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ABSTRACT

In my project I explain the meaning of Dying Declaration and its evidentiary values. Dying declaration is very important documentary evidence. It is hearsay evidence but even then it is given a lot of weight age in the court proceedings. Recording of dying declaration is very important. If it is recorded properly by the proper person keeping in mind the essential ingredients of the dying declaration it retains its full value. Missing any single ingredients of dying declaration makes it suspicious and offenders are likely to get the benefits of its shortcomings. Further I explained the purpose behind Dying Declaration and its value in front of the court.

KEYWORDS:

- Dying Declaration,
- Compos Mentis

INTRODUCTION

" A person, who is about to die, would not lie", " Truth sits on the lips of a person who is about to die"

Dying declaration is based on the maxim "*Nemo moriturus praesumitur mentire*" i.e. a man will not meet his maker with a lie in his mouth. Hearsay evidences are not given any weight age in the courts because the person who is giving this evidence is not telling his experiences but that of another person and who cannot be cross examined to verify the facts. Dying declaration is an exception to this rule because if this evidence is not considered very purpose of the justice will be forfeited in certain situations when there may not be any other witness to the crime except the person who has since died. Sometimes it the best evidence in such situations. Its admissibility is explained in the section 32 (1) of Indian Evidence Act. According to this section when the statement is made by a person as to the cause of his death, or 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. Such statements are relevant whether the person who made this was expecting death or not. ¹In English law he must be under expectation of death only then this declaration is valid. This declaration is valid both in civil and criminal cases whenever the cause of death comes into question. If we read the various judgments on the admissibility of dying declaration at times various judges have taken diagonally opposite views and different explanations have been offered though the motive in all have been to provide justice to the people. Main thing is that if these declarations seem trustworthy to courts these retain their full values. Most important point of consideration is that victim was in a fit condition of mind to give the statement when recording was started and remained in fit condition of mind till the recording of the statement finished. Merely stating that patient was fit will not serve the purpose. This can be best certified by the doctor who knows best about the condition of the patient. But even in conditions where it

¹1999 Cr.L.J 1122

was not possible to take fitness from the doctor, dying declarations have retained their full sanctity if there are other witnesses to testify that victim was in such a condition of the mind which did not prevent him from making statement. Medical opinion cannot wipe out the direct testimony of the eyewitness stating that the deceased was in fit and conscious state to make the dying declaration.² Second most important point to be considered is that it should not be under the influence of any body or prepared by prompting, tutoring or imagination. Even if any one of these points is proved then dying declaration is not considered valid. If it becomes suspicious then it will need corroboration. If a person has made more than one dying declarations and if these are not at variance with each other in essence they retain their full value. If these declarations are contradictory than these lose value. Best form of dying declaration is in the form of questions and answers. If it is in the form of narrations it is still good because nothing is being prompted and everything is coming as such from the mind of the person making it. If a person is not capable of speaking or writing he can make a gesture in the form of yes or no by nodding and even such type of declaration is valid. Whenever this is being recorded in the form of questions and answers precaution should be taken that exactly what questions are asked and what answers are given by the patient those should be written. It is preferred that it should be written in the vernacular which the patient understands and speaks. It is best that it is recorded by the magistrate but if there is no time to call the magistrate due to the deteriorating condition of the victim it can be recorded by anybody e.g. public servant like doctor or any other person. Courts discourage the recording of dying declaration by the police officers but if there is no body else to record it dying declarations written by the police officers are also considered by the courts. If these are not recorded by the magistrate it is better that signatures of the witnesses are taken who are present at the time of recording it. In burn cases usually it is debated the person is not capable of making dying declaration due to the effect of burns or due to the narcotic sedation given to treat burns. But Gupta and Jani have opined that neither effect due to burns nor the drugs used to treat burns victims conventionally affects the higher functions. Therefore they safely concluded that *compos mentis* is not affected either by burns or by its treatment³. If the person making it is imbecile or is of tender age and was incompetent to testify due to this reason, that dying

