Code. We, however, maintain the sentence imposed by the learned Judge, because the learned counsel for the Crown admits that the reason why the Local Government invoked the jurisdiction of this Court was to obtain an authoritative pronouncement on the question of law and not to seek an enhancement of the sentence.

A. N. C.

Appeal accepted.

APPELLATE CRIMINAL.

Before Mr. Justice Broadway and Mr. Justice Fforde.

AUTAR SINGH—*Appellant*

versus

THE CROWN—*Respondent.*

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June 13.

Criminal Appeal No. 419 of 1923.

Indian Evidence Act, I of 1872, sections 6, 8, 32 (1)—Dying declaration—statements made by deceased to witnesses sometime prior to the happening of the event which resulted in her death—whether admissible in evidence.

The appellant was charged with, and convicted of, the murder of his wife and the prosecution produced 2 witnesses B. S. and G. S. who gave evidence of certain statements alleged to have been made by the deceased about 8 or 9 months and 10 days, respectively, prior to the event which resulted in her death.

Held, that the statements made by a person who is dead could only be admitted if they could be shown to come within the provisions of section 32 (1) of the Indian Evidence Act, which subsection applies to the class of statements known as dying declarations, *i.e.*, statements made by a dying person as to the injuries which have brought him or her to that condition or the circumstances under which those injuries came to be inflicted. The evidence concerning statements made by the deceased in this case was therefore inadmissible under section 32 (1) nor could it be admitted under either section 6 or section 8 of the Act.

The commentary in regard to the value of dying declarations in India contained in Mr. Justice Stephen's History of Criminal Law in England, referred to.

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Appeal from the order of F. W. Kennaway, Esquire' Sessions Judge, Ferozepore, dated the 15th February 1923, convicting the appellant.

C. BEVAN-PEIMAN and MANOHAR LAL, for Apellant.

JAI LAL, Government Advocate, for Respondent.

The judgment of the Court was delivered by—

FFORDE J.—The appellant Autar Singh has been convicted by the Sessions Judge of Ferozepore, under section 302, Indian Penal Code, of the murder of his wife *Mussammat* Balwant Kaur and sentenced to death; and the appellants Harnam Singh and Kirpal Singh, the father and brother, respectively, of the first appellant, have been convicted under section 201, Indian Penal Code, of having caused the disappearance of evidence of the crime, and have been sentenced to five years and three years' rigorous imprisonment, respectively. To sustain the conviction in any one of the three cases it must first of all be satisfactorily proved that *Mussammat* Balwant Kaur was in fact murdered.

The story for the prosecution is that on the night of the 1st or the early morning of the 2nd October 1922 Autar Singh shot his wife dead with a revolver; that he with the help of his father and brother then removed the body in a bullock cart in the early hours of the morning to the cremation ground, which is a short distance from the scene of the crime, and there burnt it.

The story of the appellants on the other hand is that the deceased died suddenly in the course of the night of a somewhat rare form of cholera known as *gum haiza* and that the body was removed and cremated without unnecessary delay to avoid risks of contagion. They deny that the funeral ceremony was carried out at the early hours alleged by the prosecution, but claim that it in fact took place between 8 and 9 on the morning of the 2nd, before a large crowd of villagers who assisted in the funeral ceremonies such as they were. A great deal of evidence was produced to show on the one hand that the mode of disposing of the body at the cremation ground was in violation of the proper and customary procedure prescribed by the Hindu re-

ligion, while on the other hand it was sought to be proved that the procedure adopted was in accordance with the notions of advanced Sikhs.

I do not consider it necessary for the purposes of my judgment to deal with this class of evidence, nor do I consider it necessary to refer to the mass of testimony put forward by the prosecution to show the existence of grounds for enmity on the part of individual witnesses towards one another, or towards the accused on the one hand or the complainant and his family on the other.

The case for the Crown on the charge of murder depends, as the learned Government Advocate candidly admits, on the testimony of four persons, namely, Gahla, Rukna, Sayan, and Bahna. But the true vital witnesses are Gahla and Rukna. If we believe the story told by Gahla at the trial before the Sessions Judge, the fact that *Mussammat* Balwant Kour was shot dead with a pistol fired by the appellant Autar Singh is established beyond all question. And if Rukna's and Bahna's stories are also believed, there can be no reasonable doubt that the other two appellants are guilty of the offence of causing evidence of the crime to disappear. It is necessary therefore to scrutinize the testimony of the first two witnesses with the greatest care.

