

Post-Hypnotic Evidence Barred In Canada

By JD Staff

Canada's Supreme Court ruled in a February 2007 decision that post-hypnotic evidence cannot be used in criminal trials. (*R. v. Trochym*, 2007 SCC 6 (Feb. 1, 2007))

Stephen Trochym was a postal supervisor convicted in 1995 of murdering Donna Hunter, a woman he was intimately involved with. Her throat had been slashed with a bread knife.

Hunter's body was found in her Toronto apartment in October 1992. It was determined that she had been murdered in the early morning hours of a Wednesday, and that eight to twelve hours afterwards her body had been repositioned. It also appeared she had been sexually assaulted before being murdered.

During the investigation of the crime, a neighbor, Ms. Haghnegahdar, was questioned by the police. She gave a statement in

which she described seeing Trochym in the area of Hunter's apartment at 3 p.m. on Thursday, the day after her murder.

No evidence recovered from the crime scene implicated Trochym in the murder, but the police pursued their only tenuous lead: That Trochym had been involved with Hunter and he was seen in the vicinity of her apartment the day after she was murdered. To find out if the neighbor would change the day she saw Trochym to Wednesday, the police obtained her consent to have her memory enhanced by hypnosis. After being hypnotized she changed her original recollection by saying she saw Trochym at 3 p.m. on Wednesday – not Thursday.

Trochym was then charged with Hunter's murder. The prosecution's theory was he murdered Hunter very early Wednesday morning and returned about 12 hours later to move her body to make it appear she had been killed during a rape. The lynchpin of the prosecution's case was the neighbor's post-hypnosis recollection that she saw Trochym on Wednesday.

Trochym's lawyers objected to the admissibility of the neighbor's testimony based on

her post-hypnosis recollection of when she saw Trochym. The trial judge, however, sided with the prosecution and allowed the jury to hear the neighbor's post-hypnosis testimony. With her as the prosecution's star witness, the jury convicted Trochym of second-degree murder in July 1995.

After Trochym's appeal to the Court of Appeal for Ontario was dismissed in July 2004, he applied for and was granted leave to appeal to the Canadian Supreme Court.

The Supreme Court quashed Trochym's conviction by a 5-3 majority on February 1, 2007. After examining the scientific basis of hypnosis using a multi-pronged analysis similar to the U.S. Supreme Court's *Daubert* test,¹ the Court ruled it is a scientifically unreliable technique. Consequently, the trial judge erred by allowing the neighbor's post-hypnosis testimony into evidence. The Court stated in part:

"Although hypnosis has been the subject of numerous studies, these studies are either inconclusive or draw attention to

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depend on the question whether there is some other evidence which can demonstrate its significance."⁶

Based on their understanding that the suggestive DNA evidence was inadequate to support Hazel's conviction without complementary evidence, the Court wrote in regards to Hazel's claim on appeal that the prosecution's evidence was insufficient:

"Dr. Browne [Hazel's appellate counsel] complains that in the first place the trial judge should have withdrawn the case from the jury at the end of the case for the defence because insufficient evidence linking Hazel to the murder made it unsafe for the judge to have left it to the jury.

The attack was made on the sufficiency of the DNA evidence because identification was a critical issue in this case. ...

... Where, on assessment, the judge thinks that the quality of the evidence is poor, the judge should withdraw the case from the jury and direct an acquittal. No witness saw Hazel kill Mr. Fetherston. The prosecution relied on circumstantial evidence based on the DNA results to link Hazel to the crime.

... While DNA profiling is rather reliable

in providing individual genetic blueprints it will not in every case perfectly and clearly link a person to a crime."⁷

The Court concluded its analysis by observing:

"In this case the DNA evidence did not link Hazel to the murder of Mr. Fetherston in a manner that would support his conviction on proof beyond a reasonable doubt. ...

... The identification evidence was tenuous. ... the DNA evidence was not by itself so conclusive that it provided sufficient circumstantial evidence to make a *prima facie* case against Hazel. It was a question of statistical probability that the DNA evidence pointed to Hazel as the possible perpetrator of the murder. ... there was no 'other evidence' that supported the DNA evidence so that, compendiously, the jury could properly have inferred guilt therefrom. In his summation, the learned judge told the jury that there was no evidence in the case that supported the DNA evidence.

In the absence of DNA evidence that clearly linked Hazel to the murder and there being no supporting evidence, ... The learned trial judge should have withdrawn the case from the jury because there was insufficient evidence of identification to make a *prima facie* case

against Hazel. I would therefore grant the appeal on this ground, and, in the result, quash the conviction and sentence against Joseph Hazel."⁸

Fetherston's widow responded to the news of Hazel's release and quashed conviction, "I am shattered – but not totally surprised, because there has always been confusion [about Hazel's identification]."⁹

Since Hazel's conviction was quashed due to insufficiency of the evidence, he cannot be retried without new evidence. Hazel was jailed for 5-1/2 years, including 2-1/2 years on death row.

