[COURT OF CRIMINAL APPEAL]

1972 *Present:* **Alles, J. (President), Thamotheram, J., and Deheragoda, J.**

SINNIAH PALANIYANDY, Appellant, *and* THE STATE, Respondent

C. C. A. No. 7 OF 1972, WITH APPLICATION No. 9

S. C. 364/71—M. C. Nuwara Eliya, 41809

*Evidence Ordinance—Sections 6, 32 (1), 118—Child of tender years—Competency to testify—Considerations applicable—Whether oath or affirmation is necessary—Oaths Ordinance, s. 4 (1)—Dying declaration of a child—Admissibility in evidence—Sense of impending death not necessary—Meaning of word "statement"—Weight to be attached to the statement—Whether the statement should be corroborated—Effect of non-direction concerning it—*Res gestae*—Requirement of contemporaneousness—Court of Criminal Appeal—Scope of its power to interfere with verdict of jury on the ground of its unreasonableness—Certificate of trial Judge—Effect of it—Court of Criminal Appeal Ordinance, s. 4 (b).*

The accused-appellant was convicted of the murder of a woman and her son who was four years and one month old. According to the evidence, the boy, while he was lying fatally injured, uttered the appellant's name "Palaniandy" when he was questioned by his father as to the the name of the assailant. Shortly after the boy uttered that single word, he died before he could be admitted to hospital. The most important item of evidence on which the conviction was based was that statement made by the boy to his father when the latter came to the scene during the afternoon when the boy was injured. The questions for consideration in the present appeal upon a certificate issued by the trial Judge under section 4 (*b*) of the Court of Criminal Appeal Ordinance were (1) whether the statement of the boy was properly received in evidence, and (2) whether, having regard to the age of the boy, a conviction based upon the statement was unreasonable.

The factual position was that the boy, despite his tender years, had sufficient mental capacity to appreciate the nature of the question put to him by his father and give a rational answer to that question. The simplicity of the question which called for a simple answer was in itself a very relevant matter in the circumstances of the case. A Judge and Jury could well have come to the conclusion that had the boy given evidence in Court he would have satisfied the test of competency laid down in section 118 of the Evidence Ordinance.

Held, that the competency of the boy to testify as a witness having been established under section 118 of the Evidence Ordinance, the fact that he was not available as a witness at the trial could not affect the admissibility in evidence, under section 32 (1) of the same Ordinance, of the declaration made by him as to the cause of his death.

A witness who is otherwise competent and who understands the obligation to speak the truth is competent to testify even if he does not understand the nature of an oath or affirmation. Even if section 4 (1) of the Oaths Ordinance, which requires an oath to be administered to all persons who may be lawfully

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examined or required to give evidence before any Court, can be made applicable to a witness who is competent to testify under section 118 of the Evidence Ordinance, such a requirement is not necessary in the case of a declaration falling under section 32 (1) of the Evidence Ordinance.

In our law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under the expectation of death. The solemnity of the occasion would be a sufficient guarantee that the declaration may be fairly assumed to be relied upon for its truth.

The word " Palaniandy " uttered by the boy could properly be regarded as a " statement " within the meaning of section 32 (1) of the Evidence Ordinance. If one renders the question put to the boy and the answer given by him in the form of a narrative, there is a clear oral statement to the effect that Palaniandy had committed the murders. In *Alisandiri v. The King* (1937) A. C. 220 the Privy Council went so far as to hold that a verbal statement inferred from certain gestures and signs made in answer to questions, as opposed to an oral statement expressed in words, was admissible under section 32 (1).

The weight to be attached to a dying declaration of a child of tender years would depend on the circumstances of the particular case. But if, in spite of an adequate warning by the Judge about the infirmities of such evidence, the Jury choose to act upon the dying declaration, the Court of Criminal Appeal would not set aside the verdict as unreasonable on account only of the age of the child. The unreasonableness of a jury verdict does not mean and cannot mean that the Court of Criminal Appeal is entitled to substitute its own view of the facts for that found by the jury.

In a case where the law requires corroborative evidence, but there is in fact corroboration of a substantial character, the failure of the Judge to direct the jury on the need for corroboration does not affect the decision of the jury. In the present case there is ample corroborative evidence of the boy's dying declaration.

Held further, (i) that the statement made by the boy was not part of the *res gestae*, inasmuch as it was not substantially contemporaneous with the transaction.

(ii) that the fact that the trial Judge issued a certificate under section 4 (*b*) of the Court of Criminal Appeal Ordinance was not of itself a sufficient ground for interfering with the verdict of the Jury. The questions that arose for consideration on the certificate were confined to questions of mixed law and fact.

