[IN THE PRIVY COUNCIL.]

1936 *Present :* **Lord Roche, Sir John Wallis, and Sir George Rankin.**

ALISANDIRI *v.* THE KING.

Dying declaration—Evidence of signs made by person unable to speak—Nod of assent to question—Verbal statement—Evidence Ordinance, s. 32 (1).

Where a nod of assent was given by a person, who was unable to speak, to a question whether it was the accused that cut her neck,—

***Held,* that there was sufficient evidence of a verbal statement by the deceased within the meaning of section 32 (1) of the Evidence Ordinance.**

***Held, further,* that evidence as to signs made in answer to questions put to the deceased was admissible but statements of witnesses as to what interpretation they put upon the signs were inadmissible.**

Where apart from the evidence proceeding from the deceased woman, the other evidence was not sufficient to warrant a conviction but at the same time that other evidence was not merely consistent with the deceased's statement but pointed in the same direction,—

***Held,* that the conviction was justified.**

THIS was an application for special leave to appeal against a judgment and sentence of the Supreme Court.

L. M. D. de Silva, K.C. (Ceylon), for appellant.

Sir D. B. Somervell, K.C., A.-G. (with him *Kenelm Preedy*), for the Crown.

November 12, 1936. Delivered by LORD ROCHE.

This is an appeal by special leave against a judgment and sentence of the Supreme Court of the Island of Ceylon dated May 1, 1935, whereby, after a trial before a Commissioner and a jury, the appellant was sentenced to death for the murder of a woman named Salami Nadatchi on May 15, 1934. The jury had returned a verdict of guilty by a majority of six to one. The main point raised in the appeal was whether information given by the deceased woman before her death was a statement within the meaning of section 32 of the Ceylon Evidence Ordinance, No. 14 of 1895, and as such was admissible in evidence by virtue of that section. This information was admitted in evidence and directly implicated the appellant. The material part of the section is as follows :—

"*Statements by Persons who cannot be called as Witnesses.*

Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.

"32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases :

When it relates to cause of death ;

"(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

The facts of the case as proved by evidence not the subject of objection were as follows :—

The deceased was a widow living alone in a two-roomed one-storied house on a plot of land lying between the estates of one Stanley Jayawardene and one Collin Silva. The deceased's house was about 150 yards from the estate bungalow of Collin Silva where a witness named Rengam Arumugam, watcher of the estate, lived with his wife. The accused man had worked as a carter for Stanley Jayawardene's estate and lived in the neighbourhood, but recently and until shortly before May 15, 1934, he had been in the employment of two brothers Mohamadu a few miles away. He had been discharged from this employment some days before May 15 and was then unemployed. On the day in question he had been to the place of business of the brothers Mohamadu, had borrowed a bicycle from one of them, and gone home on it to dinner at his house, which he left after dinner about 2 P.M. Between 2 and 3 P.M. he was seen near the house of the deceased woman in conversation with her. Between 3 and 4 P.M. he was seen riding the bicycle away from that locality and was described by a witness (Charles) as dismounting and as going into a thicket and lurking there and behaving in a suspicious and excited manner. He then, after bathing in a stream, went back on the bicycle to the place of business of the brothers Mohamadu where he was later arrested. Meanwhile at about 4 P.M. the deceased had come in a terribly wounded condition to the bungalow of Collin Silva occupied by Arumugam. The principal wound was one about 4 inches in length extending from the right side of her neck across the throat to about ½ an inch on the left side of the middle line. There were minor wounds on the face and head and her ears were severed and torn. She had evidently made her way unaided from her own house and was found on the verandah of Collin Silva's bungalow. There the interrogation took place from which the evidence in dispute was derived and in consequence the accused was arrested the same afternoon at the Mohamadus' place of business. The statement of the accused, made on May 16, was of the nature of an *alibi* and in particular was to the effect that from 12.30 P.M. onwards he was at the boutique. This was proved at the trial to be untrue as appears from the evidence summarized above. At the trial the accused did not elect to give evidence nor was evidence called on his behalf. At the house of the deceased woman the main features of the attack upon her were plainly to be seen. There was blood on a camp cot in the outer room upon which the deceased must have been sitting or lying when attacked. The room was disturbed and jewellery which she possessed was missing. The door from this room to the outside was locked and the wounded woman, as was indicated by blood marks, made her way into the inner room and then out of a window and thence by a path to Collin Silva's bungalow. There she was bandaged and propped up against a wall with cushions. The throat wound rendered her unable to speak ; but she was fully conscious and able to understand what was said to her and to make signs and to nod her head, though slightly. She was asked questions both by the police and by neighbours and in particular by one Martin Perera—a carter who had worked with the accused for Mr. Stanley Jayawardene and

