R v NELSON

Supreme Court of the Northern Territory of Australia

Nader J.

13 and 21 June and 27 November 1991 at Alice Springs.

CRIMINAL LAW - Evidence - Voir Dire - admissibility of confession - discretion to exclude - unrelated confession - discredited confession under consideration - unreliability of confession - *Evidence Act* s.26L

Statutes

Criminal Code (NT) s.213, s.192
Evidence Act (NT) 1980

Counsel for the Crown	:	J. Lawrence
Solicitor for the Crown	:	Director of Public Prosecutions.
Counsel for the accused	:	P. Brustman
Solicitor for the accused	:	Central Australian Aboriginal Legal Aid Service

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No 58 of 1990

THE QUEEN

against

SIEGFRIED NELSON

CORAM: NADER J

REASONS FOR JUDGMENT

(Delivered 27 November 1991)

The accused was arraigned on 13 June 1991 at Alice Springs on two charges.

Count 1

On or about 2 April 1990 at Tennant Creek in the Northern Territory of Australia unlawfully entered a building, namely, hotel room with intent therein of committing an offence.

AND that the said offence had the following circumstances of aggravation:

a) that Siegfried Nelson did so with intent to commit a crime, namely, unlawful assault with intent to have carnal knowledge;

b) that the said building was a dwelling house;

c) that the said offence was committed at night time;

Section 213(1), (4) and (5) of the *Criminal Code*.

Count 2

On or about 2 April 1990 at Tennant Creek in the Northern Territory of Australia, unlawfully assaulted Samantha Reuter with intent to have carnal knowledge of her.

Section 192(1) of the *Criminal Code*.

Immediately following the arraignment, pursuant to section 26L of the *Evidence Act*, the accused, through his counsel, Mr Brustman, challenged the admissibility of certain confessional matter consisting of a typed record of interview and of certain alleged exchanges with police officers. The objections were upon the grounds that the communications between the accused and the police were not voluntary on the accused's part and that, even if they were voluntary, they should be rejected in the exercise of the court's discretion because it would be unfair to the accused to admit them.

This case is quite extraordinary: not because of its own facts, which are commonplace enough; but by reason of an alleged confession made in an unrelated case. If the latter had not been brought to light and if its implications had not been detected by the vigilance of Mr Brustman, I would certainly have admitted the confessional material under challenge here without reserve and without reserving in the complete confidence that it was entirely above board and reliable.

If one were to do no more than look at the tendered confession itself and the circumstances under which it was procured, one would not hesitate to admit it into evidence as having come into existence regularly. There is nothing in the confession or those circumstances that reflects adversely on its reliability. But, <u>another</u> confession, relating to <u>another</u> crime, which was brought to my notice by Mr Brustman, counsel for the accused, during the challenge to the tendered confession, like the thirteenth stroke of a crazy clock, discredited not only itself but, of necessity, cast serious doubt upon the material now under challenge. (Apologies to A.P. Herbert.)

In general, the circumstances were that the accused was

taken to the police station at Tennant Creek on the afternoon of 10 April 1990. He was interrogated about a crime (not the subject of the case at bar) that had recently been committed. He, seemingly, voluntarily confessed to that crime, giving considerable particularity to his conduct in its commission. Some extracts from the typed record of the interrogation will illustrate the point:

Q55 Did the rooms connect.
A. Yes, little house, but there was a passage with bathroom, toilet and shower.

Q63 Did this lady shout anything.
A. Yeah.

Q64 What did she shout.
A. Get off me and then she punched me. Then I was bleeding. Then I ran past that little girl.

Q68 What did you do next.
A. The lady wacked (sic) me and pushed me and punched me.

Q69 Did you touch her vagina - her cunt.
A. No, I tried to touch but she punched me.

The typed record was signed by the accused. The interrogation was not electronically recorded, such recording not having yet become the regular practice at Tennant Creek.

At 11.18am the following day, the accused, having been in police custody overnight, was again interrogated, this time about the case at bar. Again, the interrogation was recorded by typewriter but not electronically, and again the accused signed the record. In it the accused confessed to committing the crime. The record contained a similar amount of circumstantial particularity as the earlier record. There were many similarities in the circumstances of both confessions.

But, the thirteenth stroke struck when the police conceded in evidence that the accused had not committed the crime to which he had allegedly confessed on 10 April. Not

only did they concede that, but they also conceded that the accused had had nothing whatsoever to do with that offence. The police testified that sometime after the accused had confessed, they learned that another person had committed that crime. The interrogating detective was at a loss to explain how the accused came to confess to a crime he had nothing to do with or how he could have known so many of the circumstances of its commission, it never having been suggested that the particulars of the confession were not true save as to the identity of the culprit.

So I am confronted with the undenied fact that a confession allegedly made by the accused, only hours before the confession under challenge, to the very same police, in the same place, has been demonstrated to be false.

The factors that operated to render the first confession false remain unknown. One can only guess; and guessing may be unfair. Whatever those factors were, who can possibly say they did not continue to operate at the time of the confession under challenge?

Two chances had to be realized to reveal the unreliability of the challenged confession. One was that the accused was interrogated about a crime other than those with which we are here concerned. The other, that the police conceded that the accused was not the person who committed that other crime. If either of those chances had not been realized, the unreliability of the confession would never have come to light. This case illustrates well the value in the interests of justice of vigilance and professionalism on the part of counsel.

For the reasons stated, I reject the confessional material tendered here in the exercise of my discretion.