²2000 Cr.L.J. 3949

³V. S. De.sai, **Foreward** to A Short edition of Principles **and** Digest on the **Law of Bvidemce (19 1 t)** by M.Monir.

declaration would not be valid.⁴ As a measure of safety original dying declaration should be sent to the court like FIR and its Photostat should be kept in the case file⁵. It does not matter that the person has put a thumb impression or signed it if this is duly witnessed. But in the court question does arise if a person who can sign puts a thumb impression. If a literate person putting the thumb impression is in such a condition that he cannot sign e.g. he was lying in the bed and could not get up to sign it or it was inconvenient for him to put thumb impression due to his condition (intravenous drip on the back of hand) or injury e.g. injury on the right hand in a right handed person. In the absence of such conditions if there is thumb impression and this is not witnessed by disinterested persons a doubt may be created whether this was done after the person died to take revenge by some interested person. There is usually no time limit that dying declaration becomes invalid if the person died after many months after making the declaration. Cases are on record when it was considered valid after 4 months. Even the HISTORY given by the injured recorded by the doctor in the case file has been considered as dying declaration by the honorable Court if it is mentioned that the patient told in the history that incident occurred in such and such manner which was responsible for the death of the victim⁶. Hence it is important that if such history is written as narrated by the victim it should be recorded carefully, keeping in mind the mentioned finding of the court. First information report got recorded by the police has been taken as dying declaration by the Honorable Supreme Court, when the person did not

⁴Sir Rupert Cross, Evidence (1979) at 1.

⁵Section 60 of the Indian Evidence Act reads **as**. Oral evidence must be direct.-Oral evidence must, in all cases whatever, be direct; that is to say if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it. if it refers to **P** fact "hi& could **be** perceived by any other sense or in say other manner, it **must be** the evidence of a witness who says he perceived it by that sense or in that manner; if it refers to an opinion or **to** the grounds on whichthat opinion is held, it must be the evidence' of the person who holds that opinion on those grounds ; Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held. May be proved by the production of such treatise if the author is dead or cannot be found. Or has become incapable of giving evidence, or cannot be called as a witness without an amount o. delay or expense which the Court regards as unreasonable: Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

⁶C. D. Field, Law of Evidence, (10th ed.) 2191.

survive to get his dying declaration recorded⁷. But when patient remained admitted in hospital for sufficient days i.e. for 8 days FIR cannot be treated as dying declaration⁸. A suicidal note written found in the clothes of the deceased it is in the nature of dying declaration and is admissible in evidence under Section 32 of Indian Evidence Act⁹.

⁷W M, Beat, The Principles of the Law of Evidence, (9th ed.) 41.

⁸William Holds worth, 5 History of English Law, 183

⁹R. v. Woodcock, (1789) 1 Leach 534.

Section 32 (1) of Indian Evidence Act

A close scrutiny of section 32 (1) of Indian Evidence Act, it is vividly known when the statement is made by a person with regard to the cause of his death, or 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. Such statements are relevant irrespective of the person who made such declaration was expecting death or not. Thus, it is apt to say that admissibility of Dying declaration is explained in the section 32 (1) of Indian Evidence Act.

How a dying declaration should be?

There is no particular form of dying declaration. However, the best form of dying declaration is in the form of questions and answers. However, whenever a dying declaration is being recorded in the form of questions and answers precaution should be taken that exactly what questions are asked and what answers are given by the patient those should be written. A dying declaration may be in the following forms:

1. Written form;
2. Verbal form;
3. Gestures and Signs form. In the case "*Queen vs. Abdulla*"¹⁰, it was held that if the injured person is unable to speak, he can make dying declaration by signs and gestures in response to the question.
4. If a person is not capable of speaking or writing he can make a gesture in the form of yes or no by nodding and even such type of dying declaration is valid.
5. It is preferred that it should be written in the vernacular which the patient understands and speaks.
6. A dying declaration may be in the form of narrations. In case of a dying declaration is recorded in the form of narrations, nothing is being prompted and everything is coming as such from the mind of the person making it.

