

P L D 1977 Supreme Court 612

Present : Anwarul Haq, Muhammad Akram and Dorab Patel, JJ

ZARIF KHAN--Appellant

versus

THE STATE-Respondent

Criminal Appeal No. 9-P of 1976, decided on 9th July 1977.

(On appeal from the judgment and order of the Peshawar High Court. Peshawar dated the 7th March 1973 in Criminal Appeal No. 71 of 1972).

Per Dorab Patel, J.

(a) Evidence Act (I of 1872)---

S. 32-Dying declaration--Becomes evidence-Conviction, held, can be based solely on a dying declaration.-[Dying declaration].

Muhammad Khan v. The State P L D 1961 Lab. 936 ; R. v. Woodcock 1 Leach C C 5(30 ; Emperor v. Akbarali Karibhai A I R 1933 hem. 470 arid in re : Gurusswami Tevar and others A I R 1940 Mad. 196 ref.

(b) Evidence Act (I of 1872)

-- S. 32-Dying declaration-Can be challenged on any ground permissible in case of challenge to evidence of a witness, e.g., enmity.[Dying declaration].

(c) Evidence Act (I of 1872)-

S. 32-Dying declaration-A weaker type of evidence than evidence subjected to cross-examination-Dying declaration deliberately made under, solemn sense of impending death and concerning circumstances wherein deceased not likely to be mistaken -Entitled to great weight-Dying declarant not having a deep sense of accountability to his Maker, feelings of anger or revenge, or in case of mutual conflict natural desire of screening his own misconduct may affect accuracy of his statement and give false colouring to whole transaction-Presumption that truth sat upon lips of a dying man, held, applicable only to a dying declaration made by a person knowing his death to be imminent and when author of dying declaration a man of unquestionable integrity and persons giving evidence about such declaration also persons of integrity.--[Dying declaration].

Bakhshish Singh alias Bakhshi and others v. Emperor A I R 1925 Lab. 549 ; A I R 1940 Mad. 198 (sic) Hussain Sk. and others v. The State A I R 1953 Cal. 383 ; Ranoo Mir Bhand v. Crown I L R 1942 Kar, 587 ; Khurshid Hussain Salitron and others v. Emperor A I R 1941 Lab. 368 I Muhammad Arif v. Emperor A I R 1941 Pat. 409 ; Gulabrao Krishnaje Maratha v. Emperor A I R s 94:1 Nag. 153 ; Taj Muhammad and others v. The State P L D 1960 Lah. 723 1 Muhammad Khan v. The State P L D 1961 Lah. 9361 Abdul Razik v. The State P L D 1964 Peeh. 67 1 Emperor v. Akbarall Karimbhai A I R 1933 Bom. 479 ; Woodroffe's Commentary on Evidence, 8th Edn., p. 309 ; Sarkar on Evidence, Nth Edn., p. 3301 Ramnath v. State A I R 1953 S C 420 ; Taylor's Treatise on Evidence, 11th Edn., S. 716; R. v. Fitzpatrick (1910) 46 I L T R 173 (C C R) I Chandrasekera alias AH:andiri v. The King 1937 A C 220 ; Cyril Waugh v. The King 1950 A C 203 ; Rang Ali v. The Slate P L D 1958 Lab. 242 ; Khusal Rao v. State of Bombay A I R 1958 S C 22 and Tawaib Khan and another v. The State P L D 1970 S C 13 referred and discussed.

Per Anwarul Haq, J. (disagreeing on burden of proof as to reliability). (Muhammad Akram, J. Agreeing).

Evidence Act (I of 1872)-

- S. 32-Sanctity attached to dying statements by statute-To be respected unless clear circumstances brought out showing same not reliable-No absolute rule can be laid down regarding dying declaration not forming sole basis of conviction unless corroborated.[Dying declaration].

Expressions like "weaker type of evidence", as employed in some of the precedent cases to describe the evidentiary value of a dying declaration are likely to produce a misleading impression as to the quality of such evidence and the reliance which may be placed upon it in the particular circumstances of each case. It has to be remembered that the Legislature has advisedly, as a matter of sheer necessity, incorporated in section 32 an exception to the general rule that hearsay is no evidence. In the very nature of things the sanctity of oath and the test of cross-examination are not available to ascertain the veracity of a dying statement. But the nature of the statement itself and the circumstances under which it is made make probable the truth of the statement and thus take the place of oath and cross-examination. On first principles, the sanctity attached to such statements by the statute should be respected unless there are clear circumstances brought out in the evidence to show that a dying declaration is not reliable for any reason.

It cannot be laid down as an absolute rule of law, nor even of prudence, that a dying declaration cannot form the sole basis of conviction unless it is corroborated. Each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made so that the Court is satisfied that the same is true and genuine. In order to test the reliability of a dying declaration, the Court has to keep in view the various circumstances like the opportunity of the dying man for observation, and whether the capacity of the deceased to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control ; whether the statement had been consistent throughout if he had made several dying declarations ; and whether the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties. It also goes without saying that the exact contents of the dying statement should be proved by reliable evidence, and for this reason a dying statement recorded by a competent Magistrate in the proper manner in the words of the maker of the declaration would obviously carry greater weight than an oral statement which may suffer from all the infirmities of human memory and human character. If the Court comes to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the identity of the assailants, there is no need for further corroboration. But if it appears to be unreliable by itself, or suffers from some infirmity, then it cannot form the basis of a conviction without corroboration.

Chanderasekar v. The King 1937 A C 220 ; In re : Guruswami Tevar A I R 1940 Mad. 196 ; Khushal Rao v. State of Bombay A I R 1958 S C 22 ; Tai Muhammad v. State P L D 1960 Lab. 723 ; Muhammad Khan v. State P L D 1961 Lab. 939 ; Abdul Raziq v. State P L D 1964 Pesh. 67 ; Tawalb Khan v. State P L D 1970 S C 13 and Ekabbar All v. State 1971 H Cr. L J 275 ref.

Per Muhammad Akram, J.

Evidence Act, (I of 1872)

-- S. 32-Question as to reliability of dying declaration and credibility of declarant-Primarily questions of fact-No absolute rule can be laid down.-(Dying declaration-Question of fact).

Per Dorab Patel, J., [Anwarul Haq and Muhammad Akram, JJ. agreeing].

(d) Evidence Act (I of 1872)

-- S. 32-Dying declaration-Deceased, even assuming to have been in fit condition to make a dying declaration, prosecution still required to prove deceased having opportunity to see and identify assailant-Accused appellant alleged to have fired at deceased through door of shop of deceased-Poor alleged to have been pierced by a bullet-Accused allegedly firing a single shot-Difficult for appellant to have seen deceased through door and difficult to believe appellant having been able to kill deceased by a single shot-Prosecution witness produced to corroborate

such statement disbelieved and another witness of occurrence dropped-Oral dying declarations, in circumstances, held, not fit to be relied upon and conviction not warranted.-

(e) Evidence Act (I of 1872)-

S. 32-Dying declaration-Proof-Dying declarations attested by a police constable even though not on duty at relevant time-Lower Court, held, erred in relying upon evidence of such witness in circumstances of case.-[Dying declaration].

Ghulam Farid v. The State P L D 1966 S C 264 and Waheeduddin v. Allah Ditta and others 1977 S C M R 72 ref.

Muhammad Ishaq Khan Kundi, Advocate instructed by M. Qasim Imam, Advocate-on-Record for Appellant.

S. Safdar Hussain, Advocate-on-Record for the State.

Date of hearing : 14th March 1977.