REX v. LOUIE

(1903), 10 B.C.R. 1 British Columbia Court of Criminal Appeal, Walkem, Drake and Martin JJ., 22 June 1903

Criminal law--Admissibility of evidence--Dying declaration--Indian woman --Consciousness of impending dissolution--Hearsay evidence to prove dying declaration.

An Indian woman's statement that she thinks she is going to die is a sufficient indication of such a settled hopeless expectation of immediate death as to render the statement admissible as a dying declaration.

Before the death of an Indian woman, for whose murder the prisoner was being tried, a statement was obtained from her in the following way: A Justice of the Peace swore an Indian to interpret the statement the woman was about to make; a constable then asked questions through the interpreter and a doctor wrote down what the interpreter said the woman's answers were. The doctor and the Justice of the Peace then signed the statement. To some of the questions the woman indicated her answer by nodding her head.

At the trial the statement was tendered as a dying declaration and the doctor, the Justice of the Peace and the constable identified the statement; the interpreter deposed that he interpreted truly, but he gave no evidence as to what the woman really did say:--

Held, disapproving *Reg. v. Mitchell* (1892), 17 Cox, C.C. 503, that the statement was admissible as a dying declaration; also that it had been properly proved.

A dying declaration may be obtained by means of questions and answers and if it is reduced to writing it is sufficient if the answers only appear in the writing.

IN the Supreme Court of British Columbia *in banc*. Crown case reserved. The following case was reserved by IRVING, J., the trial Judge:

"Alex Louie, an Indian, was tried before me at the last Assizes for the County of Yale, held at the City of Vernon, upon an indictment charging, him with the murder of an Indian woman named Julian, alleged to have been committed by him on the 1st day of April, 1903.

"On the trial the prosecution sought to put in evidence a document in writing which purported to be the dying declaration of the said Julian, the murdered woman.

"The circumstances under which this dying declaration was made are to be found in the evidence given before me, a transcript of which is made a part of this case.

"The evidence satisfied me that the said Julian was fully conscious when she made the said declaration, and that when she made it she had a settled hopeless expectation of impending death. I then directed a certain portion of said declaration, which I considered not to be admissible in evidence against the accused, to be struck out, and ruled that the portion of the said declaration hereinafter set out should be admitted in evidence [Statement.] and read to the jury, which was thereupon done.

"The portion of the said declaration admitted in evidence and read to the jury as aforesaid, is as follows:

"'Head Okanagan Lake, April 2nd, 1903.

"'I, Julian, knowing that I am likely to die, make oath and say:

"'Yesterday he came to me to my mother's house (here) and asked me to go home. I said no, I will not go, because you have been beating me and have been bad to me. He was on his horse, and he said, I will try and kill you right straight. Then he shot and I tried to turn away. I fell down and did not know anything. I think I am going to die and am telling only what is true. Julian, her x mark,' "

The jury brought in a verdict of 'guilty,' and the prisoner was sentenced to be hanged on the 19th day of June, 1903.

"The question for the consideration of the Court is:

"Was the dying declaration given by Julian, the murdered woman, rightly admitted in evidence?

"If this question be answered in the affirmative, then the conviction should stand.

"If this question be answered in the negative, then such order and direction should be made as to the Court may seem just."

It appeared from the evidence that the woman was wounded by a rifle bullet at three o'clock in the afternoon of April 1st; the bullet entered the right side of the chest, passed through the upper lobe of the left lung, entered the wall of the chest, fracturing three ribs and then turned backwards and imbedded itself underneath the shoulder blade. The next day at noon she was visited by Dr. Williams, who found her suffering from traumatic pneumonia, as a result of the wound; she was then breathing very rapidly and the doctor told her she could not live.

At two o'clock in the afternoon of the same day a declaration was obtained from the woman in the following manner: Mr. O'Keefe, a Justice of the Peace, swore an Indian named Brazil to interpret the statement the woman was about to make. Simmons, a constable, then asked questions which were put to the woman by Brazil, and Dr. Williams wrote down on paper what Brazil said were the woman's answers. To some of the questions put to her the woman indicated her answers by nodding [Statement] her head. The statement was then signed by O'Keefe and Dr. Williams.

At the trial the Crown tendered this statement in evidence as a dying declaration and Mr. O'Keefe, Dr. Williams and Simmons were called and identified it. Brazil was also called by the Crown and his evidence in full was as follows:

"(To Allan MacDonald, counsel for the Crown).

"What is your name? Brazil.

"Are you Brazil? Yes.

"Were you present about the 2nd of April last when Julian was dying and doctor Williams and Mr. O'Keefe were present; were you present at that time? Yes.

"Now, you were sworn as an interpreter? Yes, I am.

"To interpret the words that might be spoken by the dying woman? Yes.

"And did you interpret the words that were spoken by the dying woman at that time? Yes.

"Was that interpretation correct and true? Yes.

"It was made in the presence of Mr. O'Keefe, was it? Yes.

"Who was it that asked the questions? Simmons.

"(Cross-examined by Mr. *Macintyre*). "Mr. Simmons asked the questions? Yes.

"And then you put the questions to Julian? Yes.

"Did you want Mr. Harris just now to interpret for you?

"Just I think it would be some better to.

"(By the Court).

