

LETERM MORTEM A BOON OR A BANE.

Adhiraj Bhandari & Bindya Singla

3rd Year, B.A.LL.B. (Hons.) | Army Institute of Law, Mohali

Dying declaration is a very vital element of the Indian Law. "Words said before death" is enshrined in the principle of "Leterm Mortem" & in a legal sense it is called 'Dying Declaration'. This research will be dealing with the minutest of details related to the dying declaration. Dying declaration being a very important evidence in Indian law is given in the Section 32 of the Indian Evidence Act of 1872.

Introduction

The Section 32 reads as follows:

Cases in which statements of relevant fact by person who is dead or cannot be found-statement, written or verbal, or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:

- (1) When it relates to cause of death.
- (2) Or is made in course of business.
- (3) Or against interest of maker.
- (4) Or gives opinion as to public right or custom or matters.
- (5) Or relates to existence of relationship.
- (6) Or is made in will or deed relating to family.
- (7) Or in document relating to transaction mentioned in Section 13, clause (a).
- (8) Or is made by several persons and expresses feelings relevant to matter in question.

A Dying Declaration is considered **Credible** and **Trustworthy** evidence as it is based upon the general belief that most people under the shadow of impending death don't lie.

1. Evidentiary Value of a Dying Declaration

In *K.R. Reddy v. Public Prosecutor*¹, evidentiary value of dying declaration was observed as under :-

“The dying declaration is undoubtedly admissible under section 32 & not being statement on oath so that its truth could be tested by cross-examination, the court has to apply the scrutiny & the closest circumspection of the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to connect a case as to implicate an innocent person, yet the court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe & identify his assailants & that he was making the statement without any influence or rancor. Once the court is satisfied that the dying declaration is true & voluntary, it can be sufficient to found the conviction even without further corroboration.”

In *Khushal Rao v. State of Bombay*², Apex Court laid down the following principles related to dying to dying declaration :

- (i) There is no absolute rule of law that a dying declaration cannot be the sole basis of conviction unless corroborated. A true & voluntary declaration needs no corroboration.
- (ii) A dying declaration is not a weaker kind of evidence than any other piece of evidence;
- (iii) Each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made.
- (iv) A dying declaration stands on the same footing as other piece of evidence & has to be judged in the light of surrounding circumstances & with reference to the principle governing the weight of evidence.
- (v) A dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, & as far as practicable in the words of the maker of the declaration stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory & human character.
- (vi) In order to test the reliability of a dying declaration the court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed in the night; whether the capacity of man to remember the facts stated had not been impaired at the time he was making the statement by circumstances beyond his control; that the statement has been consistent

¹ 1976 SCC (3) 618.

² AIR 1958 SC 22.

throughout if he had several opportunities of making a dying declaration apart from the official record of it; & that the statement had been made at the earliest opportunity & was not the result of tutoring by interested party.”

As a result, dying declaration is an exception to the Hearsay rule, which prohibits the use of a statement made by someone other than the person who repeats it while testifying during a trial, because of its inherent untrustworthiness. If the person who made the dying declaration had the slightest hope of recovery, the statement is not admissible into evidence.

Word “Dying Declaration” means a statement written or verbal of relevant facts made by a person, who is dead. It is the statement of a person who had died explaining the circumstances of his death. This is based on the maxim ‘**nemo mariturus presumuntur mentri**’ i.e. a man will not meet his maker with lie on his mouth.

The Apex Court in *P. V. Radhakrishna v. State of Karnataka*³ held that ‘the principle on which a dying declaration is admitted in evidence is indicated in latin maxim, **nemo mariturus presumuntur mentri**, a man will not meet his maker with a lie in his mouth.

In our country paramount consideration of the courts is to avoid miscarriage of justice as a result of which a special sanctity is attached to the dying declaration, as said in the case of *Allah Rakha K Mansuri v. State Of Gujarat*⁴, that the miscarriage of justice may arise from the acquittal of guilty is no less than from conviction an innocent. It is an exception to the principle of excluding hearsay evidence rule. Here the person (victim) is the only eye-witness to the crime, and exclusion of his statement would tend to defeat the end of justice. Indian law recognizes the fact that ‘a dying man seldom lies.’ Or ‘truth sits upon the lips of a dying man’ as said in the case of *Kachwwa v. State Of Rajasthan*⁵. The dying declaration is given special weightage as per section 32 as truth sits on the lips of a dying man s said in the case of *Sukhdev Singh v. State Of Delhi*⁶. Also in the case of *Sant Gopal v. State Of Uttar Pradesh*⁷, the court said that it is important to attach intrinsic values of truthfulness to the dying declaration. A dying declaration has a special sanctity attached to it since its given by a person on the dying bed and on the verge of dying and at that solemn moment a person is most unlikely to make any untrue statement as said by the court in the case of *Narayan Singh v. State Of Haryana*⁸. The court also held in the case of *Ram Bihari Yadav v. State Of Bihar & others*⁹, that the dying declaration is a substantive piece of

³ AIR 2003 SC 2859.

