

SC CR 95 001

CR 02518

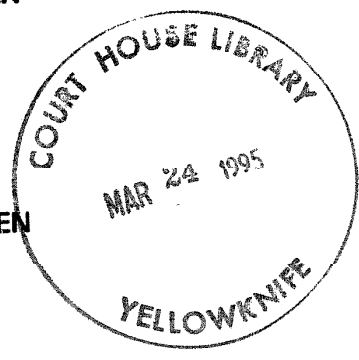
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROGER WALLACE WARREN



RULING ON ADMISSIBILITY OF EVIDENCE

Objection to admission of certain expert evidence sustained.

Heard at Yellowknife on January 4th and 6th 1995.

Judgment filed January 9th 1995.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

PUBLICITY BAN

**PUBLICATION AND BROADCASTING OF THIS RULING IS PROHIBITED
PENDING SEQUESTRATION OF THE JURY PURSUANT TO SECTION 648
OF THE CRIMINAL CODE.**

Counsel for the Crown: Peter W.L. Martin, Q.C.
David W. Guenter

Counsel for the Accused: Glen Orris, Q.C.
Gillian Boothroyd

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROGER WALLACE WARREN

RULING ON ADMISSIBILITY OF EVIDENCE

Crown counsel objects to the introduction in evidence before the jury of any mention of certain assessments, tests or studies specifically designed to indicate the likelihood that the accused falsely confessed in October 1993 to the culpable homicide of nine miners who died in an underground explosion at Giant Mine near Yellowknife on September 18th 1992.

The disputed evidence has been outlined in a *voir dire* held last week in the absence of the jury. Robert G. Ley, B.A., M.A., Ph.D., the defence witness who would provide that evidence gave that outline in his testimony on the *voir dire*.

Dr. Ley is a tenured Associate Professor in the Department of Psychology of Simon Fraser University at Burnaby, British Columbia, teaching both graduate and undergraduate courses in psychological assessment, psychotherapy, personality theory, child (and adolescent) psychology, ethics and professional issues. He is currently the Director of Training in the Psychology and Law Institute of Simon Fraser University and

has been a consultant since 1985 to the Correctional Service of Canada, the Royal Canadian Mounted Police and various other correctional and police services in British Columbia.

4 Dr. Ley has, among many other things, appeared as an expert witness in the trial courts of Alberta, British Columbia and Newfoundland. He has, in addition, made an impressive number of contributions to the literature in his field both in Canada and the United States. And he has carried on a private practice at Vancouver, British Columbia, since 1982, oriented towards forensic work and psychotherapy in relation to adults, adolescents and younger children.

5 Crown counsel accepts without question the expert qualifications of Dr. Ley as a psychologist whose opinions may be received in evidence before the jury in reference to his professional assessment of the accused based upon generally well recognized psychological tests and studies. That acceptance does not however extend to any assessment, test or study made or designed for the specific purpose of indicating the probability or possibility that a confession of crime made to police is unreliable. It is the Crown's submission that these assessments, tests and studies are in themselves lacking in necessary reliability, according to the evidence before the Court on the *voir dire*.

6 In Crown counsel's submission the disputed evidence would not only take up the time of the Court to no good purpose; it would in all likelihood mislead the jury. It is submitted on behalf of the Crown that this evidence does not satisfy the requirements for admissibility laid down by the Supreme Court of Canada in *R. v. Mohan*,

[1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402, 29 C.R. (4th) 243, 114 D.L.R. (4th) 419, 71 O.A.C. 241, 8 C.R. (3d) 173, 166 N.R. 245. Accordingly, the Crown's position is that the evidence should be excluded.

7 The disputed evidence, though apparently of some relevance to the issues before the Court on the pre-trial *voir dire* held last year in this case, was not sought to be adduced at that time. The Court's rulings on the admissibility of the accused's confession in October 1993 were therefore made without any reference to this evidence, which is now sought to be adduced for the first time during these proceedings.

8 The evidence, as I understand Dr. Ley's outline of it, will show the nature and results of three tests administered to the accused. These consist of (a) "compliance"; (b) "suggestibility"; and (c) "confession" tests, in the form of "true or false" questionnaires. The tests were apparently developed in this form by Dr. Gisli Gudjonsson, a psychologist at the Institute of Psychiatry, De Crespigny Park, Denmark Hill, England, to whom reference is made in *R. v. Raghip*; *R. v. Silcott*; *R. v. Braithwaite*, *The Times* 9 December 1991 (C.A.). As yet, I have heard only the outline given by Dr. Ley and have not seen the actual questionnaires.

