

CR 03017

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- V -

MICHAEL BELL

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Transcript of a Ruling following a Voir Dire of The Honourable Mr. Justice J.E. Richard, at Yellowknife, in the Northwest Territories, on the 23rd day of May, A.D. 1996.

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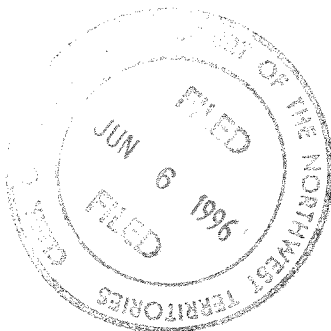
APPEARANCES:

MR. A. REGEL:

Counsel for the Crown

MR. B. GORIN:

Counsel for the Defence



1 THE COURT: On this third voir dire, defence  
2 counsel seeks a ruling on the admissibility of the  
3 proposed opinion evidence of Dr. Read, a professor of  
4 psychology whose expertise lies in the study of human  
5 memory.

6 I have carefully reviewed the testimony given by  
7 Dr. Read on the two voir dires, and after much  
8 consideration of that evidence, I am not satisfied that  
9 his proposed evidence will assist the jury in the task  
10 it has before it, particularly in the four areas  
11 stipulated by Mr. Gorin. I will deal with these in  
12 turn.

13 Firstly, it is submitted that Dr. Read can assist  
14 the jury in dealing with one theory of the defence,  
15 that is that the complainant in this case is confused  
16 when recollecting two similar sexual assaults which she  
17 says she suffered within a few weeks. Dr. Read says  
18 that if a person is recalling two similar traumatic  
19 events either immediately afterwards or later on, it is  
20 possible the person could confuse the details of the  
21 two incidents. That is no more and no less than what  
22 an ordinary lay person would say or believe.

23 Dr. Read says that generally it would be minor  
24 details of the event that could or would be transposed  
25 to the other event. That too is what the ordinary lay  
26 person would say or believe.

27 In my respectful view, the possibility of

1 confusion is within the common stock of knowledge of  
2 adult jurors, that is, the notion of the possibility of  
3 confusion. Dr. Read's expert evidence in this area  
4 does not, therefore, meet the threshold test of  
5 necessity.

6 The Supreme Court of Canada has said in the Mohan  
7 case that in order for the opinion evidence of an  
8 expert to be admissible, it must be necessary in the  
9 sense that, "it would provide information which is  
10 likely to be outside the experience and knowledge of a  
11 judge or jury."

12 The second area in which defence counsel submits  
13 that Dr. Read could assist the jury is in dealing with  
14 that part of the complainant's testimony where she says  
15 she had no memory of the sexual assault by the accused  
16 for two years thereafter. The topic here is sometimes  
17 referred to as repressed memory syndrome.

18 Dr. Read says that the recovering or recovery of  
19 memories is a common experience. The notion of  
20 repression of memories though he says is a highly  
21 contentious issue. There is a division of opinion  
22 between the scientists on the one hand and the clinical  
23 psychologists on the other.

24 The scientists, and Dr. Read I take it includes  
25 himself in that group, the scientists say that the  
26 mechanism of repressing a memory simply can't be done,  
27 whereas the clinicians say that they experience it

1 often with their patients or in their patients.

2 Dr. Read, accordingly, refrains from using the  
3 term "repressed memory", but rather states that certain  
4 things or events are not available to a person.

5 It is Dr. Read's opinion that it is unlikely that  
6 a traumatic event which happened to a 20-year-old woman  
7 would be unavailable to her for a period of two years  
8 after its occurrence. He indicated that this  
9 complainant's situation would be unique in that  
10 regard.

11 I have a number of concerns which cause me to keep  
12 this proposed opinion evidence from the jury in this  
13 case. Firstly, the Crown has closed its case and there  
14 is no evidence in the Crown's case of the presence of  
15 repressed memory syndrome. No Crown expert has been  
16 called. Dr. Read is not convinced that there was any  
17 repression of memory. No one, thus far, is suggesting  
18 that there was. The complainant is not a  
19 psychologist. I understand her to be saying simply  
20 this,

21 I do not recall ever, during that  
22 two-year period, ever thinking about this  
23 assault, but one particular day in July  
1994 when I was stressed out, it did come  
back to me.

