[COURT OF CRIMINAL APPEAL]

1950 *Present :* **Gratiaen J. (President), Gunasekara J. and Swan J.**

THE KING *v.* ASIRVADAN NADAR

Application 25 of 1950

S. C. 22—M. C. Kanadulla, 2,912

Court of Criminal Appeal—Evidence Ordinance, Section 32 (1)—" Dying deposition " —Duty of Court to caution Jury—Requirement of corroborative evidence—Manner of recording dying deposition—Criminal Procedure Code, Section 298 (2).

Where, in a trial for murder, the " dying deposition " of the deceased was led in evidence against the accused under section 32 (1) of the Evidence Ordinance—

Held, that it was imperative that the Jury should have been adequately cautioned that, when considering the weight to be attached to the statements contained in the dying deposition, they should appreciate that the statements of the deponent had not been tested by cross-examination.

Held further, (i) that the attention of the Jury should have been specifically drawn to the question how far the other facts and surrounding circumstances proved in evidence might be said to support the truth or otherwise of the deposition.

(ii) that whenever Magistrates are called upon to record " dying depositions " in accordance with the procedure laid down in Chapter 23 of the Criminal Procedure Code they should record the deponent's statements in the words which he actually employs (or, when this is not practicable, in an accurate translation of those actual words). Whenever questions are put to the deponent for purposes of elucidation, the form of the question as well as of the answer should be precisely recorded.

APPLICATION for leave to appeal against a conviction in a trial before a Judge and Jury.

M. M. Kumarakulasingham, for accused appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 9, 1950. GRATIAEN J.—

This is an appeal against a conviction for the murder of a man named Thangasami Nadar, alleged to have been committed at Uduwela in the early hours of the morning of October 2, 1949.

The case for the Crown was that Thangasami Nadar had occasion on the previous day to find fault with the accused, who was his employee; and that at approximately 5 a.m. on October 2 the accused stabbed Thangasami Nadar while the latter was asleep in the "wadia" in which they, and certain other employees of Thangasami Nadar, resided. A blood-stained knife, alleged to belong to the accused, was shortly afterwards discovered under the deceased's bed. The man was taken to the Government Hospital at Kuliyapitiya for medical attention. As his condition was serious, the Magistrate was sent for and a "dying deposition" was recorded by him at 8.55 a.m. Thangasami Nadar died at 4.20 p.m. on the same day.

The prosecution called as witnesses at the trial the other inmates of the "wadia". None of them gave direct evidence of the stabbing, but there can be no question that their evidence, if true, did tend to implicate the accused. The learned Judge did not, however, invite the Jury to consider whether the cumulative effect of this circumstantial evidence was *by itself* sufficient to establish the guilt of the accused on the charge of murder. We cannot therefore with propriety accede to learned Crown Counsel's submission that the conviction should in any event be upheld on the weight of this evidence alone. As to the extent, if any, to which the Jury believed the witnesses concerned, it is impossible to speculate.

Apart from the evidence of these witnesses, the prosecution strongly relied on Thangasami Nadar's "dying deposition" which was recorded by the Magistrate at 8.55 a.m. on October 2, 1949. The entirety of this document—marked P9—was read in evidence at the trial without objection by the defence.

Such portions of the deposition P9 as are "statements made by (Thangasamy Nadar) as to the cause of his death or as to any of the circumstances which resulted in his death" constitute admissible evidence on which the prosecution was entitled to rely under the provisions of section 32 (1) of the Evidence Ordinance. Learned Crown Counsel concedes that at least some statements which appear in the deposition are not admissible under this section. We do not think it desirable that we should at this stage give a final ruling as to which portions of the deposition are, upon a proper application of this section, admissible and which portions should have been ruled out. That question must be decided, after due consideration, by the presiding Judge at the fresh trial which we propose to order in this case. For the purposes of the present appeal we shall assume—although we do not hold—that the entire document had been properly admitted in evidence.

The main ground on which the accused's conviction has been attacked is that, in leaving it to the Jury to consider whether they could accept as true the statements in the dying deposition P9 which incriminated the accused, the learned Judge omitted to give them adequate directions for their guidance in deciding what degree of reliance they could place upon those statements. It was submitted that in the circumstances of the present case this non-direction amounted to a misdirection which vitiates the conviction. In our opinion the objection is a substantial one.

