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# The Plausibility of Dying Declaration under the Indian Evidence Act as an Exception to the Rule against Hearsay

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## ABSTRACT

*The Law of Evidence, compiled and consolidated in the Indian Evidence Act 1872, is one of the most efficacious stanchions fortifying the whole corpus juris of procedural law. This epoch-making pre-independent legislation which clarified the rules regarding the admissibility of evidence was essentially the contribution of the British Empire in India. Every case which comes before the court is a crusade for justice in which truth is the paramount quest. The most important role of a judge as a benefactor of justice is to seek and unravel the truth in respect of every case which comes before him. He applies his judicial mind to analyze the facts and sifts and weighs the grains of relevant facts to corroborate the narrative of the case. A dying declaration is a unique species of evidence as being the statement made by a man who is dead. There is, therefore, no occasion during the trial to consider the fidelity and detect falsehood of the dying declaration by the test of cross-examination. Moreover, the significance and the solemnity of the occasion in which a dying man speaks about the causes or circumstances leading to his death makes it extremely crucial for the judge to consider such a statement in evidence to impute criminal liability on the accused. This certainly invites judicial dichotomy as the mind of the judge is tossed between the need to consider the statement on the one side and the doubtfulness of basing conviction upon the dying declaration on the contrary side. The present article seeks to study the conditions under which a dying declaration can be admitted in evidence, the form and procedure of doing so and, also to reflect upon the judicial interpretations given by the courts in a plethora of cases relating to dying declarations which can act as a beckoning light for the trial judge to determine the guilt or innocence of the accused.*

**Keywords:** *Dying declaration, Doctrine of Necessity, Evidentiary value of dying declaration.*

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## **I. INTRODUCTION**

A dying declaration is a piece of indirect evidence and an exception to the rule against the admissibility of hearsay evidence. According to the golden rules of evidence, one of the principles governing the admissibility of evidence in courts of law is that oral evidence must be direct and hearsay evidence is not admissible. The exclusion of hearsay evidence is justified on the ground that any statement which the court considers and relies upon for examination in a regular way must be given on oath and its verity must be capable of being tested by cross-examination so that the possible sources of inaccuracy and untrustworthiness can be exposed in the best possible manner. However, Section 32 of the Indian Evidence act 1872 enumerates eight exceptional circumstances which constitute an exception to the rule against hearsay evidence. Section 32(1) of the Evidence Act lays down the law relating to the dying declaration. “It is essential to the admissibility of dying declaration, first, that when they were made the declarant should have been in the actual danger of death, secondly, that he should then have had a full apprehension of his danger, and lastly, that death should have ensued. The length of time which elapsed between declaration and death of the declarant furnishes no rule for the admission or the rejection of testimony, though in the absence of better evidence, it may serve as one of the exponents of the deceased’s belief that his recovery was or was not impossible<sup>2</sup>”.

## **II. DYING DECLARATION**

A dying declaration is a statement made by a person who believes that death is imminent relating to cause or circumstances resulting in that person’s imminent death. A statement made by a dying person as to the cause of his death has been accorded a special sanctity by the legislature by enacting Section 32 of the Evidence Act. Although the expression dying declaration has not been statutorily defined under the Evidence Act, a reading of sub-section (1) of Section 32, illuminates the nature of a dying declaration. “A dying declaration is a statement made by a person who is dead; as to the cause of his death or as to any circumstances of the transaction which resulted in his death, in cases in which his death comes into question, such statements are relevant under Section 32 of the Evidence Act, whether the person who made them was or was not, at the time when they were made, under the expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes into question<sup>3</sup>”.

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<sup>2</sup> JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE 458-59 (12<sup>th</sup> ed.)

<sup>3</sup> Ram Bihari Yadav v. State of Bihar, AIR 1988 SC 1850.

Thus, dying declarations are statements made by the deceased as to the injuries which culminated in his death or the circumstances under which the fatal injuries were inflicted. For instance, if A having been brutally assaulted by B succumbs to his injuries and shortly before his death makes a statement holding B responsible for the injuries inflicted on him, the statement of A is admissible as a dying declaration at the trial against B as it relates to the cause of his death. Dying declarations under Section 32 of the Evidence Act covers both homicidal and suicidal deaths, provided the statement gives sufficient notice relating to the cause of death or the circumstances leading to death.

