A

SUKH RAJ

v.

REGINAM

B [COURT OF APPEAL, 1968 (Gould V.P., Hutchison J.A., Marsack J.A.), 14th, 22nd October]

Criminal Jurisdiction

Criminal law—evidence and proof—dying declaration—state of mind of deceased—
C *gravity of wounds—completeness of statement—admissibility.*

At the trial of the appellants for murder a dying declaration was received in evidence. When it was made the deceased was suffering from a ten inch wound on the back penetrating a lung, another four inch wound on the back, a long deep cut through the muscles of the right arm and a four inch wound on the chest. There were no injuries to the
D head. The statement was made about an hour after these injuries were received and while he was receiving a transfusion; he died from the wounds shortly afterwards. The opening words of the statement were "I am suffering very much and I will die."

Held: 1. The statement showed no sign of lack of lucidity or inconsistency with other circumstances in evidence and there was no reason
E to say that the trial Judge was in error in his assessment of the deceased's state of mind.

2. The finding of the trial judge that the deceased had a settled hopeless expectation of death was not based upon the gravity of his wounds alone as the deceased had used the specific words "I will die."

3. The words of the deceased were unambiguous; there was no relapse
F into unconsciousness in mid-sentence and no reason to say that the statement was incomplete.

4. While a judge, in summing up, should point out that a dying declaration has not been subjected to cross-examination, and the trial judge had merely used the word "untested" in relation to it, in all the circumstances of the case the absence of a fuller direction on this point was not
G material.

5. There was no ground to criticise the ruling of the trial judge, after a trial within a trial, that the dying declaration was admissible in evidence.

Case referred to: *R. v. Waugh* [1950] A.C. 203; 66 T.L.R. (Pt. 1) 554.

H Appeal from a conviction of murder in the Supreme Court.

A. D. Patel for the appellant.

B. A. Palmer for the respondent.

The facts sufficiently appear from the judgment of the court.

Judgment of the Court (read by GOULD V.P.): [22 October, 1968]—

The appellant was convicted in the Supreme Court of the murder on the 19th November, 1967, at Labasa, of Raghunandan s/o Ram Lakhan.

The deceased died of shock, loss of blood, and partial asphyxia following upon a number of wounds and other injuries, the most serious of which were inflicted with a cane-knife or knives. It was held by the Court that the appellant inflicted at least one of the major wounds, extending across the arm of the deceased onto his chest, and that in so doing he aided and abetted another person or persons in the infliction of grievous harm, pursuant to a common intention to do so.

There are only two grounds of appeal —

(1) that the verdict is unreasonable and cannot be supported having regard to the evidence; and

(2) that evidence admitted as a dying declaration of the deceased was inadmissible in law.

As to the first ground, we do not propose to say more than that we find nothing in it which would justify the Court in holding that the unanimous opinions of three assessors and the judgment of the learned trial Judge were wrong. The trial was a long one, and clearly many of the witnesses for the prosecution were unreliable in that they had made previous statements at variance with their sworn evidence. But nothing of this was overlooked by the trial Judge in his direction to the assessors. He warned them generally and in relation to specific witnesses of that aspect of the case, and, in relation to the most important witness, quoted from his earlier statement, which did not contain all of the allegations he made against the appellant in his evidence. There has been no challenge on the appeal to the summing-up in any matter of law and we are satisfied that it fairly and adequately dealt with the evidence and questions of fact; it was a case in which the opinions of the assessors, properly directed as they were, were of high importance. This ground of appeal therefore fails.

The dying declaration was made in hospital a little over an hour after the deceased had received his fatal injuries. The most serious was a ten inch wound on the back, penetrating the right lung; there was another four inch wound on the back, a long deep cut through the muscles of the right arm to the bone, and a four inch wound on the right chest probably from the same blow. Crown Counsel has pointed out that there were no injuries to the head.

