



CAMMINO DIRITTO

Rivista di informazione giuridica



THE HEARING OF THE MINOR VICTIM OF SEXUAL ABUSE

The "institutional" and "psychosocial" path [1] involving the minor victims of sexual offenses lies in a somewhat complex reality in which psychological, social and legal variables come together.

Loredana Vega (redattore Salvatore Aromando)
PENALE - PROCEDURA PENALE
Articolo divulgativo - ISSN 2421-7123

Publicato, Giovedì 7 Settembre 2017

In jurisprudence it has been observed that *"a child's credibility must be examined in a comprehensive way, assessing his psychological position [...], his emotional conditions, related to the relationships with the outside world and family dynamics, as well as cognitive processes of the events that have taken place"* [2].

Therefore, for a comprehensive understanding of the subject under consideration, it is necessary to adopt a multifactorial approach operating on different fields of investigation.

One of these may be inherent in the family context: the family represents the habitat within which the individual defines his personality and how to interact with the outside world through the introjection of reference behavioural patterns.

Researches in the field of ethology and psychology of development, credit attachment to the maternal figure (or to a "caregiver" reference figure) as a primary role in the construction of cognitive mapping of impulse management [3].

Researchers have identified different types of attachment.

Among these, we may recall, by way of explanation, what is called *"disorganized-disoriented attachment"*.

According to the proponents of this approach, the child who established this bond with his reference figure, demonstrates very contradictory and confusing behaviours, whose genesis can be identified in a low socio-cultural level, parental psychopathology, neglect, maltreatment and abuse, both physical and sexual [4].

That said seems to have been transposed also by established case law.

According to judges of legitimacy *"it can not be considered that children at an early age have empirical and adhesive-oriented relationships and are influenced by potentially suggestive external stimuli"* [5].

Experiences lived in early childhood are stored in memory, and after being relocated to an unconscious level, they continue to exert their influence on the individual's life [6] and sometimes require a punctual and precise decoding activity.

In the case of minor victims of sexual abuse, the main problems are related to the need to meet a double demand:

- on the one hand, it is necessary to provide protection to the abused minor, seeking to allow him to recover the serenity and balance that are necessary for a correct psychophysical development, already heavily compromised due to the facts for which it is proceeding;
- On the other hand, the exact and not unequivocal assessment of what the young victim reported, for example, during probative incident, should be guaranteed. And this, in the implementation of the right of defence of the indicted / accused (Article 24 Cost.), through a fair trial (art. 111 Cost.; 6 ECHR).

Clearly, the importance of the ways in which evidence is taken up emerges.

In this respect, it seems to be a recent statement by the Court of Cassation.

In the sentence no. **1752/17**, the judges of legitimacy state that *"in the case of sexual violence against minors, it is unlawful for the violation of the principle of the formation of the controversial evidence, the refusal of the court of appeal to provide a psychological examination in order to ascertain the aptitude of the offender to testify when the assessment serves to assess the risk of any imaginative elaboration of the victim, relevant to the child's age and the child's personality structure, unless adequate motivation is given for the superfluity of the test required."*

In particular, in the present case, the defence of the accused, in the second instance, supported the illegality of the decision by which the court of first instance dismissed, without good reason, the request for a contradictory expert to establish the ability to witness the offender and the witness.

According to the Supreme Court Judges *"the court of appeal, to which the violation of art. 495 cpp, paragraph 2, must decide on the eligibility of the test,, according to the*

strict parameters laid down in art. 190 cpp (for which the evidence is admitted at the party's request), while it can not use the merely discretionary powers recognized by art. 603 cpp, for the assessment of eligibility of the evidence not found in the first-instance judgment "[7].

In the present case, the judges have confirmed the capacity to testify of the young victim through a mere reference to the material provided during the execution by the operators with whom the young person had begun a therapeutic course before the facts of the case.

"This reasoning appears to be, ictu oculi, lacking [...] and merely assertive in the part where it is desirable that there are no doubts about the ability to testify from the mere finding that health records did not give legitimate pathologies a different warning" [8]

According to the Supreme Court, *"the evaluation of the content of the statement of the minor offense concerning sexual offenses, given the complex implications that matter entails, must be carried out through a psychological inquiry" [9].*

This type of investigation allows us to deepen two fundamental aspects: *"the child's attitude to witnessing, from an intellectual and affective point of view, to his credibility" [10].*

The assessment of the ability to testify aims at assessing the child's predisposition to internalize information, to remind them and to express them in a complex vision to be considered in relation to various elements such as age, quality and nature of family relationships.

