

[COURT OF CRIMINAL APPEAL.]

1943 Present : Moseley A.C.J., Keuneman and Jayetileke JJ.

THE KING *v.* SAMARAKOON BANDA.15—*M. C. Kandy, 7,211.*

Dying declaration—Charge of murder of person other than declarant—Right of private defence—Evidence of relevant facts—Statement admissible—Evidence Ordinance, s. 32 (1).

The accused was charged with the murder of A, in the course of which he also inflicted fatal injuries on B. The accused pleaded the right of private defence.

The Crown put in a dying declaration by B, giving the circumstances in which he met with his death and which also brought A to the scene.

Held, that the dying declaration was admissible under section 32 (1) of the Evidence Ordinance.

A PPEAL from a conviction by a Judge and Jury before the 3rd Midland Circuit, 1942.

S. Mahadeva for the appellant.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

March 15, 1943. MOSELEY A.C.J.—

The appellant was charged with the murder of one Kiri Banda. According to the evidence for the prosecution the killing of the deceased was one incident in a transaction, in the course of which three persons were done to death by the appellant. One of them, Punched Banda, father of the deceased, survived his injuries long enough to make two statements, one to the headman, the other on affirmation to the magistrate. Each was made within a few hours of the incident. These statements were produced in evidence. It is now urged on behalf of the appellant that they are inadmissible on the ground that the cause of Punched Banda's death is not a fact in issue and that a statement made by a deceased person "as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death" is only relevant "in cases in which the cause of that person's death comes into question." The words quoted are taken verbatim from section 32 (1) of the Evidence Ordinance (Cap. II) upon which Crown Counsel relies for the admissibility of the two statements.

It must, of course, be conceded that the main facts in issue in the case were the causing of Kiri Banda's death by the appellant and the intention underlying his act. The defence which was indicated in the course of cross-examination of the prosecution witnesses was that of private defence. The existence of circumstances justifying, wholly or partially, the act of the appellant therefore became a fact in issue at an early stage of the trial. The appellant in giving evidence was at first disinclined to admit knowledge of any incident, in the course of which several people were stabbed but, after admonishment by his Counsel to tell the truth, claimed to have been assaulted by five persons including the three deceased

and admitted that he drew his knife and stabbed aimlessly, through fear of being killed. That, indeed, was the line adopted by Counsel for the defence who obtained from the first witness put into the box the following answer:—"I deny that long before the first knife blow was dealt by the accused, my father (Punchi Banda), my elder brother and my uncle had surrounded the accused armed with clubs." Since Punchi Banda was according to the witnesses for the prosecution, the first person to be attacked by the appellant, it seems to us that at that stage of the trial the cause of Punchi Banda's death came into question. By virtue of section 32 (1) any statement made by Punchi Banda of relevant facts is a relevant fact. Now, in each of the statements to which objection is taken, Punchi Banda brings Kiri Banda to the scene and in the first speaks of him being chased, and in the second of being stabbed by the appellant. It cannot be disputed that these are relevant facts. It follows that the statements themselves are relevant.

We have arrived at this conclusion on what appears to us to be the clear wording of the section. No authority exactly in point was brought to our notice. Crown Counsel, however, cited the case of *Lalji Dusadh v. Emperor*, in which it was held that a statement made by a person who had been robbed, and subsequently killed, regarding the robbery and the assault committed in the course thereof, was admissible in evidence at the trial of the assailant for robbery. In the words of Mullick A.C.J., "the words of section 32 are very wide and it is not necessary that the charge should be one of homicide." The same view was expressed in *Nga Ba Min v. Emperor*. As we have indicated, these cases are not exactly in point, but they are useful as indicating that the Patna and Rangoon High Courts are not prepared to restrict the scope of section 32 (1) to the narrow rule of English law that a dying declaration as to the cause of death is only admissible when the causing of that death is the subject of the charge.

In the circumstances of the case before us we are of opinion that each of the statements made by Punchi Banda is relevant and was properly admitted. The appeal is dismissed. There was also an application for leave to appeal on questions of fact. No ground of any substance was advanced. The application is therefore dismissed.

Appeal dismissed.