APPEAL against a conviction at a trial before the Supreme Court, with a certificate issued by the trial Judge under section 4 (*b*) of the Court of Criminal Appeal Ordinance.

L. D. Guruswamy, with *Wijaya Wickramaratne*, *Lal Wijenaike* and *K. Kanag-Iswaran* (assigned), for the accused-appellant.

Cecil Gunewardena, State Counsel, for the Attorney-General.

Cur. adv. vult.

October 9, 1972. ALLES, J.—

The appellant, Sinniah Palaniyandy, was convicted by the unanimous verdict of the jury of the murders of Emmy, wife of Kitnan Ramasamy and of their young son Dilran, aged 4 years and one month.

At the conclusion of the trial the learned Chief Justice, who presided at the trial, issued a certificate under Section 4 (*b*) of the Court of Criminal Appeal Ordinance that this was a fit case for an appeal on the following grounds :—

> "The only evidence on which the conviction was based was a statement alleged to have been made by the boy Dilran to his father. Two important questions which therefore arise are whether—
>
> (1) the alleged statement was properly received in evidence at the trial, and
>
> (2) whether, having regard to the age of the boy a conviction based upon the statement was unreasonable."

There are previous decisions of this Court in which certificates under Section 4 (*b*) of the Ordinance have been issued by the trial Judge—Vide *The King v. Pablis* [1] and *The King v. De Alwis* [2] and in both these cases the Court of Criminal Appeal did interfere with the verdict because the Court held that, after a careful examination of the evidence, there appeared to be a reasonable and substantial amount of doubt about the guilt of the accused on the facts particularly as the trial judge himself considered the evidence to be unsatisfactory. However in the latter case Wijeyewardene J. stated that " the fact that the trial Judge disapproved of the verdict of the Jury or has issued a certificate under section 4 (*b*) is not of itself a sufficient ground for upsetting the verdict of the Jury." In the present case there is no clear indication that the trial judge disapproved of the verdict although he may have been surprised at the ultimate result, and it would appear that the trial judge himself entertained doubts in regard to the admissibility of the statement, but decided, as a question of law, that the statement was legally admissible and that the jury were entitled to take that evidence into account " subject to certain observations " that he proposed to make at a later stage. Therefore the questions that arise for consideration on this certificate are confined to questions of mixed law and fact.

The following facts were established at the trial by the prosecution :—

The deceased, Emmy, was a Sinhalese woman from the village of Pannala and had married Kitnan Ramasamy in 1965. Dilran was born in June 1966. At the time of the tragedy on 23rd July 1970, Ramasamy had been working on Waldemar Estate for 3½ years as a plucking Kangany and used to be referred to as a Kanakapulle. Adjoining his house lived two other Kanakapulles—Palaniandi Ramasamy and Selvarajah—both of whom testified at the trial. The two Kanakapulles were

[1] (*1944*) *45 N. L. R. 541.* [2] (*1946*) *46 N. L. R. 422.*

unmarried and Selvarajah used to have his midday meals at the house of Kitnan Ramasamy. Another witness who gave evidence at the trial was Arumugam Palaniandy who was a labourer on Kondagala Division of Waldemar Estate but who had never visited Kitnan Ramasamy's house. The appellant was a labourer working under Kitnan Ramasamy and has been referred to as a " sack cooly "—He was in charge of the gunny bags for the pluckers. There were other " sack coolies " attached to Ramasamy's division—Karupiah, Perumal and Ramiah. They were in and out of Ramasamy's house since they had constantly to take away and bring back and leave the weighing balances which were kept at Ramasamy's quarters.

The Kanakapulles being attached to the staff grade were considered to be on a higher social status than the labourers and there is evidence that the little boy Dilran always referred to the Kanakapulles as " Uncle " whereas he used to call the labourers by their name. He referred to his father as " Daddy " and his mother as " Mummy ".

It was suggested by the prosecution that the motive for the crimes was robbery. It would appear that the appellant was engaged to be married and the motive suggested was that he wanted to steal Emmy's valuable necklace. The learned trial Judge directed the jury that such a motive had not been established and we must therefore proceed on the basis that no motive has been proved by the prosecution for the killings.

