REGINA *v.* CHARLES DIAS.

Mátara Criminal Sessions, No. 2.

Evidence—Dying declaration of person whose death was not the subject of inquiry at the trial—Its admissibility under s. 466 of the Criminal Procedure Code and under the common law.

A statement made by a dying man before an Inquirer into Deaths is not receivable in evidence under section 466 of the Criminal Procedure Code, not having been made on oath or affirmation, nor taken down by a Police Magistrate.

Per BONSER, C.J.—The declaration of a dying person whose death did not form the subject of inquiry at the trial is not admissible without proof that the declarant was in actual danger of death and had given up all hope of recovery, and that the deaths of the declarant and the person whose death was being investigated were all due to one and the same transaction.

THE accused in this case was convicted of murder at a Criminal Sessions of the Supreme Court held at Mátara in May last, and a question of law was reserved by the presiding Commissioner of Assize and referred to the Supreme Court for decision under section 424 of the Criminal Procedure Code.

Two murders, consequent upon a land dispute, had been committed almost simultaneously and in the same place at Dikwella on the 17th of December, 1894: one by Dias, who killed Andris; the other by Gregoris, who killed Tilloris. A desultory fighting was maintained, after the two murders had taken place, between the trespassing party and some of the party of the deceased

persons, who were brothers. One Andrias, a brother of Dias, while fighting with a brother of the two murdered men, received a gun-shot wound and died. It appeared that some time before his death he made a dying declaration to the effect that he killed both Dias and Gregoris.

In the case against Dias, the alleged dying declaration of Andrias was attempted to be given in evidence. The Commissioner of Assize disallowed the question put in that behalf to a witness for the defence, and the jury returned a verdict of guilty against the accused. The learned Commissioner thereupon referred the following case for the decision of two or more Judges of the Supreme Court :—

Case Reserved.

I have the honour to refer to the Hon. the Supreme Court the following questions which arose at the trial of the above-named accused on the 15th instant, for the murder of one Don Andris Kumaratunga by stabbing.

The case for the prosecution on the evidence was that accused and twenty-five to fifty others committed criminal trespass on a cocoanut garden in the possession or occupation of deceased Andris and his brother Tilloris; that these latter ran from 150 yards off to protect their property, and a fight ensued between them and the trespassers in a kurakkan enclosure; that Tilloris was beaten and fell, and, when rising, was stabbed by one Grigoris (who was convicted of such murder on the day previous to this trial); that Andris, deceased, thereupon ran from the enclosure into an adjoining field, and was chased by the accused and two others of the trespassers, was beaten and fell on his face, and was then stabbed in the back by the accused; and that immediately thereafter as Andrias, another of the trespassers, was fighting with Mendris (a brother of the two men already stabbed), he (Andrias) was killed by a gun-shot wound.

The defence called two witnesses, who deposed that after plucking nuts in the enclosure by lawful right they were menaced and went to the field; that there the deceased brothers Tilloris and Andris attacked Andrias, and that Andrias, in self-defence, drew his knife and, as Andris turned from it, he (Andrias) stabbed him (Andris) in the back first of all, and then stabbed Tilloris, who jumped into the enclosure, after which a shot was fired and Andrias fell wounded.

In addition to these witnesses the following witness was examined. To quote my notes :—

Francis de Silva Abeywardena sworn.

I am Mudaliyár of Wellaboda pattu and Inquirer into Deaths. I know Kadjugaha Koratuwa. I went there on 17th December. I saw Andrias on the road lying on a cot. He is a son of the Veda Arachchi. He was suffering from gun-shot wounds, and appeared to be in great pain. He died about three hours after I saw him. Before his death I spoke to him. He made a statement as to who injured him, and whom he injured.

Mr. Pereira proposes to ask this witness what statement the dying man made.

I disallow it, since the statement was not made and recorded in accordance with the provisions of section 466 of the Criminal Procedure Code.

The accused was convicted and sentenced to death, execution of sentence being respited for a month. In view of this necessary respite, and although I did not at the trial expressly reserve the question for the decision of the Supreme Court, I would desire to be permitted to refer for their decision or review the question, whether or not the statement made to the Inquirer by Andrias should have been admitted by me in evidence, so that the conviction, if thereby improperly obtained, may be quashed. I desire this entirely by reason of the sentence and punishment which follows upon the conviction, and not because I myself doubt that my rejection of it was correct.

