit the evidence of David LaRooy:- a. All of the matters raised by me at [24] above have been referred to during the trial. b. The complainants (both [Witness 1] and [Witness 2]) have raised the issue of 'repressed' memory during the currency of their evidence. The jury may be mistaken into believing that the term 'repressed' provides a panacea supporting the accuracy of delayed memories from childhood. Both experts agree that the accuracy of such repressed memory can be false. c. [Witness 1] referred to having memories of events when she was a one year old. There appears to be scientific agreement that such memories are not possible. d. All of [Witness 1's] memories (save for the events in the bedroom with the bunkbeds) relate to a period when [Witness 1] was between 1 and 5 years old. e. The British Psychological Society provide the following - 'Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory (Revised April 2010). This contains the following:- 'Detailed and well-organised memories dating to events that occurred between 5 to 3 years of age should be viewed with considerable caution'. 'All memories dating to the age of 3 years and below should be viewed with great caution and should not be accepted as memories without independent corroborating evidence.'" 5. Whilst the evidence of experts in this case would involve them commenting on the evidence of the complainants and the reliability of their memories, which Advocate Preston acknowledged was close to if not the question for the jury, he said there should be no objection to that. In murder charges, for example, expert evidence in relation to diminished responsibility, an issue for the jury, was routinely heard by the Court. Experts are there not to displace the jury but to assist them in an area outside their knowledge. 6. Advocate Thomas said that the following are the salient features of Witness 1's evidence: - "She recalled an incident at school when she had a memory about something that had happened to her in the toilet at home. She had not thought about this for a long time. She said in cross-examination 'It came into my head. I hadn't really thought about what had happened'. Her explanation of what she referred to as 'repressed memories' was this: 'memories I have now which have been pushed down. Something I knew was there but I hadn't looked at'. She acknowledged that when she uses the phrase 'repressed memory' this is just the language she has chosen to describe her recollection and she is not using the phrase in a technical, psychological sense. The last 8 years of her life she described as a 'massive blur' in which she was 'bombarded' with memories. In cross-examination she said 'I know what's real and what's a memory. I think it is more a case of not wanting to believe memories. I know what's real and what's not. I'd rather not look at it...' Asked whether she had described her recollections as a 'dream' she said 'I know what is real now. Looking back I was trying to suss out what's real or not .. After remembering you look at it properly. Look at what was going on at the time times around it. I can remember so much of living here. I know what's real and what isn't. I know what's a dream and what isn't. You

don't dream that kind of stuff, it's a memory'. In re-examination she was asked about her description of 'repressed memory' and said that she was not comfortable looking at these memories. She did not know how they got 'pushed down'. They had always been there, although they were not her favourite memories." 7. Whilst the above is selective, he submitted that the general tenor of what she told the jury was that memories came back to her during her teens and early adulthood, but as far as she was concerned, these memories were of events that she had always known about. She had not used the expression "repressed memory" in any technical sense. The question therefore arose as to whether the jury would be assisted by expert evidence on "repressed memory". 8. Advocate Preston had passed to me an article co-written by the prosecution expert, Dr Tully, on recovered memory which says in the introduction:- "The science is controversial. Definitions of 'recovered memory' and the language of complainants are inconsistent and ambiguous. Cases are complex and eccentric with no typical pattern. Some complainants affected by the controversy present strategically. There are legal and professional barriers to obtaining historical documentation. Newly recognized phenomena of 'recovered memories' arising from adult onset psychopathology are sparsely reported. In general there is professional agreement that there is no infallible way of discriminating possibly true recovered memories from false memories." 9. In his report for the prosecution, Dr Tully says this in Appendix 4:- "2 Involuntary Autobiographical Memories and "Recovered memory Experiences" The major function of the brain in managing autobiographical memories is mainly inhibitive. If every possible reminder of any and all events in the past actually triggered a recollection, the mind would be flooded and unable to function properly in the present. An involuntary autobiographical memory (which is not intentionally being sought for) will come to mind spontaneously usually only when such is triggered by a highly distinctive relevant and unexpected prompt or cue. There is no search of memory, no active imaginative 'envisioning'. Rather the memory or part thereof pops into mind unbidden and unexpected and often with a surprisingly vivid emotional sense of reliving the moment. It feels like a kind of ambush (Berntsen 2012). Most people have a few involuntary autobiographical memories (IAMs) everyday. When people who remember historic sexual abuse/assault in this way are tested in the laboratory, it turns out they are no more prone to memory falsification than any one else. The quality of the memory may seem to be new or 'recovered' if they haven't remembered having brought those particular episodes to mind earlier. A person may well refer to such long unremembered memories having been 'blocked' or 'buried'. Such persons may have well remembered parts of these narratives earlier in life (when there were distinctive relevant cues) but forgotten that they have done so. A memory of remembering is weak, especially if that experience is attenuated, being deliberately suppressed or pushed away and the person distracts themselves. People who have these 'recovered memory experiences' tend to be more prone (than average) to forgetting that they have remembered before, when tested in the laboratory. Recent research work from psychologists at Harvard University, U. S. A. Canada, the Netherlands and the UK has developed this understanding considerably (Geraerts et al 20089, McNally & Geraerts 2009). Corroborative evidence

