R v Nelson [2003] NTSC 64

PARTIES:	THE QUEEN
	v
	RONNIE PANGATE NELSON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	20200578
DELIVERED:	4 June 2003
HEARING DATES:	26 and 27 May 2003
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Criminal law – murder – whether "confession" to nurse voluntary – whether nurse a person "in authority" – whether accused prejudiced by "confession" because of ill health.

Cases:

R v Burnett (1944) VLR 115; *R v Burt* (2000) 1 Qd R 28 at 41-43; *The Queen v Swaffield* (1977) 192 CLR 159, referred.

REPRESENTATION:

Counsel:

Prosecution:	R Noble, Dr N Rogers
Accused:	D Brustman

Solicitors:

Prosecution:	Director of Public Prosecutions
Accused:	Central Australian Aboriginal Legal Aid Service Inc

Judgment category classification:	B
Judgment ID Number:	Mil03302
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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT

R v Nelson [2003] NTSC 64
No. 20200578

BETWEEN:

THE QUEEN

AND:

RONNIE PANGATE NELSON

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 4 June 2003)

[1] The accused is charged with the murder of his customary law wife at Utopia on 13 January 2002.

[2] The accused was extensively interviewed by the police on an electronically recorded record of interview. It is not proposed to challenge the record of interview at the trial. Subsequent to his arrest, the accused was released on bail. Whilst on bail on Saturday, 23 February 2002, the accused underwent pay-back whilst at Ti Tree at a place referred to, locally, as the Creek Camp. The pay-back took place in the presence of a registered nurse and mid-wife, Ms Gayle Blennerhassett, as well as a police officer, Constable Leith Phillips, who were requested to attend by the elders. The pay-back took the

form of the accused being hit with nulla nullas by various members of both his own family and the family of the deceased. Quite a number of blows were delivered to the accused's body, particularly on the arms and legs. There were no blows administered above the shoulders. The accused, who also gave evidence on the voir dire, said that he was also hit by a boomerang on his back. The blows were delivered over a period of between 15 to 20 minutes; people in groups of three or four came forward, hit the accused a few times, then retreated and, after some discussion, others would come and repeat the punishment. On two occasions, the accused had to be assisted to his feet after he had fallen down as a result of the blows.

[3] When the punishment was completed, he was assisted onto a stretcher, placed in an ambulance and driven back to the Ti Tree clinic for full assessment. When the ambulance arrived at the clinic, the accused was able to walk from the ambulance into the examination room, where he was sat down on a chair and Nurse Blennerhassett did a full medical assessment. On clinical examination, she was unable to find any evidence of fractures. The accused had some soft tissue injuries to the left hand, left arm and left leg. Some swelling was noted. There was a full range of movement with discomfort in the arm and the leg. The left elbow was also swollen and there was swelling to both lower legs, as well as the left hand. According to Nurse Blennerhassett, his blood level was slightly elevated at 160/100. She said that, although that would be regarded as a very high level in a place like a teaching hospital in Melbourne, that was not an abnormally high blood

pressure reading for an Aboriginal gentleman of the accused's age. She also indicated that she was familiar with the accused's normal blood pressure and that his blood pressure reading was only sightly elevated. She also did a neurological assessment. There was no headache, there were no complaints of blurred vision and he was sitting calmly in the chair.

[4] At a time when there was no-one else in the examination room, Nurse Blennerhassett said to the accused if she could ask him a question. The accused said, "Yeah, what?". She said, "Well, why did you do what you did?". He said, "What do you mean?", or, "What?". She said, "You know what I'm referring to". He said, "Lisa?" (the name of the deceased). She said, "Yes". He said that, "She was a rubbish wife and that if she had done as she was told and had stayed where she was told, and sat where she was told, she could have been a good wife". He also said something about his wife doing the wrong thing by other men.

[5] Counsel for the accused, Mr Brustman, sought to have this conversation excluded on the following grounds. First, it was submitted that the conversation was involuntary. Secondly, it was submitted that I should exclude it in the exercise of my discretion. After hearing submissions, as well as evidence from Ms Brennerhassett, the accused and another witness by the name of Mark Russell, I indicated that I considered that the admissions were made voluntarily and that I did not intend to exclude them in evidence in the exercise of my discretion. I said I would deliver reasons later, if required. I now provide those reasons.

[6] Firstly, there is no evidence that Nurse Blennerhassett was acting as an agent for the police. It was not suggested and nor did she claim to have had this conversation because she was moved to do so by Constable Phillips who was, at that time, in the building. She said that the reason she asked the accused, whom she had known for some time, why he had killed his wife was out of curiosity. That being so, I am unable to find that the nurse was acting as an agent for the police. Indeed, Mr Brustman did not submit that I should so find.

[7] There is no evidence that Nurse Blennerhassett put any pressure on the accused to speak to her about the reasons for the homicide. The argument rested upon a proposition that, because of the accused's state of health, his mind was over-borne by the presence of the nurse and that, accordingly, he felt obliged to answer her question. In part, the submission depended upon an acceptance of a finding based upon subsequent hospital records that the accused had, indeed, suffered two fractures to the hand.