For, so far as I can see by the text books before me, "the deceased" —whose dying declarations are admissible upon the principles laid down in *R. v. Mead, 2 B. & C. 605*, and *R. v. Hind, 29 L. J. M. C. 148* (called "the party" in *R. v. Hutchinson, 2 B. & C. 408*), as cited in *Roscoe*, 11th edition, *32*, and *3 Russell, 267/8*—is the person whose death is the subject of inquiry. I do not find in the text books any case anent the dying declaration of any person other than such "deceased subject of inquiry" being admitted in evidence, except in one instance. The case of *R. v. Baker, 2 M. & Rob. 53*, where an inquiry into the death of a man poisoned by eating a cake made by his maid, who had also eaten of it and was poisoned; her dying declaration was received, on the ground that it was all one transaction. Roscoe (*p. 32*) cites this ruling, but at once refers to *R. v. Hind* and *R. v. Hutchinson* in such a manner as to imply that this admission of the declaration of one not the "deceased subject of inquiry" was contrary to that rule.

And can it be said here that the death of Andrias by a gun-shot wound from some other hand was "one and the same transaction" as the prior death of Andris? In *R. v. Baker* the cause of death was the same, the poisoned cake; but not so here. The decision in *R. v. Baker* must have been passed before the Statute 30 and 31 Vic., c. 35, § 6, was enacted, from which section 466 of our Criminal Procedure Code is taken, and under the operation of it I would submit for consideration whether Andrias was not truly a witness within its purview. Had he not been injured and died, that would have been his position; and if at any time between Andris's death and the trial he had sickened to the danger of his life, his examination could only have been taken as section 466 directs, after notice in writing (*R. v. Shurmer, 17 Q. B. D. 323*) to the accused.

Will the fact that he met his death at the same time and place (only, for his death was not due to the same cause) as the deceased subject Andris, permit his dying declaration to be received? It might be urged that the apprehension of death had not been proved ere the witness was asked to narrate the statement, and my rejection of the testimony might be supported thereon. But I would even presume the intended statement would include an assertion of that apprehension, and that it was yet open to me to inquire into the state of illness, &c. (*3 Russ. 266*).

I would therefore humbly submit for the consideration of the Hon. the Supreme Court, whether, if it had been proved that Andrias was under due apprehension of death, his dying declaration should have been admitted in evidence by me, and ask that, if necessary, order may be made under section 425 of the Criminal Procedure Code.

DODWELL F. BROWNE,
Commissioner of Assize.

Walter Pereira appeared for the prisoner. The Commissioner of Assize disallowed the evidence simply because the statement of the deceased was not made and recorded in accordance with the provisions of section 466 of the Criminal Procedure Code. That section merely gives power to Police Magistrates to take evidence beforehand of persons lying dangerously ill, with a view to perpetuate their testimony to be used at the trial, but the section was not intended to abrogate or modify the general law of evidence as to the admissibility of dying declarations. The general rule as to dying declarations is, no doubt, that such declarations, though made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declarations; but I rely on the ruling of the Court in *R. v. Baker, 2 M. & Rob. 53*, where the dying declarations of a person other than the deceased for whose murder the prisoner was being tried was admitted in evidence on the ground that the declarant himself met with his death and the declaration was made in the course, so to say, of the "same transaction" as that in which the deceased whose death was being inquired into was killed. In the present case, Andrias met with his death in the same general fight as that in which Tilloris and Andris were stabbed, and it is as to who stabbed these two that the declaration in question is said to have been made.

Rámanáthan, S.-G., submitted *R. v. Baker* was a solitary decision, which did not appear to rest on sound principle, and which was thought by the Judge who pronounced the ruling to be deserving of the consideration and adjudication of a higher tribunal. Even if that decision were accepted, the dying declaration of Andrias was inadmissible, as it was not shown that it was made under a settled hopeless expectation of death (*Queen v. Jenkins, 1 L. R. C. C. 187*). Nor did section 466 of the Criminal Procedure Code apply, as the statement was made before the Inquirer into Deaths, and not before the Police Magistrate. Under any circumstance, the case reserved by the Commissioner was an hypothetical case, and did not really "arise in the course of the trial" as provided in section 424 of the Criminal Procedure Code. The questions submitted were improperly before the Supreme Court, for want of evidence that Andrias was under a settled hopeless expectation of death.

Pereira, in reply.