On 23rd July 1970, Kitnan Ramasamy went to work at his field and returned for his midday meal about 12.30 p.m. which he had in the company of Selvarajah, Emmy and Dilran. About 1½ hours later Ramasamy again left for the field in the company of Selvarajah. Arumugam Palaniandy, the other Kanakapulle, had his meal at his house and then left for his field. This meal was cooked by Karupiah. Karupiah had gone to the bazaar to buy some kerosene oil and returned about 3.45 p.m. Finding no matches in the house he went to the house of Kitnan Ramasamy to borrow some matches and he found the infant daughter of Kitnan Ramasamy being carried by one Karuppen Arumugam, outside the house on the compound. On questioning Arumugam, the latter told him that the child was outside and that the mother could not be seen. Karupiah then entered the house and saw an extensive trail of blood near the kitchen. He got frightened and went immediately to inform the Head Kanakapulle. Not finding him at his house he then went to inform Kitnan Ramasamy and told him that his house was full of blood and requested him to come immediately. Kitnan Ramasamy returned home and reached his house about 4 p.m. He fixes the time by the sounding of the siren which he heard when he was approaching his house.

Although there was a large crowd outside, the evidence discloses that Kitnan Ramasamy was the first person to enter the bed room where he found his wife brutally done to death. She had 21 external injuries all over her body caused with a sharp cutting weapon. Fatal injuries had been caused to the chest cutting the ribs, penetrating the heart and

the lungs, and the liver and the spleen had been cut. There cannot be the shadow of a doubt that the intention of the assailant was to kill. Dilran had also been injured on the chest and parts of his liver, stomach and small intestines were protruding.

Kitnan Ramasamy found the door of the bed room half closed and as he opened it, he found his wife lying on the floor face downwards in a pool of blood. He went and fell on her body and turned her upwards. He then heard the sound " Daddy ". He looked in the direction of the sound and saw his son who was lying close to his wife's feet and questioned him in the following terms : " Babba, who has done this ? " To this question the son uttered one word "Palaniandy". Dilran died before he could be admitted to hospital. Quite apart from the fact that Dilran always addressed the labourers by their names there was evidence that the appellant besides being a " sack cooly ", whose duties required him to visit Kitnan Ramasamy's house frequently, also did some of the household work—he used to buy provisions, chop firewood and pluck leaves for the goats. He used to talk and play with Dilran. Apparently the little child was a pet of everybody and the " sack coolies " including the appellant were fond of the child. Ramasamy states that they used to hide his toys, no doubt to tease him and the boy used to complain to his father.

When the boy referred to Palaniyandy as being the assailant he could not have referred to Palaniandy Ramasamy whom he always addressed as " Uncle " and he could not have referred to Arumugam Palaniandy who was not known to him and who never visited Kitnan Ramasamy's house. Having regard to the evidence in the case, therefore, the name " Palaniandy " can only refer to the appellant. Dilran knew him well and the medical evidence is not inconsistent with the possibility of Dilran being sufficiently conscious to be able to understand his father's question and give a rational answer. The learned trial Judge adequately directed the jury on the credibility to be attached to Ramasamy's evidence, the possibility of Dilran being alive at the time he mentioned the assailant's name and stressed more than once in the course of his charge that it was absolutely essential that the jury should be satisfied beyond reasonable doubt that the child did give that name and that the named person was the appellant.

At the argument before us, learned Counsel for the appellant strongly urged, that Dilran could not be regarded as a competent witness if he was available to testify in Court, and consequently any statement attributed to him would therefore not be admissible under Section 32 (1) of the Evidence Act. It was further urged on the ground of competency that he could not have understood the nature of an oath or affirmation and that this failure must necessarily affect his competency. The competency of a witness to testify in Court under our law is governed by Section 118 of the Evidence Act which reads as follows :—

" All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them,

or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

The test laid down in the Section in regard to the competency of a child witness to testify is whether the Court considers that he is prevented from understanding the questions put to him or from giving rational answers to those questions. This is essentially a question of fact and does not depend on the age of the child and would necessarily vary with the nature of the statement made. Before examining the question of law I propose to examine the factual position in order to determine whether Dilran had sufficient mental capacity to understand questions put to him and give rational answers. He commenced to attend the estate school from the beginning of 1970; he had learned about four letters of the Tamil alphabet; he was able to call people by their names and distinguish the Kanakapulle class from the labourer class; he was able to converse quite intelligently for a boy of his age in Tamil and English; he used to speak to Selvarajah about his toys and requested him to buy him a car or a bus and he used to describe how the Superintendents and Assistant Superintendents of the Estate talked and walked. We think, on this material, a Judge and jury would have found him quite capable of satisfying the requirements of Section 118 of the Act.

In *Sarkar's Commentary*[1] the commentator citing *Queen Emperor v. Lal Sahai*,[2] states—

"In determining the question of competency, the court, under s. 118, has not to enter into inquiries as to the witness's religious belief or as to his knowledge of the consequences of falsehood in this world or the next. The court is at liberty to test the capacity of a witness to depose by putting proper questions. It has to ascertain, in the best way it can, whether from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established."