OBJECTS

- The presumption is " a person who is about to die would not lie".
- It is also said that " Truth sits on the lips of a person who is about to die".
- The victim is exclusive eye witness and hence such evidence should not be excluded.

Who may record a dying declaration?

- It is best that it is recorded by the magistrate.
- If there is no time to call the magistrate, keeping in view the deteriorating condition of the declaring, it can be recorded by anybody e.g. public servant like doctor or any other person.
- It cannot be said that a dying declaration recorded by a police officer is always invalid.
- If any dying declaration is not recorded by the competent Magistrate, it is better that signatures of the witnesses are taken who are present at the time of recording it.

Important facts to be remembered before recording Dying Declaration:

- The declaring was in a fit condition of mind to give the statement when recording was started and remained in fit condition of mind until the recording of dying declaration is completed.
- The fact of fit condition of mind of declaring can be best certified by the doctor.
- Yet, in case of where it was not possible to take fitness from the doctor, dying declaration has retained its full sanctity if there are other witnesses to testify that declaring was in fit condition of the mind which did not prevent him from making dying declaration.
- However, it should not be under the influence of any body or prepared by prompting, tutoring or imagination. If any dying declaration becomes suspicious, it will need corroboration.

- If a declarant made more than one dying declarations and if these are not at variance with each other in essence they retain their full value. If these declarations are inconsistency or contradictory, such dying declarations lose their value.

Now it is very essential to know the conditions for admissibility and evidentiary value of a dying declaration. The table given infra succinctly explains the same:

CONDITIONS FOR ADMISSIBILITY	EVIDENTIARY VALUE
1. The declarant, who gave dying declaration, should have died.	1. Evidentiary value of dying declaration will change from case to case according to fact and circumstances of each case.
2. Admissibility of dying declaration is explained in the section 32 (1) of Indian Evidence Act.	2. A dying declaration must be recorded in exact words spoken by the declarant.
3. When the statement is made by a person as to the cause of his death, or 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. Such statements are relevant whether the person who made this was expecting death or not. (See section 32 (1) of Indian Evidence Act).	3. If a competent Magistrate records a dying declaration in question and answer form, such dying declaration will have much evidentiary value.
4. The dying declaration must be complete ¹¹ .	4. If a dying declaration is recorded No sooner does the information receive than the dying declaration is recorded, tutoring by interested

¹¹ Yet, it was held that "Dying declaration incomplete as deceased not being able to answer further, held could be relied upon. (AIR 1956 SC 168). "

	persons can be avoided.
5. The cause of death must be explained by the declarant or atleastthe circumstances which resulted his/her death must be explained.	5. In case more than one dying declarations, all such declarations must be identical.
6. The declarant, who makes dying declaration, must be conscious and coherent.	6. In <i>Jai Prakash vs. State of Haryana</i> ¹² , it was observed that " a statement of victim which was recorded by the police officer in hospital. Later, such statement was taken to be a dying declaration.
7. The declarant must be sound state in mind.	7. In some cases, F.I.R was also considered as a dying declaration.
8. The cause of death of declaring must be in question.	8. Inconsistent dying declaration is no evidentiary value. (<i>SmtKamla vs State of Punjab</i> ¹³)
9. The declarant need not be under shadow of death. ¹⁴	9. Despite there is a dying declaration, Court seeks further corroboration.

12 (1998) 7 SCC 284

13 AIR 1993 SC 374.

14 State of Haryana vs Manageram& others (AIR 2003 SC 558)

RELEVANT CASE-LAW AS TO "DYING DECLARATION":

