[CROWN CASE RESERVED.] 1927.

Present: Garvin and Lyall Grant JJ. and Maartensz A.J.

KING *v.* ARNOLIS PERERA.

28.—P. C. Negombo, 46,211.

Evidence—Statement by a deceased person—Circumstances of the transaction resulting in death—Evidence Ordinance, ss. 6, 8, 32 (1).

M, who was living in the house of her parents near the Botanic Gardens, Henaratgoda, disappeared on the night of June 30, and her corpse was found, in the afternoon of the following day, lying on a mat in a threshing floor about half a mile from the house. At the trial of A, who was a watcher at the Botanic Gardens, for the murder of M, evidence was led of circumstances, which, it was alleged, proved that M was murdered by A, and it was sought to give in evidence a statement alleged to have been made by M to her daughter Jane on June 30 to the effect that she was going away with the accused to Rambukkana.

Held, that evidence of the alleged statement of the deceased to the daughter was not admissible. Section 32 (1) of the Evidence Ordinance is limited to statements made by a person after the event which resulted in his death.

CASE referred by the Attorney-General under section 355 (3) of the Criminal Procedure Code. The facts are stated in the reference as follows:—

The accused in this case was charged with murdering a woman named Dingiri Menika on June 30, 1926. He was tried before Mr. Justice Schneider and an English-speaking jury composed of three Europeans and four Ceylonese. He was found guilty by a verdict of 6 to 1. He was accordingly sentenced to be hanged.

Dingiri Menika was a widow, who lived with her brothers and sisters in a house inherited from her parents adjoining the Botanic Gardens at Henaratgoda. She disappeared on the night of June 30. When her disappearance was discovered at about 10 or 11 P.M., it was found that her clothing and jewellery and also certain jewellery belonging to one of her sisters was missing. Her corpse was discovered at about 3.30 P.M. on the afternoon of July 1 lying on a mat and pillow in a threshing floor about half a mile from her house which at that time of year was not much frequented.

The circumstances which point to the accused as the murderer of Dingiri Menika are the following:—

(*a*) The accused is a married man. He was intimate with Dingiri Menika, and she was five months with child.

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(*b*) Dingiri Menika told her little daughter Jane on June 30 that she was going away with the accused to Rambukkana to open a boutique there.

(*c*) Dingiri Menika disappeared from her house between 9 and 11 P.M. on June 30, and the accused (who ought to have been on duty at the Botanic Gardens at Henaratgoda from 5 P.M. on the 30th to 5 A.M. on July 1) was not at his post on the night of June 30, when search was made for him from about 3 A.M. till daybreak.

(*d*) The accused, when questioned on the morning of July 1 regarding his absence from the Gardens on the night previous, said first, that he had gone for his dinner at 9 P.M. and had returned at 1 A.M., and then that he had returned at 3 A.M.

(*e*) The accused fainted when he heard that the Police Headman had searched for him on the night of June 30 in connection with the disappearance of Dingiri Menika.

(*f*) The witness Samaneris saw the accused at about 11 P.M. on June 30 going with Dingiri Menika in the direction of the threshing floor on which later Dingiri Menika's corpse was discovered.

(*g*) The witness Siappu saw the accused about midnight returning homewards from the direction of the Botanic Gardens and the threshing floor.

(*h*) The witness Theris identifies the mat and pillow on which the corpse was found lying as the property of the accused.

(*i*) The witness Bastian Sinno identifies certain pieces of jewellery which were found on the night of July 1 at the accused's house (in a box of the accused's wife) as his sister Ruihamy's jewellery which was in his box and which Dingiri Menika took away.

(*j*) The witness Bastian Sinno identifies a string of silver beads found among the accused's wife's jewellery as a necklace usually worn by Dingiri Menika.

The question of law that is now submitted for a final determination arises as a result of the admission at the trial of the evidence indicated in paragraph 4 (*b*) above.

(*a*) In the Police Court the girl Jane had testified among other things as follows:—

". . . . Day before evening I was at home. My mother too was in the house. I saw her bundling some clothes. I asked her why she was doing that. ***She told me that she was going to Rambukkana with the watcher.*** I started

crying. Then she gave me 50 cents and asked me to take hoppers in the morning and go to school . . . ." " She further promised to return in four days and take me . . . "

(*b*) At the commencement of the trial Counsel for the accused objected to the above evidence being led. The Judge ruled that the evidence was admissible.

