

THE APPLICABILITY OF DYING DEPOSITION IN CRIMINAL CASES

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Introduction

Dying Declaration has based on maxim called "*Nemo moriturus praesumitur mentire*"; man will not meet his maker with a lie in his mouth. In ***R V Pike***¹ the court held that "when the person at the point of death and when every hope of this world is gone, the mind is induced to tell the truth and it is equal to the evidence given in a court of justice under an oath". When a person badly injured and near the door of death, is uttering facts about his death or any other circumstantial facts about the perpetrator is called "dying deposition/dying declaration".

Dying deposition is not a piece of direct evidence and categorized under hearsay as the witness does not live anymore while the second person who heard the utterance of the deceased and give evidence in the courthouse. According to the English Law rules, hearsay evidence does not give any evidential value whether it is oral or written, facts in issue or relevant facts and are not admissible. Phipson says that "oral or written statements that are not parties or witnesses of the case is inadmissible to prove the truth".² According to Cross "any other person's statements both verbal and

written except witness, unable to testify and inadmissible in the courthouse"³.

Dying Declarations in Sri Lankan Context

Hearsay evidence is inadmissible in Sri Lanka, though some exceptions. Section 32 of Evidence Ordinance of Sri Lanka is one of the exceptions to the hearsay rule. It is stated about a person who cannot be called as a witness. This section provides 8 relevant facts and 4 types of persons. The 8 relevant facts are the statement, **written or verbal of relevant fact made by a person who is dead**, or who **cannot be found** or who is become **incapable of giving evidence** or **whose attendance cannot be procured without an amount of delay or expense with under circumstances of the case, appears to the court unreasonable**. Four types of persons can be found in section 32(1) of Evidence Ordinance. They are, when a **statement is made by a person as to the cause of his death**, or as to any **circumstances of the transaction, which resulted in his death** in cases in which cause of the **person's death come in to question**.

When applying the section 32(1) of Evidence Ordinance the declarant should not be an alive person and it is inadmissible

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¹*R V Pike* C & P 1829,3:598

² Phipson on the Law of Evidence, 9th Edition, Sidney Lovell Phipson, London Sweet & Maxwell, 195

³ Cross and Tapper on Evidence, 12th Edition, Colin Tapper

under the live declarant. In **Chandra Nath Roy V Nilmadhab Bhattacharjee**⁴ case, court held that if the statement made by several persons and one or few have died and rest are alive, the section is admissible.

In **Mendis V Paramaswamy**⁵case, court held that “a dying declaration cannot be admissible unless it comes with very words of the deceased person”.

According to section 32, the statement may be written or verbal. In **Alisandiris case**⁶, a dying child symbolized on his murder through signs to his father. In this matter court held that "verbal" words cover wide area and signs also categorized under “verbal”.

In Section 32(1) it is stated: "dying declaration should comprise of the cause of death or circumstances of the transaction which resulted in death". In other words, the declaration has been made after the cause of death arise or the statement made before the deceased had any reason to expect to be killed? For this problem, an Indian case gave a clear answer. "In **Swami Case**⁷ the court stated that “before the cause of death occurs or before the deceased person had facts to foresight about his death, those are not important. The important thing is the statement must come out after the incident & deceased shall rate near-death & circumstances can only include the acts done when & where the death was caused”.

When considering on English Law and Sri Lankan law, both of them are derived from the same legal principles. Even though the

applicability of principles are different due to court practices and circumstances of the facts of the cases. In English Law, the declarant should have been in danger of death and should get away from all the hopes in this world and should not have any hope of recovery. But in Sri Lankan law the dying depositions are relevant whether the person who made them was or was not at the time when they were made, under the expectation of death. In **King V Marshall Appuhamy**⁸, the deceased woman told her mother that the accused made her an improper suggestion two or three days before her death. Then accused stabbed her to death. The defence argued that the deceased declaration cannot admit as dying deposition as it did not contain any fact on her death. But the court held that it was having a nexus between the death and the declaration.

In England, dying depositions are admissible only in homicidal such as murder and manslaughter cases. But in Sri Lankan context, it is admissible not only for homicidal cases but for robbery and rape cases as death comes in to the question. In England, the deposition is not admissible other than the declarant, whereas in our law it is admissible not only to the declarant but also to other victims also. In **Samarakoon Banda Case**⁹ the accused charged with the murder of Kiribanda. Within the same transaction, the accused murdered Punchi Banda and deceased Punchi Banda gave a dying deposition divulging the way of approach of accused to the murder and approach of Kiribanda to the incident. The

⁴ 1898,26 Cal 236

⁵ 1958,62 NLR

⁶ 1936,38 NLR 256

⁷ 1939,1 all E.R 396

⁸ (1950) 51 NLR 272

⁹ (1943) 44 NLR 169

court admitted this deposition to the Kiribandas' murder also.