who also knew the deceased woman. Mr. Stanley Jayawardene was present at the material time and there was no ground for suggesting that the evidence to which objection was taken was derived solely or mainly from police sources, or that Perera or Mr. Jayawardene, who gave evidence of what took place, were witnesses with ill-will to the appellant. The greater part of the interrogation was conducted by Martin Perera, who spoke to the wounded woman in Sinhalese. The course and result of it was as follows:—Asked who cut her neck, the deceased indicated by signs the height of the person and later pointed to Mr. Jayawardene and also made signs as of goading a bull. The accused had worked for Mr. Jayawardene as a carter. She also pointed to a constable and then patted or slapped her cheek two or three times. The accused had some time previously assaulted a constable by slapping his face and this was a matter of common knowledge. Probably at this state—though the witnesses were not entirely in agreement as to the order of events—Martin Perera put the direct question: "Was it Alisandiri?"—the name by which the accused was ordinarily known. The wounded woman nodded her head in answer to this question. As to this fact and that it was a nod of assent no witness seemed in any doubt. The wounded woman was removed to hospital and died there and, as has been already stated, the appellant was arrested and charged.

At the trial the admissibility of the evidence in question seems to have been raised by counsel for the defence as soon as the jury was empanelled and sworn. The jury was quite properly ordered to retire and the question of admissibility was argued and decided in their absence. An authority (*Queen Empress v. Abdullah* [1]), which will be referred to later in this judgment, was cited to the learned Commissioner, and in accordance with that authority he ruled that evidence as to signs made in answer to questions put to the deceased was admissible but that statements of witnesses as to what interpretation they put upon the signs were not admissible. It was said upon the argument of this appeal that the latter part of the ruling was not observed, and that evidence ruled inadmissible was in fact given. It is difficult to adhere to a clear line of division between the description of signs and the interpretation of signs, and it may be that in some respects witnesses trespassed beyond the line and so usurped what obviously is the function of the jury; but their Lordships observe that in some instances the matter complained of was elicited by cross-examination on behalf of the accused. Their Lordships are of opinion that no substantial grievance can be made out in this regard, still less any real or serious miscarriage of justice. The main question is whether any part of the evidence as to what passed between the deceased and Perera should have been admitted. In their Lordships' opinion the ruling of the learned Commissioner was correct. It is to be observed that in the section the word used is "verbal" and not "oral" which is used elsewhere in the Ordinance, as for example in section 3 and section 119 in reference to evidence given in Court. It is unnecessary to decide whether the question put "Was it Alisandiri?" and the nod of assent would have constituted an oral statement made

[1] *I. L. R. 7 All. 385.*

by the deceased, but their Lordships are clearly of opinion that it constituted a verbal statement made by her. The case under consideration closely resembles the case of a person who is dumb and is able to converse by means of a finger alphabet. Upon proper evidence proving the words used in a conversation so held their Lordships think that a statement so made would be a verbal statement within the meaning of the section. So here their Lordships think that there was proper and sufficient evidence of a verbal statement by the deceased to the effect that it was the accused who cut her neck. As to the remainder of the evidence as to signs made by the deceased it was necessarily given in order that it might be understood in what circumstances and context the vital question came to be asked and to be answered. Mention has already been made of the decision in Allahabad upon which the learned Commissioner relied to support his ruling. This was a decision of the Full Court and was pronounced in the year 1885. Since that time it has been followed in Bengal in the case of *Emperor v. Sadhu Charan Das*[1], in Patna in *Chandrika Ram Kahar v. King Emperor*[2], and in Lahore in *Mam Chand v. The Crown*[3]. The material provisions of the Evidence Act in India are identical with the provisions of the Ceylon Ordinance. For the reasons already given their Lordships think that those decisions were correct and that the learned Commissioner was right in following them.

Observations were properly and forcibly made by Council for the appellant as to the caution required in the reception of evidence of this character and in the use to be made of it. It is, of course, true that evidence of signs of an ambiguous or uncertain character ought not to be admitted at all and that in many cases the evidence though admissible might be of little weight. It is no doubt also true that answers to questions of a leading character may be of little weight, but in the circumstances of this case Martin Perêra's question was in its context other than a mere leading question. At any rate all such matters are matters for the jury, going to the weight and not to the admissibility of the evidence, and there is nothing here to show that anything took place in this connection calling for or justifying the interference of this Board. Unfortunately neither the advisers of the appellant nor the Crown were able to trace or produce any note of the summing up. In the absence of any suggestion, based on any other materials, that the summing up was open to objection, their Lordships can only assume that the learned Commissioner who heard the argument on the admissibility of the evidence with regularity, and ruled upon it, as their Lordships have decided, correctly, also directed the jury adequately and properly as to the weight of the evidence. The result seems to their Lordships to be this: Apart from the evidence proceeding from the deceased woman, the other evidence was not sufficient to warrant a conviction, but at the same time that other evidence was not merely consistent with the deceased's statement but pointed in the same direction. It was a case in which, if the deceased's statement was received, and was believed,

[1] *I. L. R. 49. Cal. 600.*

[2] *I. L. R. 1 Pat. 401.*

[3] *I. L. R. 5 Lah. 324.*

as it evidently was by the jury, to be clear and unmistakable in its effect then a conviction was abundantly justified and indeed inevitable. For these reasons their Lordships have felt themselves impelled to advise His Majesty that this appeal should be dismissed.

Appeal dismissed.