The credibility test is *"aimed at examining how the young victim lived and reworked the story, in a way to select sincerity, misrepresentation and lies" [11].*

The Supreme Court has not merely stated this. Rather, it pointed out that the ability to testify to a minor victim of sexual abuse must be verified by means of expertise that must be made also using the contributions offered by *"relevant sciences (pedagogy, psychology, sexology)" [12].*

Over the last few years, the so called Noto's Charter has become a constant reference to jurisprudence, doctrine and industry, as it provides the guidelines to follow and practice in the psychological investigation and examination of a minor victim of sexual abuse.

In regard, to the value of the dispositions contained therein, the Supreme Court has consistently maintained that *"it does not invalidate or inapplicable the non-compliance with the criteria set out in the Charter"* [13].

Therefore, the provisions of the Charter of Noto are not recognized as binding.

However, this should not undermine the importance of the guidelines it offers. Indeed, by careful analysis of the provisions contained in the Charter of Noto, it emerges that some of them can be considered as further specification of the rules by which the Criminal Procedure Code governs the taking of evidence.

Article. 1 of the Charter of Noto states that *"technical advice and expertise on sexual abuse should be entrusted to specially trained professionals"*. To see, in a similar way, the art. 221 cpp, where, in paragraph 1, states that the judge, when appointing an expert, must make a choice by weighting the peculiar skills required in the specific discipline. Still art. 1 of the Charter of Noto, also finds a direct link with art. 498 cpp when, in the fourth paragraph, states that in the testimony of the minor, *"the president may avail himself of the aid of an expert in child psychology"*. Continuing in this analysis, it can be seen that art. 10 of the Noto's Charter reads *"The activities of acquiring the child's declarations and behaviours must be recorded"* in order to be able to capture aspects related to nonverbal language as well. As stated in the aforementioned article, it can be found directly in Art. 398, paragraph 5-bis, of cpp.

In such cases, the breach of the provisions will in any case imply the application of the penalties provided for in the Code of Criminal Procedure [14].

There are also Noto's Charter prescriptions that do not find any correspondence, even indirect, with the contingency provisions of the rite code. Think of, as an explanatory note, those that concern the ways, procedures and scientific protocols to be followed when assuming the child's declarations (Article 7 of the Charter of Noto).

In accordance with these provisions, the judges of lawfulness stated that "*the lack of nullity or uselessness (in case of breach) does not exclude the duty of reasoning because it is always to take into account the non-compliance with the methodologies prepared by the scientific community [...] which can prove to be a valid support in the assessment of the evidence and also in the assurance of the effective exercise of the defendant's right to defend himself through a fair trial (Article 6 ECHR and 111 Cost.)*" [15].

References

- [1] G. De Leo, P. Patrizi, *Psicologia giuridica*, Il Mulino, 2002;
- [2] Corte Cassazione Sezione III Penale sentenza n. 23278 del 6/4/2004;
- [3] A. Franchini, F. Introna, *Delinquenza minorile*, Padova, Edizioni Cedam, 1972, p.168;
- [4] G. Attili, *Attaccamento e costruzione evolucionistica della mente*, Raffaele Cortina Editore, 2007, p. 21-35;
- [5] Corte di Cassazione III Sezione Penale , sentenza n. 24248 del 13/05/2010;
- [6] Alice Miller, *Il dramma del bambino dotato e la ricerca del verso sé*, Bollati Boringhieri, 2010 pp. 125-126-127.,
- [7] Corte di Cassazione Sezione III Penale, sentenza n. 1752 del 16/01/2017;
- [8] cfr. sentenza cit. ;
- [9] Corte di Cassazione Sezione III Penale, sentenza n. 8962 del 3/7/97 ;
- [10] cfr. sentenza cit. ;
- [11] cfr. sentenza cit.;

[12] Corte di Cassazione Sezione III Penale, sentenza n. 29612 del 27.7.10;

[13] Corte di Cassazione Sezione III Penale, sentenza n.5754 del 16/01/2014;

[14] Corte di Cassazione Sezione III Penale, sentenza n. 46176/2014;

[15] Corte di Cassazione Sezione III Penale, sentenza n.39411 del 13/3/2014.