

conviction on the first two charges could not be sustained on the question of an unlawful assembly. Learned Crown Counsel contended that the withdrawal of the third charge did not preclude the Court from convicting the accused on that charge. He relied on the provisions of s. 185 of the Criminal Procedure Code read with s. 6 (2) of the Court of Criminal Appeal Ordinance, No. 23 of 1938. He further contended relying on *The King v. Sayaneri (supra)* that apart from the third charge the jury could have convicted the accused on count 2 without "unlawful assembly". Howard C.J., who delivered the judgment of the Court said "We are in agreement with these contentions." Here again we would repeat what we said before that the learned Chief Justice overlooked the decision of the Privy Council in regard to the scope of s. 146.

Learned Crown Counsel addressed another argument to us that the offences of which the appellants were convicted are minor offences within the meaning of s. 183 of the Criminal Procedure Code. The two illustrations given in the section indicate that there is no substance in that argument.

For the reasons given above we are of opinion that in the absence of a charge the appellants could not have been convicted under ss. 433, 380, 383 and 382 read with s. 32.

On the facts the evidence against both appellants is that of Thevani Amma. She said that she identified both appellants when they came into the house but when she was taken to the identification parade she found it difficult to identify the 1st accused appellant by looking at his face. She examined his arms and identified him by the tattoo marks on the arms. That fact leaves room for the suggestion that she had been told by someone that the first accused appellant had tattoo marks on his arms. The evidence against the 1st accused appellant appears to be very weak.

We are of opinion that the convictions of both appellants must be quashed, and we would order accordingly.

*Convictions quashed.*

[COURT OF CRIMINAL APPEAL]

1950 Present: Jayetilleke, S.P.J. (President), Gunasekara J. and Palle J.

THE KING v. MARSHALL APPUHAMY

*Appeal 4 and Application 6*

*S. C. 4—M. C. Negombo, 58,963*

*Court of Criminal Appeal—Evidence Ordinance, section 32 (1)—Statement of deceased prior to death—Admissibility—Meaning of "circumstances of the transaction."*

The statement of a deceased person which is admissible under section 32 (1) of the Evidence Ordinance may be one which was made before the cause of death arose, or before the deceased had any reason to expect to be killed. The transaction contemplated by the section cannot be restricted to the physical cause of death and would include the connected events which culminated in death.

**A**PPEAL, with application for leave to appeal, against a conviction in a trial before a Judge and Jury.

*D. W. F. Jayesekera*, for accused appellant.

*R. R. Crossette-Thambiah, K.C., Solicitor-General*, with *A. C. Alles, Crown Counsel*, for the Crown.

*Cur. adv. vult.*

February 27, 1950. JAYETILEKE S.P.J.—

The appellant was charged with having murdered one Wettige Elizabeth on September 19, 1949. He was convicted by a divided verdict of the jury and sentenced by the presiding Judge to death.

The principal witness for the prosecution was Ana Maria, the mother of the deceased. She said that about two or three days prior to the death the deceased complained to her that the appellant made an improper suggestion to her, that she did not agree to it and that she did not want him to come to the house. Soon after the complaint was made to her by the deceased she went to the appellant and she asked him not to come to her house. On the day of the tragedy at about 1.30 p.m. she and the deceased were standing in front of their house when the appellant came along the road saying "magay veday hari" (my work is right). Then she and the deceased ran along the road towards a neighbour's house, whereupon, the appellant pursued them and stabbed the deceased with a kris knife on the chest. Then the deceased fell down, whereupon, the appellant stabbed her several times. The appellant admitted that he stabbed the deceased, but he stated that he did so under grave and sudden provocation.

The main point taken at the argument before us was that the statement alleged to have been made by the deceased to Ana Maria was not admissible in evidence under section 32 (1) of the Evidence Ordinance.

Statements written or verbal of relevant facts made by a person who is dead . . . . are themselves relevant facts in the following cases—(1) when the statement is made by a person as to the cause of his death, or (2) 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. This section is identical with section 32 (1) of the Indian Evidence Act, 1872, which was interpreted by their Lordships of the Privy Council in the case of *Swami v. King Emperor*<sup>1</sup>. The facts of that case are as follows :—

The appellant was convicted of the murder of one Kurree Nukaraju and sentenced to death. On March 23, 1937, the body of the deceased man was found in a steel trunk at Puri, the terminus of a branch line on the Bengal-Nagpur Railway where the trunk had been left unclaimed. The medical evidence left no doubt that the man had been murdered.