### III. REASONS FOR THE ADMISSIBILITY OF DYING DECLARATION

In the words of Mathew Arnold, “Truth sits on the lips of a dying man<sup>4</sup>”.

A dead person cannot be called to the witness box to depose facts. The two main reasons behind the acceptability of dying declaration are principally based on the doctrine of necessity and the solemnity of the occasion in which they are pronounced.

**The Doctrine of Necessity-** In many a case, the victim or the deceased is generally the only principal eyewitness to the crime. Therefore, the rule of necessity requires that if his statement is excluded as indirect, it might cause an impediment to justice<sup>5</sup>. When there is no direct evidence available and the case rests wholly upon circumstantial evidence, then the statement given by the deceased as to the cause of his death, being the only evidence available under the given circumstances becomes extremely crucial for linking the missing beads of pearl in the chain of evidence.

**Nemo mortiturus Praesumitur mentire-** This maxim of law means that A man will not meet the Maker with a lie in his mouth. There is a presumption that when a person is conscious of his approaching death or when he has resigned from the hope of survival, then at such a solemn moment he is most unlikely to make an untrue statement. In other words, when a person is facing imminent death, every motive of falsehood is obliterated, and the mind is overwhelmed by powerful ethical reasons to speak nothing but the truth. In such a case, the shadow of impending death creates a sanction equal to the obligation of an oath; a dying declaration is almost sacrosanct<sup>6</sup>. The pall of imminent death itself becomes a guarantee of the truth of the declaration as to the cause or circumstances resulting in his death. The requirements of oath and cross-examination are therefore dispensed with.

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<sup>4</sup> Babulal v. State of Madhya Pradesh, AIR 2004 SC 846.

<sup>5</sup> Radhakrishna v. State of Karnataka, AIR 2003 SC 2859 (para 11).

<sup>6</sup> Ram Mani Yadav v. State of U.P. (2003 CrLJ 4131); Arjun Kushwah v. State of M.P., 1999 CrLJ 2538(MP).

However, it is a rule of prudence that dying declaration should be admitted in evidence with utmost care and caution because experience shows that often the dying man utilizes the last opportunity to implicate all his enemies and thus wreak a sweet vengeance on them.

#### IV. CONDITIONS FOR THE ADMISSIBILITY OF DYING DECLARATION

- 1) For the dying declaration to be admissible in evidence, the person furnishing the dying declaration must have died. If the declarant chances to survive then that statement would not become admissible as substantive evidence under Section 32(1) of the Evidence Act but it might be relied upon under Section 157 to corroborate his testimony when examined and also under Section 153 for contradiction. It can also be used as an admission under Section 23 of the Evidence Act or is relevant and admissible as *res gestae* under Section 6 of the Evidence Act.
- 2) The dying declaration must be a statement. It may be either oral or in writing. An oral or verbal declaration may also include gestures or signs such as a nod or a shake of the head made by a dying man who is unable to communicate otherwise than by words in reply to the questions put to him.
- 3) The injuries inflicted on the deceased must be the proximate cause of his death. If the deceased person dies not on account of the injuries inflicted on his body but because of some other reasons or ailment the dying declaration would not be admissible.
- 4) The dying declaration must refer to the circumstances which have a nexus- proximate or distant, direct or indirect with any of the circumstances of the transaction which ended up in the victim's death.
- 5) The dying declaration must be complete, from the point of view of the declarant. In *Cyril Waugh v. King*<sup>7</sup>, the dying declaration was prima facie incomplete and no one could tell what the deceased was about to add further. The court declared that the dying declaration was inadmissible. However, if the incomplete dying declaration invariably points out the guilt of the accused then there is no harm in relying upon such an incomplete declaration<sup>8</sup>.
- 6) The dying declaration must be taken as a whole. It cannot be rejected in part and retained in part. In *Tafiz Parmanik v. Emperor*<sup>9</sup>, it was observed that if a statement is admissible, it must either go in as a whole or not at all.

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<sup>7</sup> [1950 ALJ 412 (PC)].

<sup>8</sup> *Muniappan v. State of Madras* AIR 1962 SC 1252.

<sup>9</sup> AIR 1930 Cal 229.

