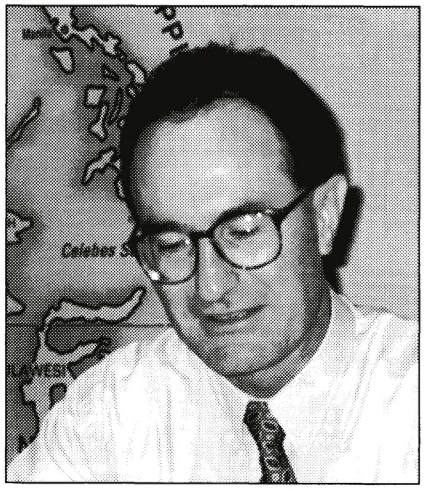
case notes with mark hunter



Mark Hunter

Regina v Shane Slack

Court of Criminal Appeal (NSW) No. 93/2003

Judgment of Sheller JA, Wood CJ at CL and Smart AJ delivered 7 April 2003

CROSS-EXAMINATION - COLLATERAL MATTERS - CREDIT

The appellant (S) exercised fortnightly weekend access in 2000 to his two daughters, who were then aged fourteen and eleven. On 1 September 2000 they were accompanied at his residence by the 11 year old complainant for an overnight stay. S was convicted at trial on two charges of aggravated sexual assault (digital penetration), committed that night, and was sentenced to serve two years periodic detention.

The alleged assault was first complained of in September 2001 and S's estranged wife refused to allow Police to interview her daughters. The trial was therefore one of "oath against oath".

Issues which loomed large at trial included whether S had on the night in question:

- chosen or allowed the three girls to watch a video classified M (15+, sexual references);and
- suggested to the complainant playing a "game" involving hypnosis.

S stated that the four of them had only once played this game, during a *previous* overnight stay. He claimed that his daughters had chosen the video, and had told him that their mother had previously allowed them to watch it.

No objection was taken to the Crown Prosecutor extensively cross-examining S as to:

- his reasons for studying hypnotherapy;
- the power of hypnosis to lower a subject's inhibitions; and
- the appropriateness of attempting hypnosis on the earlier occasion, or showing the movie, without both parents' express permission.

The propriety of this line of questioning was also not challenged on appeal, S's counsel only arguing that the verdicts were unreasonable.

HELD

(Sheller JA, Wood CJ at CL and Smart AJ agreeing)

1. Appeal allowed / convictions quashed / verdicts of acquittal entered.
2. The cross-examination was designed to prejudice the jury against the appellant and went beyond the bounds of legitimate cross-examination on credit.
3. A substantial miscarriage of justice was created by the risk that the jury may have been diverted by this cross-examination from an objective consideration of the evidence.

The Court determined that the above cross-examination did not *tend rationally and logically to weaken confidence in S's veracity* (n[1]) as a witness of truth.

His Honour the trial judge was criticised by the Court for not preventing the miscarriage of justice. Their Honours observed that objection by defence counsel may have suggested to members of the jury a lack of confidence in the accused's ability to deal with the cross-examination.

APPEARANCES

Appellant - O'Donnell / John Taylor

Respondent - Lamprati / DPP

COMMENTARY

n[1] This phrase was used by the NSW Court of Appeal in *Wentworth v Rogers (No. 10)* (1987) 8 NSWLR 398 at 408.

Section 15 of the *Evidence Act* (NT) specifies the conditions for the admissibility of questions which are alleged to be relevant to the credibility of a witness. This section was considered by Mildren J in the context of a civil trial in *Hart v Wrenn* (NTSC, unrep. 2/10/95).