APPELLATE CRIMINAL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Lakshmana Rao and Mr. Justice Krishnaswami Ayyangar.

1939, December 1. December 4.

IN RE GURUSWAMI TEVAR AND OTHERS (ACCUSED 1 TO 5), APPELLANTS.*

Indian Evidence Act (I of 1872), sec. 32 (1)—Dying declaration—Sufficiency of, for supporting a conviction—Corroboration by other circumstances, if necessary.

On a question whether statements made by a person who is dead, uncorroborated by any other evidence, can support a conviction,

held: It is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances; but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and naturally it could not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility.

TRIAL referred by the Court of Sessions of the Tinnevelly Division for confirmation of the sentences of death passed upon accused 1, 2 and 4 and appeal by all the appellants against the sentences passed upon them by the Court of Sessions of the Tinnevelly Division in Calendar Case No. 60 of 1939.

The case came on for hearing in the first instance before BURN and MOCKETT JJ. who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The appellants have been convicted of murder by the learned Sessions Judge of Tinnevelly and the first, second and fourth appellants have been sentenced to death. The third

* Referred Trial No. 119 of 1939 and Criminal Appeal No. 508 of 1939.

and fifth appellants have been sentenced to transportation for life.

The case is one of a simple nature but there is an important question of law involved. There is no doubt about the fact that, on the early morning of 31st of March 1939, Nammalwar Naickar, a resident of the village of Kalugachalapuram, was attacked while he was on his way to the village of Mannagopalanaickenpatti. He was stabbed in thirty-eight places and he died soon after midnight. The Sub-Assistant Surgeon (P.W. 1) who was in charge of the hospital at Ettiyapuram saw him at 1 p.m. and found thirty two injuries on him, of which seven were penetrating wounds into the abdomen, and one was a penetrating wound in the chest. This Sub-Assistant Surgeon was not able to do anything for the man beyond rendering first aid and then he sent him on to the headquarters hospital at Palamcottah. Another Sub-Assistant Surgeon (P.W. 2) made a post-mortem examination on the 1st of April and then he found that there were in all thirty eight injuries. P.W. 1 expressed an opinion that the abdominal injuries inflicted upon Nammalwar Naickar would only prove fatal in the absence of medical or surgical treatment but that, if treated properly, there was "every chance" of the injured man escaping death. This is a very remarkable opinion and in our opinion, it is worthless. The post-mortem certificate shows that two of the stabs not only penetrated the abdomen but punctured the intestines, so that fæces escaped into the peritoneal cavity. It is quite clear that Nammalwar Naickar was fatally wounded by persons who meant to kill him, and that he never had any chance of recovery.

There are no eye-witnesses in the case, the assassins having been careful to choose a time when there was nobody in sight. The case against the appellants rests almost entirely on statements said to have been made by Nammalwar Naickar himself before he died. Three witnesses, P.Ws. 6, 7 and 8, say that they were in the vicinity and that they were attracted to the spot by the cries of Nammalwar Naickar but they do not corroborate him any further than by saying that the number of persons whom they saw running away was five. As the learned Sessions Judge has said, there are four statements of Nammalwar Naickar to be considered. In the first place, P.Ws. 6, 7 and 8 say that as soon as they reached him he told

GURUSWAMI, *In re.*

them the names and fathers' names of the five persons who had attacked him. Those are the names of the present five accused persons. P.W. 6 ran to the village and informed P.W. 12 the brother-in-law of the deceased. P.Ws. 12, 13 and others went to the place where Nammalwar Naickar was lying stabbed. Nammalwar Naickar is said to have told those witnesses also the names and fathers' names of these five appellants. P.W. 12 went and fetched the village munsif, P.W. 21. He reached the scene of the murder at about 8 o'clock in the morning and he took down a statement from Nammalwar Naickar which is Exhibit K. In that also the names and the fathers' names of the five appellants are found. Finally at about 2-30 p.m. on the same day in the hospital at Ettiyapuram a dying declaration (Exhibit A) was recorded by a Special Magistrate (P.W. 4). In that again the deceased has stated that these five persons attacked him and stabbed him.