Endnotes:

1 Although a very wealthy couple, the Fetherston's St. Kitts house was very modest. A person who lived in Basseterre wrote the following: "I looked at a couple other rentals, including a small house in Fortlands. The agent who showed it to me mentioned in passing that it was Tony Fetherston's house. It was a tiny little house, I mean there are tents bigger than that, and I sort of liked him for having billions but being quite comfy with his wife in a little poky house. No one had lived in it since the murder. I didn't take the house." Source: Personal – from Gall and Gumption blog, Wednesday, February 28, 2007.

2 *Joseph Hazel v The Queen*, ECSC1606, ¶ 9.

3 *Id.* at ¶ 12.

4 *Id.* at ¶ 33.

5 *Id.* at ¶ 32.

6 *Id.* at ¶ 31 (Quoting from, (*Michael Pringle v The Queen*, Privy Council Appeal No. 17 of 2002).

7 *Id.* at ¶¶ 25-29.

8 *Id.* at ¶¶ 32, 34-35.

9 St. Kitts murder conviction quashed, *Suffolk and Essex online*, February 21, 2007.

\$1.4 Million Awarded Korean After Espionage Exoneration

By JD Staff

Twenty-one year-old Ham Ju-myeong was trapped in North Korea when the Korean War ended in 1953. As a ploy to return to South Korea and be with his family, he volunteered to be a North Korean agent.

After being smuggled across the border Ham surrendered and told South Korean authorities about his scheme of pretending to want to spy for North Korea in order to get out of the country. Ham was released after an investigation and placed for a time on probation.

Twenty-nine years later, in early 1983, Ham was arrested on espionage charges. He confessed to spying for North Korea after many weeks of intensive interrogation. Charged with violating South Korea's National Se-



Painting of waterboarding from Cambodia's Tuol Sleng Prison, that currently serves as a torture museum.

curity Law, Ham recanted his confession at his trial, claiming he had only done so to stop being tortured. The judge rejected Ham's recantation, and after his conviction he was sentenced to life in prison.

In August 1998, after almost 16 years of imprisonment, Ham was released as part of a general amnesty following South Korea's return to civilian rule after years as a military dictatorship.

In 1999 the man who oversaw Ham's torture, Lee Geun-an, admitted Ham told the truth at his trial - his confession was contrived after 45 continuous days of physical and psychological mistreatment that included waterboarding, sleep deprivation, physical beatings, and electrical shocks: all while Ham was blindfolded and naked.

Based on the new evidence his confession was coerced, Ham filed a petition in 2000 to quash his conviction. His evidence was compelling enough that in 2003 his petition was granted and a new trial was ordered. It was the first time that a South Korean espionage conviction had been overturned.

Acquitted after his July 2005 retrial, Ham filed a compensation suit for his wrongful conviction and years of imprisonment. In September 2005 Ham and his family were awarded \$320,000. The South Korean government appealed, arguing that the statute of limitations had expired before Ham filed his suit.



'Mothers With Purple Scarves' (also known as the Minkahyup) is a South Korean human rights group that for 32 years has protested the government's wrongful imprisonment of people. Ham Ju-myeong said after his exoneration, "When nobody paid attention to our pleas of innocence, the mothers of Minkahyup were the only ones who fought for us."

Source: Militant moms mark 20 years of protests, *JoongAng Daily*, December 12, 2005.

In November 2006 the appeals court ruled the statute of limitations doesn't apply to civil suits involving claims of "illegal, inhumane crimes perpetrated by state agencies." It also increased the lower courts compensation award more than 400% to \$1.4 million.

Sources:

Were not more wrongly accused of espionage, Editorial, *The Hankyoreh*, July 16, 2005.

High court overturns faulty spy conviction, *JoongAng Daily*, September 5, 2005.

Korea Democracy Foundation Newsletter No. 4, November 2005, esp. 2-3.

Militant moms mark 20 years of protests, *JoongAng Daily*, December 12, 2005.

We cannot turn our backs on the unjustly accused, Editorial, *The Hankyoreh*, November 6, 2006.

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the fact that hypnosis can, in certain circumstances, result in the distortion of memory. Perhaps most troubling is the potential rate of error in the additional information obtained through hypnosis when it is used for forensic purposes. At the present time, there is no way of knowing whether such information will be accurate or inaccurate. Such uncertainty is unacceptable in a court of law."

...
"The admission of Ms. Haghnegahdar's post-hypnosis testimony constitutes an error of law." *R. v. Trochym*, 2007 SCC 6, ¶55 and ¶67 (02/01/07).

The Court also rejected the proposition that a jury could be exposed to hypnosis testimony by a witness whose recollection didn't differ from what it was prior to the hypnosis, since it could improperly suggest to the jurors that the hypnosis increased the likelihood the testimony was truthful.

The three dissenting Justices contended that barring post-hypnosis evidence was too drastic of an action by the Court. They argued it is sufficient to instruct a jury about the unreliability of hypnosis recovered memories, and to instruct the jurors that they should weigh the hypnosis testimony in the context of other evidence in the case.

The Supreme Court's decision makes Canada the first country with an English common law legal tradition to bar post-hypnotic evidence.

1 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

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