- 7) The dying declaration should be precise. It need not contain the detailed version of the occurrence for a declarant who is under extreme physical trauma and mental agony cannot reasonably be expected to cover the minutest details of the incident.
- 8) The person who is making a dying declaration must be competent. He must possess the ability to understand the questions put to him and give rational answers to them in terms of Section 118 of the Evidence Act.
- 9) For placing implicit reliance on the dying declaration, the court must be satisfied that the declarant was in a fit mental condition to narrate the correct facts of occurrence. If the capability of the declarant to recount the facts is found to be impaired, it is extremely unreliable and hence such a dying declaration should be rejected. He should be conscious of the surroundings and of the person who attacked him. Thus where the victim sustained a brain injury and his brain function was incapacitated, the dying declaration made by him cannot be relied upon<sup>10</sup>. Certificate from the doctor and an endorsement from him that the victim was not only conscious but was also in a fit state of mind to make the statement is requisite. In the absence of such a medical certificate, the declaration may be rendered highly dubious<sup>11</sup>.

## **V. FORM OF DYING DECLARATION**

There is no cut-and-dried strait-jacket formula prescribed for recording a dying declaration. The dying declaration may be either verbal or in writing or it may even be partly oral and partly in writing. It may also consist of signs or gestures made by the deceased. It is preferable if the dying declaration is recorded in the language and the exact words of the person making it. It should be in question and answer form, although this is not a universal rule. A dying declaration made before a Judicial Magistrate carries a higher evidentiary value because he is presumed to know how to record a dying declaration and he is an impartial person<sup>12</sup>. The law does not, however, require that the statement under Section 32(1) should be made before a Judicial Magistrate<sup>13</sup>. Recording of a dying declaration by the magistrate is itself not a guarantee of its truthfulness<sup>14</sup>.

As a general rule, it is desirable to get evidence of the declarant certified from a doctor. The person who records the statement should be satisfied that the declarant was in a fit state of mental health to narrate the facts of occurrence. If the prosecution relies solely on the dying

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<sup>10</sup> State of Rajasthan v. Teja Ram AIR 1999 SC 1776.

<sup>11</sup> Amar Singh v. State of M.P., 1996 CrLJ 1582 (MP).

<sup>12</sup> Samadhan Dhudaka Koli v. State of Maharashtra, AIR 2009 SC 1059 at p.1062.

<sup>13</sup> Kulwant Singh v. State of Punjab, (2004) 9 SCC 257.

<sup>14</sup> Kanchy Komuramma v. State of A.P., (1995) Supp 4 SCC 118.

declaration, the normal rule is that the court must exercise due care and caution to ensure the authenticity of the dying declaration, keeping in mind that there is no opportunity to test the veracity of the statement made by the accused by cross-examination. However, the law does not mandate that the dying declaration should be corroborated by other material evidence on record before it can be accepted. The insistence of corroboration to a dying declaration is only a rule of prudence and caution. If the court, after going through all the details, is satisfied that the dying declaration is voluntary, not alloyed by tutoring, prompting or, malice, and is not the product of the imagination of the declarant, there is no bar in basing conviction on such dying declaration.

### **Dying declaration recorded by Doctor**

A dying declaration recorded by a medical practitioner is reliable. Where the dying declaration was recorded by the doctor in question and answer form in the presence of other witnesses and it was corroborated with the testimony of other eye-witnesses, it was held that it was sufficient to convict the accused<sup>15</sup>.

### **Dying declaration recorded by Police Officer**

In emergency cases, a dying declaration may be recorded without calling a Magistrate or doctor. A clear and corroborated dying declaration is not liable to be rejected only because it was recorded by a police officer. A dying declaration recorded by a police officer without the presence of any witnesses or doctors or nurses on duty evokes suspicion and such dying declaration should be rejected. However, if the evidence of the police officer inspires the confidence of the court and there was no possibility of tutoring or prompting then the dying declaration may be accepted as evidence.

## **VI. THE PROCEDURE FOR RECORDING DYING DECLARATION**

- 1) The medical officer should certify that the declarant was in a fit state of mind to narrate the facts. Such certificate may be on the dying declaration itself or it may be on a separate form, but this essential requirement must be satisfied in letter and spirit.
- 2) The person recording the dying declaration must be satisfied that the declarant was making a conscious and voluntary statement with the full understanding of the questions put to him.
- 3) The recording officer may ask general questions to elicit from the declarant what has happened to him.

