CASES

DECIDED BY

THE SUPREME COURT OF CYPRUS

IN ITS ORIGINAL JURISDICTION AND ON APPEAL FROM THE ASSIZE COURTS, DISTRICT COURTS AND TURKISH FAMILY COURTS

AND

CASES DECIDED BY THE DISTRICT COURTS IN WHICH THERE WAS NO APPEAL

[BOURKE, C.J., and ZEKIA, J.]

1958
Dec. 29
1959
Jan. 5

ERDOGHAN DJEMALI, *Appellant*,

v.

THE QUEEN, *Respondent*.

(*Criminal Appeal No.* 2216).

ERDOGHAN DJEMALI *v.* THE QUEEN

Evidence in criminal trials—Dying declaration—Principles of English Law applicable—Evidence Law, Cap. 15, *Section* 3—*Dying declaration partly obtained by questions and answers—Whether admissible—Dying declaration made in response to leading questions—Whether admissible—Weight of—Proof of dying declaration—Police Officer refreshing his memory from a note taken at the time—Note-book need not be put in evidence.*

The appellant was convicted (and sentenced to death) by the Assize Court sitting at Paphos of the murder of his brother. The trial Court relied, *inter alia*, on a dying declaration made by the deceased to a police officer. It was argued on appeal that the dying declaration was inadmissible in evidence on two grounds: (1) it has not been established that the deceased, at the time he was making his statement, was in the settled and hopeless expectation of death; (2) the statement was obtained by questions and answers. It was further argued that the dying declaration was wrongly proved by secondary evidence and that it should have been proved by the production of the note-book in which the police officer recorded the declaration. On appeal:

Held: (1) On the evidence, the deceased, at the time he was making his declaration, was in the settled and hopeless expectation of death. The principles of English Law being applicable under the Evidence Law, Cap. 15, Section 3,* the statement was therefore, rightly admitted in evidence as a dying declaration.

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*Section 3 reads as follows : "Save in so far as other provision is made in this Law or has been or shall be made in any other Law in force for the time being, every Court, in the exercise of its jurisdiction in any civil or criminal proceeding, shall apply, so far as circumstances may permit, the Law and rules of evidence as in force in England on the 5th day of November, 1914."

(2) Although the police officer has put some questions to the deceased, still not all the declaration was made in answer to questions; there being, on the other hand, no suggestion that those questions were leading ones, clearly the declaration was not rendered inadmissible on that ground.

R. v. Mitchell 17 *Cox* 503, *not followed.*
R. v. Smith 10 Cox 82 and the authorities quoted in *Phipson, On Evidence*, 9th edn. p. 333, *followed.*

(3) The police officer who proved the dying declaration was testifying before the trial Court to the best of his recollection, refreshing his memory from the note he took at the time. This was not an instance of a formal document affording the best evidence of its contents. Therefore, the dying declaration was not proved by a secondary evidence.

Appeal dismissed.

Cases referred to :

R. v. Mitchell 17 *Cox* 503.
R. v. Smith 10 Cox 82.
And the authorities quoted in *Phipson*, On Evidence, 9th edn. p. 333.

Per Curiam: Dying declarations are not rendered incompetent merely by being made in response to leading questions, though their weight may be thus impaired:

Phipson, ubi supra.

Appeal against conviction.

The Appellant was convicted (and sentenced to death) on the 18th November 1958 by the Assize Court sitting at Paphos (Zannetides, J., Zenon P.D.C., and Attalides, D.J., Criminal Case No. 1252/58) of the murder of his brother, one Moustapha Djemal, on the 18th April 1958, under the Criminal Code, Cap. 13, Sections 198 and 199.

Dem. Stylianides for the Appellant.

L. Loizou for the Crown.

Cur. adv. vult.

Only the portion of the judgment relevant to the issues of the dying declaration is reported.

BOURKE, C.J., after dealing with some other aspects of the case went on : At about 2.45 on the morning of the 18th April Sub-Inspector Kemal Osman got to the hospital and saw the deceased to whom he was known. The deceased made a statement to the police officer which was admitted in evidence as a dying declaration. We have no doubt that the lower

Court was right in holding that such a declaration is admissible under the law in Cyprus having regard to section 3 of the Evidence Law, Cap. 15, and no question now turns upon that. Sub-Inspector Kemal Osman recorded in his notebook what the deceased said to him and he was allowed to refresh his memory. The statement was:—

> "Erdogan burned me ; my brother Erdogan. I saw him with my own eyes. I saw him on the roof of Kiamil. He came to me and burned me because of a vineyard. He broke the panes and set the fire ; I saw him with my own eyes. I am dying. I cannot speak".

Five minutes later he died in the presence of the police officer.

It is argued on this appeal that this statement was inadmissible in evidence as a dying declaration on three grounds. First, it is said that it was not established that at the time the deceased was in the settled and hopeless expectation of death. We find no substance in this. The deceased was in an appalling condition, as the photographs alone reveal to any layman, and in the greatest pain so that he asked for poison to put him more quickly out of his misery. Nevzat, whose evidence was clearly accepted, testified that at the hospital the deceased "was telling him (Nevzat) that he was about to die". Dr. Costas Vrachimis gave evidence that he knew he was going to die and knew that there was no hope. He told Sub-Inspector Kemal Osman that he was dying and in fact he died within a few minutes. We consider that there was sufficient material to indicate the mental condition of the deceased and to show that the declaration was made in extremity, when the deceased was at the point of death, when every hope of this world was gone and he believed himself to be dying — a situation, in short, when the mind is induced to speak the truth.

Secondly, it is submitted that the declaration was inadmissible on the ground that it was obtained by questions and that the questions and answers should have been written down and proved in that form. Sub-Inspector Kemal Osman said in cross-examination that he put some questions to the deceased because he was speaking with difficulty and that not all the declaration was made in answer to questions. The matter was not pursued further by Counsel for the defence and there is no suggestion that they were leading questions. Reliance has been placed upon *R. v. Mitchell* 17 Cox 503. But that strictness has not been required in other cases - see, for instance, *R. v. Smith* 10 Cox 82, and the authorities mentioned in Phipson, On Evidence, 9th edn. p. 333. Moreover, such declarations are not rendered incompetent by being made even in response to leading questions, though their weight may be impaired (Phipson *ib.* p. 333). Clearly the

declaration was not rendered inadmissible in evidence on this ground.

Thirdly, it is argued that the declaration was wrongly proved by secondary evidence and that it should have been proved by production of the police officer's note-book. The answer to that is that it was not proved by secondary evidence. The police officer was testifying to the best of his recollection, refreshing his memory from the note he took at the time. It was not an instance of a formal document affording the best evidence of its contents.

Appeal dismissed.