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ASSUMPTIONS BEHIND SANCTITY OF DYING DECLARATIONS

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All judicial systems, world-over, have barred the admission of hearsay-evidence, because to act upon hearsay evidence is risky as it does not provide any medium or instrument like cross-examination to test the truthfulness, falsity or reliability of this type of evidence. Evidence in the nature of the statement of the deceased i.e. dying declaration made about the circumstances in which his death resulted also falls in the category of hearsay evidence. Hence, any such statement of the deceased as such remains irrelevant and inadmissible in evidence. But out of necessity a compulsion arises to meet a peculiar situation which has made this type of evidence, namely dying declaration, relevant and therefore admissible by creating an exception to the general rule against admissibility of hearsay evidence. This compulsion of necessity arises from the fact that in a number of incidents of murder there is usually no eye-witness except the injured victim. Hence, if his statement about the circumstances in which his death occurred is not admitted in evidence during the criminal trial, then the only evidence of crime would be lost and as a consequence of it the offender would go scotfree and thus cause a miscarriage of justice. To balance this compulsion, a dying declaration is made an admissible piece of evidence and the inherent infirmity of the evidence in the nature of dying declaration, namely, that there is no medium or instrument like cross-examination to test the truthfulness, or falsity of a dying declaration, support is derived from a belief or enunciation in its favour on the basis that the dying man's deep faith in his religion would not allow lies on his lips, while he is dying and when he knows that he is soon to meet his Maker, i.e., God.

Historical Development of the Rule

The earliest judicial pronouncement making dying declaration admissible in evidence inspite of its being in the nature of hear-say evidence is found in the case of *King v William Woodcock, (1789) 1 Leach, 500.* Judge Eyre, Chief Baron laid down as under:

"The general principles on which this species of evidence is admitted, is that they are declarations made in extremity when the party is at the point of death and when every hope in this world is gone. When every motive to falsehood is silent and the mind is induced by the most powerful consideration to speak the truth, a situation so solemn, and so awful is considered by the law as creating obligation equal to that which is imposed by a positive oath administered in a Court of justice..... But a difficulty also arises with respect to such declarations i.e. whether the deceased herself apprehended that she

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was in such a state of morality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions."

Judge Eyre at the same time cautioned that "Declarations so made are certainly entitled to credit, they ought, therefore, to be received in evidence, but the degree of credit to which they are entitled must always be a matter for the sober consideration of the Jury under all the circumstances of the case."

Thus, even the earliest available judicial pronouncement on the point was conscious about the weakness of dying declaration.

It is significant to note the observations made by Taylor that "though declarations, deliberately made under a solemn sense of impending death and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, it should always be recollected that the accused has no power of cross examination, a power as effectual in eliciting the truth as is the obligation of an oath and that when a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge or, in the case of mutual conflict, the natural desire of screening his own misconduct may effect the accuracy of his statement and give a false colouring to the whole transaction".

It is observed in Corpus Juris Secundum Vol XL, Page 1283 that:

"In weighing the Dying Declarations, the Jury may consider the circumstances under which they were made, as to whether they were due to outside influence or were made in a spirit of revenge or when the declarant was unable or unwilling to state the facts, the inconsistent or contradictory character of the declarations, and the fact that deceased has not appeared and the accused has been deprived of the opportunity to cross-examine him, and may give to them the credit and weight to which they believe, under all the circumstances, they are fairly and reasonably entitled."

