APPELLATE CRIMINAL.

1937.

July, 28, 29, 30.

Before Varma and Rowland, JJ.

KING-EMPEROR

v.

SOMRA BHUIAN.*

Evidence Act, 1872 (Act 1 of 1872), section 32—statement as to motive in dying declaration, admissibility of—written record of statement made by deceased—mode of proof required.

Where in the dying declaration the deceased stated that the accused had assaulted him " on account of enmity caused by my acting as a wizard ", *held*, that the statement made by the deceased was a statement " as to the circumstances of the transaction which resulted in his death ", so as to be admissible under section 32(*1*) of the Evidence Act, 1872.

Edula Venkatasubba Reddi, In re(1), distinguished.

The law is not that the written record of a statement made by a deceased person cannot be used at all but that it is not to be used without first examining as a witness the person who heard the statement made.

The case against the accused persons was instituted on the first information laid by the deceased himself and recorded by a police officer. Subsequently a Magistrate took his statement as a dying-declaration. The statement to the police was sought to be proved by the evidence of the police officer who deposed that the information was recorded by him on the statement of the deceased in presence of attesting witnesses who also signed the first information and that he took down the first information report " in the own words of the injured ". The Magistrate who had recorded the dying declaration proved the statement and deposed that the deceased was in his senses and that he read over the statement to him and he admitted it to be correct.

*Death Reference no. 26 of 1937 and Criminal Appeal no. 178 of 1937. Reference made by M. M. Philip, Esq., I.C.S., Sessions Judge of Gaya, dated the 3rd July, 1937, and appeal from his decision, dated the 2nd July, 1937.

(1) (1931) I. L. R. 54 Mad. 931.

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Held, that there was sufficient proof of the statements to make them admissible under section 32 of the Evidence Act, 1872.

Emperor v. *Balram Das*(1) and *Partap Singh* v. *The Crown*(2), followed.

Empress v. *Samiruddin*(3), distinguished.

Reference under section 374 of the Code of Criminal Procedure, 1898.

The facts of the case material to this report are set out in the judgment of Rowland, J.

K. K. Banarji, for the appellant,

The Advocate-General, for the Crown.

ROWLAND, J.—This is a reference under section 374 of the Code of Criminal Procedure, by the Sessions Judge of Gaya, who agreeing with all the assessors has convicted Somra Bhuian of the murder of Kudrat Mian. Two other persons, Sukna and Nagwa, were accused along with Somra, but these the learned Judge disagreeing with all the assessors has acquitted.

The case for the prosecution was that the deceased Kudrat had about two years before the occurrence settled in mahalla Maranpur of Gaya, where he practised as a medicine man (*ojha*), that the accused Somra Bhuian used to practise as an *ojha* and resented Kudrat setting up in the village as his rival. On the 16th March, 1937, Kudrat had a visit from some clients who brought a child as a patient. Kudrat was performing some incantations when suddenly the three accused persons came into the courtyard and attacked him with cutting instruments. The clients fled away. As they escaped from the courtyard, two of them received incised injuries from one or other of

(1) (1921) I. L. R. 49 Cal. 358.
(2) (1925) I. L. R. 7 Lah. 91.
(3) (1881) I. L. R. 8 Cal. 211.

the assailants who were coming in. Kudrat received more than a dozen injuries, some on the head and face, others on the chest and abdomen, the small intestine was perforated, and a portion of the intestine protruded through the opening of two of the wounds. He raised an alarm, neighbours came and the accused fled. He was taken to the police-station where he himself laid the first information on which the case was instituted. He was then removed to the hospital where he died the same night. As his condition became critical a Magistrate came and took his statement as a dying declaration. He named Somra, Sukna and Nagwa as his assailants, and these were the three persons who were put on trial.

The case for the prosecution rested on the statement of Kudrat admitted in evidence under section 32, Indian Evidence Act, and the evidence of the deceased's wife, Musammat Marunwa who claimed to have identified the assailants. The accused were all arrested the same night, and Somra was found to be wearing a shirt which was stained with spots of blood. This blood on chemical examination has been proved to be human. The Sessions Judge was not satisfied with the identification of the accused by the woman Marunwa, as it appeared that when first examined by the police she had failed to identify or name any of the accused. He, therefore, considered the case as resting on the statements of Kudrat corroborated in the case of Somra by the recovery from his person of the blood-stained shirt. He has convicted Somra while acquitting the other two.