9 The tests in question were selected to provide some measure of the degree to which the accused's confession might be classified as unreliable because it was made during a police interview, in a "coerced compliant" manner, according to the typology of alleged "false confessions" developed in Kassin (S.M.) and Wrightsman (I.S.) (editors): *The Psychology of Evidence and Trial Procedure* (London, Sage 1985). This typology has

been accepted and used by Dr. Gudjonsson, who is described by Dr. Lev as being by far the outstanding expert in the field. An article in *The Lancet*, vol. 344, No. 8935, pages 1447-50, dated November 26th 1994, states at page 1448:

A general understanding of the phenomenon of "false confessions" has come about via a series of studies over ten years by Gudjonsson, a forensic psychologist and former police officer. Gudjonsson has provided good empirical evidence to support a theoretical construct of *interrogative suggestibility* - the variable degree to which individuals tend to acquiesce to authority during questioning.

10

The Lancet enlarges on this a few lines further on, as follows:

Kassin and Wrightman also suggested, mainly on the basis of anecdotal evidence, that there are two distinct types of false confessions during interrogation, the first based on overt compliance under interrogative pressure, with retention of internal cognitive control (the suspect confesses knowing he or she is innocent), and the second based on suggestibility (the suspect comes to believe in his or her guilt under questioning). Gudjonsson has been able to observe directly many such cases and to measure separately individuals' "compliance" and "suggestibility". His data suggest that there is no clear distinction between compliant and suggestible individuals who confess falsely, but it is nevertheless useful to distinguish two psychological mechanisms that may be provoked in vulnerable individuals subjected to interrogation: in *coerced-compliant confessions* the suspect yields to the short-term benefits (freedom from further interrogation and conflict, gaining approval from the police) without realising the long-term risks of confessing; and in *coerced-internalised confessions* suspects come to believe in their guilt, either because they have no clear memory of the events concerned, owing to traumatic or toxic amnesia, or because they begin to mistrust their own recollections.

11

At page 1449, *The Lancet* sounds a necessary note of caution, however, as

follows:

... There is no simple way to detect individuals who are vulnerable to the processes leading to false confessions. Gudjonsson has developed two scales designed to measure objectively how likely an individual is to yield to pressure during interrogation and to leading questions. These methods provide a powerful and innovative research tool, but practical application in forensic assessments is limited by the fact that subjects' level of anxiety and general emotional state can strongly influence results. Moreover, it is doubtful whether the test can be used reliably by psychologists without specific training. The potential for misuse and even for preparing subjects to give false-positive results should not be underestimated. All psychological and medical techniques proposed in the past to yield clear answers in criminal cases (e.g. the polygraph, hypnosis, stylometry, and drug-aided interviews) have proved to be potentially unreliable, liable to be manipulated, and subject to both false-positive and false-negative results.

Dr. Ley very candidly acknowledged that he had used the tests on less than a half-dozen occasions and that this is the first instance in which he has appeared as a witness in court in that connection. Indeed, although he met Dr. Gudjonsson at Vancouver in 1993 during an International Congress on Mental Health and Law, this is the first case in which he has consulted him (by telephone, to seek advice on scoring certain responses of the accused to the tests, but apparently to no avail since Dr. Gudjonsson's heavy commitments prevented him from providing more than general advice to Dr. Ley).

Dr. Ley was frank also in acknowledging that nothing has been developed to date to show whether the test results are affected by the subject's level of general intelligence. He concurred in the opinion of Dr. Lohrasbe, the defence psychiatrist, that

the accused is highly intelligent. A reading of the report in the case of *R. v. Raghip*; *R. v. Silcott*; *R. v. Braithwaite* reveals that Raghip had a very low Intelligence Quotient and could be classed as illiterate (probably dyslexic); whereas the accused in the present instance appears to be a person of above average general intelligence who is possessed of a remarkable vocabulary and is a daily solver of crossword puzzles. The somewhat simple-mindedly obvious questions in Dr. Gudjonsson's "compliance" test (twenty questions to be answered "true" or "false") do not appear likely to have presented much of a challenge to this accused.

14 With reference to Dr. Gudjonsson's "suggestibility" test, Dr. Ley agreed that a significant effect resulting from the manner of administering this test had been admitted by Dr. Gudjonsson. This "experimenter effect" is one which the test does not measure; and there is no way of knowing how significant this effect may have been in the test administered by Dr. Ley to the accused.

