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of mesne profits from the date of the suit, where there was a conditional decree passed in the plaintiff's favour. I think, therefore, that it is open to Courts to apply this equitable principle according to the facts of each case, and on the facts of this case, I think the plaintiff should get mesne profits not from the date of the transaction but from the date of the suit.

Decree varied.

Y. V. D.

APPELLATE CRIMINAL.

Before Mr. Justice Broomfield and Mr. Justice Wassoodew.

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EMPEROR *v.* MOTIRAM ALIAS TANA RAISING (ORIGINAL ACCUSED).*

Indian Evidence Act (I of 1872), sections 32, 8—Dying declaration—Questions put to deceased—Answers to questions by signs and gestures—Verbal statement—Gestures explained by questions—Conduct—Admissibility of evidence.

Owing to serious injuries inflicted on her throat, the injured woman lost all power of speech but was otherwise conscious and in full possession of her faculties. While she was in the dispensary where she had been taken, the Magistrate put certain questions to her and she answered them by signs and gestures, implicating the accused as her assailant. The record of the examination was reduced to writing as her dying declaration. On the following day the woman died.

The accused was afterwards tried for an offence of murder when the dying declaration was given in evidence. The trial ended in the conviction of the accused. The accused appealed.

When the matter came up for confirmation of the sentence, it was contended for the accused that the evidence in the form of the dying declaration was not admissible under section 32 of the Indian Evidence Act, 1872, or otherwise :—

Held, confirming the order of conviction and sentence, that the evidence was admissible, that it was reliable evidence, and that the conviction was not based entirely or even mainly on that evidence.

Queen-Empress v. *Abdullah*,[1] commented on;

Emperor v. *Sadhu Charan Das*,[2] *Chandrika Ram Kahar* v. *King Emperor*,[3] and *Ranga* v. *The Crown*,[4] referred to.

*Confirmation Case No. 9 of 1936 (with Criminal Appeal No. 191 of 1936).

[1] (1885) 7 All. 385, F. B.
[2] (1921) 49 Cal. 600.
[3] (1922) 1 Pat. 401.
[4] (1924) 5 Lah. 305.

Per Broomfield J. "Apart from authority, I must admit that I should greatly doubt whether Sita's gestures in reply to the questions put to her or the questions put to her taken together with her gestures in reply to them, could without straining of language be regarded as a verbal statement made by Sita within the meaning of section 32. On the other hand, apart from authority, I should myself have thought that her gestures as explained by the questions put to her would be relevant as conduct under section 8 of the Act, although I must admit that section 8 is a little difficult to understand, in particular the precise meaning of the expression 'influences or is influenced by any fact in issue or relevant fact'."

CONFIRMATION CASE (with Criminal Appeal) from an order of conviction and sentence passed by P. N. Moos, Sessions Judge, Nasik, in Sessions Case No. 9 of 1936.

Admissibility of dying declaration.

The material facts appear sufficiently from the judgment of Broomfield J.

L. P. Pendse, for the accused.

Dewan Bahadur P. B. Shingne, Government Pleader, for the Crown.

BROOMFIELD J. The charge against the accused Motiram was that on January 22, 1936, he committed murder by cutting the throat of Sitabai, wife of Bhika Kashiram. The facts leading to the crime were as follows. The accused Motiram and Bhika the husband of Sita are distant cousins and lived in adjoining houses in the village of Aundane in the Taluka of Satana. Motiram had lent money to Bhika and for about a year before the offence he had been carrying on an intrigue with Bhika's wife. Bhika naturally resented this and made up his mind to leave the village taking Sita with him. The accused then demanded the repayment of his loan and as it was not paid he gave both Bhika and Sita a severe beating. That was on January 19, 1936. On the 20th Bhika and Sita went to Satana. Bhika complained of the beating to the Head Constable who referred him to a Magistrate. No complaint was made to a Magistrate but they both went to the dispensary and had their injuries treated. The medical evidence shows that they were suffering from a number of contusions, abrasions