Monir in his commentary on the Indian Evidence Act[3] states—

"At one time the age of a child was considered as the criterion of his competency, and it was a general rule that none could be admitted under the age of nine years, very few under ten. But of late years no particular age is required in practice to render the evidence of a child admissible. A more reasonable rule has been adopted and the competency of children is now regulated not by their age, but by the degree of understanding which they appear to possess. A child may be a competent witness to give evidence in Court if it appears that she can understand the questions put to her and give rational answers

[1] *Sarkar on Evidence (10th ed.) Vol. 2, p. 1045.*
[2] *(1888) 11 Allahabad 545 at 546.*
[3] *Principles and Digest of the Law of Evidence by Monir, pp. 797, 798.*

thereto. No precise age is fixed by law, within which children are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of intelligence and knowledge which will render a child a competent witness. In all questions of this kind much must ever depend upon the good sense and discretion of the Judge."

and again

"No fixed rule can be laid down as to the credit that should be assigned to the evidence of a child witness. Obviously the question would depend on a number of circumstances."

The same view has been expressed in *Field's Law of Evidence*[1] when the author states that—

"if the child, though of tender years, is sufficiently intelligent to understand the questions put to him and to give rational answers to those questions, then his capacity to give evidence is on the same footing as that of any other adult."

When the witness is available in Court to give evidence, the preliminary examination to determine competency is known as the *voire dire*. This is done merely to save time because the Court can then decide at the outset whether the witness is competent or not, but the failure of the Judge to do so does not affect the issue of competency and would amount to a mere irregularity. In the case of a person who cannot be called as a witness and whose statement may become admissible under Section 32 of the Evidence Act, the competency has necessarily to be determined by other evidence. In the present case there was evidence on which the Judge and jury could have come to the conclusion that Dilran had sufficient understanding to appreciate the nature of the question put to him by his father and give a rational answer to that question. The simplicity of the question which called for a simple answer would in itself be a very relevant matter in the circumstances of the particular case. The learned trial Judge himself formed the view, no doubt tentatively, that the boy had sufficient understanding to give a rational answer to his father's question. Dealing particularly with the imaginative nature of a child's evidence the learned trial judge drew the attention of the jury to the fact that this was not a case "where there was some long discussion where the child was saying something to protect himself or to protect his father or mother" and that it was "an automatic remark made under the pressure of events which took place a little while before in that room." Thereafter he left the issue to the jury, who by their unanimous verdict apparently endorsed the Judge's view. In *Fatu Santal v. Emperor*[2] the Patna High Court held that—

"The mere fact that the evidence of the only eye-witness of a crime is that of a child six years of age, is not a ground for not relying upon

[1] *Field's Law of Evidence (1967), Vol. VI, p. 4473.*
[2] *(1921) 22 Cr. L. J. 417.*

it, especially when the evidence is given without hesitation and without the slightest suggestion of tutoring or anything of that sort, and there is corroboration of the evidence in so far as it narrates the actual facts, and of the child's subsequent conduct immediately afterwards."

This was, of course, a case where the child was available as a witness, but the observations of the Court might well apply to the circumstances in which Dilran made his statement in the present case.

The jury were entitled to come to the conclusion that had Dilran given evidence in Court, he would have satisfied the test of competency laid down in Section 118. Undoubtedly one of the circumstances that a Court could take into account in an appropriate case in deciding the competency of a child witness is whether the child is able to understand the nature of an oath or affirmation. There are however conflicting decisions as to whether an oath or affirmation should be administered after the court has decided upon the competency of a witness. In *The Queen v. Buye Appu*[1], *The King v. Jeeris*[2] and *The King v. Ramasamy*[3] whieh were followed by the Court of Criminal Appeal in *The Queen v. Siripina*[4] the view was taken that it was obligatory to administer an oath or affirmation, when the Judge has decided that a person is a competent witness. There are however two other decisions of this Court supported by a decision of the Privy Council which have taken a contrary view. In *The King v. Dingo*[5] Wijeyewardene A.C.J. following the Privy Council decision in *Mohamed Sugal Esa Mamasan Rer Alalah*[6], a case from the Protectorate of Somaliland, held that there was no obligation on the Court to administer an oath or affirmation provided the witness was competent to testify. This decision has recently been followed in an unreported decision of this Court in *Regina v. Somasundaram*[7] to which our attention has been drawn by learned Counsel for the State. We are inclined to follow the decisions in *King v. Dingo* and *Regina v. Somasundaram* and hold that a witness otherwise competent and who understands the obligation to speak the truth is competent to testify even if he does not understand the nature of an oath or affirmation.

