

BOMBAY HIGH COURT

Emperor

Vs

Akbarali Karimbhai

(John Beaumont, Kt., C.J. N Wadia, J.)

28.07.1933

JUDGMENT

John Beaumont, Kt., C.J.

1. [His Lordship after discussing the evidence proceeded:] Then the next evidence to which I would refer is the dying declarations. The declarations made to the doctor, to the Sub-Inspector of Police and to the Deputy Superintendent of Police were unquestionably made. Whether earlier declarations were made to people who came to the assistance of the deceased is perhaps more doubtful. The defence theory is that, although these declarations; were made, they were the result of a deliberate plot concocted by the deceased and his friends between the time of the assault and the time of the arrival of Dr. Taherali, that is to say, in about half an hour. The view of the defence is that probably the attack was made by some robber who got away and that the deceased having then his relations and friends round him decided to make the best of a bad job and to make a false charge of assault against his enemies. Why on that theory he should have included accused No. 4, who is a servant of his enemies, I am not clear. It is, I think, very difficult indeed to accept that theory. If in fact the deceased had been attacked by some outside party who had run away, the natural feeling of the deceased would be a desire that the miscreant should be caught, and it seems to me hardly conceivable that within a few minutes after the assault the deceased should be committing himself to a story which entirely exculpated the real criminal for the sake of inculpating people with whom he had a civil quarrel but who for aught he knew might be well able to establish an alibi and prove their innocence of this particular assault. There is no evidence of this theory of robbery except that of Ex. 53, Kalu Dalu. His evidence is rather mysterious. He was called by the Crown as a Panch but in cross-examination he volunteered information that he heard the assault on the deceased and he went out in the road and he then found accused Nos. 2 and 4 helping the deceased and the deceased alleging that he had been robbed. The learned Judge again does not tell us what view he formed as to the demeanour of Kalu Dalu in the box. He rejects his evidence because it refers to the theory of robbery which the

learned Judge thinks improbable. I should have been glad to know whether the learned Judge thought that this witness was a reliable type of witness or not. However, I am not disposed to attach any very great importance to his evidence.

2. The learned Judge and the assessors in effect accepted as true the dying declarations in part, but rejected them in part, and Mr. Carden Noad for the defence has argued that in law they were wrong in doing that and he has cited in support of his contention the case of *Emperor v. Premananda Dutt*¹ In that case Mukerji J. (with whom Greaves J. agreed) at page 1003 says this:-In my opinion a dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though to found a criminal conviction on such appraisal of evidence is very often unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon. I am not prepared to accept that statement as an accurate proposition of law, and I am unable to see the particular distinction which the learned Judge draws between a dying declaration and other forms of evidence. What Section 32 of the Indian Evidence Act does is to make certain declarations relevant which under the ordinary law would be irrelevant as being hearsay. Once you find that a declaration falls within Section 32 it becomes relevant evidence, and it seems to me that the Court must judge of the weight of that evidence on exactly the same principles as those upon which it acts in judging of the weight of other types of evidence. Of course the Court has always to bear in mind that a declaration admissible under Section 32 is not made on oath, and is not the subject of cross-examination, and therefore it is a weaker type of evidence than the evidence given by a witness in the witness box, and if a Judge thought that part of a dying declaration was deliberately false it is no doubt very improbable that in practice he would act upon the other part of the declaration, at any rate, without very definite corroboration. But I am not prepared to accede to the view that because it transpires that something in a dying declaration is false, therefore the whole declaration must necessarily be disregarded.

3. The learned Advocate General argues that corroboration of a dying declaration is not necessary, and I agree with him that there is no rule of law which requires that a dying declaration should not be acted upon unless it is corroborated. But the evidential value of a declaration relevant under Section 32 of the Indian Evidence Act varies very much in accordance with the circumstances in which it is made. If it is what would be called a dying declaration under English law, that is to say, a declaration made by a man in imminent expectation of death, then it certainly has a special sanction attached to it, because the law recognises that it is unlikely that a man will be willing to leave this world with a lie upon his lips. But a dying declaration may

be relevant under Section 32 although the man who makes it does not expect to die, and it is, I think, clear on the evidence in this case that neither the deceased, nor the doctors who were attending him, nor the police, had any anticipation that he was about to die. Therefore, no particular sanction attaches to the declarations in this case. Generally speaking, and as a rule of prudence, I am of opinion that a declaration, relevant under Section 32, but not made by one in immediate expectation of death, and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration; and that rule applies with extra force in a case like the present where I am satisfied that there is a good deal of evidence which is deliberately false, and where both the learned Judge and the assessors do not accept the dying declaration as to one of the accused. They think that as accused No. 3 came back from Nadiad suffering from asthma and arrived at his house a very few moments before the assault he cannot be supposed to have taken part in it. To allow the appeal of the Crown against the acquittal of accused 2 and 3 we shall really have to rule that the trial Judge and the assessors were bound to act on the dying declarations. [The judgment dealt with the facts of the case and resulted in the acquittal and discharge of accused Nos. 1 and 4.] N.J. Wadia, J.

4. Delivered a separate but concurring judgment.

Cases Referred.

1(1925) I.L.R. 52 Cal. 987