24 Next, to use Dr. Read's preferred terminology,  
25 there is no evidence that the memory of the assault was  
26 unavailable to her during that time frame. There is no  
27 evidence that its availability or unavailability was

1 tested during that time. Dr. Read states that it is  
2 impossible to know if a certain memory was unavailable  
3 to a person during a time if that was not tested. He  
4 says that there are a number of reasons why a person  
5 would say or think that they did not have a memory of  
6 an event during a period of time, for example, that  
7 there was nothing to remind the person of it, that the  
8 person was not asked about it, that the person did not  
9 think about it.

10 Finally, in this area, Dr. Read states that the  
11 vast majority of the studies reported in the  
12 professional literature deal with repressed memories of  
13 childhood sexual abuse. He conceded that there are  
14 very few individuals of the complainant's age who have  
15 been included in the studies which he has read.

16 I, therefore, deny this part of the application  
17 for the reason that in my view Dr. Read's expertise in  
18 this particular area, which I acknowledge, is not  
19 pertinent to the Crown evidence in this case.

20 The next area in which defence counsel seeks to  
21 have Dr. Read assist the jury is with respect to the  
22 phenomenon of false memory. Dr. Read shies away from  
23 the expression "false memory syndrome", however he does  
24 say that there are now published dozens of research  
25 projects, experiments, etc. which demonstrate that a  
26 person can produce false memories. He states that most  
27 of that literature shows a rate of as much as 25

1 percent of people will produce false memories after  
2 being submitted to certain interview techniques. Most  
3 of the literature though does not deal with false  
4 memory of traumatic experiences. Dr. Read says that  
5 certain patterns emerge with respect to the causes of  
6 the production of false memories and these are, for  
7 example, influence of other people, therapeutic  
8 intervention, any post-event information that doesn't  
9 amount necessarily to suggestive material.

10 The difficulty that I have with this interesting  
11 opinion evidence or description of the ability of a  
12 person to create a false memory is that there is no  
13 evidence of any of this occurring with this complainant  
14 prior to her recollection of events in July 1994. Her  
15 testimony before the jury is that her memory today of  
16 the assault is the same memory that she had when it  
17 first came back to her in July 1994. This is not a  
18 situation where this complainant's memory was initially  
19 repressed and then later recovered with the assistance  
20 of a therapist thus creating the possibility of the  
21 production of a false memory.

22 Also I note that it was Dr. Read's opinion that  
23 typically a false memory is produced after a long  
24 period of time when the memory was not available,  
25 certainly more than two years.

26 Accordingly, I deny the request to allow opinion  
27 evidence on the phenomenon of the creation of false

1 memory for the reason that it cannot be related to the  
2 evidence before the jury in this case and, therefore,  
3 is of no assistance to the jury.


4 The final or fourth area in which defence counsel  
5 seeks to adduce evidence, opinion evidence, from Dr.  
6 Read is in a very general treatment of the variables  
7 and parameters which impact on the reliability or  
8 unreliability of a person's memory.

9 In my view, such a wide-ranging discussion is  
10 inappropriate as a general proposition given the  
11 respective roles of the expert witness and a jury. I  
12 am not satisfied that there is anything specific or  
13 unique in the trial evidence here that should lead the  
14 Court to run the risk or danger of an expert witness  
15 wandering onto the jury's domain of assessing  
16 credibility and reliability of other witnesses'  
17 testimony.

18 For these reasons then, the proposed opinion  
19 evidence of Dr. Read as described to me on the voir  
20 dire is ruled inadmissible.

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22  
23 Certified Pursuant to Practice Direction  
24 #20 dated December 28, 1987

25   
26 Sandra Burns  
27 Court Reporter