The account given by Gahla before the Sessions Judge is as follows :—

He had been employed by the appellant Autar Singh as his servant towards the end of September 1922 and was accustomed to stop at the appellant's house. On the night of the murder, *viz.*, the 1st of October, he was asleep in the courtyard of the house where the deceased and her husband were also sleeping some 7 or 8 paces distant, when he was awakened by the sound of a shot. He got up to find the deceased lying dead and her husband standing by her side with a pistol in his hand. Early in the morning of the 2nd, he went to his own house where he found his mother and his uncle Sayan. He told the latter that the appellant had shot the deceased with a pistol but he made no mention of the matter to his mother. A little later he returned to the house of the appellant and remained there three days and saw no one there during

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that time. He then went to the house of the appellant Kirpal Singh, which is in the same courtyard, and there stayed for a further 2 or 3 days, after which Kirpal Singh shut him up in a room for 3 days. After this he was taken by the three appellants to Jhindwali and sent back from there in charge of a *Teli* boy. Next he was taken to Indar Singh's threshing floor by Kirpal Singh and from there "a heavy man" took him to a hut where the *Thanedar* was. The *Thanedar* took down a statement from him and he was then taken to another village where a *Sahib* took down his statement. He adds that he was 2 or 3 days at Indar Singh's before he was removed from there. Indar Singh, I may mention, is a *lambardar* of Sherewala. He was called as a witness for the prosecution but although he gave some evidence, most of which was purely hearsay and should never have been admitted, he does not mention Gahla's name except a couple of times casually in cross-examination when he says "I saw Gahla at Sherewala when he was produced before the *Thanedar*" and again "Gahla was perhaps being examined at the time" the time being the 27th October. Gahla under cross-examination varies his statement in some details. Amongst other things he says that he was awake before he heard the shot and had been half-awake for about an hour. He also says that neither the deceased nor Autar Singh spoke before the shot was fired, and that the latter said nothing after firing the shot. He adds further, that the appellant and the deceased used to quarrel daily but he did not know what they used to quarrel about.

Now if we turn to the statement of this witness made before the District Magistrate, Colonel Coldstream, on the 16th of October or about 2½ months before the above evidence was given, we find he there says that he was awakened by the noise of a pistol shot and found that Autar Singh had killed his wife; that she was lying on her back and blood seemed to be coming from her body on to the bed-clothes. Autar Singh asked him if he was cold and put a *razai* over him and told him to go to sleep again, whereupon this remarkable boy promptly went to sleep. Next morning he went home, and in the morning his uncle Sayan came, and he told him what had happened.

It is at once seen that there are vital discrepancies between the two stories which I need not particularize as they speak for themselves.

The question as to the credibility of this supremely important witness Gahla does not depend only upon these two inconsistent narrations. This boy made a statement to the police on the 13th of October 1922, referred to in the judgment of the Court below. This statement, made 11 days after the morning of the alleged murder, is the first record of the matter taken by any person in authority, and its material part is as follows :—

"On the night of the occurrence I slept in the house of Autar Singh. At night I heard the report of a firearm. I got up. Autar Singh at once put a *razai* on me saying that I was perhaps cold. I then fell asleep. In the morning I heard that the wife of Autar Singh had died that night."

This is the only version of the affair that the learned Sessions Judge thinks can be relied upon with any safety. In fact the learned Judge states that he will only rely upon the evidence of this witness to this extent : that he heard a shot and that Autar Singh covered him with a quilt. I entirely agree that this is the only part of this boy's evidence that can be said to be consistent, but at the same time I consider it highly dangerous to hold on such evidence that a murder has been committed and that Autar Singh is the murderer.

Before leaving this witness, I should point out that whereas in his cross-examination in the Sessions Court he alleges that " the accused and the deceased used to quarrel daily " in his evidence before the Committing Magistrate he states that he not only heard of no quarrel between the accused and the deceased that night but that he had never heard of any quarrels between them.

It follows that if we cannot believe Gahla's story, the case for the prosecution is not improved by producing witnesses who say that they heard tales or rumours to much the same effect as Gahla's finally edited version given at the trial. Most of such evidence is obviously inadmissible as offending against the most elementary principles of evidence, and should never have been allowed to have been given.

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As to Sayan, his evidence is that Gahla told him much the same story that he told Colonel Coldstream. But, as I have already observed, if I cannot believe this version of Gahla's how does the production of a witness to say that Gahla told him the same tale help matters? If A tells me what I have reason to believe is a lie, the fact that B swears that A told him the same lie does not turn the lie into a truth. The learned Sessions Judge, however, attaches weight to Sayan's evidence as to what Gahla told him, though he does not believe the same story when Gahla swears to it in the witness box.

The witness next in importance to Gahla is Rukna. He purports to have heard a shot fired and to have seen shortly afterwards a human body removed in a bullock cart. According to this witness, when the body had been placed in the cart Harnam Singh came to the spot and asked whether there was any breath in the body and told the others to look carefully, whereupon the two persons in charge of the cart said; "*Bapu* there is no breath left, she was killed at once." This story is highly suspicious. The witness states that he was sleeping in the compound in question by permission of Harnam Singh himself, who gave him leave in person. Harnam Singh therefore knew he was there, and knowing that, and having just assisted in or come to know of the murder of his daughter-in-law, he deliberately supplies evidence of the crime to the strangers sleeping within his gate, and to make this evidence more definite and conclusive holds an incriminating conversation within ear shot of these strangers.

