APPELLATE CRIMINAL.

Before Cunliffe and Henderson JJ.

NAI MUDDIN BISWAS

v.

EMPEROR.*

1936

Aug. 11, 12.

Dying declaration—Directions to jury, what it should be.

It cannot be laid down as a general proposition of law that if a portion of a dying declaration is untrue, the rest of it must be necessarily rejected. It becomes almost always a question of fact as to whether a dying declaration should be relied upon or not. If part of such statement has been deliberately concocted, the Court would decline to believe the rest of it without corroboration and in such cases the jury ought to be properly cautioned. If any part is untrue owing to failure of memory or lack of powers of observation and so on, there is no reason why the jury should be debarred from accepting the rest.

Emperor v. *Premananda Dutt* (1) discussed.

R. v. *Mitchell* (2) and *Emperor* v. *Akbarali Karimbhai* (3) relied on.

CRIMINAL APPEAL.

The material facts and arguments appear sufficiently from the judgment.

Narendra Kumar Basu and *Binayak Nath Banerji* for the appellants.

The Deputy Legal Remembrancer, Khundkar, and *Beereshwar Chatterji* for the Crown.

HENDERSON J. The four appellants have been convicted of offences punishable under s. 326 of the Indian Penal Code and sentenced to various terms of imprisonment. The first two were convicted in connection with an assault upon one Kala Chand, which eventually resulted in his death. The other two were convicted in connection with an assault upon

*Criminal Appeal, No. 430 of 1936, against the order of N. N. Bose, Assistant Sessions Judge of Nadia, dated April 21, 1936.

(1) (1925) I. L. R. 52 Cal. 987. (2) (1892) 17 Cox. C. C. 503.
(3) (1933) I. L. R. 58 Bom. 31.

1936

Nai Muddin Biswas v. *Emperor.*

Henderson J.

two persons named Meru and Palan. Various points have been taken by Mr. Basu on behalf of the appellants, two of which deal with the general aspect of the case and the remainder of which relate to objections against specific portions of the charge delivered by the learned Assistant Sessions Judge.

The first point taken is that the learned Judge ought to have proceeded with the case on the footing that the previous trial had finally determined a certain matter. What happened was that the appellants and various other persons were put on their trial not only on the present charges, but on charges under ss. 148 and 304/149 of the Indian Penal Code. The result was that the four appellants were convicted under s. 326, but the jury brought in a verdict of not guilty against the other persons and on the other charges. The appellants then appealed to the learned Sessions Judge who ordered a retrial.

The contention of Mr. Basu is that the previous verdict really amounts to this that the occurrence took place in accordance with the defence theory and the only thing which the learned Judge ought to have put before the jury was that they should consider whether the appellants had exceeded the right of private defence. There is of course no foundation for this argument. All that the previous trial amounts to is that the appellants have all been acquitted of rioting. For all we know to the contrary, the jury may not have been satisfied that there were as many as five persons in the attacking party. The learned Judge was clearly right in putting the case before the jury in the way he did.

Then it was said that the defence case with regard to the right of private defence was not properly put before the jury at all. We have reached the conclusion that it was really put in an unduly favourable light, because the learned Judge left it open to the jury to find that the occurrence took place

in accordance with the defence version although there is no evidence in support of that conclusion. Briefly the two versions were as follows :—

The complainant Irad Mandal held certain land under one Sreemanta Kundu as a *bargâdâr*. On the day of the occurrence he and some relations and labourers were clearing jungle from a portion of his land with a view to preparing it for sowing *kalâi* seed. They were then attacked by the appellants and others headed by the *nâib* of the Putiya *râj* and assaulted with a view to depriving the complainant of the possession of the land. The defence made a case that the occurrence did not take place on Irad's land at all, but at a place called Bangalparha where the accused party were attacked by the complainant's party and a scuffle took place resulting in injuries caused to persons on both sides.

Now if this defence version be true there must have been evidence available to establish it. But the defence did not examine a single witness. Nothing was elicited in the cross-examination of any of the prosecution witnesses to prove that the occurrence took place in Bangalparha. There was, therefore, no evidence at all which would have justified the jury in accepting this view. Nor was there any evidence upon which any sort of claim to the right of private defence could be founded. The learned Judge should, therefore, have directed the jury that there was no evidence at all to support any right of private defence. It is perfectly true that some of the evidence given by certain police officers might support an inference that the occurrence did not take place on Irad's lands. The learned Judge was very careful to tell the jury that, whatever view they might take of the defence version, they could not convict the accused unless they were satisfied as to the truth of the prosecution version as to the place of occurrence. There was clearly no misdirection causing any prejudice to the appellants in this aspect of the case.