In appeal it is contended, firstly, that so much of Kudrat's statement as refers to motive is not admissible under section 32 of the Indian Evidence Act, and for this proposition reference is made to *In re Edulla Venkatasubba Reddi*(1). The headnote of the report states a much broader proposition than the Judges appear to have intended to lay down, in fact the observations made in the judgments appear to be made with reference to the facts of the case then under

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consideration, and the particular statement which the prosecution had sought to prove. This was a statement made several months before the murder by Sivamma, the person who was eventually murdered, and the statement was to the effect that she intended to cut the accused out of her will. The prosecution case was that this intention on the part of Sivamma had been the motive for the accused to murder her; but the prosecution had failed altogether to establish that the accused had any knowledge of Sivamma having made such a statement. It was observed that the statement cannot be deemed to be "one made as to the cause of her death or as to any of the circumstances of the transaction which resulted in her death". The argument for the prosecution in that case was that the statement though not coming within the provisions of section 32, might be admissible under section 8 of the Act as showing a motive for the murder. This line of reasoning was negatived by Beasley, C. J. The position here is quite different. We are not concerned with section 8 of the Indian Evidence Act, but with the question whether the statement is one "as to any of the circumstances of the transaction which resulted in the death" of Kudrat. It would be a very far cry from anything that was said in the decision *In re Edulla Venkatasubba Reddi*(1) to hold that the statement made by Kudrat is not a statement as to the circumstances of the transaction which resulted in his death. What he has said regarding motive is at two places: firstly, in his first information report, and secondly in the dying declaration. In the first information report (Exhibit 4/1) he says "Somra Bhuian is a wizard and cultivator. Nagwa and Sukna are his comrades. They did not want that I should act as a wizard there. This was the cause of the dispute"; and in the dying declaration (Exhibit 3) he says

"They assaulted me on account of enmity caused by my acting as a wizard".

(1) (1931) I. L. R. 54 Mad. 931.

I do not see how any reasoning can make these statements to be anything other than statements as to the circumstances of the transaction which ended in Kudrat's death.

The next point of law raised was that the statements of Kudrat to the Sub-Inspector and to the Magistrate were not properly admitted in evidence, because neither of them has been proved in accordance with law. In each case the officer who recorded the statement, has been examined as a witness, and the written record of the statement has been attested by him and exhibited. The argument is that the witnesses in each case should have given his parol evidence in full as to each sentence of what Kudrat stated to him, and that the written record is not evidence of the statements. For this proposition reliance is placed on *Empress* v. *Samiruddin*(1). In this case the dying statement of the deceased Baber Ali had been recorded by the Deputy Magistrate as a deposition but not apparently in the presence of the accused. It was held that unless the deponent had been so examined by the Deputy Magistrate exercising judicial jurisdiction, the statement required to be proved in the ordinary way by a person who heard it made and could not be proved by the writing made by the Magistrate, though if the Deputy Magistrate had been called to prove the statement he might have refreshed his memory with the writing made by himself at the time when the statement was made. This decision appears to have been sometimes cited in support of more than the Judges intended to lay down. In my opinion the law is not that the written record cannot be used at all but that it is not to be used without first examining as a witness the person who heard the statement made. This is the view taken in *Emperor* v. *Balram Das*(2). Here the statement which was sought to be proved had been made

(1) (1881) I. L. R. 8 Cal. 211.

(2) (1921) I. L. R. 49 Cal. 358.

