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## SUPREME COURT OF QUEENSLAND — COURT OF CRIMINAL APPEAL

**R v NEVILLE****Connolly, Vasta and Moynihan JJ****26 August 1985 — (1985) 2 Qd R 398; 17 A Crim R 285****EVIDENCE – CONFESSIONAL STATEMENT – REFERENCE TO PREVIOUS CRIMINAL HISTORY – PREJUDICIAL TO ACCUSED – WHETHER ADMISSIBLE.**

An undercover police agent handed to one Soo, two \$50 notes in exchange for heroin. When these notes were subsequently found in a wallet the property of N., he was questioned about his possession of them and was asked: "Do you understand that?" to which he replied: "Yes, that is how I got caught last time". Notwithstanding the prejudicial nature of this answer, the trial judge admitted the question and answer into evidence. On appeal against conviction—

**HELD: Appeal Dismissed.**

**Notwithstanding that the answer was prejudicial in that it indicated that N. had previous criminal history, it was admissible because it was relevant to the issues being tried and was capable of being construed as a confessional statement that N. was involved in the commission of the offence.**

**CONNOLLY J:** (with whom Vasta and Moynihan, JJ agreed). [1] The appellant was convicted before the Supreme Court at Brisbane on 31 May this year on three counts, the first of which was the possession of a sum of \$100 had directly by him by way of the commission of an offence against s130(2) of the *Health Act*. The sum in question had been handed by an undercover police agent to one Soo, in exchange of heroin. It was found in a wallet which was the property of the appellant.

The case against the appellant consists of the finding of the money in his possession and there was no evidence that the undercover agent had purchased the heroin from the appellant. His explanation for having the money was that Soo had owed him money for the purchase of a coat and whilst the relative sizes of the two men gave a certain degree of implausibility to this version, the facts which I have mentioned are the essentials of the Crown case except when asked about the two \$50 notes found in his wallet which he was told were identical with the two \$50 notes used by the police agent to purchase the heroin from Soo on 25 July. He was asked, "Do you understand that?" If he had answered, "Yes" to that question, it would have meant on any view no more than, "Yes, I understand that". It would of course, have been open to the argument that one would expect him to say a bit more than that but the actual answer itself would have gone no further than, "Yes, I understand". In fact, his reply was, "Yes, that is how I got caught last time".

Now, the learned trial judge admitted that question and the answer and it is argued that both question and answer were inadmissible; that the answer was not in any sense incriminating of him; but that the reference to being caught last time mounted to putting before the jury that he had previous criminal history. It is said that the answer so understood is prejudicial and I agree that it is, indeed, prejudicial. But if it is capable of being understood as an admission that he was criminally involved, and in my respectful opinion it is clearly capable of being so understood, then the fact it is also prejudicial is of very little moment.

Most confessional statements are of their nature prejudicial and the classic ground for excluding prejudicial material, namely, that its probative value is far outweighed by its prejudicial effect, infrequently has much relevance to the decision to admit or reject the evidence. Frequently, in the course of a criminal trial, a statement may be made which is peripheral to the issues being tried but which is highly prejudicial.

It is easy in those circumstances for the trial judge to reject the [2] evidence: but where it

is truly confessional, the fact it is prejudicial, which would usually be a feature of a confessional statement, can rarely be a ground for rejecting it. I suppose I should qualify that by saying that the concessional statement may, again, go to the periphery of the case, but that is not so here.

In my judgment, the learned trial Judge took the only course open to him and that was to admit the statement and to warn the jury that if they thought there was a reference to his previous criminal history they should put that out of their minds and treat the statement as being capable, if the jury so regarded it, of being a confessional statement to be regarded in the context of the whole of the evidence in the case – and His Honour carefully warned the jury that essentially this was a circumstantial case: and that they could only convict if they found that no hypothesis consistent with innocence was available. Despite the vigorous argument by Mr Johnson, I will reject the appeal.

*[Judgment supplied courtesy of CSM Queensland].*

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