As the evidence was presented to the Jury at the trial, the statements contained in the dying deposition P9 formed to a very large extent the foundation of the case against the accused, and it was in our opinion imperative that they should have been adequately cautioned that, when considering the weight to be attached to this evidence, they should appreciate that the statements of the deponent had not been tested by cross-examination. It has been pointed out in this connection in *Taylor on Evidence (12th Ed. para 722)* that it should always be recollected that the power of cross-examination is " a power quite as essential to the eliciting of the truth as the obligation of an oath can be ". In *Waugh v. the King* [1] the Privy Council quashed a conviction in a case where the presiding Judge had fallen into " the serious error of not pointing out to the Jury that a statement made in a dying deposition had not been liable to cross-examination ".

Admittedly there is no rule of law under which evidence which is admissible under section 32 (1) may not be acted upon unless it is corroborated by independent testimony, but the Jury should always be cautioned as to the inherent weakness of this form of hearsay evidence. In *Arumuga Tevan v. Emperor* [2] Jackson J. held that " when a man who is dead has left a statement throwing light upon the cause of his death, that statement is relevant evidence under section 32 (of the Indian Act) but it is not entitled to any peculiar credit . . . . It is incumbent upon the Court before it accepts the statement as true to see how far it is corroborated ". A similar view was taken in *Bullu Singh v. Emperor* [3]. Moreover, the attention of the Jury ought specifically to be drawn to the question of " how far the other facts and surrounding circumstances proved in evidence might be said to support the truth or otherwise of the deposition ". *Sashi Kanta De v. King Emperor* [4]. It is important to remember that in this country, unlike in England, statements, untested by cross-examination, which are made by a deceased person as to the cause of his death or as to the circumstances which resulted in it are admissible in evidence *whether or not they were made in expectation of death*—i.e., at a time " when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth "—*R. v. Woodcock* [5]. Under our Evidence Ordinance the sense of impending death which is believed to provide " a situation so solemn as to create a special guarantee of veracity " is not insisted upon ; and yet another safeguard which generally assists jurors to assess in the light of cross-examination, the testimony of witnesses whom they have had the advantage of seeing and hearing for themselves, is also absent. It is therefore prudent, and indeed essential, that these minimising factors should be prominently placed before the Jury by the presiding Judge (*vide* in this connection *King Emperor v. Premandanda Dutt* [6]). In the present case, this necessary caution was not administered. Moreover, we find from the record that when the Jury retired to consider their verdict, they returned to the Court *within three minutes* with a

[1] *The Weekly Notes 31.3.50 page 173.*
[2] *A. I. R. 1931 Mad. 180.*
[3] *A. I. R. 1929 Patna 249.*
[4] *(1930) 32 Cr. L. J. of India 324.*
[5] *168 E. R. 352.*
[6] *(1925) 26 Cr. L. J. of India 1256.*

unanimous verdict against the accused on a capital charge. We cannot believe that in the present case this was a sufficient interval of time within which a Jury could have properly decided the difficult questions which they were either invited to consider or which, in our judgment, they should have been invited to consider. We therefore quash the conviction and order that the accused be tried on the indictment framed against him in fresh proceedings.

There is one further matter to which we wish to refer. In the course of his charge to the Jury, the learned Judge suggested that some at least of the statements in the "dying deposition" had been made in answer to questions which had been put to Thangasami Nadar by the recording Magistrate. Upon an examination of the deposition P9, this seems to us to be not improbable, although there is no specific evidence on the point. If this be correct, it is regrettable that there is no record of any precise questions in reply to which the deponent gave certain answers. Lord Cave (then Mr. Justice Cave) pointed out in *R. v. Mitchell*[1] that "a declaration should be taken down in the exact words which the person who makes it uses, in order that it may be possible, from those words, to arrive precisely at what the person making the declaration meant. When a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence which it is desirable should not be open in cases which the accused person has no opportunity of cross-examination. In the first place, the questions may be leading questions, and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being fully comprehended. In such cases the *form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining Magistrate, and how much was the production of the person making the statement*". For these reasons we think that whenever magistrates are called upon to record "dying depositions" in accordance with the procedure laid down in Chapter 23 of the Criminal Procedure Code, they should record a deponent's statements in the words which he actually employs (or, when this is not practicable, in an accurate translation of those actual words). The method of recording evidence "in the form of a narrative", though sanctioned in ordinary cases by section 298 (2) of the Code seems to be inappropriate to the special case of a "dying deposition". Whenever, as is sometimes necessary, questions are put to the deponent for purposes of elucidation, the form of the questions as well as of the answer should be precisely recorded. Where this procedure has not been adopted in any particular case, the weight which a Jury would be entitled to attach to the statements made by a deceased person as to the circumstances of a transaction which resulted in his death must necessarily be greatly minimised.

Fresh trial ordered.

[1] *(1892) 17 Cox 503.*