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in the presence of a Sub-Deputy Collector and an Assistant Surgeon. The Sub-Deputy Collector recorded the statement but was dead at the time of the trial in which it was sought to use the statement in evidence. The Assistant Surgeon, however, was called and deposed that the declaration had been recorded in his presence by the Sub-Deputy Collector on the statement of the dying man and that it had been read over in his presence to the deceased who admitted it to be correct. This was held to be sufficient proof of the statement to make it admissible under section 32 of the Indian Evidence Act. This case was cited and approved in *Partap Singh* v. *The Crown*(1) where the proof offered of a dying declaration was the testimony of a head-constable who deposed in Court that he had recorded the statement correctly and that the deponent was in his senses at the time, the witness had not repeated in his own words what the deponent Nawab had said to him. Following *Emperor* v. *Balram Das*(2), it was held that the evidence was certainly admissible. The evidence regarding the first information of Kudrat is given by Ramkripal Kumar, Sub-Inspector, who says that the information was recorded by him on Kudrat Mian's statement in presence of two attesting witnesses who also signed the first information. It would have been better if it had been elicited from the Sub-Inspector in his examination-in-chief that he recorded the information correctly in the words used by the informant. But it is definitely stated in his cross-examination

> "I took down the first information report in the own words of the injured."

There is, therefore, the clearest evidence that the first information report is a correct record of the statement made by Kudrat. The dying declaration (Exhibit 3) is proved by Maulavi Minhajul Islam, Sub-Deputy Magistrate, who proves the statement recorded by him and proves that Kudrat was in

(1) (1925) I. L. R. 7 Lah. 91.
(2) (1921) I. L. R. 49 Cal. 358.

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his senses. He deposes that he read over the statement to Kudrat who admitted it to be correct. This is sufficient attestation and proof of the statement to make it admissible for the purposes of section 32, Indian Evidence Act.

ROWLAND, J.

It was further argued on the merits that it was not safe to act on the statement of Kudrat standing as it does almost alone. We were invited to consider cases in which such dying declarations have not been acted on on the ground that the identification might be mistaken, or that there was inadequate opportunity of observation owing to surprise, or that the names of accused might have been given by the deponent not on his own initiative but on being suggested to him by others, or that the circumstances suggested a possibility of malicious implication. It is not necessary, I think, to refer to the cases in which it has been held for one or other of these reasons too unsafe to convict. Every such case must in the last resort be decided on its own facts. On the evidence and in the circumstances of this case we do not think that so far as this accused was concerned there was any mistake by Kudrat. There was a light and he was awake. There might no doubt be some surprise but the assault was continued for some time, and we find no difficulty in believing that he had sufficient opportunity to recognize his assailants. We were reminded that the witnesses have not said that immediately after the occurrence Kudrat forthwith gave out the names of his assailants. In fact the witnesses have said that he was in great pain and was screaming. As soon as he was brought to the police-station and questioned he appears to have given the names without hesitation. I do not feel inclined in the circumstances to discard this naming of the accused as an afterthought. Then in the case of the appellant there is the corroboration which consists in the finding of blood stains on the shirt which he was wearing. This, in my opinion, is a material corroboration. No doubt there have been cases in which the finding of a

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few spots of blood on the wearing apparel of an Indian have been taken to be insufficient corroboration of a dying statement for the purpose of supporting a conviction; but here again every case needs to be considered on its own facts and what is done in one case can hardly be authority in another set of facts. The course of the occurrence, the manner in which the attack was made, and the number of persons concerned in it receive corroboration from the evidence of Bandua and Ramdhani, the clients who met and were wounded by some of the assailants. The only point on which corroboration is wanting is the identification of the accused. In the circumstances the finding of spots of blood on Somra's shirt seems to me to be sufficient to corroborate the statement of Kudrat. I feel no doubt that Somra was one of those taking part in the murder.

There is no extenuating circumstance which would justify the accused receiving less than the extreme penalty. I would therefore dismiss the appeal, accept the reference and confirm the sentence of death.

VARMA, J.—I agree.

S. A. K.

Reference accepted.

Sentence confirmed.

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April, 16. *August*, 9, 10.

SPECIAL BENCH.

Before Courtney Terrell, C.J., Khaja Mohamad Noor and Manohar Lal, JJ.

BAIJNATH PRASAD SINGH

v.

UMESHWAR SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 149 *and Order VII, rule* 11—*plaint insufficiently stamped*—

*Appeal from Original Decree no. 5 of 1934, from a decision of Maulavi Saiyid Muhammad Ibrahim, Subordinate Judge of Gaya, dated the 26th January, 1933.