- In the case of *N Ram vs. State*¹⁵ the Supreme Court held that Medical opinion cannot wipe out the direct testimony of the eyewitness stating that the deceased was in fit and conscious state to make the dying declaration.
- In the case of *R v. Pike. C & P.*¹⁶ the Supreme Court held that If the person making it is imbecile or is of tender age and was incompetent to testify due to this reason, that dying declaration would not be valid.
- In the case of *State of Karnataka v. Shivalingappa*¹⁷ the Supreme Court held that As a measure of safety original dying declaration should be sent to the court like FIR and its Photostat should be kept in the case file.
- In the case of *State of Karnataka v. Shariff*¹⁸ the Supreme Court held that Even the "History" given by the injured recorded by the doctor in the case file has been considered as dying declaration by the honorable Court if it is mentioned that the patient told in the history that incident occurred in such and such manner which was responsible for the death of the victim
- But, in the case *State of Punjab v. Kikar Singh*,¹⁹ it was held that "when patient remained admitted in hospital for sufficient days i.e. for 8 days FIR cannot be treated as dying declaration".

¹⁵ AIR 1988 SC 912: 1988 Cri LJ 1485

¹⁶ 1829; 3: 598

¹⁷ 2001 (4) RCR (Criminal) 237 (Karnataka) (DB)

182003 CAR 219-228, (SC)

¹⁹ 2002 (30 RCR (Criminal) 568 (P & H) (DB),

- In the case "*State v. Maregowda*,²⁰ it was held that "A suicide note written found in the clothes of the deceased it is in the nature of dying declaration and is admissible in evidence under section 32 of Indian Evidence Act".
- In the case, *State of Gujarat v. RabriPanchaPunja*²¹, it was held that " It retains its full value if it can justify that victim could identify the assailant, version narrated by victim is intrinsically sound and accords with probabilities and any material evidence is not proved wrong by any other reliable evidence".
- Dying declaration becomes unreliable if it is not as per prosecution version. In the case of "*State of UP v. Madan Mohan*,²² the Hon'ble Supreme Court of India held:
 - a. It is for the court to see that dying declaration inspires full confidence as the maker of the dying declaration is not available for cross-examination
 - b. Court should satisfy that there was no possibility of tutoring or prompting.
 - c. Certificate of the doctor should mention that victim was in a fit state of mind. Magistrate recording his own satisfaction about the fit mental condition of the declarant was not acceptable especially if the doctor was available.
 - d. Dying declaration should be recorded by the executive magistrate and police officer to record the dying declaration only if condition of the deceased was so precarious that no other alternative was left.
 - e. Dying declaration may be in the form of questions and answers and answers being written in the words of the person making the dying declaration. But court cannot be too technical.

²⁰ 2002 (1) RCR (Criminal) 376 (Karnataka) (DB)",

²¹ Cri LJ. 1981;NOC: 171 (Guj)

²²AIR 1989 SC 1519"

- In the case of *Barati vs State Of U. P*²³, it was held that "There was no reason to discard the dying declaration made by the appellant to the police sub-inspector, The trial Court was wrong in rejecting the dying declaration to the police (F.I.R.) on the ground that the deceased had stated to the doctor that he had become unconscious after the occurrence. There was nothing in the statement recorded by the doctor to indicate that the deceased remained unconscious for a long time and as such was not in position to lodge the F.I.R. The fact that the language used in the dying declaration made to the doctor was rather chaste would not go to show that the said statement could not have been made by the deceased. As to the language used in the dying declaration there is nothing abnormal or unusual in the same person using colloquial language while talking to one person and using refined language while talking to another person.

²³ 1974 AIR 839, 1974 SCR (3) 570

DYING DECLARATION: A NEED FOR CHANGE

The substantive law defines the rights, liabilities, disabilities and extent of such rights, liabilities and disabilities etc. of the parties. Determination of rights, liabilities sought to be enforced by a party is adjudicated by a court of law in a judicial proceeding. The adjective law provides for the manner in which and the method by which such adjudication is carried on in arriving at a conclusion as the existence of the right or liability sought to be enforced. The law of evidence is the branch of law, which deals with proof which may, from a practical stand point, be stated as establishing the essential facts relating to the right claimed or liability sought to have enforced by proper legal means to the satisfaction of the court²⁴. The evidence of a fact is that which goes to prove it-something which would satisfy an inquirer of the facts' existence. Courts of law usually have to find that certain facts exist before pronouncing on the rights, duties, and liabilities of the parties and such evidence as they will receive in furtherance of this task is described as 'judicial evidence'.²⁵ Judicial evidence consists of the testimony, documents, things, and facts which a court may accept as evidence of facts in issue in a given case. In India the law of evidence as applied in judicial proceedings is mainly contained in the Indian Evidence Act 1872.