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and swellings. On the morning of the 22nd the Sub-Inspector received information to the effect that the accused had not only beaten Sita but had also wrongfully confined her. So he sent constable Vaman to Aundane to inquire into this allegation. Vaman left at about 8 o'clock in the morning and was accompanied by Sita and the accused. On reaching Aundane he went to the Police Patel's house and Sita and Motiram went to their own houses. Soon after Sita came to the Police Patel's house and the accused followed her and tried to force her to go back with him to compromise the dispute. As he was trying to drag her away Vaman intervened and released her. He then took the accused to his house but a few minutes later he came back and forcibly dragged Sita away. He took her to her house and shut himself in with her. The Police Patel and constable Vaman knocked at the door but found that it was chained from inside. Vaman looked through a chink in the door and saw the two sitting on the floor engaged in conversation. Finding, as he says, that without further assistance he was not in a position to release Sita he went back to Satana to report. As he says he reached Satana at 9-30 a.m. it must have been about 9 a.m. when he and the Police Patel saw the accused in the house. The events so far mentioned are deposed to by the complainant Bhika, i.e., for the days up to the 22nd, and by constable Vaman, exhibit 9, and Dadaji Patil, exhibit 23. About 11 a.m. on the same day the accused appeared at Satana and got a petition writer Purshottam, exhibit 24, to write a letter to the Sub-Inspector. This letter, exhibit 25, was as follows :—

"I, the applicant, Tana Raising Patil of Aundana, beg to inform you that the persons named below have conspired together and are molesting and beating me at my village Aundana. To-day my brother's wife Sita has been beaten very severely. She was dragged from her house and is still being beaten. They also threatened me, so I ran from there. Persons named below, viz. :—

(1) Dadaji Vedu, (2) Punda Bharsing, (3) Sukdeo Subhaji, (4) Dodha Fulsing, (5) Shambhau Bhausing, (6) Nathu Nanaji, (7) Tanya Mahar, (8) Tana Sutar, (9) Pundlik Dhonda, (10) Bayaji Mahadeo have conspired together and they are beating me and my brother's wife. Hence I request that I may be helped. Sita, my brother's wife,

has been beaten so severely that she is not expected to survive. I have informed this to you. Dated 22nd January 1936."

So that soon after 11 o'clock that morning the accused according to the statements made in this letter was aware of the fact that Sita had been severely if not fatally injured. The accused did not take this letter to the Sub-Inspector or to the Police Station but for some reason sent it by registered post so that it did not arrive till the next day. But meanwhile on receiving the report of constable Vaman and the Police Patel the Sub-Inspector had sent Bhika to Aundane directing him to inquire and lodge a complaint if the facts reported were true. Bhika says that he got to Aundane at 2 p.m. but it would seem that it must have been earlier than this. He found the door chained from outside and on opening the door and going in he found Sita lying on the floor with her throat cut. By her side lay a *vili*, a sort of chopper for cutting vegetables. Bhika looked the door and went straight to Satana to report what he had found. The Sub-Inspector registered the offence at 2 p.m. and then went to Aundane. He took Panch witnesses to Sita's house and according to the evidence when Sita was questioned as to who had cut her throat she contrived with a great effort to utter the word "Moti" which is the name of the accused. Afterwards she was taken to the Satana dispensary and a further dying declaration, exhibit 14, was recorded by the Sub-Judge and First Class Magistrate. By this time she had completely lost the power of speech but was conscious and in full possession of her faculties. She answered the questions put to her by signs. The medical evidence shows that Sita had, in addition to minor incised wounds just under the chin, an incised wound 4" long and $1\frac{1}{2}$" deep on the front of the neck which cut the windpipe completely through. The cause of death was pneumonia which supervened on the injury to the windpipe. She died on the evening of January 23. The accused was arrested on the same day and in due course was sent up for trial.

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He denied all knowledge of the offence. He denied having been in the village of Aundane at all on January 22. He denied having sent the petition, exhibit 25, and he told what was obviously a cock and bull story about the Sub-Inspector having given Rs. 25 to Bhika and Bhika giving the money to him and the Sub-Inspector thereupon getting him arrested for having stolen the money. Agreeing with two out of the four Assessors the learned Sessions Judge convicted the accused and sentenced him to death.

The learned advocate who appears for the accused in this Court has devoted a large part of his argument to the question of the admissibility of the dying declaration alleged to have been made by Sita to the Magistrate. The Magistrate was examined as a witness and has deposed to the questions which were put by him and to the manner in which Sitabai answered the questions by signs and gestures. The record of the examination is exhibit 14 and is as follows :—

Q. Who caused you the injury to your neck ?

A. She points out her finger to the accused Motiram alias Tana walad Raising Rajput of Aundane in front of her.

Q. How is the injury caused ?

A. She points out at the *vili* and the accused in front of her and makes signs with her finger on her neck as if cutting with *vili*.