In India in the relevant provision of Section 32 of the Indian Evidence Act, 1872 the first exception to the rule against admissibility of hearsay evidence, is as under:

> *"When statement is made by a person, as to the cause of his death or as to 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 statement of the dead person is made admissible. Such statements are relevant whether the person who made them, was or was not at the time when they were made, under expectation of death and whatever may be the nature of the proceedings in which the cause of his death comes into question.*

While drafting and enacting Indian Evidence Act, 1872, the Select Committee avoided to refer to the phrase hearsay evidence saying that the phrase 'hearsay

evidence' which is used by the English writer in so vague and unsatisfactory a manner finds no place in our draft and we hope we have avoided the possibility of any confusion in connection with it. This approach while drafting and enacting the Indian Evidence Act, 1872 was totally arbitrary and was a clear disregard to the universal concept of hearsay evidence and under all tests of theories and systems of law of evidence. This comment is made only for the purpose of saying that this approach of the select committee amounted to, knowingly, failing to recognise a basic weakness to the evidence in the nature of Dying Declaration as is made applicable in India. As a corollary to this approach para (2) in clause (1) of Section 32 was further drafted and enacted which is a second weakness to the evidence in the nature of dying declaration.

Thus, there are three salient and basic differences, between the Indian concept and English concept about Dying Declaration. Firstly, under English law only when a charge is for the offence of homicide or manslaughter, a Dying Declaration can be admissible as an evidence, whereas under Indian Law the Dying Declaration is made admissible in all types of proceedings of both Civil and Criminal nature, if in such proceedings the death of the person who made such statement comes into question. Secondly, under the English law a dying declaration is receivable in evidence of making it under the sense of impending death, whereas para 2 of clause 1 of Section 32 of Indian Evidence Act, lays down that irrespective of whether the person who makes a Dying Declaration was under the expectation of death or not at the time when the statement was made, his Dying Declaration is admissible as evidence. Thirdly, under the English law the judge has to approach the issue of the appreciation of Dying Declaration with a judicial note i.e., consciousness that such evidenc is hearsay in nature, while under the Indian law, as said by the Select Committee the phrase 'hearsay evidence' is purposefully not imported in Indian law and is not given any significance at all, though under the legal theory and truth it cannot be denied that it is in totality hearsay evidence.

By para 2 of clause (1) of Section 32 of the Indian Evidence Act, 1872, the very foundation from which the sanctity of a Dying Declaration is born is pulled out from its ethical and religious base and it's consequent evidenciary value. Hence, the only justification in law, moral and social expediency for receiving Dying Declaration in evidence as the situation found in majority of cases is that no other witness or evidence to the crime is available.

In this article an attempt is made to show that, irrespective of the judicial propositions made earlier and subsequent to the case of *Khushal Rao v State of Bombay* a need has arisen for the Supreme Court to reverse its approach in the last three decades to restate the law on judicial approach to Dying Declarations, because the ground realities of the present times reduce the assumptions accepted since centuries for giving the very quality of sanctity to Dying Declaration and

justifying its acceptability as a piece of evidence have not only become obsolete but even should be considered as unrealistic, arbitrary and untrue as also contrary to everyday experience of individual and social living today, particularly so far as law and society in India are concerned.

For the first time in the above mentioned case of *Khushal Rao v State of Bombay,* a bench of three judges of the Supreme Court differed from this long, well-established judicial approach of sound wisdom and prudence in case of appreciating evidence in the nature of dying declaration by enunciating, a judicially and factually erroneous pronouncement to the effect that it cannot be laid down as a general proposition that the dying declaration is a weaker kind of evidence than other pieces of evidence. It stands on the same footing as any other piece of evidence. In the view of the legislature, that test of veracity is supplied by the solemn occassion when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such a serious and solemn moment, that person is not expected to tell lies. The court continued "it cannot be laid down as an absolute rule of law that a Dying Declaration cannot form the sole basis of conviction unless it is corroborated".

It should be said at this stage that the observation of the Supreme Court in the case of *Khushal Rao* that "it cannot be laid down as a general proposition that a Dying Declaration is a weaker kind of evidence than other pieces of evidence, is in total contrast to all the weak features surrounding a Dying Declaration, which are described above. The fact remains that the Dying Declaration is a weaker kind of evidence than other pieces of evidence. Another observation of the Supreme Court in the above case of *Khushal Rao* that a Dying Declaration stands on the same footing as another piece of evidence is also equally fallacious both in practice and theory. The third observation of the Supreme Court in the said case of *Khushal Rao* that a Dying Declaration, which has been recorded by a competent Magistrate in the proper manner, stands on a much higher footing then other types of Dying Declaration is equally illogical and fallacious. Infirmities and weakness of a Dying Declaration whether made to the relatives or to a competent Magistrate are the same and remain the same.