1936

Nai Muddin Biswas v. *Emperor.*

Henderson J.

A part of the evidence was a statement recorded by the Sub-Deputy Magistrate and made by the accused Nai Muddin. Now this evidence has been attacked in two ways. In the first place, it is said that the learned Judge did not make it sufficiently clear to the jury that this evidence was inconsistent with that of the eye-witnesses. Now, there was another witness, a doctor, who also deposed about a statement made by the deceased. So far as this statement goes the jury would have had to consider what view they would take of this evidence with regard to the discrepancies between it and the rest of the evidence. But when we turn to the dying declaration recorded by the Sub-Deputy Magistrate we find that there is absolutely nothing in it which is inconsistent with the rest of the case. Then it is said that there was a very serious misdirection with regard to the use which the jury were at liberty to make of this evidence. What the learned Judge said was this :—

> There is, however, one misstatement in the said declaration that the deceased Kala Chand who was struck, did not strike anybody, as it is in evidence from prosecution witness that Kala struck his assailant with the *falá* with which he was struck after he was struck, and you are to consider if in view of the said single misstatement the entire version of the dying declaration should be disbelieved or not.

Mr. Basu's contention is that the proper direction would be that if the jury were satisfied that the statement with regard to the alleged striking of one of the assailants by the deceased was untrue, they were by law forbidden to believe the rest of the dying declaration.

In support of this argument, reliance was placed upon a single sentence in a judgment delivered by our learned brother Mr. Justice Mukerji in the case of *Emperor* v. *Premananda Dutt* (1) :—

> 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.

(1) (1925) I. L. R. 52 Cal. 987, 1003.

In my opinion, the learned Judge did not intend to lay down any proposition of law at all. He was dealing with a reference under s. 307 of the Code of Criminal Procedure and he had to form his own opinion about the facts of the case. A part of the evidence upon which the prosecution relied was a dying declaration said to have been made by the deceased and a later part of the judgment from which this extract has been made deals with the question whether the dying declaration was correctly recorded and whether in view of the surrounding circumstances of the case it was a reliable piece of evidence. Indeed, at the bottom of the page already referred to the learned Judge says this:

> It becomes almost always a question of fact as to whether it should be relied upon or not.

In my opinion, that last sentence succinctly sets forth the true position. It seems to me that it is absolutely impossible to say that the tribunal responsible for coming to the decision upon the facts is not allowed to take into consideration what is admittedly part of the evidence and which it actually believes to be true. We have not been shown any authority for this proposition. Of course any sensible tribunal, after reaching the conclusion that a part of the statement has been deliberately concocted, would decline to believe the rest of it without corroboration and, no doubt, in such cases the jury ought to be suitably cautioned. Again if certain statements are untrue owing to failure of memory or lack of powers of observation and so on, it would be ridiculous to say that because a man made a mistake with regard to one statement of fact, the jury was debarred from accepting the rest.

In the present case what happened was this. The deceased made an exculpatory statement with regard to an assault said to have been committed by him upon one of the accused party. Truthful witnesses sometimes leave the path of truth in order to make exculpatory statements about themselves and I do not

1936

Nai Muddin Biswas v. *Emperor.*

Henderson J.

think any sensible jury would refuse to accept the remainder of the dying declaration in the present case corroborated as it is by a mass of evidence merely because the deceased told a lie in his own interest. In our opinion the learned Judge would have been guilty of misdirection if he had told the jury that, if they thought this exculpatory statement to be untrue they could not believe the rest of the statement. I need hardly say that no direction of this kind nor any provision of the law of this character would, in fact, ever prevent a jury from believing it, if they saw fit to do so.

The other points taken on behalf of the appellants are of minor importance: for example, it was said that the learned Judge was wrong in directing the jury with regard to the evidence of some police officers. He was certainly entitled to give the jury his view of the matter and in addition to that he supported his view with very cogent reasons. A complaint, however, is made that his view is not supported by the record. The jury of course took their own view of the matter. We have ourselves been taken through these depositions by Mr. Basu and as recorded they are so unsatisfactory that it is really very difficult to know what these police officers meant.