The Learned Counsel for the appellants has attempted to show that the statement (Exhibit K) recorded by the village munsif was a concoction but he has not adduced any convincing arguments in support of that proposition. It was proved that there was enmity between Nammalwar Naickar and the accused, but the accused were not the only members of the Marava caste with whom the deceased was at enmity. P.Ws. 6, 7 and 8 belong to a different village, Mannagopalanaicken-patti, and no enmity whatever was even suggested between them and any of the accused. There is therefore no reason why these witnesses should say falsely that Nammalwar Naickar named these five persons as his assailants. We can see no reason to believe that Exhibit K was concocted.

The next contention of the learned Counsel for the appellants is that Exhibit K and Exhibit A are widely discrepant. This contention is based upon the fact that in Exhibit K Nammalwar Naickar is recorded as having said that, when the five appellants approched him, the first appellant came and gave him a stab with a *soori* (dagger) in the abdomen and afterwards the four persons joined together and stabbed him in the body. In Exhibit A, however, he has given a much more detailed account in which he says that Guruswami Tevar (the first accused) stabbed him not only in the abdomen but in several other places before any of the other accused stabbed him at all. He also says that the third and fifth accused held his

legs while the other three accused 1, 2 and 4 were stabbing him. We are not able to see that there is any discrepancy in these statements. In Exhibit K the wounded man has stated that all the five persons joined together and stabbed him. This cannot be said to be an inaccurate description of the occurrence. If five persons jointly attack a man and two of them hold him while the others stab him, he cannot be considered to be an untruthful person if he says that they all five stabbed him. The only real inconsistency that is apparent between Exhibit K and Exhibit A is with regard to a knife. In Exhibit K. Nammalwar Naickar said, "When I warded off the *soori* which Kandiah Thevan had, it fell down." In Exhibit A he said: "When they stabbed me I wrested the soori from Krishna Thevan." Now, Krishna Thevan is the name of the second accused and Kandiah Thevan is the name of the fourth accused. In Exhibit K, Nammalwar Naickar does not mention that he wrested a knife from the second accused and in Exhibit A he does not mention that, while he was warding off a blow aimed at him by the fourth accused, the fourth accused's knife fell down. These however cannot be considered as contradictions. The learned Public Prosecutor points out that at the scene of offence two knives were actually found, one in a sheath and one bare. Apart from this, there is no discrepancy, and both these statements show that Nammalwar Naickar charged these five persons with the attack upon him. We cannot find also, as already stated, any reason to disbelieve P.Ws. 6, 7 and 8 and P.Ws. 12 and 13, and their evidence makes it clear that from the very beginning, within a few seconds after he was attacked, Nammalwar Naickar has been alleging that these five appellants are responsible for his death.

We agree with the learned Sessions Judge therefore that the statements of Nammalwar Naickar have been truthfully described by the witnesses and in the documents Exhibits K and A. The next question, as the learned Sessions Judge has pointed out, is whether Nammalwar Naickar's statements are true. As to this, the plea of the accused was that the whole case was a concoction against them by P.W. 12 and the village munsif on account of the enmity due to faction between the Thevars (Maravars) and the Naickars. The third accused alleged that he had been sick for the last eight months and therefore confined to his house. He repeats this

GURUSWAMI, *In re.*

statement in his appeal petition from jail. None of the accused offered any explanation beyond this bare denial and the allegation that the case was concocted on account of faction and none of them cited any witnesses. As already observed, there was enmity between the deceased and the Maravars of Kalugachalapuram, but there was no special enmity between the deceased and these five appellants and, as the learned Sessions Judge has observed, there was not the slightest reason shown why Nammalwar Naickar, within a few seconds of being stabbed, should have made up his mind to exculpate the persons who really attacked him, and to accuse falsely five persons who had nothing whatever to do with the matter. It was sunrise when this attack on Nammalwar Naickar took place. He was stabbed in thirty-eight places, which must have taken some time, so that he had ample opportunity to see who were the persons who were stabbing him. We can find no reason for doubting the truth of the statements made by Nammalwar Naickar. If they are believed, the appellants are clearly guilty of his murder.