The general rule is that in order to prove fact best evidence must be furnished and direct evidence is the best evidence²⁶. Hence, as a general rule the admissibility of hearsay evidence is excluded though there are exceptions to it. The theory that hearsay evidence should not -be a Howled is-that the many 'impossible sources of inaccuracy and untrustworthiness which may be underneath bare untested assertion of a witness can best be brought to light and exposed, if they

²⁴Gupta BD, Jani CB. Status of compos mentis in relation to dying declaration in burn patients.JIAFM. 2004; 5(4):133 – 136

²⁵R v. Pike. C & P.1829; 3: 598.

²⁶Indian Evidence Act, 1872, Criminal Manual. 14th ed. Lucknow: Eastern Book Company, 2003: p15.

exist, by the test of cross-examination²⁷". Dying declaration is one of the exceptions to the direct evidence stated above and the necessity is for its admissibility. The victim, a prominent witness to the occurrence, being dead in the absence of any other witness exclusion of the dying declaration may lead to the acquittal of the accused resulting in miscarriage of justice. Hence the need for this exception. . It may be stated here that the law requires that the evidence in a court of justice should be given on oath. Oaths, however, it is well known , are not peculiar to courts of justice, nor are they even are incarnation of the municipal law-having been in use before societies were formed or cities built, and the most solemn acts of political and social life: bring guarded by their sanction". An Oath is an application of the religious sanction. It is calling the God to witness in aid of a declaration by man. Therefore, nothing but the belief in God, and that He will reward and punish us according to our deeds, is necessary to qualify a mall to take an oath. A witness who violates the sanctity of oath by narrating facts untrue to his knowledge exposes himself to be punished fix perjury. Furthermore, the testimony of a witness in a court is liable to be scrutinized and sifted by cross-examination, but the dying declaration is not subject to any of the above safeguards to guarantee its truth.

Under the English law the earliest statement of the rule that a declaration by a dying man as to the cause of his death is admissible evidence in a trial for murder or manslaughter is to be found in dictum of Coke in the Star Chamber. As to the principle underlying the acceptance of dying declaration Lord Eyre C. B. held that: The principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the part is at the point of oath, and when every hope of this world is gone; when every motive of falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn and awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in the court of justice. Thus, the rationale is that no one would wish to die with a lie on his lips. Under the English law dying declaration is admissible only in cases of homicide. "Where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration." Therefore, the dying declaration is not admissible in civil cases as also in criminal cases excepting prosecution for homicide. It can be safely said that the dying declaration has been allowed "to stand only upon the ground of public

²⁷State of Karnataka v. Shariff 2003CAR 219-228, (SC)

necessity of preserving the lives of the community to bring manslaughter to justice. For it often happens that there is no third person present to be an eye witness in other cases of felony, namely, the party injured is himself destroyed". At the same time the dying declarations are admissible on the sole ground that they were made in extremis.

The danger of impending death being equivalent to the sanction of an oath, the declarants are, therefore, considered as standing the same situation as if they were sworn. Hence, were the declarant living he would be incompetent to testify and his dying declarations are inadmissible.

The rules for admissibility of dying declaration in India are contained in section 32 (1) of the Indian Evidence Act 1872. It is a statement written or oral of a person who is dead and the same is with respect to the cause of his death or the circumstances resulting in his death. The statement is relevant in any judicial proceedings where the cause of death of that person is in issue. The second Para of the sub section makes it abundantly clear that the statement is admissible in civil as well as criminal proceedings and it is not necessary that the Person making the statement should be apprehending death at the time of making the statement Thus, it may be noted that, the Indian law as to admissibility of dying declaration makes a departure from the English law inasmuch as it is not limited to the cases of homicide and the restriction of expectation of death has not been recognized. The declaration is admissible irrespective of whether the declarant was in the danger of impending death at the time of making the statement. Thus, the basis which has been considered to have taken the place of Oath and ensuring the truthfulness of the statement has not been made a condition for its admissibility.