Q. In what position you were when the injury was caused ? Were you standing or sitting ?

A. She pointed out at the accused by taking her right leg in her hand and touching her chest with her fingers and makes indication as if the accused fell her down by placing his foot on her and cutting her neck with *vili*.

Q. At what time this happened ?

A. By showing her ten fingers she makes an indication as if this happened at 10 a.m.

It is contended that this evidence is not admissible under section 32 of the Indian Evidence Act or otherwise. Section 32 provides that statements, written or verbal, of relevant facts made by persons who cannot be called as witnesses are relevant facts in certain cases, one of the cases being 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. Now, apart from authority, I must admit that I should greatly doubt whether Sita's gestures in reply to the questions put to her, or the questions put to her taken together with her gestures in reply to them, could without straining of language be regarded as a verbal statement made by Sita within the meaning of section 32. On the other hand, apart from authority, I should myself have thought that her gestures as explained by the questions put to her would be relevant as conduct under section 8 of the Act, although I must admit that section 8 is a little difficult to understand, in particular the precise meaning of the expression "influences or is influenced by any fact in issue or relevant fact".

There is no decision of this High Court on the point, but the authority of other High Courts is the other way. That is to say, it has been held that evidence of this kind is admissible under section 32, not under section 8. In the oldest case, *Queen-Empress* v. *Abdullah*,[1] the only case in which reasons have been given, the facts were that an injured person had been questioned at considerable length. A large number of questions had been put to her, some of them leading and some not leading, to which she had replied by various signs and gestures. The Sessions Judge had allowed the evidence to be given and the question which was referred to the full bench was whether the evidence was admissible. At the commencement of his judgment the learned Chief Justice said that he understood the question submitted to come to this :—

"When a witness is called who deposes to having put certain questions to a person, the cause of whose death is the subject-matter of the trial, which questions have been responded to by certain signs, can such questions and signs, taken together, be properly regarded as 'verbal statements' under section 32 of the Evidence Act or are they admissible under any other sections of the same Act ?"

The learned Chief Justice took the view that the evidence was admissible under section 32 and not section 8. Two of

[1] (1885) 7 All. 385, F. B.

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the learned Judges concurred with that answer. Mr. Justice Mahomed, though agreeing with the other Judges that the answer to the question referred in the form given to it by the Chief Justice should be in the affirmative, took the view that the case came under section 8 and not under section 32.

The argument which has been put forward before us is that the majority of the Judges in this Allahabad case made a distinction between (*a*) leading questions such as "Did A inflict the injuries on you?", answered by a nod, and (*b*) "Who inflicted the injuries on you?" answered by pointing to an individual present, and that they held that (*a*) was admissible as a verbal statement under section 32, and (*b*) was not. I can see no logical basis for such a distinction. As I say, my own view, apart from authority, would be that in neither case is there any verbal statement of the person questioned. But if (*a*) is to be regarded as a verbal statement, I can see no reason why (*b*) should not. At one passage in his judgment at p. 397, the learned Chief Justice said:—

"The same objection which is now made to the admission in evidence of these signs might equally be made to the assent given by a witness in an action to leading questions put by counsel. If, for example, counsel were to ask—'Is this place a thousand miles from Calcutta?' and the witness replied 'Yes', it might be said that the witness made no statement as to the distance referred to. The objection to leading questions is not that they are absolutely illegal, but only that they are unfair."

It would almost seem from this passage that the learned Judge was relying on the narrative form which is given to the evidence when recorded. But if any argument could be based upon that the same argument would apply in the case of the answers by signs or gestures which I have classified under the heading (*b*). If the question were "who inflicted the injuries?", and it was answered by pointing to a person named A, the record of the evidence, if it were recorded in a narrative form, would be "A inflicted the injuries on me".

In the course of the argument our attention was directed to section 119 of the Act, which says:—

"A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must

be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence."

This section has no direct relevance. It deals with statements of witnesses, i.e., persons who are actually examined in Court, whereas section 32 deals with statements made by persons who cannot be called as witnesses. But perhaps section 119 has some little importance as suggesting that the framers of the Act were prepared to include answers given by signs in the category of oral evidence. It cannot, of course, be suggested that section 119 only permits answers to be given by signs to leading questions.