The point of law which arises is whether, on the statements of a deceased person such as these, uncorroborated (except as to the number of the assailants), the appellants can be convicted of murder. The weight of authority appears to be in favour of the view that a conviction based wholly upon the statements of a deceased person is not illegal. This was assumed in the case of *Sanjappa* (Referred Trial No. 112 of 1937) in which the judgment was pronounced by one of us, but in that case the judgment in Criminal Appeals 653 of 1935 and 148 of 1936 was not brought to our notice. Those appeals were heard by BEASLEY C.J. and GENTLE J. and the judgment contains passages indicating that a dying declaration uncorroborated by other evidence could not justify a conviction. The learned Judge GENTLE J. says:

"Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution, in the absence of any corroboration of its contents, it is clear from the authorities and the text books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms can be levelled against the declaration."

In the case in question the learned Judge showed that the dying declaration upon which the prosecution relied

was unreliable; but the observations are of a general nature. And in another place the learned Judge has said:

"Apart from the dangerous practice of relying upon the uncorroborated contents of a dying declaration alone . . . ." Referring to these passages, MOCKETT and HORWILL JJ. have stated in Referred Trial No. 5 of 1937: "Even a dying declaration, as had been held by this High Court, is very dangerous material by itself on which to found a conviction." These dicta are clearly at variance with the principle on which Referred Trial No. 112 of 1937 was decided. The learned Public Prosecutor has stated that, so far as he is aware, there has not been any case in which it has been held that a dying declaration, proved to have been made and with no reason shown for distrusting its truth, was insufficient to warrant a conviction. Such a case as *Gulu Ello Reddi* v. *Emperor* (1) is no exception to this rule, for there the dying declaration was found to be unsatisfactory in itself. On the other hand there are many cases in which dying declarations alone have been relied upon as justifying conviction. The learned Public Prosecutor brought to our notice the views expressed in the cases of *Emperor* v. *Akbarali Karimbhai*(2), *Nai Muddin Biswas* v. *Emperor*(3) and *The King* v. *Maung Po Thi*(4).

It is clear that by the provisions of section 32 (1) of the Evidence Act the statements made by Nammalwar Naickar in this case are evidence. There are very good reasons for believing them to be true, and none for disbelieving them. With respect, we do not think we should be acting dangerously or imprudently, if relying on these statements we confirmed the convictions of the appellants in this case.

As however there is a conflict between the decision in Referred Trial No. 112 of 1937 and the observations in Criminal Appeals Nos. 653 of 1935 and 148 of 1936 with regard to the question whether statements made by a person who is dead, uncorroborated by any other evidence, can support a conviction, we order, under Rule 2 of the Appellate Side Rules, that this matter be referred to a Full Bench.

The records will be laid before his Lordship the CHIEF JUSTICE.

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(1) 1935 M.W.N. (Cr.) 193. (2) (1933) I.L.R. 58 Bom. 31.
(3) I.L.R. [1937] 1 Cal. 475. (4) A.I.R. 1938 Ran. 282.

GURUSWAMI, *In re.*

The case then came on for hearing in pursuance of the above order of reference before the Full Bench constituted as above.

ON THE REFERENCE.

E. R. Balakrishnan for appellants.—[After reading the Order of Reference, Counsel proceeded :] Mere dying declaration is not sufficient to warrant a conviction. It is not made on oath. The accused has no opportunity to cross-examine the deceased as to the truth of his statement. [*In re Dabbukota*(1), *Emperor* v. *Akbarali Karimbhai*(2) and *Gula Ella Reddi* v. *Emperor*(3) were referred to.] No doubt under section 32 of the Indian Evidence Act a dying declaration is admissible, but a conviction should not be based on that alone.

[LEACH C.J.—In this case, the deceased made three earlier statements. They are admissible in evidence. Exhibit A, the dying declaration, receives corroboration from the earlier statements. Then why do you say we should not base a conviction on such a dying declaration ?]

The corroboration must be from independent circumstances and not from the statements of the deceased. [Taylor on Evidence, Twelfth Edition, page 462, was referred to.]

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.—Whether a conviction can be based only on a dying declaration is a question of fact and depends on the circumstances of each case. If, on a consideration of the facts of a case, the Court believes a dying declaration to be true, a conviction can be based on that alone. A dying declaration is regular and good evidence. [Sections 157 and 158 of the Indian Evidence Act were referred to.] The other circumstances can be considered before the Judge accepts the dying declaration as true. It is not analogous to the evidence of an accomplice which is presumed to be tainted (*vide* illustration (*b*) to section 114 of the Indian Evidence Act), and so requires corroboration. Even though there is no expectation of death, a dying declaration is proper evidence according to the Indian Evidence Act. In this respect it differs from the English law of evidence.