⁴ Criminal Appeal No. 1285 of 1998.

⁵ 1986 Cri LJ 306.

⁶ 2003 Cri LJ 4315.

⁷ 1995 Cri LJ 312.

⁸ AIR 1980 SC 1087.

⁹ AIR 1998 SC 1850.

evidence. Even the Supreme Court in the case of *Laxmi v. Omprakash*¹⁰ held that, The law is well settled that the Dying Declaration is admissible in evidence. The admissibility is founded on principle of necessity. A Dying Declaration, if found reliable, can form the basis of conviction. The dying declaration has a special weightage and sanctity attached to it because usually the victim is the only principal eye witness of the crime, and for the sake of justice and so that a criminal does not go free dying declaration are taken seriously and sometimes become the sole basis of conviction. The Apex Court took a view that under Indian law, for Dying Declaration to be admissible in evidence, it is not necessary that the maker of the statement at the time of making the statement should be under shadow of death and should entertain the believe that his death was imminent. The expectation of imminent death is not the requirement of law¹¹.

2. Admissibility & Reliability of a Dying Declaration

For the dying declaration to be admissible in the court of law:

- a) There is no dispute that the dying declaration can be sole basis for conviction, however such dying declaration has to be proved to be wholly reliable, voluntary, and truthful and further that the maker thereof must be in fit state of mind¹².
- b) Dying declaration should be such, which should immensely strike to be genuine and stating true story of its maker. It should be free from all doubts and on going through it, an impression has to be registered immediately in mind that is is genuine, true and not tainted with doubts. Further, it should not be result of tutoring¹³.
- c) It would be very unsafe and hazardous to sustain the conviction of the accused charged for offences under section 302¹⁴ read with section 34 of the same act on the basis of dying declaration recorded by special executive magistrate and police officer separately¹⁵.
- d) Where there were infirmities in declaration regarding state of deceased to make oral dying declaration and unnatural conduct of witnesses to whom dying declaration was given by the deceased which was disclosed t the police after two days of death of deceased, accused was entitled t the benefit of doubt¹⁶.

¹⁰ AIR 2001 SC 2383

¹¹ State of Haryana v. Mange Ram & Ors, AIR 2003 SC 558.

¹² Waikhom Yaima Singh v. State of Manipur, jt 2011 (6) sc 355: (2011) 4 scale 718: cr lj 2673.

¹³ Nanhar v. State of Haryana, jt 2010 (6) sc 196: (2010) 6 scale 178: 2010 cr lj 2450

¹⁴ Indian penal code 1860

¹⁵ Dada Machindra Chaudhary v. State of Maharashtra, 1999 cr lj 4009 (bom)

¹⁶ Ram Sai v. State of Madhya Pradesh, 1994 cr lj 138 (sc)

- e) Where the deceased victim knew assailants and gave their names to his family members at first opportunity, his dying declaration could be relied upon¹⁷.

The dying declaration which as of now is considered to be a very vital evidence is supposed to be scrutinized by the court and is essential for the party using it for their case to prove it beyond all reasonable doubt¹⁸ because in a case where dying declaration can form sole basis of conviction one thing has to be taken into account that the accused does not have the power of cross examination and also the dying declaration is an un corroborated piece of evidence.

If the dying declaration in the eyes of court is a piece of tutoring or is not trustworthy or is not credible or the person making it at the time of making the statement was not in a fit state, the dying declaration is inadmissible.

In the case of **Bhaju Karan Singh v. State of M.P.**¹⁹

It was held, if Dying Declaration had been recorded in accordance with law, was reliable and gave a cogent and possible explanation of occurrence of events, then Dying Declaration could be relied upon by Court and could convict the accused on such basis. The Dying Declaration can be corroborated with circumstance evidence.

The Principal on which Dying Declaration depends on:

(i) There is neither rule of law nor of prudence that Dying Declaration cannot be acted upon without corroboration.²⁰

(ii) If the Court is satisfied that the Dying Declaration is true and voluntary it can base conviction on it, without corroboration.²¹

(iii) The Court has to scrutinize the Dying Declaration carefully and must ensure that the declarations not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.