In view of the decisions referred to above, the necessity for administering an oath or affirmation to Dilran does not arise, and having regard to his tender years and the absence of any material from which the Court can assume that he would have been able to understand the nature of an oath or affirmation, we entertain no doubt that had he been alive and present in Court to testify, no oath or affirmation would have been administered to him. But, Dilran's statement in this case is not one that is governed by Section 118 of the Act but one which is made admissible under

[1] *(1883) Wendt's Reports, p. 136 at p. 140.*
[2] *(1905) 1 Bal. Rep. 185.*
[3] *(1941) 42 N. L. R. 529.*
[4] *(1964) 65 N. L. R. 545.*
[5] *(1948) 50 N. L. R. 193 at 194.*
[6] *(1946) A. C. 57; (1946) A. I. R. (P. C.) 3.*
[7] *S. C. 29/69 M. C. Nuwara Eliya 37749, decided on 2nd August, 1971. [76 N. L. R. 10]*

Section 32 (1). Therefore, even if Section 4 (1) of the Oaths Ordinance, which requires an oath to be administered to all persons who may be lawfully examined or required to give evidence before any Court, can be made applicable to a witness who is competent to testify under Section 118, such a requirement is not necessary in the case of a declaration under Section 32 (1).

The English law certainly would not have permitted a child of such tender years to testify, but the reason for this is quite different. In the leading case of *Rex v. Pike*[1] it was held that a declaration *in articulo mortis*, made by a child only four years old is not admissible in evidence on the trial of an indictment for the murder of such child, because a child of such tender years could not have that idea of a future state which is necessary to make such a declaration admissible. As Justice Park remarked in that case—

> "We allow the declaration of persons *in articulo mortis* to be given in evidence, if it appears that the person making such declaration was then under the deep impression that he was soon to render an account to his Maker."

Similar views were expressed by the Court in *King v. Drummond*[2] where the dying declaration of a convict was excluded, but this decision can no longer be considered authoritative since a convict witness is now entitled to testify. If the English law as stated in *Rex v. Pike* applied, Dilran's declaration would not have been admissible in evidence. This theological belief—a belief in a punishment of a future state—is a condition prerequisite for the acceptance of the declaration in England as well as in the United States. The principle enunciated in *Rex v. Pike* (supra) has been generally accepted in the United States—(Vide *Wigmore on Evidence*).[3] As one American Judge remarked "The vital inquiry before the Court was as to the real condition of the mind of the deceased when making the statement under consideration...."[4]. In England a wider approach has since been recognised under the Oaths Act of 1961 which entitled atheists and non Christians (*i.e.* those who did not believe that a God would punish for false swearing) to make dying declarations. Some of the commentators on the Indian Evidence Act appear to have adopted the early English practice—Vide *Amir Ali* on Evidence,[5] *Sarkar*[6] and *Field*[7], but *Monir*[8] doubts the applicability of the English law to the law in India and draws attention to Section 158 of the Evidence Act which enables the credit to be attached to the dying declaration to be impeached or confirmed in the same way as that of a witness actually

[1] *3 C. & P. 597, 172 English Reports.*
[2] *1 Leach 338. 168 E. R. 271.*
[3] *Wigmore on Evidence, Vol. V, Section 1443.*
[4] *Per Mulkey J. in Tracy v. The People (1880) 97 Ill. 108.*
[5] *Amir Ali on Evidence (1962), Ed. Vol. 1, p. 664.*
[6] *Sarkar (10th Ed.) Vol. 1, p. 323.*
[7] *Field's Law of Evidence, Vol. 3, p. 1736.*
[8] *Monir, Vol. 1, p. 218.*

examined in Court. In support, Monir relies on one of the earliest commentaries on the Indian Evidence Act published by Sir Henry Cunningham, a former Judge of the Calcutta High Court. Commenting on Section 32 Cunningham states in his commentary [1]) :

> " The English ruling in *R. v. Pike*, 3 C. & P., 598, according to which the dying declaration of a child of such tender years that she could not understand the doctrine of a future state, was rejected, is not applicable under the present section ; nor, it would seem, is the question of the competence of the person to bear testimony one which affects the admissibility of the statement. If it complies with the requirements of this section it is relevant, though, possibly, of small importance."