15 It deserves to be noticed in this connection that the accused (on advice of counsel) has refused to be examined (or, I presume, tested) by a Crown psychiatrist (or, I presume, a Crown psychologist). No matter how neutrally professional the manner of Dr. Ley undoubtedly was when testing the accused, it is plain that he would have been seen by the accused in a light different from that of a Crown forensic expert.

16 As for the more general "confession" questionnaire, it is apparent that this also suffers from a serious defect, this time in reference to the "internal consistency" of the questions which are posed. The best that Dr. Ley could say is that the reliability of

this test is not yet satisfactorily established. The accused evidently completed this potentially important questionnaire without personal supervision by Dr. Ley. This is not a test which can be looked on as reliable for the forensic purposes intended, given its low level of "internal consistency" and the apparent absence of any supervision of the accused when the test was completed.

A most disquieting feature of these tests is that there is no indication that they have ever been independently assessed to determine whether they are in fact capable of showing anything more than that those who claim to have made a false confession of some crime at some time in the past tend to score well on the tests. There is apparently nothing to show how far those claims are truthful other than the anecdotal accounts of the subjects themselves. Such cases are not to be confused with those where an individual has been the victim of forged or perjured evidence of a "confession" not in fact made to the police. And they are likewise to be distinguished from cases such as *Re Judith Teresa Ward* (1992), 96 Cr.App.Rep. 1 (C.A.) and *R. v. Raghip*; *R. v. Silcott*; *R. v. Braithwaite*, where convictions based in part upon confessions were set aside as "unsafe" following inquiry and judicial review going beyond the evidence at trial.

Dr. Ley, who is apparently as knowledgeable as anyone in Canada in reference to the work of Dr. Gudjonsson and its impact on the forensic science community, frankly acknowledged that the present status of the research in this area of psychometry is "still in the toddler stage". No published research in the field is yet available other than that of Dr. Gudjonsson.

19 In practical terms, Dr. Gudjonsson has himself emphasized the importance of specific training and specific qualifications for those who administer his tests. Dr. Ley, notwithstanding his extensive and most impressive general qualifications, does not have any such specific training or qualifications. To quote Dr. Ley, Dr. Gudjonsson has in effect "cornered the market" in this area of psychometry.

20 Evidence on the *voir dire* was also given by Dr. Julio E. Arboleda-Flórez, M.D., Ph.D., F.R.C.P.(C.), Professor and Head of the Division of Forensic Psychiatry in the Department of Psychiatry of the Faculty of Medicine and the holder of other professorial posts in the University of Calgary, Alberta. Among his many other distinctions, he is the Director of the World Health Organization Collaborating Centre for Research and Training in Mental Health at Calgary General Hospital and an Honorary Member of the World Psychiatric Association. Called on behalf of the Crown, Dr. Arboleda-Flórez was substantially in agreement with the evidence of Dr. Ley as to the early state of the research into the field of psychometric testing of alleged false confessors. As I understand the evidence of Dr. Arboleda-Flórez, it is as yet too early to regard the tests propounded by Dr. Gudjonsson, as outlined by Dr. Ley, as being forensically reliable for their intended purpose in this case. The tests are not as yet widely used and the results of any ongoing research into their validity are as yet unpublished. Moreover, *The Lancet* article is not to be taken as other than a cautionary alert to the medical profession at large to maintain its professional objectivity when dealing with individuals accused or convicted of crime.

21 On behalf of the accused, it is submitted that Dr. Ley's opinion as to the

accused's state of mind at the time of the confession will be based on other observations or tests than those of Dr. Gudjonsson. However, Dr. Ley's opinion on that point has been at least influenced by those test results. It is therefore argued that to exclude Dr. Ley's evidence of the tests and their results will in effect remove an important element of the basis for Dr. Ley's more widely-based opinion.

22 It is also argued on behalf of the accused that Dr. Gudjonsson's adopted classification of "coerced-compliant confessions" is not a classification of the confessors but of the confessions themselves. At the same time, if I understand correctly, Dr. Ley will not be asked to say if the confession is false or if the accused is the type of person who would make a false confession; instead, Dr. Ley will be asked to say whether the circumstances in which the confession was made, given the state of mind of the accused, were such as to render the confession unreliable.

3 The ultimate question for the jury, in relation to the identity of the person who set the explosion, is clearly dependent upon the jury's acceptance or rejection of the confession. While Dr. Ley, like Dr. Lohrasbe, may be able to point to features of the accused's mental condition in October 1993 which reflect upon the confession, it is not for Dr. Ley or any other expert to say whether the confession is or is not a true one, or whether it is to be looked on as reliable or unreliable. These are conclusions to be considered by the jury based on all the evidence before them. Dr. Ley will not be heard to express his opinion on any of these issues.