(iv) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.²² Dying Declaration was truthful and voluntarily made then same could be sole basis of conviction of Accused even in absence of any corroboration.²³ If the Court is satisfied that the Dying Declaration is true and free

¹⁷ Prakash v. State of Madhya Pradesh, air 1993 sc 65.

¹⁸ Mohan Singh v. State of Punjab, 1963 air 174

¹⁹ (2012)4scc327.

²⁰ Mannu Raj v. State of M.P, [1976] 2 scr 764.

²¹ State of U.P v. Ram Sagar Yadav, AIR 1985 sc 416.

²² Paniben v. State of Gujarat, 1992 sc 1817.

²³ Anil Kumar v. State of Delhi, 2014iad(delhi)53.

from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment in founding the conviction on such a Dying Declaration even if there is no corroboration.²⁴ Even in the pertinent case all the essentials have been fulfilled as it was an voluntary statement, it was not prompted or tortured and it was given in fit state of mind which makes the Dying Declaration more reliable.

3. Burden of Proof

Burden of proof- In *Binay Kumar and others v. State of Bihar*²⁵, It was held by the Hon'ble Supreme Court that, it is basic law in the criminal case in which the accused is alleged to have inflicted physical injury to another person, the burden of proof is on prosecution to prove that the accused was present at the scene and has participated in that crime.

The burden always lies on the prosecution to establish all the essential elements which go to prove the guilt and these elements must be established beyond reasonable doubt²⁶.

It's the duty of the prosecution to establish a prima facie case and to assert each and every fact that they are contending, the burden that arises from the pleadings depends upon the facts asserted or denied and is determined by rules of substantive or statutory law or by presumptions of law or fact. Such a burden never shifts²⁷.

As per **section 101**²⁸ Burden of proof – whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

As **Per section 102**²⁹ On whom burden of proof lies- the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

²⁴Tarachand Damu Sutar v. State of Maharashtra, 1962c(2) scr 775,
Munna Raja v. State of Madhya Pradesh, (1976) 3 scc 104.

²⁵ AIR 1997 SC 321.

²⁶ Public prosecutor v. Abdul Rahim, AT P.235, Sanna Eranna v. State of Karnataka, 1983 Cr L.J. 619; A Nagesia v. Bihar State, AIR 1966 S.C. 119; Rajendra Bahadur Singh v. State of M.P., 1990 (2) Cr.L.J. 42.

²⁷ Lakshmanu v. Venkateswarlu, AIR 1949 PC 278, Chunnial Kapur v. Prakash 1975 Rajdhani LR 110 (DEL), Ajit Pratap Narain Singh v. Nandini Satpathy, AIR 1975 Ori 184.

²⁸ Indian Evidence Act 1872.

²⁹ Ibid

Section 103³⁰ Burden of proof as to particular fact- the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In a criminal case, it is always the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt³¹.

Where an onus is placed upon him by statute to establish his innocence or some other fact, the extent of that onus is only to satisfy the jury of the 'probability' of that which he is called upon to establish, for he is not required to prove any fact 'beyond reasonable doubt'³². In *Mohan Singh v. State of Punjab*³³ it was observed by the apex court that the prosecution has to prove everything they contend beyond reasonable doubt.

Moreover, it's a fact that the occurrences as alleged by the prosecution did not take place. The accused were, therefore, entitled to the benefit of doubt and acquittal³⁴. The burden of proof as to any particular fact lies on that person who wishes the court to believe the same³⁵. Also if the prosecution fails to prove beyond all reasonable doubt the suit must be dismissed³⁶. The onus of proof is not discharged by producing evidence which is just as consistent with the allegation of the party on whom the onus of proof lies as with the allegation of the party whom the onus of proof lies as with the denial of the opponent³⁷. Where the undoubted evidence is consistent, both with the allegation of the plaintiff as well as with the denial of the defendant, the plaintiff must fail for the simple reason that he must establish the affirmative of the proposition which he asks the court to accept³⁸.

Although the circumstances may be suspicious, it is essential to take care that the decision of the court rests not upon suspicion, but upon legal grounds established by legal testimony³⁹.

4. Role of Courts

³⁰ Ibid

³¹ Sir John Woodroffe & Sayed Amir Ali's, LAW OF EVIDENCE Ed 17th, Volume 3 Pg 3608.

³² Canadian Criminal Evidence, second edn, p 416.

³³ 1963 AIR 174

³⁴ George v. State 1996 Cr Lj 1755.

³⁵ Pushparanui v. Paulini (1993) 1 LW 219(Mad)

³⁶ Appa v Subbunna ILR (1889) 13 Mad 60; Radha Mohan v. Kamaladhari AIR 1986 Pat 243; Ram Chandra Sahu v. Madhab Nayek AIR 1953 Cal 484.