The English Law does not admit dying deposition of the child of tender years as the court thinks such tender year's child cannot understand the result of the deposition.

When considering the Sri Lankan context, dying deposition of a child is admissible. In Palaniyandi V State¹⁰ case Allas J held that: "if the child unable to understand the nature of an oath without affirmation or oath, the child's' evidence shall not be inadmissible or invalidated. If the child declares the cause of his death and the court may satisfy his competency, it can be admissible".

Some factors are influenced by the admissibility of a dying deposition and these factors are developed with the case law.

(i)The death of the declarant shall happen before the legal action.

(ii) The deposition shall be mentioned about the cause of death of the declarant. In HerashmyCase¹¹, the deceased was assaulted and he was lying on the bed due to injuries for three months. Later, he was died due to Septicemia caused by bedsores. The court held that "the deceased statement made after assaulting cannot be admissible as dying deposition due to the distance of the death and assaulting". Furthermore, it can't be admitted as "circumstances of the transaction which resulted in his death" under Section 32(1) of Evidence Ordinance.

(iii)The informant shall be render the deposition in actual words, uttered by the declarant. In SheelaSinharage V AG¹² case, illegal abortion was done by the accused and victim died due to high bleeding. Before death, the deceased made a statement to a doctor. When giving evidence in the Magistrate Court and High Court doctors' evidence was highly contradicted. The court held that "when a dying deposition comprised of contradiction and if the declaration unable to prove by independent evidence is not fit to convict the accused".

(iv)The statement shall be stated on the cause of death or any circumstances of the transaction which resulted in death. (Marshall Appuhamy case¹³). In Sathasiwam Case¹⁴ the accused charged with the murder of his wife. Before her death, she sent a letter to the Inspector of Police to seek protection from the Police against her husband. The court held that "the letter cannot be admitted as a dying deposition as it was contained only the feeling of fear and uncertainty but not any circumstances of death".

(v)The admissibility of dying deposition based on the time it was made. In some instances, it was admitted after the cause of death arisen and in some case, it was admitted before the cause of death arisen. In Arunolis Perera case¹⁵ the deceased eloped in the previous night and later her dead body was found. Before her elopement, she made a statement to her daughter that she has planned to go to Rambukkana with the accused. The court did not admit that statement as a dying

¹⁰ (1972) 76 NLR 145

¹¹ (1946) 47 NLR 83

¹² (1985) 1 SLR 1

¹³ (1950) 51 NLR 272

¹⁴ (1953) 55 NLR 255

¹⁵ (1921) 23 NLR 225

deposition due to the distance between the statement and the death. Furthermore, the court held that "the cause and circumstances of death shall have a close relationship with the previous or subsequent transaction".

But in Mudalihamys' case¹⁶ the court interpreted section 32(1) flexibly and descriptively. In this case, the accused went to the jungle to collect bee honey and later deceased also followed him. Before going to the jungle, the deceased told his wife that he is going to the jungle as the accused asked his help for collecting honey. Few days later, deceased body was found and his statement made to his wife was admitted as a dying deposition. But in this case time gap does not concern with regard to the transaction.

(vi) To admit a dying deposing the death of the declarant shall be questionable. In Livera V Abeywickrama case¹⁷, a watcher was committed suicide inside a store and before the death, he addressed a letter to his master and stated, he was unable to protect the store from the theft. The court held that his letter is admissible as evidence for robbery but not for the death of watcher as he was committed suicide and his death was not questionable matter.

In Aseervadan Nadar¹⁸ case, the court held that "it is not compulsory to prove the dying deposition by independence evidence, but it is a duty of the judge to instruct and guide the jury on the poor evidential value of hearsay evidence."