The learned Judge held a trial within a trial in the absence of the assessors and heard legal argument before deciding to admit the evidence. In his ruling he said —

"I find that the Crown has proved beyond all reasonable doubt that at the time of making this declaration the deceased was in imminent danger of death and had abandoned any hope of recovery. Where, as in this case, a gravely wounded man is dying, and although conscious at the relevant time, able but to speak a few words, it is only

to be expected that his indication of a "settled hopeless expectation of imminent death" will be a concise one. Here the words, "I will die" constituted, in all the circumstances as I find them established, a positive affirmation by the dying man that he had abandoned any hope of living. He said affirmatively and positively, "I will die," simply because he knew he would die within a very short distance of time, as he did. No doubt great pain brought home to the dying man the hopelessness of his plight. He was not merely expressing a sense of danger of death, but a settled hopeless expectation of it. I rule, therefore, in favour of the Crown on this issue."

The content of the deceased's statement, taken from the evidence of Dt./Const. Mishra and set out in the summing-up is as follows —

"He testified that he spoke to Raghunandan when he was lying on a hospital trolley near the Outpatients Department at Labasa Hospital on the 18th November at 11.06 p.m. He asked him, "How are you Raghu?". He replied, "I am suffering very much and I will die." The Detective Constable asked him, "Who hit you?" He replied, "Sukh Raj." The Detective Constable asked, "Only Sukh Raj hit you?". He replied, "I saw him hitting me with knife." That, the Constable stated, was all Raghunandan said. He then closed his eyes and although the Constable called his name two or three times he did not reply."

The deceased died very shortly afterwards.

The main burden of the challenge on appeal to the admissibility of this evidence, is that owing to the severe shock from which the deceased must at that time have been suffering, he may not have been rational at the time. Certainly he was near death and was, in fact, receiving a transfusion at the time, but the trial Judge had to evaluate the evidence before him and the statement, as detailed in evidence shows no sign of lack of lucidity or inconsistency with other circumstances of which there was evidence. As has been pointed out, there were no head injuries. Counsel for the appellant has indicated that the last answer of the deceased is not strictly responsive to the constable's question but we are unable to attach sufficient weight to this to say that it shows the trial Judge to have been in error in his assessment of the deceased's state of mind.

Some of the authorities quoted by counsel for the appellant were relied upon as showing the danger of holding, from the grave nature of the wounds alone, that a dying person held the "settled hopeless expectation," which alone would render a statement admissible. That question does not arise here, as the learned Judge had before him the specific words of the deceased, "I will die." The learned Judge was fully entitled to consider the nature of the injuries as one of the factors leading him to his decision.

A further matter, mentioned first by Crown Counsel, was the question of the completeness of the statement by the deceased. Counsel for the appellant urged that he could have been expected to continue to describe the events which resulted in his fairly numerous injuries. This is a most speculative matter and the deceased, in his weak state, might well say only what was uppermost in his mind; the words used were unambiguous, there was no question of relapse into unconsciousness in mid-sentence, or

any evidence of a desire to say more. We do not think that the present case is comparable to the circumstances in *Waugh v. R.* [1950] A.C. 203 where the deceased fell into a coma as he was speaking and the declaration was, on the face of it, incomplete. A

There is one respect in which the summing-up is open to some criticism, though it was not raised by counsel for the appellant. It is well settled, and it was repeated in *R. v. Waugh* (supra) that it should be pointed out to a jury that a dying declaration has not been subject to cross-examination. We were informed by counsel for the Crown that both counsel in the Supreme Court did address the assessors on the absence of opportunity to cross-examine. The trial Judge in summing-up, merely used the word "untested" in relation to the declaration but, in the light of counsel's addresses, that word may well have conveyed more to the minds of the assessors than it normally would. We think there should have been a fuller direction in this respect, but the assessors were told that the question of weight was for them to consider and reminded of the condition of the deceased at the time. In all the circumstances we think the lack of a fuller direction was not material. B C

We find no ground to criticise the ruling of the learned Judge upon the trial within a trial and in the result this ground of appeal fails.

The appeal is accordingly dismissed.

Appeal dismissed.