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THE VALUE OF DYING DECLARATIONS

There are four reported cases in Volume 76 of the New Law Reports in which reference has been made to the weight to be attached to dying declarations. (*R.* v. *Perera* (1970) 76 N.L.R. 217 ; *R.* v. *Somasunderam* (1971) 76 N.L.R. 10 ; *R.* v. *Weerappen* (1971) 76 N.L.R. 109 ; *State* v. *Palaniyandy* (1972) 76 N.L.R. 145.) They show a certain inconsistency which justifies deeper examination.

The early theory of the common law was that great weight should be attached to a statement made by a victim of an assault who is in settled expectation of death on the religious assumption that such a person would be reluctant to die with a lie on his lips. In *R.* v. *Woodcock* (1789) 1 Leach 500, Eyre C.B. stated this theory in the following terms : "The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone ; when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth ; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." The origin of the rule, which forms an exception to the rule against hearsay evidence is traceable to the judgment of Lord Mansfield in *Wright* v. *Littler* (1761) 3 Burr. 1244, (further see R. W. Baker, *The Hearsay Rule* (London, 1950) pp. 88-90). Besides this reason, necessity also required admissibility for "the death of the declarant often removes the only witness to the deed and unless his statements were received, the wrongdoer would in most cases go scot-free" (East, Pleas of the Crown, 353).

But the religious theory on the sanctity the law at one time attached to dying declarations was contested in later times. It was pointed out that the declarant may have made a false statement through motives of revenge or simply to ward off a persistent questioner while in a state of agony. Furthermore, the semi-conscious state of a dying man may have made his powers of observation weak and hence the possibility of mistakes in the identity of the assailant or omission of important facts would have been great. Moreover since the truth of the statement could not be tested by cross-examination, a trend then emerged to treat dying declarations with a certain amount of suspicion.

These two conflicting trends are to be found in the case law of Sri Lanka and are reflected in the recent decisions. In *Alisandiri* v. *King* [1937] A.C. 220 conviction was based on a nod of assent made to a leading question as to the identity of the assailant. But from the decision of Grutied J. in *R.* v. *Asirvadan Nadar* (1950) 51 N.L.R. 322 where it was

held that failure of the trial judge to caution the jury that when considering the weight to be attached to the declaration they should appreciate that the truth of the statement had not been tested by cross-examination, a change is attitude becomes evident. T. S. Fernando J. agreed with this view in *R.* v. *Justingapala* (1964) 66 N.L.R. 409.

However, the view that dying declarations should not be considered an inferior type of evidence was kept alive in another group of decisions. Thus in *R.* v. *Vincent Fernando* (1963) 65 N.L.R. at p. 271, Basnayake C. J. observed that "the statement of a deceased person is not an inferior kind of evidence which must not be acted on unless corroborated. Like any other relevant fact it must be considered by the jury having regard to the circumstances in which the statement was made, the character and standing of the person making it. It is wrong to give the statement of a deceased person an inferior status, as it is also equally wrong to give it an added sanctity". This view, it is submitted with respect, is sound for though the religious theory on which the sanctity of dying declarations rested in early law no longer holds good, yet the reason advanced by East that necessity may require that such declarations be treated with respect as the dying man may have been the only person capable of identifying the assailant requires some flexible attitude towards the weight to be attached to dying declarations.

However H. N. G. Fernando C. J. in *Weerappen* v. *The State* (1971) 76 N.L.R. 109 and Samarawickreme J. in *Somasunderam* v. *Queen* (1971) 76 N.L.R. 10 were inclined to the view that the jury should be "cautioned as to the inherent weakness of this form of hearsay evidence".

But Alles J. in *Palaniyandy* v. *The State* (1972) 76 N.L.R. 145 has kept intact the view that the weight to be attached to a dying declaration does not depend on any inflexible rule but on the circumstances of the case. He found a logical point on which to distinguish the line of cases which required that the jury should be cautioned against placing too much reliance on such evidence. He pointed out that "in all these cases there were lengthy statements made by the deponent and it was essential that the jury should have been adequately warned that the statements had not been tested by cross-examination. In the present case the statement consists of an answer to a simple question made almost immediately after the transaction was completed and a direction in the terms of *Asirvardhan Nadar* was strictly unnecessary." Alles J. then ruled that the weight to be attached to an answer given by a dying boy identifying his assailant depends on the circumstances of the particular case. Alles J. however seems to be inclined to the view that independent corroboration of the dying declaration should be required before reliance is placed on the statement.

Alles J's flexible attitude to dying declarations is preferable to the line of decisions which regard them as inferior evidence on which too much of reliance should be not placed. His view is supported by Indian authority. In *Tapinder Singh* v. *State of Punjab* AIR 1970 SC 1566 the Indian Supreme Court ruled that since a dying declaration is admitted on the principle of necessity, the fact that it is not tested by cross-examination on behalf of the accused merely serves to put the court on its guard by imposing on it an obligation to scrutinize all the relevant circumstances. Dua J. said that "if the declaration is acceptable as truthful then even in the absence of other corroborative evidence it would be open to the court to act upon the dying declaration and convict the appellant stated therein to be the offender. An accusation in a dying declaration comes from the victim himself and if it is worthy of acceptance then in view of its source the Court can safely act upon it". (For similar views, see *Bakshish Singh* v. *State of Punjab* AIR 1957 SC 904 ; *Pompiah* v. *State of Mysore* AIR 1965 SC 939).

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