After the *Kushal Rao's* decision, for more than three decades, the Supreme Court's position has remain unchanged. The too general a statement made by the Supreme Court in the case of *State of U.P. v Ramasagar Yadav* that it is well settled that as a matter of law, a dying declaration can be acted upon without corroboration and that 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 it is corroborated is extremely wide and inconsistent with the actual judicial approach in practice. Usually the courts look for independent corroboration in support of a dying declaration before basing a conviction solely on a Dying Declaration and this is nothing else but a rule of prudence.

The enunciation made in the case of *Kori v State*, that "it is too well settled to be doubted that it is unsafe to found a conviction solely upon a Dying Declaration. Unlike the evidence of an accomplice, a Dying Declaration is not trainted. Neverthless, it is a rule of prudence that to found a conviction upon it, a Dying Declaration should be corroborated in material particulars. This rule of prudence, however, does not affect the law on the point, namely, that a Dying Declaration may well be the sole basis of conviction. A Dying Declaration can be as good or as bad, as any other piece of evidence and the value to be attached to it must necessarily depend upon the facts and circumstance of each case. Naturally the Court cannot ignore that a Dying Declaration is not upon oath, is not made in the presence of the person affected, and is not tested by cross-examination. These and other considerations must be present in the mind of the court in assessing the value of any Dying Declaration. If the Court, after taking everything into consideration, is convinced, that the declaration is true, it is its duty to convict notwithstanding that there is no corroboration". This approach of the Calcutta High Court is probably a better exposition and judicial approach towards the appreciation of evidence of a Dying Declaration in a criminal trial than the one, expressed buy the Supreme Court in the case of *Khushal Rao v State of Maharashtra* and a series of other cases reported thereafter.

This approach in practice would amount to taking a decision of guilt after judicially ascertaining all the weakness and infirmities of a Dying Declaration described and narrated above. Thus, it is a rule of prudence that under the Indian law a decision of guilt should not be arrived at on the sole basis of a Dying Declaration and that there should be some independent corroboration to the evidence in the nature of a Dying Declaration. This rule of prudence cannot be overlooked by saying that it is not an absolute principle that a Dying Declaration cannot form the sole basis of conviction unless it is corroborated.

In the author's view, though not so satisfying, the better enunciationed approach to evidence of Dying Declaration is found in case of *Tarachand v State of Maharashtra*, which states that "Anyway, a Dying Declaration is not to be believed because no possible reasons can be given for accusing the accused falsely. It can only be believed if there are no grounds for doubting it at all."

Probably except in the decisions of *Kori v State* and of *Ramnath v State of Madya Pradesh* there is no pronouncement that it is a rule of prudence to seek corroboration before a court bases conviction solely on a Dying Declaration. Nor, is there any pronouncement to the effect that a court cannot convict solely on the basis of an uncorroborated Dying Declaration. Neverthless, it requires to be judicially accepted, that Dying Declaration is by its nature a weak and infirm piece of evidence and Courts should approach it, being conscious of its weaknesses.

At this stage it would be interesting to consider the decision given by the Supreme Court of Papua and New Guinea in the case of *Queen v Madobi*

reported in 6th Federal Law Reports (1963) F.I. in which the statement by a native of Papua and New Guinea was held as inadmissible in evidence though it was a Dying Declaration stating that "a statement by a native of Papua and New Guinea whose belief in life after death was that it would be spent on a neighbouring uninhabitated island and upon whom there was, therefore, no solemn sanction to speak truth, is not admissible as a Dying Declaration."