[8] The evidence is that, for some reason, the accused was later that day taken by police from Ti Tree to the watch-house at Alice Springs and that, subsequently, police took the accused to the Alice Springs Hospital. The evidence suggests that the accused had been re-arrested for some reason. In any event, the hospital records indicate that the accused was in police custody when brought in. There is a history in the records of his being hit by nulla nullas. There is a note of his having a very swollen and painful left hand, a painful and swollen left wrist, and pain over the left lower leg, but

there were no signs of any injuries to the chest or head. There was an initial diagnosis of an undisplaced fracture of the third mid-shaft metacarpal and, in fact, the records indicate that X-rays revealed a fracture to the hand and a chip fracture to the elbow, although the records do not, in fact, contain the X-ray results. It appears that the accused was placed into a hospital bed; he was placed on a drip and given Panadene Forte. He was seen as an out-patient two days later on the 26th and, again, on 28 February.

[9] Notwithstanding these subsequent findings and the findings of stab wounds referred to in the hospital notes, I am not persuaded that the accused was in such pain or discomfort, at the time when he was spoken to by Nurse Blennerhassett, that his will was over-borne by her presence due to the pain that he was suffering. At the time when she saw him, there was not a lot of swelling and I do not find it unusual that, after a period of time, the pain and swelling would have increased. Neither the accused nor anyone else claimed that he suffered stab wounds as a result of the pay-back. It is not clear what is meant by this and one is left to wonder as to what the stab wounds were that are referred to in the hospital notes, and how they got there. On the evidence before me, possibly, they were caused at some stage after he had been discharged from the Ti Tree clinic. Similarly, I am left with no information as to why he was re-arrested.

[10] The accused, himself, did not assert that he spoke to Nurse Blennerhassett in answer to her question because of any pain that he was suffering. He claimed that he was feeling nervous and that he answered her question only

by telling her that the trouble that had happened at Ti Tree had also happened at Utopia. His evidence was that that was all that he told her and then he went outside, as he decided that he did not want to talk to the nurse any more. The evidence is that, after his conversation, the accused went outside and smoked a cigarette.

[11] Counsel for the accused referred me to the judgment of O'Bryan J in *R v Burnett* (1944) VLR 115, where His Honour found that the Crown had failed to prove that a confession made by an accused to police, after his arrest, was voluntary. The circumstances of that case were that, almost immediately upon his arrest, the accused had fallen into a faint on the floor of a lavatory. He was practically carried from there to the police station. Having been brought to the watch-house, he fell in a faint again on the floor of the watch-house. He was revived from that and put into a room where he was apparently left for a little while. When the police came back he was on the floor, apparently in an exhausted stated. He was told to get up. He rose slowly and apparently with difficulty, and was told to sit on the bench where he took his seat and supported his head in his hands. In the words of one of the constables, he was, to a certain extent, out of the faint but still in a dopey condition. In that state of health, he was kept closeted with three police officers for upwards of an hour. One policeman was sitting beside him, the other two sometimes sitting and sometimes standing. When he was not proceeding quickly enough with his answers, he was told by the

questioning constable to, "hurry up, as the constable could not stop there all night", or something to that effect.

[12] O'Bryan J said at page 116:

> "It requires very little imagination to see that a man in that state of health, in those circumstances, is most likely to have his mind over-borne by the presence of the officers. I think it is unfortunate, in this case, that the police constables, having a man in that state of health, did not get a doctor to see him, instead of proceeding with the questioning of him, and taking the statement from him. The desire to obtain the statement seems to have over-borne the more humane instincts which this man's condition should have excited. I think it is unsafe for any court to act upon what this man said in that state and in those circumstances. I am far from being satisfied, in those circumstances, that this confession was voluntarily obtained."

[13] In my opinion, the factual circumstances in this case are a long way short of the situation in *Burnett's* case. There is nothing to indicate that, at the relevant time, the accused was in any way over-borne by his state of health. In those circumstances, I find that the confession was voluntarily made. That finding is supported by the evidence of Nurse Mark Russell, who was also at the clinic at the time, or shortly thereafter, when he heard a conversation between the accused and one of the older ladies who was in the examination room at that stage. According to Mr Russell, he had threatened the older lady by telling her that he was going to hit her with a stick. Mr Russell said to the accused that he should not do that and that if he threatened older women, he would have to call the police straight in. Mr Russell said that the accused's demeanour was indifferent, but he did not carry on with his threatening behaviour.

[14] Turning to the question of discretion, the argument of counsel for the accused was that it was unfair that I should permit this evidence to be admitted. No caution had been administered. The conversation was not recorded. The conversation was not within the spirit of the Anunga Rules and, in particular, Rule 7, which provides that Aboriginal people are not to be interrogated when they are disabled by illness or drunkenness or tiredness, and that admissions so gained will probably be rejected by a court. These "Rules" apply to persons who are being questioned by persons in authority as suspects. They have no application to conversations between a person such as this accused and a nurse, where the nurse is not acting as an agent for the police and is not a person in authority. As to who is, or who is not, a person in authority, see the discussion by White J in *R v Burt* (2000) 1 Qd.R. 28 at pages 41-43. In *The Queen v Swaffield* (1997) 192 CLR 159, the court held that the admissibility of confessional material turns first on the question voluntariness, next on exclusion based on considerations of reliability and, finally, on an overall discretion taking account of all of the circumstances (including the means by which any admission was elicited and whether unfair forensic advantage may be occasioned by admission of the evidence), to determine whether the evidence admitted for a conviction was obtained at an unacceptable price, having regard to contemporary community standards. Having considered those matters, I am unable to see on what basis it would be unfair to the accused to admit this evidence. There is no evidence of any illegality; there is nothing to suggest that the

confession is unreliable. Indeed, the conversation was very short. The nurse immediately thereafter reported the conversation to the constable and a statement was taken from her within 10 minutes thereof.

[15] The position of the accused is that no such conversation occurred. That is a matter which will have to be determined by the jury.