Moreover the rest of this witness' story is highly improbable and I am unable to believe that he and his friend Khaira were in that *haveli* at all on the night in question. The witness admits that he had never been to Sherewala in his life before or since this alleged occurrence. He was travelling with a couple of bullocks which he wished to sell. He says he sold one at Sammewali, but he does not suggest that he even attempted to sell the bullocks at Sherewala. It was not in his direct route and no satisfactory reason is

given why he should have gone out of his way to visit that village on that particular night.

Khaira's evidence is even more fantastic and is utterly unworthy of credence.

The only remaining witness whose evidence is other than hearsay is Bahna. This person claims to have seen three appellants on one occasion at an early hour in the morning standing in the cremation ground of Sherewala throwing fuel on a fire. He explains his presence there by saying that he came to discuss some criminal case with his brother. Both he and his brother live at Chibranwali, but the brother cultivates land at Sherewala and goes there on occasions for 4 or 5 days at a time. The witness selected one of these inconvenient occasions to seek his brother. The story has all the appearance of a clumsy fabrication.

In addition to these four witnesses the prosecution have put forward two persons, Balwant Singh and his father Gurmukh Singh, who have given evidence of certain statements alleged to have been made by the deceased sometime prior to the date of her death. The statements deposed to by Balwant Singh are said to have been made by the deceased 8 or 9 months before her death, and those narrated by Gurmukh Singh are alleged to have been made on the 21st September, 1922, that is about 10 days before the date when she is said to have been murdered.

Now, apart from any other objections which might be taken to the subject matter of these statements, it seems to me quite obvious that they could not be made evidence in this case, seeing that they are statements made by a person who is dead, and, therefore, could only be admitted if they could be shown to come within the provisions of section 32 (1) of the Indian Evidence Act.

The learned Government Advocate argues that they do come within these provisions being statements made by the deceased as to the cause of her death or as to the circumstances of the transaction which resulted in her death. I feel constrained to say that I find it

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hard to believe that such a contention can be put forward seriously. The sub-section relied upon by the Government Advocate only applies to the class of statements known as dying declarations, that is to say statements made by a dying person as to the injuries which have brought him or her to that condition, or the circumstances under which those injuries came to be inflicted. In the case before us, assuming that the statements in question were in fact made, they were made in the one case many months, and in the other many days, before the cause of death.

According to the prosecution the cause of death was a shot fired from a revolver. A statement made by the deceased as to the firing of that shot or the circumstances under which it came to be fired would, of course, be admissible in evidence. The statement must be made by the person when he is dying from the result of the injury which caused his death, otherwise it is obviously not a dying declaration. In England there is the additional requirement that the injured person must be aware that he is dying, and the rule only applies in criminal cases and to the case of homicide, but in India the Evidence Act has done away with these two qualifications. In Mr. Justice Stephen's History of the Criminal Law in England the following interesting commentary appears on this rule of evidence as applied to India :—

> "The rule is in many ways remarkable. It has worked, I am informed, ill in India, into which country it has been introduced together with many other parts of the English law of evidence. I have heard that in the Punjab the effect of it is that a person mortally wounded frequently makes a statement bringing all his hereditary enemies on to the scene at the time of his receiving his wound, thus using his last opportunity to do them an injury. A remark made on the policy of the rule by a native of Madras shows how differently such matters are viewed in different parts of the world. 'Such evidences' he said, ought never to be admitted in any case. What motive for telling the truth can any man possibly have when he is at the point of death ?"

I have dealt perhaps at too great length with this point of evidence but the earnestness with which it has been pressed by the prosecution has made me feel bound to deal with it more fully than I would otherwise have done.

The learned Government Advocate has also relied on sections 6 and 8 of the Evidence Act as authorising the admission of this evidence. These sections, however, have obviously nothing to say to the class of evidence under discussion. Section 6 merely enacts the principles laid down in Articles 3 and 8 of Stephen's Digest of Evidence, which deals with that class of evidence which comes under the doctrine of *res gestae* and has nothing to say to the admissibility of statements made by persons who are dead. Similarly, section 8 of the Evidence Act applies the principles explained by Mr. Justice Stephen in Article 7 of his Digest, and has no bearing on the topic under discussion.

For the reasons I have given I am clearly of opinion that the statements of *Mussammat* Balwant Kaur deposed to by the witnesses Balwant Singh and Gurmukh Singh, are inadmissible in evidence and must be ignored.

The result is that there is no evidence before us of motive for the crime, but even if a motive had been established that would not carry the Crown case any further, as we have come to the conclusion that the evidence does not satisfactorily establish that *Mussammat* Balwant Kaur was in fact murdered, however suspicious may be the circumstances surrounding her death and the disposal of her body.

I accordingly hold that the appeals of all three appellants must be accepted and the convictions and sentences of the Court below set aside.

BROADWAY J.—I agree. The appeals are accepted.

C. H. O.

Appeals accepted.