If a witness, when alive, is competent to testify under section 118 of the Evidence Act there is no reason in principle why the declaration of such a witness, if he is dead, should not be held admissible under Section 32 (1) of the Act. In this respect there is a departure from the principles of the law in England from that which exists in India and Ceylon. In England the declaration should have been made under the sense of impending death. As Mr. Justice Park stated in *R. v. Pike*, " as this child was but four years old, it is quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such a declaration admissible." but in *Regina v. Perkins* [2] the circumstances indicated that a boy between 10 and 11 years of age was aware that he would be punished if he said what was untrue and the declaration made by him at this time was receivable in evidence on the trial of a person for killing him as being a declaration *in articulo mortis.* Under our law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under the expectation of death. The solemnity of the occasion would be a sufficient guarantee that the declaration may be fairly assumed to be relied upon for its truth in spite of the absence of an oath,—a manifestation of the Latin maxim " Nemo moriturus praesumitur mentiri."

The competency of Dilran to testify as a witness being established under Section 118 of the Evidence Act, the fact that he was not available as a witness at the trial cannot affect the declaration made by him under Section 32 (1) of the Act. The further question can arise for consideration whether Dilran's answer might properly be regarded as a " statement " under Section 32 (1). In *Alisandiri v. The King* [3] the Privy Council went so far as to hold that a verbal statement inferred from certain gestures and signs made in answer to questions, as opposed to an oral statement expressed in words, was admissible under Section 32 (1). In Dilran's case, if one renders the question asked and the answer given to the form of a narrative there is a clear oral statement to the effect that Palaniandy had committed the murders. Furthermore in view of the decisions of this Court in *King v. Samarakoon Banda* [4]

[1] *Cunningham's Law of Evidence (1894), p. 155.*
[2] *9 C. & P. 395. 173 E. R. 884.*
[3] *(1937) A. C. 220.*
[4] *(1943) 44 N. L. R. 169*

and *Ratnayake v. the Queen*[1] it could be argued that Dilran's statement is one that is admissible not only in relation to the cause of his own death but to Emmy's death as well.

We would therefore hold that the dying declaration of Dilran was one that was properly received in evidence at the trial.

It has been urged by learned Counsel for the State that this statement is also admissible under Section 6 as part of the *res gestae*. To make a statement admissible under this section the declaration must be substantially contemporaneous with the facts they accompany. In *Regina v. Bedingfield*[2] a statement made by a deceased, who suddenly came out of her room in which she left the prisoner and said something immediately afterwards shortly before she died suggesting that the prisoner had cut her neck, was held not to be a statement that was admissible as part of the *res gestae*. In *Lejzor Teper v. The Queen*[3] the Privy Council held " that it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement." To be admissible as part of the *res gestae* the test of contemporaneousness must be strictly followed. When Kitnan Ramasamy came to the house the transaction had been completed and an interval of time had elapsed before Dilran made his statement. We are therefore of the view that the statement is not admissible as part of the *res gestae*.

The weight to be attached to a dying declaration under Section 32 (1) is quite a different matter and would depend on a number of circumstances, particularly in the case of a child witness. The deponent being a person of tender age there is always the possibility of the statement being tutored or the likelihood of the imaginative outlook of a child witness affecting the nature of the statement. The learned trial Judge did warn the jury of these infirmities and there was an adequate caution in the words of this Court in *The Queen v. Anthonypillai*[4] that there was a risk in acting on the statement of a person who is not a witness and it was necessary to consider with special care the question whether the statement could be accepted as true and accurate. The infirmities referred to above may not have been present in the circumstances of the instant case, but nevertheless we are in agreement with the views of the trial Judge, that the appellant was entitled to be acquitted if the jury could not decide with certainty that the appellant's name was mentioned. In view of these directions we must assume that the jury acted on the dying declaration, only because it was supported by other evidence to which reference will presently be made. Since however, the learned trial

[1] *(1971) 73 N. L. R. 481.*
[2] *(1879) 14 Cox's Criminal Law Cases, p. 341.*
[3] *(1952) A. C. 480 at 487.*
[4] *(1965) 69 N. L. R. 34 at 38.*

Judge has posed the question in his certificate whether, having regard to the age of the boy, a conviction based upon the statement was unreasonable it is incumbent on this Court to give an answer to that question.