(*c*) Accordingly Jane gave evidence at the trial, on this point, as follows:—

Examined.—" . . . . One night I found my mother missing. On the morning of the day she disappeared, before midday meals, *she told me that she was going to Rambukkana with the watcher.* I cried after she said that as I felt sorry. I did not ask her, but she told me that of her own accord. When she said this she was simply seated down inside the house doing nothing. I was just seated down near my mother then. A little while after she said this, she bundled her clothes. I did not want to go with her, but cried as I felt sorry. I asked her not to go. She gave me 50 cents in 10- and 5-cent pieces and asked me to buy hoppers in the morning and go to school. *She told me that she would return in four or five days to see me . . . .*"

Cross-examined.—". . . . She took the clothes from a wooden box to which there was a lock and key. That was my mother's box. I cannot remember whether she took only clothes from that box. I was standing close by when she was taking them. I asked her why she was bundling them, and *she said that she was going to Rambukkana with the watcher. In the morning too she told me that she was going to Rambukkana with the watcher.* She told me the same thing about two days before that shortly after my midday meals . . . ."

Cross-examined.—". . . . For the last time *when she told me that she was going to Rambukkana she said that she was going there to open a boutique . . . .*"

The question of law that is now submitted for decision is whether the learned Judge was right in permitting Jane to relate what Dingiri Menika had told her on the afternoon of June 30.

. . . . . .

R. L. Pereira (with *Basnayake*), for accused.—Evidence of the alleged statement is not admissible under section 32 (1) of the Evidence Act. Our Ordinance is a reproduction of the Indian Evidence Act. In India it has been held that the words must have been uttered after the injury was received. The words of

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which secondary evidence is sought to be given must amount to a dying declaration. The difference between the English and the Indian law is that in England dying declarations are only admissible in cases of homicide, while in India they are admissible even in civil matters. Also, under the English law the statement must be made under the expectation of death, while that is not necessary under the Indian law.

Ameer Ali and Woodroffe in their book on Evidence speak of a statement coming under section 32 (1) as a dying declaration. See *Autar Singh v. The Crown.*[1] *Shivabhai Becharbhai v. Emperor* [2] is against us. But in this case the Judges were under the misapprehension that the words " or as to the circumstances " in section 32 (1) find no place in the English Act, and that therefore the Indian Act is wider and would permit statements made even before the injury was inflicted being led in evidence. The English law is the same as the Indian except for the differences already indicated. See *Stephen's Digest, Article 26.*

Obeyesekere, Deputy S.-G., (with *Dias, C.C.*), for the Crown.—The facts in *Shivabhai Becharbhai v. Emperor* (*supra*) are indistinguishable from those in the present case. When the woman was packing up her goods the transaction that led to her death was taking place. In the Bombay case, where the boy was travelling in the train to the place where he was killed, the transaction had commenced. There may be several stages to the transaction leading up to the death, and all those stages that are not too remote in the opinion of the Court must be considered a part of the transaction. Any statement made in the course of one of these stages is admissible.

Our Evidence Act and the Indian Act are a wide departure from the English Law of Evidence. The words " cause of death " and " as to any of the circumstances of the transaction which resulted in death " are separated by the word " or " and form two watertight compartments totally unconnected with each other. The words circumstances include facts which happened long before deceased came by his injuries.

Sections 32 and 33 are not exhaustive of instances, where statements made by a deceased can be proved (*Sellambram v. Kadiraie* [3]).

The statement is admissible under section (6), illustration (*a*). Section 6 practically reproduces the English law as to *res gestae*. The fact, that the deceased was packing up her things is a relevant fact, as it helps to explain how certain articles of the deceased came to be in accused's possession. Any statement made during the time that act was done and in respect of that act is *res gestae* and admissible.

[1] *(1923) I. L. R. Lah. 451.* [2] *(1926) 50 I. L. R. Bom. 683.*
[3] *20 N. L. R. 161.*

R. L. Pereira, in reply.—All admissible evidence must be relevant, but all relevant evidence is not admissible, viz., a statement made to a police officer may be relevant but inadmissible. It is a principle of law that the later section 32 governs the earlier sections 6 and 8.

June 28, 1927. GARVIN J.—

This is a reference by the Attorney-General under the provisions of section 355 (3) of the Criminal Procedure Code. The question for determination arose in the course of the trial of Jayawardana Thambugalagey Arnolis Perera on a charge of having on June 30 committed murder by causing the death of one Dingiri Menika.

The facts of the case are fully set out in the written statement filed by the Attorney-General. It would seem that Dingiri Menika was a widow who lived with her brothers and sisters in the house of their parents which adjoined the Botanic Gardens at Henaratgoda. The accused Arnolis was a watcher employed at the Gardens. On the night of June 30 between 10 and 11 P.M. it was discovered that Dingiri Menika had disappeared from her house, and it was also found that her clothing and jewellery were missing. The next day, at about 3.30 P.M., her corpse was found, and it was stated in the course of argument that the injuries on her body established that she died as a result of injuries inflicted upon her by some person.