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<sup>15</sup> Malik Ram Bhoi v. State of Orissa, 1993 CrLJ 984; Munna Raja v. State of M.P., AIR 1976 SC 2199.

- 4) The questions asked by the recording officer should also be recorded.
- 5) No leading questions should be put to the declarant.
- 6) The recording officer must ensure that there is no prompting.
- 7) The declarant doesn't need to describe the genesis or give an exhaustive account of the whole incident to cover every minute detail of the incident. It is sufficient that the dying declaration is complete and precise.
- 8) A dying declaration made soon after the alleged incident has a greater probative value. If there is an interval between the alleged incident and the recording of the dying declaration, it lures a possibility for that dying declaration being tampered with and tutored on account of impression gathered from other persons.
- 9) The dying declaration should, as far as possible be recorded in the exact words in which they are spoken by the declarant because it enhances the potency and credibility of the statement.
- 10) If the declarant is in a position to append his signature or put his thumb impression on such a statement, then the signature or thumb impression should be obtained or appended.
- 11) Generally dying declaration should be recorded in question and answer form. But if the dying declaration is not elaborate and if it is recorded in the actual words of the deceased then the mere fact that it is not in question and answer form cannot be a valid reason against its acceptability or reliability.
- 12) If the injured person is not able to speak verbally in a coherent way, then short questions must be put to him and his answers given by gestures should be noted.
- 13) When a Magistrate records a dying declaration, he ought to follow Rule 33 of Criminal Rules of Practice, otherwise, the statement cannot be given evidentiary value<sup>16</sup>.
- 14) The dying declaration must be signed by the scribe of the dying declaration.

## **VII. DYING DECLARATION AS THE BASIS OF CONVICTION**

In *Atbir v. Govt. (NCT of Delhi)*<sup>17</sup> the Apex Court observed that the dying declaration can be the sole basis of conviction if it inspires full confidence of the court. If the court is satisfied that the dying declaration is true and voluntary, it can form the basis of conviction without

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<sup>16</sup> *Bhaskar v. State of A.P.* [2005 CrLJ 48, 53 (para22) (AP)].

<sup>17</sup> (2010) 9 SCC 1.

any corroboration.<sup>18</sup> Corroboration is only a rule of prudence. However if the dying declaration suffers from any infirmity or if it is suspicious, then it should not be acted upon without corroborative evidence.

The necessity for corroboration arises in the following cases<sup>19</sup>:

- a) Where the dying declaration suffers from an inherent infirmity as a piece of evidence;
- b) Where the statement was not recorded at the earliest opportunity;
- c) Where the statement appears to be tainted prima facie;
- d) Where the dying declaration was not voluntary and was the result of tutoring by the interested parties.

To put concisely, if the dying declaration is found to be honest and reliable then there is no need for corroboration by any witness and the conviction can be sustained on its basis alone<sup>20</sup>

### **The plurality of dying declaration**

Where there are multiple dying declarations of the same person, each dying declaration has to be separately evaluated and assessed independently of its merit as to its evidentiary value and one cannot be rejected because of certain disparity in the other<sup>21</sup>. If they differ from each other on material aspects, efforts could be made to see if they could be reconciled. The Supreme Court has suggested that the first statement in point of time made by the injured person must be preferred to any of his subsequent statements<sup>22</sup>.

### **Proof of dying declaration**

A dying declaration may be either verbal or written. When the dying declaration is verbal it can be proved by examining the person in whose statement was made. But if the dying declaration is recorded, the person recording the statement is to be examined before the court, and he will prove the writing before the court. A dying declaration cannot be treated as a deposition unless it is made in the presence of the accused and before a Magistrate. In *Emperor v. Balaram Das*<sup>23</sup>, it was held that the written record of a dying declaration, not taken down in the presence of the accused, is admissible, when it is proved by a witness that the statements contained therein were, in his presence recorded by a Magistrate, and read

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<sup>18</sup> S.P. Devaraji v. State of Karnataka, AIR 2009 SC 1725 at p. 1062.

<sup>19</sup> Gopal Subramani v. State of Mysore 1974 Cr LJ 36 (Mysore).

<sup>20</sup> Bapu v. State of Maharashtra 2007 Cr LJ 310 (SC).

<sup>21</sup> Ashabai v. State of Maharashtra, AIR 2013 SC 341 AT p. 345, Per Justice P. Sathasivam

<sup>22</sup> Gangaram Gehani v. State of Maharashtra, (1982) 1 SCC 700.

