What the Psychologist Report Left Out

Brendan Lloyd PhD, January 2016

This article illustrates the importance for psychologists to address *the circumstances of the offence* in their court reports. This is about what the psychologist report left out.

The "circumstances of the offence" is a tricky topic for a psychologist to take on in a report for the court. There is a thin line between addressing the evidence and reporting the circumstances. A psychologist dare not address the evidence for fear of enraging the client's defines team. It's not the psychologist's job to question the evidence no matter how tempting; and it is not the psychologist's job to defend the client.

Cherdchoochatri (Cherdchoochatri v R [2013] NSWCCA 118) is a case where the psychologist report didn't address the circumstance of the offence; and clearly doing so would have been useful to the court.

In Cherdchoochatri a 55 year old Australian man, born in Laos, imported more than 89 packages (balloons) of heroin in his gut into Australia. He flew into Sydney from Cambodia and passed undetected through customs. Shortly after arriving home in Cabramatta, he was rushed to hospital by ambulance. Over the next day he passed the 89 packages of heroin. He told police that he had passed up to 30 packages whilst on the plain, which he had flushed down the toilet.

The man had been in Cambodia on holidays with his wife and youngest daughter. His other daughter lives in Cambodia. Just before they were due to leave, a local criminal forced the man to agree to import the heroin. The man was beaten, and about 120 packages of heroin were forced into the man's stomach by way of a tube. He was told that his family were in danger if he did not carry through with the enterprise and he was promised $1,500 if he was successful.

The man pleaded guilty and his defines team naturally wanted to claim "duress falling short of defence to criminal liability" as a mitigating factor to be considered during sentencing. But due to certain circumstances the claim of duress is not made until the man is before the judge for sentencing.

There is a written submission by his council that makes reference to the relevant legal principles and the authorities supporting those principles concerning duress, but the submission made no mention of the factual basis upon which the Court should make a finding of duress. The actual sorry comes out as uncontested oral evidence given by the man to the court through an interpreter.

The sentencing judge and the Crown couldn't get passed the point that the man was offered $1,500 to bring the heroin into Australia. He is seen as a drug mule and his offence carries a maximum penalty of 25 years. He was sentenced to six years with a non-parole period of 3 ½ years.

In the Court of Criminal Appeal there were two grounds for appeal…

1. The applicant was denied procedural fairness in that the sentencing judge failed to warn him, or those acting for him, that he did not accept the uncontested evidence of duress.
2. The primary judge erred in failing to find that the applicant had acted under duress when he committed the offence for which he stood sentence.

In the original trail, the evidence of duress was not contested in cross-examination by the Crown and it was dismissed as irrelevant because the court took the view that the accused was motivated by monetary gain. The man wins the appeal due to legal arguments to do with procedural fairness and the matter is sent back to the District Court for re-sentencing.

For the appeal judges it was perplexing for how the evidence for duress had not been brought out into the open from the start. This absence of such evidence from the outset made it less credible when it was presented at the last minute, before the judge during sentencing. But there was no real opportunity for the man to tell his story to the police.

There was to be a police interview whilst the man was in hospital, but at the time he was too ill and the interview never happened. Then the appeal judges turn to the psychologist report. They expressed some expectation that the matter would have at least been mentioned to the psychologist.

The psychologist report presented for sentencing in the District Court has importance to the appeal

judges for what it omits, rather for what it says. There is no reference to the circumstances in which the applicant came to commit the offence. Instead the report focused on “Presentation", "Family Background", "Education and Employment", "Social Relationships", "Health" and "Clinical Opinion and Recommendations". The appeal judges say that just because it’s not in the psychologist report doesn’t mean that it wasn’t mentioned. The problem might have more to do with the fact that the psychologist had only 1 ½ hours with the man and the interview was through an interpreter. The appeal judges also have an issue with the quality of the interpreter.

The appeal was won. The matter was sent back to the District Court to be heard again. There was the issue of the denial of procedural fairness. In other words, if the defence team had knowledge of the judge’s intention to ignore the evidence without at least questioning it, then this is unfair because the defence has no opportunity to address the concerns, such as by finding a witness.

What I get from Cherdchoochatri is that if it is very hard to get information out of your client, then you at least need to get down to the circumstances of the offence before you run out of time.

Cherdchoochatri v R [2013] NSWCCA 118