³⁷ Gopinath Sarangi v. Ajharrul Haque AIRR 1027 Pat 225, 101 IC 119.

³⁸ Rameshwar Narain Singh v. Riknath Koeri AIR 1923 Pat 165; Sundarama Reddi v. State Of Andhra Pradesh (1928) 2 Andh WR 536, AIR 1959 AP 215; Swapan DDas Gupta v. The First Labour Court of West Bengal (1976) 1 Lab IC 202.

³⁹ Seth Manik Lal v. Raja Bijoy Singh AIR 1921 PC 69.

- i. 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.
- ii. Court should satisfy that there was no possibility of tutoring or prompting.
- iii. Certificate of 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.
- iv. Dying declaration should be recorded by the executive magistrate or a police officer only if condition of the deceased was so precarious that no other alternative was left.
- v. Dying declaration may be in the form of questions & answers & answers being written in the words of the person making the dying declaration. But court cannot be too technical.

5. Prescribed Form for Recording Dying Declaration

There is no particular form of dying declaration which is identified or admissible in the eye of law. But that must be functioning as a piece of evidence with the proper identification.

In a case, Apex court has also held that, "The crux of the whole matter was as to who had stabbed the deceased & why. These crucial facts are to be found in the dying declaration."

i. Question answer form

Where the dying declaration was not recorded in question-answer form, it was held that it could not be discarded for that reason alone. A statement recorded in the narrative may be more natural because it may give the version of the incident as perceived by the victim.

ii. Gestures & signs form

In the case of *Queen-Empress v. Abdullah*⁴⁰ Accused had cut the throat of the deceased girl & because of that, she was not able to speak so, she indicated the name of the accused by the signs of her hand, it was held by the full bench of the Allahabad High Court "If the injured person is unable to speak, he can make dying declaration by signs & gestures in response to the question." In another case The Apex Court observed that "the value of the sign language would depend upon as to who recorded the signs, what gestures & nods were made, what were the questions asked, whether simple or complicated & how effective & understandable the nods & gestures were."

iii. Language of statement

Where the deceased made the statement in Kannada & Urdu languages, it was held that the statement could not be discarded on that ground alone, or on the ground that it was recorded only in Kannada. Where the statement was in Telugu & the doctor recorded it in

⁴⁰ (1901) ILR 24 Mad 262.

English but the precaution of explaining the statement to the injured person by another doctor was taken, the statement was held to be a valid dying declaration.

iv. Oral Declaration

The Apex Court emphasized the need for corroboration of such declaration particularly in a case of this kind where the oral statement was made by the injured person to his mother & she being an interested witness. Such declaration has to be considered with care & caution. A statement made orally by the person who was struck down with a lathi blow on head and which was narrated by the witness who lodged the F.I.R. as a part of the F.I.R. was accepted as a reliable statement for the purpose of Section 32.

v. Incomplete Statement

The Apex Court had held that if a deceased fails to complete the main sentence (as for instance, the genesis or motive for the crime) a dying declaration would be unreliable. However, if the deceased has narrated the full story, but fails to answer the last formal question as to what more he wanted to say, the declaration can be relied upon.

In *Abdul Sattar v. Mysore State*⁴¹, it has been observed that even if the dying declaration is incomplete, the statement of the dying man in so far as it went to implicate the accused would be relevant.

6. Critical Analysis

i. Misuse of dying declaration by the relatives of the victim: The relatives of the victim sometimes act as the interested victims as they try to fabricate and change the facts and situation of the actual incident and mislead the court. This results in the miscarriage of justice.

ii. Falsely implicating due to enmity: The victim at times bring in between the enmity which may be going on between the victim and the accused. Which ultimately puts the accused behind the bar.

iii. Dying Declaration- Result of Faulty Investigation: The faulty investigation leads to miscarriage of justice since the police sometimes does the investigation with biasness and also many a times the police carries out hasty investigations as a result of which important factors related to dying declaration goes in vain.

iv. Interested parties usually the Relatives and Kin of the Deceased Are Interested Witnesses as a result of which there can be misuse of the dying declaration.

The dying declaration may be a result of tutoring by the relatives of the deceased this shall also lead to the miscarriage of justice.

⁴¹ A.I.R. 1956 SC 168

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:

- i. It is for the court to decide that dying declaration inspires full confidence since the maker of the dying declaration is not available for cross examination.
- ii. Court should satisfy that there was no possibility at all of tutoring or prompting.
- iii. Certificate of the doctor should mention that victim was is 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.
- iv. 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.
- v. 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.