Finally, it was contended that the learned Judge led the jury to suppose that the first information report was actually substantive evidence with regard to the occurrence. The learned Judge never says so in plain terms; nor after perusing the whole of the charge do we think there is any legitimate reason to suppose that he intended the jury to believe so.

All the points on behalf of the appellants fail and the appeal is, accordingly, dismissed. The appellants must surrender to their bail and serve out the remainder of the sentences imposed upon them.

CUNLIFFE J. I am of the same opinion and agree to the order proposed by my learned brother.

An interesting contention during the course of the argument before us was put forward by Mr. N. K. Basu. As I understood his proposition it amounted to this, that because there was a mistake or untrue statement to be found in a declaration which was admitted in evidence under s. 32, sub-s. (*1*) of the Indian Evidence Act, that whole declaration ought to have been withdrawn from the consideration of the jury because any inaccuracy or untruth in a declaration of that character vitiates the whole of the contents contained therein. As my learned brother has pointed out, the authority for this proposition relied upon by the learned advocate for the appellants is the case of *Emperor* v. *Premananda Dutt* (1). The argument rests upon a dictum of Mr. Justice Mukerji which is quite short and runs as follows:—

> 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 appraisement 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.

The learned Judge then went on to point out that the rule in India under the Indian Evidence Act with regard to statements concerning death made by persons before their death in trials which are concerned with an investigation into the responsibility of the death is, much wider than the rule with regard to dying declarations according to the principles of the English law of evidence. Sub-s. (1) of s. 32 of the Indian Evidence Act does not confine these statements to that class of statement which is made by a man who is apprehensive and is just about to die. Therefore, of course, the statements which are admitted according to the Indian law of evidence

(1) (1925) I. L. R. 52 Cal. 987, 1003.

1936

Nai Muddin Biswas v. *Emperor.*

Cunliffe J.

lose a great deal of the sanctity which is supposed to invest the dying declaration according to the English law of evidence.

In this particular statement, which is a very short one, there is nothing in the statement itself which indicates that the dead man thought that he was going to die. It seems to me, therefore, to be somewhat dangerous from the point of view of the appraisement of the value of the evidence to put the statement which we are considering here upon a different footing from any other piece of evidence not, as my learned brother pointed out, of very great value. In my opinion the true principle upon which this kind of evidence should be recorded ought to be—firstly, does it strictly come within the provisions of s. 32, sub-s. (*1*)? If it does come within those provisions, from the point of view of admissibility, in my view, the statement should be looked upon from the stand point of its own value and nothing else. I see no reason to introduce an artificial rule such as is suggested by the learned Judge in the judgment to which I have referred. I think it is almost certain that declarations of this kind ought to be corroborated, but this is about as far as we can go. There is a leading case which is often quoted in the English law of evidence, the case of *R.* v. *Mitchell* (1) which is alluded to in Mr. Justice Mukerji's judgment. In that case the trial Judge refused to admit a dying declaration for consideration because, on examining it, he found that instead of it being a straightforward account of what the dying man had said, without any additions, it turned out to be a series of questions and answers and a good deal more question apparently than answer In those circumstances, the Judge said that he would not allow such a document to go to the jury because he apprehended that in the mental state which a dying man might be supposed to be in,

(1) (1892) 17 Cox. C. C. 503.

it was very dangerous for anyone in authority to put leading questions to him and thereby possibly to direct his enfeebled mental powers towards uncertain questions in such a way that the authorities interested in the prosecution might possibly gain a benefit.

We are told by the learned Deputy Legal Remembrancer that as far as the case of *Emperor* v. *Premananda Dutt* (1) is concerned this dictum has already been doubted by the Bombay High Court. I have had an opportunity of reading the judgment in the case to which he referred, namely, the case of *Emperor* v. *Akbarali Karimbhai* (2) and I am fortified in the view that I take that the value of the evidence amounting to a dying declaration cannot be whittled down in the manner in which Mr. Justice Mukerji suggests, by the judgment of the Chief Justice of the Bombay High Court which, if I may say so, is characterised by an expression of good sense and good law.

For these reasons and for the reasons given by my learned brother, I agree that this appeal must be dismissed.

Appeal dismissed.

A. C. R. C.

(1) (1925) I. L. R. 52 Cal. 987. (2) (1933) I. L. R. 58 Bom. 31.