APPELLATE CRIMINAL.

Before Young C. J. and Rangi Lal J.

INAYAT KHAN (CONVICT) Appellant

versus

THE CROWN—Respondent.

1934

Oct. 29.

Criminal Appeal No. 1234 of 1934.

Indian Evidence Act, I of 1872, section 32 (1) : Dying declaration—Statement made by a person as to the cause of his death—he not being aware that he was dying when he made it—whether admissible—Difference between English and Indian Law pointed out.

Held, that under section 32, clause (1) of the Indian Evidence Act, a statement made by a person who is dead, as to the cause of his death, is admissible in evidence, even though he was not aware that he was dying when he made it, and in this respect the Indian Legislature has deliberately departed from the corresponding English Law on the subject.

Autar Singh v. *Crown* (1), dissented from.

Shivabhai v. *Emperor* (2), followed.

Appeal from the order of K. B. Sheikh *Din Mohammad, Sessions Judge, Jhelum, dated 29th August, 1934, convicting the appellant.*

BARKAT ALI and MOHAMMAD ASLAM KHAN, for Appellant.

DIWAN RAM LAL, Government Advocate, for Respondent.

The judgment of the Court was delivered by—

YOUNG C. J.—Inayat Khan and Mohammad Ayub were charged under section 302, Indian Penal Code, for the murder of one Fateh Mohammad. Mohammad Ayub was convicted under section 323, Indian Penal Code, and bound down under section 562 of the Criminal Procedure Code. Inayat Khan was convicted under section 302, Indian Penal Code, and

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sentenced to death. He has appealed through Mr. Barkat Ali and the case is also before us for confirmation of the death sentence.

The case for the prosecution was briefly as follows :—

A few days before this occurrence Inayat Khan and Mohammad Ayub were charged with the theft of gram from the field of the deceased. The matter was, however, dropped because they pleaded guilty to the charge and begged forgiveness. On the day of this occurrence Inayat Khan and Mohammad Ayub were grazing their cattle near a spring. Niaz Mohammad and Sher Khan, prosecution witnesses, who were helping Fateh Mohammad in reaping his crop, came to the spring for a drink of water. When they were returning Fateh Mohammad brought his cattle to the spring. When he saw the two accused there an altercation ensued and abusive language was used on both sides. Fateh Mohammad was carrying a hatchet, but either he dropped it or it was snatched from him by Inayat Khan. The latter struck a severe blow with it on Fateh Mohammad's head. The outcry raised by Fateh Mohammad attracted Niaz Mohammad and Sher Khan to the spot. They saw that Inayat Khan aimed another blow at the head of Fateh Mohammad but the latter received it on his hand. Mohammad Ayub then came and gave two stick blows to Fateh Mohammad. On the arrival of Niaz Mohammad and Sher Khan the two accused took to their heels. The injured man was taken to the hospital and his dying declaration was recorded by the Sub-Inspector. In this declaration he stated the facts mentioned above. Later on he made the same declaration before one Diwan Chand. A few days later the wounded man was sent to the hospital at Jhelum for treatment.

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On the 27th of May, 1934, he made another formal declaration in the presence of a 1st class Magistrate and died on the 31st of May in consequence of the injuries received by him.

The prosecution evidence consists of the declarations mentioned above and the testimony of the two eye-witnesses, Niaz Mohammad and Sher Khan. There is no reason whatever why the deceased should have falsely implicated the accused and desire to allow the real culprit to go unpunished. The learned counsel for the appellant urged that the declarations made by the deceased before the Sub-Inspector and Diwan Chand could not be said to be dying declarations and were, therefore, inadmissible in evidence. He relied on the remarks of Fforde J. in *Autar Singh* v. *The Crown* (1), in support of his contention. These remarks are to the effect that under the English Law a dying declaration is admitted only if the injured man was aware that he was dying from the result of the injury received by him. The Indian Evidence Act, however, does not use the expression " dying declaration " at all. Section 32, clause (1) of the Indian Evidence Act merely lays down that a statement made by a person who is dead is relevant, when the statement is made as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. It is clear that the Indian Legislature deliberately departed from the corresponding English Law on the subject. The wide words used in the clause referred to above show that it was intended to cover statements other than dying declarations strictly so called. The view taken by Fforde J. in the ruling cited

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above was dissented from by a Bench of the Bombay High Court in *Shivabhai* v. *Emperor* (1). We are clearly of opinion that, under the Indian Evidence Act, a statement made by a person who is dead, as to the cause of his death is admissible in evidence, even though he was not aware that he was dying when he made it. It is, of course, for the Court to consider in each case what value is to be attached to such a statement. In the present case the earlier declarations are fully supported by the later declaration which can undoubtedly be called a dying declaration. We are satisfied that these declarations are entitled to the greatest weight in this case.

The two eye-witnesses were certainly related to the deceased, but there is no reason why they should have come forward to depose falsely against the accused. It is noteworthy that the witnesses admitted that the hatchet was carried by the deceased and not by the accused. If they had been false witnesses there was nothing to prevent them from saying that Inayat Khan came armed with the hatchet. We are satisfied that the witnesses were telling the truth and that it was Inayat Khan who was responsible for the incised injuries found on the deceased.

According to the medical evidence the injury which proved fatal was a transverse linear wound, scalp deep, on the right side of the head. There was an extensive fracture of the skull $6\frac{1}{2}''$ long, $3''$ wide, involving the right temporal and the right parietal bones. An incised wound $\frac{3}{4}'' \times \frac{1}{4}''$ was also found on the back of the left hand. This wound supports the prosecution evidence that a blow was received by the

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deceased on his hand. Two marks of *lathi* blows were also found on the deceased.

It is perfectly obvious that a severe blow was delivered on the head and the weapon used was a deadly one. The counsel, however, pointed out that death in this case had taken place a month and four days after the commission of the offence. But this is quite immaterial. The medical witness clearly stated that the extensive fracture of the skull did not leave much hope of recovery, even if skilled treatment had been applied from the beginning. We are, therefore, satisfied that the appellant has been rightly convicted under section 302, Indian Penal Code.

It is, however, a question for consideration whether, under the circumstances of the case, he deserved the extreme penalty of law or not. The attack was certainly altogether unpremeditated. The accused came unarmed to the spot. It is admitted that strong language was used on both sides. There can hardly be any doubt that the accused was acting under the impulse of the moment. This is, in our opinion, not a case in which the sentence of death should have been passed. We accept the appeal and reduce the sentence to one of transportation for life.

A. N. C.

Appeal accepted in part.