Applicability of Dying Declaration in India

When considering the admissibility and relevancy of dying deposition in Indian Criminal law, they are adopting more logical and scientific way to testify the trustworthiness of the statement. Indian courts pay more attention to the declarant's mental condition at the time of the declaration had made. When the declarant makes the statement, his mind shall be in clear & fit condition. To testify his mental condition of the declarant, the doctor can supervise his condition & he may record the statement. A Magistrate also can record the statement or any other Public Servant who can testify the mental condition of the declarant while recording the statement. But Indian courts discourage Police Officer to record such statement, but in a difficult situation, the police officer can record the statement with the signatures of witnesses who present at that time.¹⁹ If the declarant is an imbecile, tender aged person the dying declaration is incompetent to testify.²⁰ The statement makes under any influence of the Police Officer or somebody else it became suspicious & should corroborate in the courthouse. In any case, more than one declaration had made by the same declarant, the credibility of the declaration becomes weaker.

Declaration of a burnt victim, must handle with care because the *compos mentis* (clear mind) of the victim may be affected by the burns or treatment. Therefore it is a

¹⁶ (1946) 47 NLR 139

¹⁷ (1923) 25 NLR 1

¹⁸ (1950) 51 NLR 322

¹⁹ *N Ram V State* Air 1988 Sc 912

²⁰ *R V Pike* C& P 1829,3;598

compulsory requirement to safely examine the mental condition of the declarant²¹.

A dying declaration must comprise of all the outcome from the declarant and it should be written in real words that used by the declarant. Question& answers should minimize, except in a difficult verbal condition of the patient.

First information cannot be treated as a dying declaration if the patient in the hospital for more than 8 days²². In a suicidal case, a letter or any statement recorded by the declarant treated as a dying declaration & it is admissible in courthouse²³. Dying declaration cannot be cross-examined hence the recorder should be more attentiveness regarding the mental condition of the declarant²⁴. The original declaration needs to be sent to court & certified copy must keep as a secondary document.

Comparison of Dying Deposition of India and Sri Lanka

In India, most of the time the courts pay more attention to the declarant's mental condition at the time of declaration has made to testify whether he made the declaration in a fit mind. Whenever any declarant who is hospitalized and ready to makes a declaration regarding the cause of the death or any information regarding his death²⁵, the courts order to supervise the process by doctors or qualified person

except the police officers. But in Sri Lanka, there is no any legal provision to record such statement. In India, Police officers are discouraged because of the declarant should deliver his declaration in a free mind & free environment and the presence of such officer may indirectly influence the free mind of the declarant²⁶. In India, a special procedure has been maintained to categorize the declarants based on their mental condition & directing how to record a declaration²⁷. As said by Chandrashekar, through the case law, it has introduced various developments in relation to dying declaration. For example, when there are two declarations from one declarant, it gives proper guidance to the court how to apply such declaration to the courthouse to examine the evidentiary value of such evidence, method of recording declarations, get rid of question & answer type statements etc.

When comparing the applicability of dying declaration in Sri Lanka & India, both jurisdictions try to protect the rights of the declarant. While studying the previous judgments it could be identified that Sri Lankan courts admit declarations without any arguments or fewer arguments. But at present, our courts apply various principles while admitting the declarations as there is no cross-examination process to measure the credibility of such evidence. For example in Darmawansa Silva V Republic of Sri Lanka CA 1981, the court held that

²¹ Gupta BD, Jani CB, State of Compos mentis in relation to dying declaration in burnt patients JIMFM 2004,25(4)133-136

²².State of Panjab V Kikar Singh 2002 (30 RCR)(criminal)568

²³State V Maregowda (2002)(1)RCR (Criminal)376

²⁴ State of Karnataka V Shariff 2003 CAR 219-229

²⁵ Gupta BD, Jani CB, State of Compos mentis in relation to dying declaration in burnt patients JIMFM 2004,25(4)133-136

²⁶ ibid

²⁷ ibid

“not inferior evidence but it is wrong to give it added sanctity.No cross-examination process for co-defendants”. In **Ranjith V State** CA 98/96 -2000 couth held that “ordinarily it is not safe to base a conviction for murder solely upon a dying declaration”.

Through these recent judgments, it can be identified that the Sri Lankan courts reluctant to apply dying depositions solely and other circumstantial evidence also applied when necessary.

Admissibility of Dying Declaration of the United States of America

The USA is a country where the adversarial system is applied and the applicability of dying depositions also differs from state to state in the USA.

In the State of Lousiana, dying deposition applied in the courthouse for two reasons. The declarant be unavailable for testimony at the trial and public necessity to preventing the lives of the community by bringing manslaughter to the justice²⁸. In **State V Wilson**²⁹ case Louisiana Supreme Court held that “dying declaration was admissible even though it was not made by the victim whose death was the subject of the charge”.