<sup>23</sup> [(1921) 49 CAL 358].

over to the deceased who admitted their correctness.

### **Circumstances where dying declaration is not admissible in evidence**

- 1) A dying declaration is inadmissible in evidence if it is incomplete and inconsistent with the genesis or motive for the crime.
- 2) If the accused proves by evidence that the dying declaration was false and tainted with animosity to implicate the accused, then the dying declaration cannot be taken into consideration.
- 3) If the dying declaration is impregnated with many suspicious circumstances creating a doubt as to its credibility, such evidence of dying declaration would not be taken into consideration.
- 4) Where it is proved that there was a discussion between the injured person and interested persons before the dying declaration was made, and the maker of the statement was likely to be prompted and tutored, then the dying declaration cannot be admitted.
- 5) If an unduly long period has expired between the alleged incident and the recording of the dying declaration, its truthfulness may be damaged.
- 6) If the dying declaration suffers from infirmities regarding the mental state of the deceased to make the dying declaration, it should not be acted upon.
- 7) A dying declaration of one person is not a relevant fact concerning the question about the death of another person.
- 8) If it is proved that the accused had been already named and the fact is already known to the declarant, the dying declaration cannot be considered.
- 9) Where there are more than one dying declarations and they are inconsistent with each other, such dying declarations cannot be the basis for conviction as it indicates the deceased's confused state of mind or his intention to falsely implicate the accused with whom he had a previous grudge and enmity.
- 10) If the declarant does not succumb to his injuries but survives, then his statement cannot be used as a substantive piece of evidence under Section 32(1) of the Evidence Act.

## **VIII. COMPARISON BETWEEN THE ENGLISH LAW AND INDIAN LAW RELATING TO DYING DECLARATION**

The rules relating to the Dying Declaration under English Law are different from those in India.

- 1) In England, the dying declaration is admissible only in criminal cases of homicide; but in India, the dying declaration is admissible in civil or criminal cases. Para 2 of Section 32(1) of the Evidence Act says, whatever may be the nature of the proceedings in which the cause of the person's death comes into question which indicates that whether the proceedings are civil or criminal, the dying declaration is provable.
- 2) Under English Law, the dying declaration must have been made under the expectation of impending death. But under the Indian Law, for the admissibility of dying declaration, the only anticipation of death is required. It does not require that the dying declaration should have been made in imminent expectation of death.

## **IX. CONCLUSION**

Dying declaration is doubtlessly an important evidentiary fact which helps the court in its arduous task of pursuing the truth. Being an outright departure to the rule against the admissibility of hearsay evidence and although it suffers from an inherent infirmity that its veracity and flaw cannot be cross-examined it still carries a considerable probative force. Courts have never been scornful towards a sentence of conviction formed purely on the testimony of a witness whose presence cannot in any way be procured before the court. Dying declarations have been accorded a statutory recognition but courts should employ caution and bestow legal acumen while placing reliance on such statement as a tool to seek the truth in the trial. The necessity of corroboration as a rule of prudence and caution arises because the propensity of tutoring the witness is very much pertinent in our judicial system and often the family members and relatives use this vulnerable opportunity to unleash their sweet vengeance upon their enemies and falsely implicate an individual who might not be the real culprit. Any manipulation which may either be the product of the victim's imagination or the result of malice motivated by previous grudge or enmity is bound to mutilate the charm of judicial modesty. Hence courts have adhered to the rule of caution and have propounded the clarity rule. If the dying declaration is clear, precise, voluntary and bears an impression of truth that unmistakably points to the guilt of the accused and unerringly matches with the prosecution story, then the courts generally lean in favor of considering the statement as

evidence. If the dying declaration satisfies the yardstick of the parameters laid down by the Apex Court from time to time, then such a statement carries sufficient weight of preponderance as to the genuineness of the contents mentioned therein. Thus Section 32(1) of the Evidence Act has been wittingly crafted to cover any contingency in respect of a statement which may happen to be the last words pronounced by the deceased who directly perceived the offender. The Indian law relating to dying declaration stands on a wider plane as compared to the English Law of dying declarations and precedents bear the imprint that courts have often enthusiastically admitted the veracity of such statement in cases where the nexus between the alleged death and the involvement of the offender in it have been the matter in issue before the court.

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