Evidence was led of circumstances which it is alleged proved that Dingiri Menika was murdered by Arnolis the watcher, and it was sought to give in evidence a statement alleged to have been made by Dingiri Menika to her little daughter Jane on June 30, to the effect that she was going away with the accused Arnolis to Rambukkana. This evidence was objected to, but the objection was over-ruled and Jane's evidence admitted. The substance of Jane's evidence was that about midday on June 30 she saw her mother making a bundle of her clothes, and that upon inquiry her mother said that she was going to Rambukkana with the accused.

The question we have to determine is whether the presiding Judge (Mr. Justice Schneider) was right in admitting evidence of the statement alleged to have been made by Dingiri Menika.

Counsel seeks in the first place to justify the reception of this evidence under section 32 (1) of the Evidence Ordinance as a statement made by a person who is dead as to the circumstances of the transaction which resulted in her death.

The statement under consideration was not made after the transaction or after the infliction of the injury which resulted in death. But, if I understood the Deputy Solicitor-General, who appeared in support of the order of the presiding Judge, aright, any statement of a person who is dead made at any time so long as it

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was made in the course of the transaction which resulted in his death is admissible in evidence under section 32 (1) if it related to any of the circumstances of that transaction. It is argued *contra* that the only statements which are admissible under section 32 (1) are dying declarations; in short, that the law in Ceylon is in substance the same as the law in force in England, subject to the following exceptions:—

(*a*) That the person who made the statement need not necessarily at the time when it was made have been under expectation of death; and

(*b*) That the statement is admissible whatever be the nature of the proceeding in which the cause of death be called in question.

The statements, the reception in evidence of which are permitted by section 32 (1), are statements by a person who is dead "as to the cause of his death or of any of the circumstances of the transaction which resulted in his death." These words imply that what is made admissible is not merely a bare statement limited to the actual cause of death; they are intended to enable the reception in evidence of the statement made by a person who is dead of all the circumstances under which he met with his death. This view of the section implies that the transaction which resulted in death should have occurred and been complete in all respects save as to the death at the time the statement was made. In other words, it must be a statement made by a party who had received a mortal injury at a time subsequent to the injury narrating the circumstances under which she received that injury. It has been suggested that the words "or as to any of the circumstances which resulted in his death" mark a wide departure from the English law relating to dying declarations, and are intended to admit in evidence, not only statements made after the act which resulted in death, but also statements made at any time prior thereto, so long as they are within the period covered by the transaction. This submission is based upon the ruling in the Indian case of *Shivabhai Becharbhai v. Emperor*,[1] which is the only case the Deputy Solicitor-General has been able to cite in support of his contention. Referring to the ruling of the High Court of Lahore, in which this section was interpreted, perhaps in too restricted a sense, but generally on the lines suggested by me, the learned Judge who decided *Shivabhai Becharbhai v. Emperor* (*supra*) says: "If, as in English law, the clause is confined to the case of statements made as to the cause of a person's death, then I quite agree that the above would be a 'proper interpretation.'" The assumption that in English law dying declarations are restricted

[1] *(1926) 50 I. L. R. Bom. 683.*

to the cause of the death is purely erroneous. Indeed, Sir James FitzJames Stephen in his *Digest of the Law of Evidence* (in Article 26 of that work) states the English law to be as follows:—

> "A declaration made by the declarant as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is deemed to be relevant . . . . ."

It is inconceivable that Sir James FitzJames Stephen, to whom belongs the credit of having drafted the Indian Evidence Act, could or would have used the very words in which he summarizes the law of England on the point to mark a deliberate departure from the law of England on that very point.

The words " as to the cause of his death or as to any of the circumstances which resulted in his death " are descriptive of the subject-matter of the statement and set a limit to the matters which may be referred to in such a statement. They limit such statements to the cause and circumstances of the death of the person making them.

The section read as a whole is in my opinion intended to admit in evidence a statement made by way of narrative after the event which ultimately resulted in his death by the person the cause of whose death is in question. Subject to the differences already noticed, there is on this point no difference between the English law and the law as declared in the Ceylon Evidence Ordinance. This is the view taken in the case of *Autar Sing v. The Crown* (*supra*) of the corresponding provisions of the Indian Evidence Act. Before leaving this aspect of the case, I would observe that in the commentary on section 30 (1) of the Indian Evidence Act, which is in all respects identical with section 32 of the local Ordinance, the section is treated as one which provides for the reception in evidence of dying declarations.