The unreasonableness of a jury verdict does not mean and cannot mean that this Court is entitled to substitute its view of the facts for that found by the jury. Numerous decisions of this Court have laid down this principle in unmistakable terms—*Andris Silva* [1], *Wegodapola* [2], *Don Andrayas & Atapattu* [3], *Musthapa Lebbe* [4]. These are early decisions of this Court which have hitherto been consistently followed, but this is a principle that does not appear to be sufficiently appreciated today. When, for instance, there has been a unanimous verdict of a jury who have accepted the evidence of direct eye witnesses, even if there are criticisms that can be made about that evidence, these are matters that must necessarily have been brought to the notice of the jury by competent Counsel and if the jury, in spite of these infirmities, have chosen to accept the evidence of the eye witnesses, it would be a usurpation of the functions of the jury, for this Court to substitute its verdict for the verdict of the jury. The only exception to this rule would be if the misdirections or non-directions are of such a substantial nature which might have affected the jury's verdict resulting in a miscarriage of justice or it can be demonstrated that the verdict of the jury is perverse, and not merely because the members of this Court feel some doubt about the correctness of the verdict. In the present case the question posed by the trial Judge is purely academic, but since the law permitted the declaration of Dilran to be received in evidence, in spite of his tender years, the jury were entitled to act on the declaration in arriving at the conclusion that the appellant was the assailant.

Evidence in support of Dilran's statement consisted mainly of two items of evidence, to which reference has been made by the learned trial Judge. There was firstly a statement made by the appellant to Police Constable Banda in which the appellant stated that he had the knife in the drain behind Ramasamy's house. In consequence of this statement the Police recovered the pointed knife P 1 from the drain. The murders could have been committed with this knife. The point of this knife was bent. It is in evidence that a portion of the cement floor was chipped close to the place where Emmy's body lay, and the doctor was of the opinion that this could have been the result of the knife coming into contact with the cement floor after causing a penetrating injury which he found above Emmy's wrist-joint. On an examination of P 1 by the Analyst it revealed a preliminary positive reaction for blood in the crevices between the hilt and the guard of the knife. There was some criticism about the manner in which Banda recorded the appellant's statement

[1] *(1940) 41 N. L. R. 433.*
[2] *(1941) 42 N. L. R. 459 at 469.*
[3] *(1941) 21 C. L. W. 93.*
[4] *(1943) 44 N. L. R. 505 at 507.*

because he had to obtain the assistance of a labourer to record the statement. Banda admitted that he understood a little Tamil but not sufficient to record the translation of what the appellant stated. The trial Judge drew the attention of the jury to these infirmities in the recording of the statement, but in spite of these infirmities the jury were apparently satisfied that the record of the statement was accurate. The little Tamil which the Constable knew would have been sufficient for him to understand the appellant's statement in regard to the discovery of the knife. This evidence established the fact that the appellant had himself knowledge of the location of the "murder" weapon. Another item of circumstantial evidence relied upon by the prosecution was given by the witness Palany who stated that about 3.30 p.m. on the day in question the appellant asked her for a bucket and put a sarong in it to be washed. The water in the bucket was blood-stained. True it is that the sarong has not been identified as that of the appellant, but there is no reason why the appellant should busy himself with washing other people's sarongs. Another item of circumstantial evidence in the case, which however was not referred to by the trial Judge, was the presence of an injury on the right little finger of the appellant at the inter phalangial joint which the doctor stated could have been caused if the appellant used P 1 and the knife slipped in the course of the stabbing. The Doctor discounted the possibility of the injury being caused with a sickle as stated by the appellant in his dock statement. These items of circumstantial evidence amply support the dying declaration of Dilran.

Counsel for the appellant has criticised the charge on the ground that the directions to the jury in regard to the weight to be attached to the dying declaration were inadequate. It has been submitted that there were no directions that the declaration was not made on oath; that it was subject to the infirmity resulting from the lack of cross-examination and that no reference was made in the charge that the weight to be attached to it depended on whether the declaration was corroborated by other evidence. These criticisms are justified and the matters mentioned by Counsel have not been referred to in the charge. At one stage we contemplated directing a fresh trial of the appellant on the same charges in view of these omissions, but on further consideration we think, that in the circumstances of this case, no useful purpose will be served by doing so, as in our opinion no substantial miscarriage of justice has taken place.

It is essential in the case of a dying declaration that the jury should be warned of the danger of acting on a dying declaration and that they should be cautious in accepting it, but the adequacy of the warning must necessarily vary with the nature of the declaration. In *Monir's* commentary[1] the learned author states—

> "In India, a dying declaration assumes a character very widely different from what it has under the English Law, and is relevant

[1] *Monir, Vol. 1, p. 226.*

whether the person who made it was or was not at the time he made it under expectation of death ; the weight to be attached to it depends, not upon the expectation of death which is a guarantee of its truth, *but upon the circumstances and surroundings under which it was made, and very much also upon the nature of the record that has been made of it. It is almost a question of fact whether it should be relied upon or not, and, therefore, a matter entirely within the province of the jury.*"