[LEACH C.J.—What we have to consider here is not the rule of law, but whether, as a matter of prudence, corroboration is necessary in respect of a dying declaration.]

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(1) (1885) 2 Weir 753. (2) (1933) I.L.R. 58 Bom. 31.
(3) 1935 M.W.N. (Cr.) 193.

The surrounding circumstances may be considered in accepting the truth of a dying declaration.

[LAKSHMANA RAO J.—Whether for a conviction a dying declaration should be corroborated by independent circumstances is the question here.]

The surrounding circumstances may be considered to find out whether a dying declaration is true or not. But, once the Court believes the dying declaration to be true, no corroboration is necessary to base a conviction. [Counsel referred to *Emperor* v. *Akbarali Karimbhai*(1), *Nai Muddin Biswas* v. *Emperor*(2) and *The King* v. *Maung Po Thi*(3).] Whether corroboration is necessary to accept a dying declaration as true depends on the facts of each case. In law, a dying declaration does not require corroboration. If it is believed a conviction can be based on that alone.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—In order to appreciate the question which has been referred it is necessary to state certain of the facts. The appellants have been convicted of murder. The first, second and fourth appellants have been sentenced to death and the third and fifth appellants to transportation for life. Between five and six o'clock on the morning of 31st March 1939 one Nammalwar Naickar was attacked by a band of men and received thirty-eight injuries from which he died shortly after midnight. As the result of his cries three persons who were in the vicinity were attracted to the spot, where the deceased was lying. They had not seen the assault, but they said that they had seen five persons running away. When these witnesses reached the deceased, he told them that he had been attacked by five men and gave their names and the names of their fathers. The names given were the names of the five appellants. One of these

(1) (1933) I.L.R. 58 Bom. 31.
(2) I.L.R. [1937 1 Cal. 475. (3) A.I.R. 1938 Ran. 282.

GURUSWAMI, *In re.*
LEACH C.J.

witnesses went and called the deceased's brother-in-law and another person, both of whom also gave evidence. These two witnesses went to the spot and the deceased informed them that the appellants were his assailants. The village munsif was called to the scene of the crime at about 8 a.m. and recorded a statement made by the deceased. In that statement also the deceased implicated the appellants. The deceased was removed to the hospital at Ettiyapuram and at about 2-30 p.m. his dying declaration was recorded by a Magistrate. In that statement the deceased again said that his assailants were the appellants. It was proved that there was enmity between the deceased and the appellants, who are of the Marava caste, but they were not the only members of that caste with whom he was at enmity. The question of law which arises is whether on the statements of a deceased person of the nature of those indicated without other testimony, except as to the number of the assailants, the appellants can be convicted of murder. The question has been referred to a Full Bench because the judgments of two Division Benches of this Court are in conflict. Neither of these judgments has been reported.

The first of the two cases which have given rise to this reference is Criminal Appeal No. 653 of 1935, which was decided by BEASLEY C.J. and GENTLE J. The judgment was delivered by GENTLE J. who, after quoting from Taylor on Evidence and referring to *Emperor* v. *Akbarali Karimbhai*(1), *In re Dabbukota*(2) and *Gula Ella Reddi* v. *Emperor*(3), observed:

"Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution in the absence

(1) (1933) I.L.R. 58 Bom. 31. (2) (1885) 2 Weir 753.
(3) 1935 M.W.N. (Cr.) 193.

of any corroboration of its contents, it is clear from the authorities and text books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms can be levelled against the declaration."

The judgment which is in conflict is the judgment in Referred Trial No. 112 of 1937, which was delivered by BURN J. and in which I concurred. In that case, there was no corroboration of a dying declaration, but the facts were such that my learned brother and I had no hesitation in accepting it as reliable evidence and we upheld the conviction of the accused. The question at issue has been fully argued before this Full Bench and I am unable to accept the observations which I have just quoted from the judgment of GENTLE J. as correctly stating the position. With great respect I regard the statement as being far too wide.

Section 32 of the Indian Evidence Act says that statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in certain specified cases. The first case specified is when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, where the cause of death comes into question. The section declares that such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. Therefore a statement made by a person who is dead as to the cause of his death is

GURUSWAMI, *In re.*
LEACH C.J.

evidence notwithstanding that he was not under expectation of death when he made it.