The learned Deputy Solicitor-General next contended that if the statement is not one which may be received in evidence under section 32 it is admissible under section 6 or section 8. The former of these two sections is a statement of the doctrine of *res gestae*. It is more restrictive, in that it does not include all that under the English law is covered by that doctrine. In his work on *The Law of Evidence, section 583*, Taylor says: " Perhaps the best general idea of what is meant by *res gestae* is that the expression includes everything that may be fairly considered an incident of the event under consideration." The rule as it is stated in section 6 makes " facts which though not in issue are so connected with a fact in issue as to form part of the same transaction " relevant. Both declarations and acts would under this rule be admissible provided they are so connected with the fact in issue as to form part of the same transaction. I find it difficult to see how the statement of Dingiri Menika can fairly be said to be so closely

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connected with the murder as to form an incident of that event. There is not that connection which exists between facts which are contemporaneous, and it is conceivable that it had no actual connection with the circumstances which led to and culminated in the murder. It is impossible to say that it grew out of the main fact, as in the case of the cries of the victim of an assault; or that it is explanatory of the nature of the transaction, as in the case of the cries of a mob in a trial for riot. The determination of the question whether or not a particular fact forms part of the *res gestae* is often attended with considerable difficulty. Differences of opinion must and do arise. But for my own part, I prefer in any doubtful case, especially when it relates to a statement of a person who is dead, to adopt the course of rejecting such evidence. In this case I would do so for the reason that in my opinion this statement may not be given in evidence under section 6.

Nor do I think section 8 of the Ordinance authorizes its reception. The conduct of a person, an offence against whom is the subject of any proceeding, is relevant "if such conduct influences or is influenced by any fact in issue or relevant fact." It is only in such cases that statements may be given in evidence provided that they accompany and explain acts. I am not satisfied that there is anything to indicate that the fact in issue was influenced by the conduct of the deceased which it is sought to explain by this statement.

If, as I think, this statement was wrongly received in evidence, it remains to be considered what order should be made in the case It is impossible to say how far the minds of the jury were influenced by this statement, or that they should or would have brought in the same verdict had this statement not been admitted. Under these circumstances the proper course is to order a new trial. The proceedings taken at the trial are quashed and a new trial ordered. The prisoner will be remanded to the custody of the Fiscal for that purpose.

MAARTENSZ A.J.—

The prisoner in this case was charged with murdering a woman named Dingiri Menika on June 30, 1926. He was tried before Mr. Justice Schneider and an English-speaking jury and found guilty of murder by a majority of 6 to 1.

The Attorney-General is of opinion that a question of law which arose at the trial of the above case ought to be further considered, and submits the same for determination under section 355 (3) of the Criminal Procedure Code.

The facts stated by the Attorney-General are as follows:—

"Dingiri Menika was a widow, who lived with her brothers and sisters in a house inherited from her parents adjoining the Botanic

Gardens at Henaratgoda. She disappeared on the night of June 30. When her disappearance was discovered at about 10 or 11 P.M. it was found that her clothing and jewellery, and also certain jewellery belonging to one of her sisters, were missing. Her corpse was discovered at about 3.30 P.M. on the afternoon of July 1 lying on a mat and pillow in a threshing floor about half a mile from her house which at that time of the year was not much frequented."

One of the witnesses for the prosecution was the deceased woman's daughter Jane.

In the Police Court Jane testified as follows:—

". . . . . Day before evening I was at home. My mother too was in the house. I saw her bundling some clothes. I asked her why she was doing that. She told me that she was going to Rambukkana with the watcher. I started crying. Then she gave me 50 cents and asked me to take hoppers in the morning and go to school . . . . . "

At the commencement of the trial Counsel for the accused objected to the above evidence being led. The objection was over-ruled, and Jane gave the following evidence:—

Examined.—" . . . . One night I found my mother missing. On the morning of the day she disappeared, before midday meals, she told me that she was going to Rambukkana with the watcher. I cried after she said that as I felt sorry. I did not ask her, but she told me that of her own accord. When she said this she was simply seated down inside the house doing nothing. I was just seated down near my mother then. A little while after she said this she bundled her clothes. I did not want to go with her, but I cried as I felt sorry. I asked her not to go. She gave me 50 cents in 10- and 5-cent pieces and asked me to buy hoppers in the morning and go to school. She told me that she would return in four or five days to see me . . . . . "

Cross-examined.—" . . . . She took the clothes from a wooden box to which there was a lock and key. That was my brother's box. I cannot remember whether she took only clothes from that box. I was standing close by when she was taking them. I asked her why she was bundling them, and she said that she was going to Rambukkana with the watcher. In the morning too she told me that she was going to Rambukkana with the watcher. She told me the same thing about two days before that, shortly after my midday meals . . . . . "

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Cross-examined.—" . . . . For the last time when she told me that she was going to Rambukkana she said that she was going there to open a boutique . . . . "

The question of law submitted for decision is whether the learned Judge was right in permitting Jane to relate what Dingiri Menika had told her on the afternoon of June 30.