The court is under an obligation to closely scrutinize all the pros and cons of the circumstances while valuating a dying declaration since it is not a statement made on oath and is not tested on the touch stone of cross-examination. In *Ram Nath v. State of Madhya Pradesh*²⁸ the Supreme Court has held that: It is settled law that it is not safe to convict an accused person merely on the evidence of a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the maker of it

²⁸AIR 1976 2199 (SC)

might be mentally or physically in a state of compassion and might be drawing upon his imagination while he was making the declaration.

Thus, the Supreme Court has laid a stress, as a safeguard, on corroboration of the dying declaration before it is acted upon. But the same court later, in *Kushal Rao v. State of Bombay*²⁹ has held this observation to be in the nature of obiter dicta and observed that "it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of the conviction unless it is corroborated." In *Harbans Singh V. State of Punjab*³⁰ the Supreme Court has held that "it is neither a rule of law nor of prudence that a dying declaration requires being corroborated by other evidence before a conviction can be based thereon." In *State of U. P. v. Ram Sagar Yadav*³¹ the Supreme Court has observed: There is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless corroborated. The primary effort of the court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance, look for corroboration to the dying declaration.

Hence, as a rule of law or prudence there is no requirement as to corroboration of the dying declaration before it is acted upon. The basis for its admissibility is the conviction of the court that it is true. The court may look for the corroboration of a dying declaration if the circumstances under which it is made happen to be vague. The element of vagueness could crop up due to several reasons, namely, the inability of the dying man to perceive things properly due to pain or injury inflicted upon him or due to dwindling vision when he is on the verge of death. Another important factor that forms basis of the admissibility of a dying declaration is the morality or religious condition of the dying man, Truth sits on the lips of a dying man who has a sense of impending death. But if the dying man was under no expectation of death, could it be presumed that even then his religious or moral fiber would get strengthened impelling him to speak the truth. We strongly feel that it is not always the case. Truth would sit on the lips of a

²⁹A. I. R. 1985 S. C. 416.

³⁰AIR 1976 2199 (SC)

³¹A. I. R. 1985 S. C. 416.

dying man only if he is under expectation of death. The Indian law does not insist on the element of expectation of death while the English law does. We feel that Section 32 (1) be amended so as to include the word "expectation of death' to make its admissibility more in consonance with the reasons for which it has been enshrined in the Indian Evidence Act.

CONCLUSION

Keeping in view the above mentioned opinions of various courts it is suggested that whenever dying declaration is to be recorded it should be recorded very carefully keeping in mind the sanctity which the courts attach to this piece of evidence. It retains its full value if it can justify that victim could identify the assailant, version narrated by victim is intrinsically sound and accords with probabilities and any material evidence is not proved wrong by any other reliable evidence. It is perfectly permissible to reject a part of dying declaration if it is found to be untrue and if it can be separated. Conviction can be based on it without corroboration if it is true and voluntary. Dying declaration becomes unreliable if it is not as per prosecution version. This has been summed up the Supreme Court:

1. It is for the court to see that dying declaration inspires full confidence as the maker of the dying declaration is not available for cross examination
2. Court should satisfy that there was no possibility of tutoring or prompting.
3. Certificate of the doctor should mention that victim was in a fit state of mind. Magistrate recording his own satisfaction about the fit mental condition of the declaring was not acceptable especially if the doctor was available.
4. Dying declaration should be recorded by the executive magistrate and police officer to record the dying declaration only if condition of the deceased was so precarious that no other alternative was left.
5. Dying declaration may be in the form of questions and answers and answers being written in the words of the person making the declaration. But court cannot be too technical.

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