When considering the dying declaration in the courthouse, the trustworthiness of the statement is very important especially the actual physical condition and the mental condition of the declarant at the time of delivering the statement. In **State V**

Molisse³⁰ case, the court held that "the declarant must believe that his death is immediate and impending” and in **State V Moore**³¹ it was held that "the dying deposition is excluded on the ground that the declarant thought he would survive for another few months. In other words, the declarant should believe that his death is immediate”. Further Infancy³² , Insanity³³, Irrationality³⁴also could be treated as the ground of exclusions at the time of declaration.

Section 90 of Evidence Code of Florida mentions the provisions in relation to hearsay rule and dying declaration. Section 90. 802 state that hearsay rule is inadmissible in the State of Florida. It states as follows “except as provided by statute hearsay evidence inadmissible”. Furthermore, it denies the defendant an opportunity to cross-examine the declarant. In section 90.804 it stated that the dying declaration is an exception to hearsay. The statement under the belief of impending death is called "a dying declaration” in Florida. In **Malone V State**³⁵the Supreme Court of Florida stated that “the declarant must show the satisfaction to the court, it is not essential to consider the deceased in the gangrenous situation, but he must believe that he has not any hope of recovery, then the court determines the admissibility of the declaration". But the court never bound to admit the declaration after the death of the declarant.

In case **Bruton V US**³⁶ the court held that “dying declaration attack the right of cross-

²⁸McNamare T, Dying Declaration in Louisiana Law,

²⁹ 23 CA. ANN 558 (1870)

³⁰ 36 LA Ann 920 (1884)

³¹ 165 LA 163 (1928)

³² State V Blount 124 LA 202 (1909)

³³ State V Rankins 211 LA (1947)

³⁴ ibid

³⁵ 72 SO 415 (1916)

³⁶ 391 US 123

examination of other co-defendants. It has a doubt on the reliability and constitutionality when admitting in the courthouse".

Professor Wigmore (Mc Namara, 1962 pg 162) stated that "there is no third person who saw the incident to give evidence as an eye witness, the only person is deceased one and he tried to get rid of them, no cross-examination process going on".

In Cummings V Villinois³⁷ the court held that the dying declaration is a departure to the general rule of exclusion hearsay. In Wright V Littler³⁸ case Lord Mansfield admitted a dying declaration in an action of ejectment. Further Professor Wigmore (Mc Namara, 1962 pg 162) mentioned that dying declaration could be admitted to wrongful death actions³⁹, negligence⁴⁰, and actions to revoke the licence of a physician who performed a criminal abortion resulting death⁴¹.

In the state of Colorado and Oregon in the USA apply dying declaration for their both civil and criminal cases. According to Fordham Law Review (1970), the trustworthiness of dying declaration can argue based on some grounds. eg. Deceased memory may lose and weaken due to pain and agony of wounds, surrounded by his family and friends is apt to state only his side and his story of the affair, distracting and confusion about the witness to whom it is related and does not usually seek to elicit unfavourable factors to the declarant. According to USA scholars (Mc Namara, 1962), a dying declaration has less

evidentiary value and weight, therefore while admitting it as an evidence, the judges have to be more skillful to strike a balance between victim's and accused rights.

Conclusion

Admissibility of dying deposition is varying from jurisdiction to jurisdiction. This practice comes from the facts of the case and evidence, presented in the courthouse. Countries like India and Sri Lanka, pay more attention to protect the victim's rights. While analyzing former judgments it could be identified that the courts admitted the declarations without any arguments or fewer arguments. But at the present, the courts are trying to apply the best evidence rule. Therefore the hearsay evidence such as dying declarations gain less value compared with direct evidence. While analyzing recent judgments in Sri Lanka such as Dharmawansa Silva V Republic of Sri Lanka⁴² and Ranjith V State⁴³, it could be identified that the Sri Lankan courts do not solely depend on dying declaration and try to strike a balance between both victim's and accused rights. Whereas the USA reluctant to admit the dying deposition as they are hearsay evidence and unable to corroborate by independent evidence and cross-examine. In the famous case of State V Houser⁴⁴ the court held that "is the dying man who is speaking through him whose evidence is to have weight and efficacy sufficient to take prisoner's life".

³⁷ R.R 364 (1954)

³⁸ 97 (Eng) KB 1761

³⁹ Willims V Randolph (1921)

⁴⁰ Stevens V Stevens (1959)

⁴¹ State ex rel Sorensen V Lake 121 NEB 331 (1931)

⁴² CA 1981

⁴³ CA 98/96-2000

⁴⁴ 26 MO 431(1858)

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