<sup>1</sup> (1939) 1 A.E.R. 396.

There was evidence that the deceased had reached the appellant's house at the critical time, that a trunk had been bought by order of the appellant and taken to his house on March 22, and that the same trunk containing the body of the deceased was placed on the train at Berhampur on March 23, having been conveyed there in a vehicle ordered by the appellant in which he and the trunk travelled to the station. The prosecution proved a statement made by the deceased to his wife that he was going to Berhampur as the appellant's wife had written and told him to go and receive payment of his dues. It was contended that the statement made by the deceased to his wife was not a statement as to the circumstances which resulted in his death but their Lordships held that it was, and that it was admissible under section 32 (1). In the course of his judgment Lord Atkin said :—

“ It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death and that the circumstances can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of those limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to expect to be killed. The circumstances must be circumstances of the transaction. General expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. However statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such a person to meet him, would each of them be circumstances of the transaction and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. ‘Circumstances of the transaction’ is a phrase, no doubt, that conveys some limitation. It is not as broad as the analogous use in ‘circumstantial evidence’ which includes evidence of all relevant facts. It is, on the other hand, narrower than *res gestae*. Circumstances must have some proximate relation to the actual occurrence, though as, for instance, in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose. It will be observed that ‘the circumstances’ are those of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that the cause of the declarant's death comes into question. In the present case the cause of the deceased's death comes into question. The transaction was one in which the deceased was murdered on March 21 or March 22—that he was setting out to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused's house—appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death.”

The transaction in this case is the one in which the deceased was murdered on September 19, 1949. The transaction cannot be restricted to the physical cause of death. If events prior to the death can be taken into account, as indeed they can be, according to the judgment of Lord Atkin, the transaction would include the connected events which culminated in death. Whether there is a proximate relation between the commencement of the transaction and the ending thereof is a matter to be determined on the facts of each case. Here there is a clear connection between the complaint made by the deceased, the warning given by Ana Maria to the appellant, and the actual stabbing. The majority of us are of opinion that the statement made by the deceased is a statement as to some of the circumstances of the transaction which resulted in her death within the meaning of section 32 (1) and was rightly admitted in evidence. We would accordingly dismiss the appeal.

*Appeal dismissed.*

1949

*Present: Wijeyewardene C.J.*

CHRISTOFFELSZ, Appellant, and DHANARATH MENIKA,  
Respondent

*S. C. 314—Workmen's Compensation Case No. C 3/140/47*

*Workmen's Compensation Ordinance—Failure to make claim in time—  
Ignorance of provisions of Ordinance—Not sufficient cause—Chapter  
117—Section 16.*

Ignorance of the provisions of section 16 (1) of the Workmen's Compensation Ordinance is not a sufficient cause within the meaning of section 16 (2) for failure to make a claim within the prescribed time.

**A**PPPEAL on a question of law under the Workmen's Compensation Ordinance.

*H. W. Jayewardene*, for the appellant.

*N. D. M. Samarakoon*, Crown Counsel, as *amicus curiae*.

*Cur. adv. vult.*

July 25, 1949. WIJEYWARDENE C.J.—

This is an appeal on a question of law under the Workmen's Compensation Ordinance.

The applicant-respondent instituted this claim for compensation against the respondent-appellant in respect of the death of her husband, W. M. Punchi Banda, on the ground that Punchi Banda died as the result of an accident arising out of and in the course of his employment under the respondent-appellant.

Punchi Banda died on December 17, 1947, immediately after he was gored by a bull of the respondent-appellant. The applicant-respondent sent petition A2 of December 29, 1947, to the Assistant Labour Controller, Ratnapura, making her claim for compensation and asking him to hold an inquiry and grant compensation. She wrote letter A1 of January 12 1948, inviting attention of that officer to A2. She instituted the present claim for compensation under section 16 of the Ordinance on July 12, 1948.