28th May, 1895. BONSER, C.J.—

The question which has been reserved for the consideration of this Court by the learned Commissioner of Assize is this—"Whether, if it had been proved that Andrias was under due "apprehension of death, his dying declaration should have been "admitted in evidence." The Solicitor-General called attention to the fact that this is an hypothetical question, and that therefore it was not a question which arose in the course of the trial, and is not such a question as this Court can be called upon to answer. I agree with him that this is so; but at the same time, considering that the matter is one of life or death to the accused, I think it right that we should express an opinion on the case.

What occurred at the trial was this. The counsel for the defence called an Inquirer into Deaths, to whom a statement had been made by a dying man named Andrias. This man appears to have received the gun-shot wound which caused his death at or near the same time and place at which the deceased man, for whose murder the accused was being tried, was stabbed to death. The Inquirer deposed as follows: "Before his death I spoke to him. "He made a statement as to who injured him and whom he "injured." The counsel for the defence then proposed to ask what this statement was, but the learned Commissioner refused to admit the statement on the ground that it was not made and recorded in accordance with the provisions of section 466 of the Criminal Procedure Code, that is to say, it was not made on oath or affirmation and taken down by a Police Magistrate. It seems to me that, at that stage of the case and in that state of the evidence, the learned Commissioner was quite right in refusing to admit the statement. It clearly could not have been admitted under section 466 of the Criminal Procedure Code.

Then, could it have been admitted as being a dying declaration? It appears to me that it could not. In Mr. Justice Stephen's Digest of the Law of Evidence the rule is thus stated—and, in my opinion, correctly stated: that such a declaration is admissible "only in trials for the murder or manslaughter of the declarant, "and only when the declarant is shown, to the satisfaction of the "Judge, to have been in actual danger of death, and to have given "up all hope of recovery at the time when his declaration was "made." Now, in the present case, the person who made the declaration was not the person whose death formed the subject of inquiry at the trial. Moreover, it was not shown that the declarant was in actual danger of death, and had given up all hope of recovery. It may be that he was in actual danger of death—for he died about three hours afterwards. But there is

absolutely no evidence as to his own opinion of his condition, or whether he did or did not entertain any hope of recovery. It was incumbent on the party wishing to get the declaration admitted in evidence, to prove to the satisfaction of the Judge that the declarant had given up all hope of recovery at the time the declaration was made. This was not proved nor attempted to be proved, so that, as I observed before, on the state of facts proved before the learned Commissioner, there was no ground upon which he could have admitted this declaration.

Assuming, however, for the moment that the proper foundation had been laid for the question by its having been proved that the man Andrias was not only in actual danger of death, but also had given up all hope of recovery, still I am of opinion that his statement was inadmissible.

Mr. Pereira, who said all that could be urged in favour of the admissibility of the statement, sought to bring it within the principle of the case of *R. v. Baker, 2 M. & Rob. 53.* That was a case where two persons were poisoned by eating the same cake at the same time, and died almost immediately afterwards. The accused was tried for the murder of one of them. A dying declaration by the other person, that she had made the cake in the presence of the accused, and had put nothing bad in it, was admitted as evidence for the prosecution on the ground that "it was all one transaction." The point, however, was reserved, but, as the prisoner was acquitted, it could not be further discussed. That case was an exceptional one, and is characterized by Mr. Justice Stephen, in the book to which I have just referred, as a curious one. For my own part, I should not be disposed to follow it, except where the facts were the same, or practically identical. The present case is, however, widely different from that case. If the declarant, and the person whose death was being investigated, had both died of wounds caused by the same shot, then perhaps the statement might have been admissible. But nothing of that kind occurred here. The only ground suggested is that the declarant received his death-wound at and about the same time and place as the deceased whose death was being investigated. There is not, in my opinion, sufficient connection between the declaration and the last-mentioned death to make them "all one transaction" and bring them within the case of *R. v. Baker.* The answer, therefore, to the question proposed will be in the negative.

I have dealt with this matter at such length for the sole reason that a question of life and death is involved. But I feel this difficulty—that had our answer been in the affirmative, we could not have given any practical effect to our opinion.

LAWRIE, J.—

I agree. Sufficient foundation had not been laid for the question, " What statement did Andrias make ? " But if I allow myself to assume that Andrias was under due apprehension of death ; that he had lost all hope of life; that he was still in a fit state of mind to be able to speak clearly and truthfully ; and that he died soon after ;—even if I assume these facts, evidence of a statement by Andrias made to the Inquirer into Deaths was hearsay, and therefore inadmissible, because the death of Andrias was not the subject of the charge before the jury. If the statement he made was as to the circumstances of his own death, it was irrelevant in that trial. If it was as to the circumstances of the death of a person other than himself, it was inadmissible.