supporting these memories is found roughly at the same level as with people who have always remembered historical abuse. Because words such as 'block' or 'bury' are colloquial metaphors, it is necessary to discover whether the complainant is really claiming complete amnesia or only that after a passage of time they had avoided thinking on these matters. Any conclusion that memories have been newly manufactured depends upon a careful assessment of this issue." 10. He then goes on to deal with recovered memories, namely those allegedly recovered from impregnable amnesia, repression or dissociative inaccessibility, namely those with no memory of any sexual abuse at all and who through memory work and psychotherapy practices are more likely than other groups to develop false memories. 11. Whilst I accepted that there is scientific learning on the issue of so called repressed or recovered memory, I was conscious of the warning given by the English Court of Appeal in *R v X* about the admission of expert evidence of this kind in cases such as this. This was not one of those rare cases in which the complainant provides a description of very early events which appear to contain an unrealistic amount of detail. 12. I agreed with Advocate Thomas that in essence the central message from Dr La Rooy as per his reports, would be for the jury to exercise caution, but it would be inevitable that in examination and cross-examination of both him and Dr Tully (assuming that out of fairness leave was also given to the prosecution to call Dr Tully) their opinions as to the reliability of the memories of the complainants in this case would be before the Jury. It was not realistic or helpful in my view to try and restrict their evidence in what is controversial science to the general; Advocate Preston's fall-back position. 13. It seemed to me that the effect of time on memory, the fact that memories surfaced in Witness 1's teenage years, the inconsistencies in her accounts, her initial denial of abuse to the police in 2008, the four years that then went by during which she had counselling (about which process there was no evidence) and her comments on the way her memory worked were all matters which the jury could assess and form their own opinion (*R v Turner*

[1974] QB 834). There may be a need to warn the Jury to exercise caution, to be discussed with counsel in the usual way. 14. I therefore declined to admit the expert evidence, save to this extent. 15. In her evidence before the jury, Witness 1 claimed to have a good long-term memory and by way of example, she recounted un-traumatic unconnected events that she remembered when she was 1 and 2. The jury might deduce from this, if they accept it, that she had an unusually good long-term memory, which might in turn serve to enhance the reliability of her evidence as to what she remembered happening when she was 4 or 5. There appeared to be scientific consensus that such un-traumatic memories from that age would be most likely, if not impossible, as a consequence of what is known as infantile amnesia. It seemed to me that the jury would be assisted by an explanation of infantile amnesia which could be undertaken in writing and consensually through the two experts. 16. The second application of the defence related to what Dr Tully said in his first report about the ABE interview conducted with Witness 1 in August 2012 in which she had for the first time made an allegation of attempted rape. The multiplicity of features suggested to

him the possibility of false memory/confabulation and this was especially risky material to assume authentic long-term memory, good enough to reach the appropriate criminal standard. 17. The prosecution had at the outset of the trial, with the consent of the defence, severed the count in relation to attempted rape and another of indecent assault arising out of the same interview, which counts remain on file. Advocate Preston submitted that out of fairness to the defendant, the jury should know that the prosecution had accepted Dr Tully's advice as to the reliability of Witness 1's memory in this respect and that this was the reason for the application to sever. He therefore wanted Dr Tully to be made available for cross-examination. 18. In discussion he accepted that the Court, and the Jury, should not go into decisions made by the Attorney General in relation to prosecutions and that in reality his application was to call Dr Tully so that he could extract from him his professional opinion as to the reliability of Witness 1's memories as recounted in the August interview. 19. The August interview and the allegation of attempted rape had not been led by the prosecution but was introduced into the trial by cross-examination of Witness 1 and pursued to some extent. It was not put to her that it was a false allegation and she did not accept therefore that it was false. 20. Advocate Preston produced authority on the obligation of the prosecution to call witnesses and make them available for cross-examination but as Advocate Thomas pointed out, the prosecution cannot be under an obligation to call a witness whose evidence is not admissible. I have ruled against the admission of expert evidence (save in one narrow respect) and the evidence of Dr Tully in relation to the August interview is not therefore admissible. I agree therefore that the prosecution is under no obligation to make him available for cross examination. 21. Advocate Preston was concerned that the jury might speculate as to why the defendant was not charged with attempted rape, but that is not a reason for admitting this evidence and can be dealt with by a suitable direction.

Authorities AG-v-F

[2016] JRC 079 . R v X

[2005] EWCA Crim 1812 . R v Turner [1974] QB 834 Page Last Updated: 30 Jun 2016 BAILII:
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