There are two other sections of the Evidence Act which may have important bearing in a case of this nature, namely, sections 157 and 158.

Section 157 says :

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

Section 158 is in these words :

"Whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested."

There may not be corroboration of the nature contemplated by section 157, or matters provable under section 158, and the only direct evidence may be a statement by the deceased made admissible by section 32. It does not, however, necessarily follow that this evidence is insufficient to support a conviction. In such a case the surrounding circumstances will have an important bearing. The evidence of an accomplice is tainted, and section 114 of the Evidence Act, illustration (*b*), says that the Court may presume that he is unworthy of credit unless corroborated; but a dying declaration is on a much higher plane and the Act places no such restriction on its acceptance.

The reference which GENTLE J. made to Taylor on Evidence consisted of a quotation from section 722 of the Eleventh Edition. This section deals with dying declarations and the quotation was as follows :—

"It should always be recollected that the accused has not the power of cross-examination—a power quite as

essential to the eliciting of the truth as the obligation of an oath can be—and that where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction."

This, of course, may be the case, but I should regard a statement by a person who has received a mortal wound, made immediately after the injury was caused, as being of high probative value when it relates to the cause of the injury, unless there is some reason shown to doubt its truth. The probative value of a statement of a person who has been mortally injured, but made after a considerable interval, during which time he has been surrounded by his relatives and friends, is certainly much less; but here again it seems to me it may be accepted if it fits in with earlier statements made when he could not have been influenced and they were otherwise unimpeachable.

In *Emperor* v. *Akbarali Karimbhai*(1) BEAUMONT C.J. observed :

> "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."

The learned CHIEF JUSTICE, however, agreed that there is no rule which requires that a dying declaration should not be acted upon unless it is corroborated and he pointed out that the evidential value of a declaration relevant under section 32 varies very much in accordance with the circumstances in which it is made. Here I respectfully agree, but I am not prepared to go so far as to say that a declaration relevant under section 32, though not made in immediate expectation of death and not made in the

(1) (1933) I.L.R. 58 Bom. 31.

GURUSWAMI, *In re.*

LEACH C.J.

presence of the accused, necessarily requires corroboration.

In *In re Dabbukota*(1) it was said :

> " It is to be remembered that though dying declarations are in some respects deserving of a degree of consideration and credence to which ordinary statements are not, they are not subject to the test of cross-examination, and, if not substantially borne out by independent evidence and the probabilities of the case, or admitted facts, are worth little or nothing."

By this I presume is meant there must be corroboration before a dying declaration can be accepted. I have said sufficient to indicate that this statement is far too sweeping and it is open to the further objection that it offends against the law of evidence in India.

With regard to the case of *Gula Ella Reddi* v. *Emperor*(2) all that need be said is that the circumstances showed that it was unsafe to convict the accused on the bare dying declaration put in evidence in that case and naturally it was not accepted as being sufficient to prove the case for the Crown.

In my judgment it is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and, naturally, it could not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility.

I would answer the reference in this sense.

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(1) (1885) 2 Weir 753. (2) 1935 M.W.N. (Cr.) 193.

LAKSHMANA RAO J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

The case came on for final hearing after the expression of the opinion of the Full Bench, and the Court (BURN and MOCKETT JJ.) delivered the following

JUDGMENT:—

In view of the decision of the Full Bench, we confirm the conviction of the appellants for murder. Since the evidence is that the third and fifth accused took part in the murder by holding the legs of the victim while the others stabbed him, they are directly responsible for the murder. There was no reason to invoke section 149, Indian Penal Code, and we do not quite understand what the learned Sessions Judge means by saying: "The public prosecutor preferred to frame a charge against them under section 302 read with 149." The duty of framing the proper charge is thrown on the Court.

The sentences of death passed upon the first, second and fourth accused are the only possible sentences in this case, where five assassins have attacked a single man and killed him by stabbing him in thirty-eight places. We confirm the sentences of death passed on the first, second and fourth accused. The third and fifth accused have been fortunate to escape the extreme sentence on the ground that they did not actually stab Nammalwar Naickar, but only held his legs. We confirm the sentences of transportation for life passed upon the third and fifth accused. All the appeals are dismissed.

V.V.C.