I am by no means sure that the distinction which is now suggested was really intended by the learned Judges who formed the majority of the bench in *Queen-Empress* v. *Abdullah*.[1] In any case that decision has been followed in a number of cases of other High Courts, *Emperor* v. *Sadhu Charan Das*,[2] *Chandrika Ram Kahar* v. *King-Emperor*,[3] and *Ranga* v. *The Crown*,[4] and in none of these cases has any such distinction been made. *Emperor* v. *Sadhu Charan Das*[2] was in fact a case very similar to the present. The dying "declaration" which had to be considered merely consisted of evidence to show that three persons were made to stand before the injured person. She was asked to point out which of the three wounded her and she pointed out her husband as the person who wounded her. So far from taking the view that the question put to the woman should have been in a leading form in order to make the answer by signs admissible, the Court said that it was regrettable that the question was put in a form which suggested that the injury was homicidal. So that the Court apparently thought that it would have been better if the questions had not been put in a leading form at all. It would seem that since 1885 if not before it has been more or less settled law that dying declarations of this kind are admissible under section 32. Whether under section 32, or as I should myself

(1) (1885) 7 All. 385 F. B.
(2) (1921) 49 Cal. 600.
(3) (1922) 1 Pat. 401.
(4) (1924) 5 Lah. 305

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rather prefer to hold under section 8, I think there can be no doubt that the evidence is admissible.

But in the present case although we admit the evidence and although we consider that it is reliable evidence which lends support to the other evidence against the accused, we cannot agree with the suggestion of the learned advocate for the accused that the conviction is based entirely or even mainly on it. [His Lordship then dealt with the evidence in the case and concluded :] We take the view, therefore, that the learned Judge was fully justified in agreeing with the opinion of two of the assessors and in convicting the accused of murder. It is clearly a case in which there can be no sentence but the sentence of death. It was a brutal attack on a defenceless woman and there were no extenuating circumstances. The sentence, therefore, must be confirmed and the appeal dismissed.

WASSOODEW J. [After narrating the facts His Lordship continued :—] There is also evidence of the dying declaration of the deceased. The first indication of that declaration is given in the testimony of Bhika. In his examination-in-chief he distinctly stated that the deceased with great effort said that Moti, meaning the accused, had cut her. He resiled from that statement in his cross-examination in which the answer was extracted that he did not put her any question with regard to her assailant. The Police Sub-Inspector is, however, definite that the deceased in a low voice and with great effort uttered the word Moti when she was questioned as regards her assailant and she also pointed out the sickle with which she was cut. Before the Panch she repeated that accusation against Motiram. The dying declaration was then formally recorded by the Subordinate Judge and Magistrate, exhibit 13, at about 4 p.m. that day. The deceased was then unable to speak owing to the nature of her injury. But in reply to questions she indicated by signs that Moti who was present was her assailant, and that the instrument used was a sickle. It is reason-

able to suppose that the deceased was unable to speak after she had received the injury. That is also the view of the doctor. Objections have been taken to the admission of these dying declarations on the ground that they cannot be described as "verbal statements" within the meaning of section 32 of the Indian Evidence Act. That point has been considered by a full bench of the Allahabad High Court in the case of *Queen-Empress* v. *Abdullah*.[1] The learned advocate for the accused has tried to distinguish that case from the present one on the ground that the majority deciding that case restricted the admissibility of such declarations only to signs signifying assent or dissent by the dying person upon hearing leading questions put to him. It seems to me that the form of the question cannot affect the admissibility of the signs if such signs are rendered admissible under the Indian Evidence Act. Indeed the question whether such signs are admissible under section 8 or section 32 of the Indian Evidence Act is not free from difficulty; but I see no reason to differ from the views expressed by the learned Chief Justice in *Abdulla's* case[1] which has been followed without dissent by Patna, Calcutta and the Lahore High Courts since 1885. If the objection was to the interpretation of signs, then unquestionably the interpretation of the person recording the dying declaration would not be admissible. Here the record is full enough to permit the Court to interpret the signs independently. After carefully reading the declaration my own interpretation is that the accused was indicated in no mistakable way as the assailant of the deceased. The dying declaration, therefore, lends confirmation to the proof available, and I agree with my learned brother that the accused is guilty of the murder of Sita and that the sentence passed on him should be confirmed and his appeal dismissed.

Conviction and sentence confirmed.

Y. V. D.

[1] (1885) 7 All. 385, F. B.