Jon R. Walts, American Jurist, in his book 'Criminal evidence' (1975) on p. 75 observes that "It has been thought, rightly or wrongly, that Dying Declaration have intrinsic assurances of trustworthiness, making cross examination unnecessary. The notion is that a person who is in the process of dying and knows it, will be truthful immediately before departing to meet his Maker. Of course the validity of this hearsay exceptions is open to some debate. What about the person who is not religious? What of the person who, as his last act, seeks revenge by falsely naming a life-long enemy as his killer? How reliable is the perception and memory of a person who is dying?"

However the present state of religious belief, naturally, affords ample grounds of differences, as to the under-pinnings of the rule. However, the courts in general have declined to allow exploration of the declarant's religious views.

The Privy Council in *Nembhard v Queen* (1982) 1 All.E.R. 182 on Section 32 (1) of the Indian Evidence Act, 1872 opined that the evidence of Dying Declaration under the Indian law lacks the special quality as in Common Law and hence the weight to be attached to a Dying Declaration admitted under section 32 of the Indian Evidence Act would necessarily be less than that attached to a Dying Declaration admitted under the common law rules.

The below cited observations from the decision of *Nembhard* are of significant importance:-

> *"A final observation should be made concerning the cases already mentioned that have been decided in the Court of Appeal for Eastern Africa. It appears that a rule of practice has been developed that when a Dying Declaration has been the only evidence implicating an accused person a conviction usually cannot be allowed to stand where there had been a failure to give a warning on the necessity for corroboration: see for example Pius Jasunga s/o Akumu v R (1954) 2 EACA 331 and Terikabi v Uganda (1975) EA 60. But it is important to notice that in the countries concerned the admissibility of Dying Declaration does not depend on the common law test, that is on the deceased having at the time a settled hopeless expectation of impending death. Instead there is the very different statutory provision contained in 32(1) of the Indian Evidence Act 1872.*
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> *In Akumu it was pointed that the weight to be attached to a Dying Declaration admitted by reference to Section 32 of the Indian Evidence*

Act would necessarily be less than that attached to a Dying Declaration admitted under the common law rules. The first kind of statement would lack that special quality that is thought to surround a declaration made by dying man who was conscious of his condition and who had given up all hope of survival. Accordingly it may not seem suprising that the courts dealing with such statements have felt the need to exercise even more caution in the use to be made of them than is the case where the common law test is applied."

It is humbly submitted that a need has arisen for the Supreme Court to restate the law on the judicial approach to the evidence of a Dying Declaration after taking stock of the present-day realistic situation, historically judical and morally obsolete background surrounding the law on the evidence of a Dying Declaration.

In conclusion, it is difficult to deny that:

a. A Dying Declaration is in fact a weak and inferior type of evidence because (1) its truthfulness cannot be tested by cross-examination by the accused who is sought to be damned for life on it's assumed truthfulness. (2) It is not made under an obligation of oath (3) Unlike the British Law it is not necessary in India to prove that it was made under a hopeless expectation of immediate death, a situation imposing moral weight and burden on the person making the statement that if he would die with lies on his lips he would suffer the consequences of his such sin and (4) it is made in a kind of secrecy; in contrast to the trial of accused held openly in public.

b. A Dying Declaration does not stand on the same footing as other piece of evidence; like evidence of an eye-witness or approver, confession, incriminating discovery etc.

c. All assumptions of the truthfulness of a Dying Declaration are rendered obsolete and unrealistic by the tremedous epoch-making changes tragically lowering the levels of all moral and religious beliefs which have substantially shaken and eroded the very foundation of such assumptions.

Though in law an accused can be convicted on the sole evidence of a Dying Declaration without any corroboration (because of a helpless compulsion arising out of necessity) a Court should so convict an accused only if from the evidence of a Dying Declaration it comes to an unhestitating conclusion that it is absolutely reliable and that it is an unalloyed truth. Otherwise the Court must seek for some corroboration before basing a conviction on the basis of a Dying Declaration.