4 It is not in dispute that the confession evidence now before the jury is the

core of the Crown's case against the accused. Without it, or if it is thrown into doubt, the Crown's case against the accused as being the person who set the explosion underground at Giant Mine on September 18th 1992 is no more than purely circumstantial and would probably not support a guilty verdict on either first degree murder, as charged, or any included offence.

25 While the reliability and truthfulness of the confession is not the ultimate issue for the jury, it is nevertheless the crucial issue in this trial with reference to the identity of the person who caused the fatal explosion.

26 The leading judicial authority on the reception of expert opinion evidence in Canada is *R. v. Mohan*. Adopting the analysis formulated by Sopinka J. on behalf of the Supreme Court of Canada in that case, I proceed as follows:

1. Relevance

- (a) While there is logical relevance to the proffered evidence of Dr. Ley with respect to the tests and assessment based on the work of Dr. Gudjonsson, that evidence does not meet the criterion of legal relevance.
- (b) The evidence is misleading in the sense that its effect on the jury would be out of all proportion to its reliability. The tests have not been shown to be reliable as yet. Indeed, the contrary appears to be true. Any assessment based upon them must suffer likewise on grounds of unreliability. The probative value of the evidence is accordingly overborne by its prejudicial effect.

2. Necessity in assisting the Jury

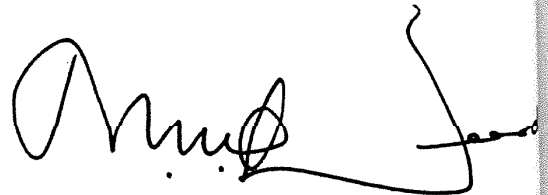
It is true that the proffered evidence is likely to be outside the experience and knowledge of the jury. However, as I have mentioned, the evidence is likely to distort the fact-finding process on a crucial point which, to all intents and purposes, may determine the ultimate issue in the case. Instead of assisting the jury, the evidence is likely to distract (and has the potential to confuse) the jury.

Since neither of these criteria is satisfied, I need go no further. The proffered evidence must be ruled inadmissible.

I have, thanks to counsel, had the advantage of reading certain other authorities, such as *R. v. Marquard* (1993) 4 S.C.R. 223, 85 C.C.C. (3d) 193, 25 C.R. (4th) 1, 108 D.L.R. (4th) 47, 66 O.A.C. 161, 159 N.R. 81; *R. v. Lafferty* (1993) N.W.T.R. 218, 80 C.C.C. (3d) 150, (1993) 4 W.W.R. 74 (S.C.); *R. v. Abbey* (1982) 2 S.C.R. 24, 68 C.C.C. (2d) 394, 29 C.R. (3d) 193, 138 D.L.R. (3d) 202, (1983) 1 W.W.R. 251, 39 B.C.L.R. 201, 43 N.R. 30 and *R. v. Lavallee* (1990), 1 S.C.R. 852, 55 C.C.C. (3d) 97, 76 C.R. (3d) 329, (1990) 4 W.W.R. 1, 67 Man. R. (2d) 1, 108 N.R. 321, in addition to the very useful discussions in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L.Ed. 2d. 469, 61 USLW 4805 (1993); "Believe It Or Not" by Mark Hansen (1993), 79-JUN A.B.A.J. 64; "The Trial Judge As Gatekeeper For Scientific Evidence" by Michael Lepp and Christopher B. McNeil (1993), 27 Akron L.Rev. 89; "Contemporary Comment: When Plight Makes Right - The Forensic Abuse Syndrome" (1994) 18 Crim. Law Journal (Australia) 29; and, not least, "Notes and Comments" by A.D.G. (1994) C.L.Q. 16; and "The Admissibility of Expert Evidence: A New Caution Based on General Principles" by R.J. Delisle (1994), 29 C.R. (4th) 267. These materials have been of considerable assistance to me.

29

The objection taken by Crown counsel is therefore sustained.

A handwritten signature in black ink, appearing to read 'M.M. de Weerd', written in a cursive style.

M.M. de Weerd
J.S.C.

Yellowknife, Northwest Territories
January 9, 1995

Counsel for the Crown: Peter W.L. Martin, Q.C.
Dale F. Guenther

Counsel for the Accused: Glen Orris, Q.C.
Gillian Boothroyd

CR 02518

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

and -

ROGER WALLACE WARREN

RULING ON ADMISSIBILITY OF EVIDENCE