In *Alisandiri's case (1937) A. C. 220* (supra) in which the facts are somewhat similar to the facts of the present case the directions of the learned trial Judge were unfortunately not available, but the Privy Council assumed that the jury were adequately and properly directed on the weight of the evidence. In the present case the learned trial Judge stressed the fact that the dying declaration was the most important item of evidence in the case and that the jury had to be absolutely certain that the child had given the name of the assailant. In our view, in the circumstances and the surroundings in which that statement was made, this was an adequate direction. We must not be misunderstood thereby to mean that in every case where the jury have to consider a dying declaration such a direction would be adequate. We would, with respect, agree with the general principles set out in the decisions of this Court in *The King v. Asirvadan Nadar* [1], *Lewis Fernando v. The Queen* [2], and *Justinpala v. The Queen* [3]. In *Asirvadan Nadar* the statements contained in the dying deposition, which formed the foundation of the prosecution case, were lengthy statements relating to the circumstances in which the deceased came by his death and Gratiaen J. held that the jury should appreciate that the statements of the deponent had not been tested by cross-examination. The learned Judge stated that in the opinion of the Court it was imperative that such a warning should be given, a view that was endorsed by Gunasekara J. in the later case of *Lewis Fernando*. This same view was also followed by T. S. Fernando J. in *Justinpala*. In all these cases there were lengthy statements made by the deponent and it was essential that the jury should have been adequately warned that the statements had not been tested by cross-examination. In the present case the statement consists of an answer to a simple question made almost immediately after the transaction was completed and a direction in the terms of *Asirvadan Nadar* was strictly unnecessary.

The necessity for a direction to the jury that the declaration has not been tested by cross-examination arises not only in a case where there has been a lengthy statement but also in the case of an incomplete statement. In the latter case the direction is all the more necessary because one can only speculate as to what the deponent would have said if he was able to complete his statement. In *Waugh v. The King* [4] cited by Gratiaen J. in *Asirvadan Nadar* the Privy Council took the

[1] *(1950) 51 N. L. R. 322.*
[2] *(1952) 54 N. L. R. 274 at 277.*
[3] *(1964) 66 N. L. R. 409.*
[4] *Privy Council. Weekly Notes of 31.3.50., p. 173.*

view " that the dying declaration was inadmissible because on its face it was incomplete and no one could tell what the deceased was about to add ; that it was in any event a serious error to admit it in part ; and that it was a further and even more serious error not to point out to the jury that it had not been liable to cross-examination."

In regard to the failure of the Judge to draw the attention of the jury to the fact that the statement was not made on oath or affirmation, we do not think any prejudice has been caused. Any intelligent jury must know that an oath cannot be administered to a child of such tender years.

Finally there is the criticism that the trial Judge did not direct the jury that it was necessary that the dying declaration should be corroborated. *Monir* in his Commentary [1] states that—

> " Corroboration of a dying declaration is not necessary as a rule of law, but where a dying declaration is not made in expectation of death and is not made in the presence of the accused, prudence requires that it should be corroborated before it is acted upon."

This view has been adopted by Basnayake C.J. in *The Queen v. Vincent Fernando* [2]. I agree with the observations of T. S. Fernando J. however in *Justinpala* that on the facts in *Vincent Fernando* it was necessary for the trial Judge to direct the jury on the need for corroboration and also draw attention to the inherent weakness in the declaration that it had not been tested by cross-examination. It is also a well known principle of law that where there is in fact corroboration, the failure of the Judge to give a direction does not affect the decision of the jury.

In other fields where the law requires corroboration, the Court of Criminal Appeal has held that " if there is corroboration of a substantial character the warning is not required "—*The King v. Ana Sheriff* [3] (a case of Rape). Similarly it was held in *The King v. Piyasena* [4] in regard to the evidence of an accomplice that if there is in fact corroboration of an accomplice's evidence the Court will not interfere even when the proper caution to the jury has not been given. In principle, we do not see why the same considerations should not apply to the case of a dying declaration. There was ample corroborative evidence of Dilran's statement in the present case.

For the above reasons we are of the view that the verdict of the jury in this case was based on admissible evidence and that it was not unreasonable for the jury to act upon the statement of Dilran, which in this case was supported by other items of circumstantial evidence.

The appeal is therefore dismissed and the application refused.

Appeal dismissed.

[1] *Monir, Vol. 1, p. 226.*
[2] *(1964) 65 N. L. R. 265 at 271.*
[3] *(1941) 42 N. L. R. 169.*
[4] *(1948) 49 N. L. R. 389 at 390.*