The accused was a watcher at the Henaratgoda Botanic Gardens, and the passage particularly objected to is Dingiri Menika's statement that " she was going to Rambukkana with the watcher."

Jane's evidence as to what Dingiri Menika told her was, I understand, admitted under section 32 (1) of the Evidence Ordinance, 1895, as a statement made by a deceased person as to a circumstance of the transaction which resulted in her death.

The contention for the accused is that a statement made by a person before the injury took place which resulted in his or her death was not such a statement as is contemplated by section 32 (1) of the Evidence Ordinance.

In support of this contention accused's Counsel argued that section 32 (1) enacts the English Law of Evidence with regard to dying declarations with certain modifications which do not alter the principle of the English law that the statement must be one made after the injury which resulted in death was sustained.

Section 32 (1) differs from the English law in various ways, but for the purposes of the question at issue before us I need only consider one of them.

Under the law of England certain conditions are required to have existed at the time of declaration, namely, it is necessary that the declarant should have been in actual danger of death; that he should have been aware of his danger and have abandoned all hope of recovery and that death should have ensued. These conditions make it as clear as possible that the statements rendered admissible as dying declarations must have been made after the injury which resulted in his death had been sustained by the declarant.

Under our law, however, such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death.

The argument *contra* based on this variation from the English law is that section 32 (1) is applicable to statements made antecedent to as well as to statements made after the injury which caused the death.

I am unable to adopt this argument.

Section 32 (1) of our Ordinance reproduces section 32 (1) of the Indian Evidence Act, 1872, and in the commentary to that section by Woodroffe and Ameer Ali it is stated at page 317 that " the statement must be as to the cause of the declarant's death or as

to any of the circumstances of the transaction which resulted in his death," that is, the cause and circumstances of the death and not previous or subsequent transactions, such independent transactions being excluded as not falling within the principle of necessity on which such evidence is received. This view of the scope of the section was followed in the case of *Autar Singh v. The Crown* (*supra*), where certain statements made by the deceased prior to the injuries being inflicted on him were rejected on the ground that they were not statements by a dying person as to the injuries inflicted on him or as to the circumstances in which those injuries came to be inflicted.

This decision was, it is true, dissented from in the case of *Shivabhai Becharbhai v. Emperor* (*supra*). The *ratio decidendi* in the latter case was that the words " as to any of the circumstances of the transaction which resulted in his death was an enlargement of the English Law of Evidence which is confined to the statements made as to the cause of a person's death." This appears to be a misconception of the law of England, for Stephen in his Digest on *The Law of Evidence*, lays down in Article 26 as follows:—

> " A declaration made by the declarant as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is deemed to be relevant . . . . ."

It is therefore less of an authority than the case decided by the Higher Court of Lahore.

I am of opinion that section 32 (1) of the Evidence Ordinance is limited to statements made by a person after he had sustained the injuries which caused his death and the circumstances in which those injuries were inflicted.

I accordingly hold that the statement under reference was not admissible under section 32 (1) of the Evidence Ordinance.

It was also contended that the statement was admissible under either section 6 or section 8 of the Evidence Ordinance.

Section 6 enacts that facts which though not in issue are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.

Whether a particular fact is or is not part of the same transaction is a difficult question—the area of the events covered by the term *res gestae* depends on the circumstances of each case.

In this case, I venture to think that the statement made by Dingiri Menika to Jane—that she was going to Rambukkana with the watcher—does not form part of the *res gestae* as there is an absence of a series of events to connect the statement with the fact in issue—whether the prisoner caused the death of Dingiri Menika.

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Section 8 enacts that any fact is relevant which shows or constitutes a motive or preparation for any fact in issue.

Now, the statement made to Jane in no way establishes a motive for murder, no does it indicate a preparation on the fact in issue.

I accordingly hold that the statement was not admissible under section 6 or section 8 of the Evidence Ordinance.

I agree to the order proposed by my brother Garvin.

LYALL GRANT J.—I agree.