"Did you interpret, did you tell her she was dying? Yes.

"Why did you do that? The woman said, 'I think I be "'dying.'

"Then what did you say? (The witness did not answer).

[Statement] " (By Mr. *MacDonald*).

"Were you sworn at that time? Yes."

The trial Judge admitted the document (with certain exceptions) as a dying declaration.

The jury returned a verdict of guilty and the prisoner was sentenced to be hanged.

The Judge refused to reserve a case for the opinion of the Supreme Court *in banc* and on the 9th of June, 1903, on motion to the Court (WALKEM, DRAKE, and MARTIN JJ.), leave to appeal was given and subsequently a case was stated by IRVING, J.

The question was argued at Victoria on the 15th of June, 1903, before WALKEM, DRAKE and MARTIN, JJ.

Macintyre, for the prisoner: The woman was not conscious of her surroundings; she was passing from consciousness to unconsciousness; the declaration on its face is bad as it does not shew a settled hopeless expectation of death in the declarant: [Statement] He cited *Reg. v. Errington* (1838), 2 Lew. C.C. 148; *Reg. v. Megson* (1840), 9 C. & P. 418; *Reg. v. Gloster* (1888), 16 Cox, C.C. 471; *Rex v. Laurin* (1902), 6 C.C.C. 104; and *Reg. v. Jenkins* (1869), L.R. 1 C.C. 187. Some of the answers were made by nods of the head and the Crown should shew that the woman understood; the declaration is only the substance of what the doctor thought was passing through her mind. Where a declaration is obtained by question and answer the questions and answers should be given in evidence: see *Reg v. Mitchell* (1892), 17 Cox C.C. 503; *Rex v. Smith* (1901), 65 J.P. 426 and *Rex v. Trowter* (1721), 1 East's pleas of the Crown, 356. *Reg. v. Whitmarsh* (1898), 62 J.P. 680 and 711 is distinguishable.

If the Court should be of the opinion that the declaration was wrongly admitted there should be a new trial: *Reg. v. Hamilton* (1898), 2 C.C.C. 390. The declaration was the convicting evidence.

Duff, K.C., on the same side: a dying declaration must be proved in the regular way; it can't be proved by hearsay evidence as was done in this case. There is only one person who knows what the woman really did say, and that is Brazil, and his evidence is silent on that point. The evidence of Dr. Williams and Mr. O'Keefe is hearsay; it is an account of what Brazil told them the woman said.

Maclean, D.A.-G., for the Crown: The state of the woman's mind and the circumstances under which the declaration was made are facts to be passed on by the trial Judge who was satisfied that the woman was conscious of impending dissolution: see [Argument] *Reg. v. Woods* (1897), 5 B.C. at p. 590; *Reg. v. Davidson* (1898), 1 C.C.C 351 and *Reg. v. Goddard* (1882), 15 Cox, C.C. 7. The wound was such a one as a person of the utmost simplicity would think fatal. In *Reg. v. Morgan* (1875), 14 Cox, C.C. 337, the injury itself was held to be conclusive of impending death.

[*Per curiam*: An Indian woman's expression "I think I am going to die," is sufficient indication of a settled hopeless expectation of impending death.]

The statement was properly admitted as the interpreter was sworn and Dr. Williams was sworn; it comes through them both. As to getting declaration by question and answer. The trial Judge was satisfied he had what was substantially the woman's statement before him. No one but the prisoner and the woman knew the circumstances of the shooting, so in putting questions to the woman no one could have suggested answers that would be against the prisoner. The decision of Cave, J., in *Reg. v. Mitchell* is not generally followed: he referred to *Reg. v. Whitmarsh* (1898), 62 J.P. 680 and 711: also *Rogers v. Hawken* (1898) 19 Cox, C.C. 122.

Duff, in reply, cited *Rex v. Smith* (1901), 65 J.P. 426. As to the argument that the Court will not interfere with the discretion exercised by the trial Judge, this is a pure question of law, and the Court is free to deal with it as it sees fit. To admit the declaration on the evidence of Dr. Williams and Mr. O'Keefe would be to wipe out the rule against hearsay evidence.

Cur adv. vult.

22nd June, 1903.

WALKEM, J.: This case comes before us as a Court of Crown Cases Reserved. The facts connected with it are sufficiently stated in the record submitted to us. The question which has been referred to us is whether the dying declaration made by an Indian woman of the name of Julian, who was recently shot by the prisoner with a bullet from a Winchester rifle, should have been admitted as evidence. The objection taken to it by counsel for the prisoner is that although it is composed of questions and answers, it appears in the shape of the answers only as given by the woman to her medical attendant, who undertook to take down the declaration. The objection is based on the refusal of Cave, J., in *Reg. v. Mitchell* (1892), 17 Cox, C.C. 503, to accept such a document as a dying declaration. The authorities have not been at all uniform on this subject, and in the recent case of *Rex v. Bottomley*, handed to me by my brother DRAKE, which was tried at the Liverpool Assizes about the middle of May, and reported in the Law Times, 1903, at p. 88, the presiding Judge, Lawrence, J., received a dying declaration similar to that objected to by Cave, J., and very similar in some respects to the present declaration. For instance it uses the words "I am dying. I don't think I shall get better." The declaration in question contains two similar statements, namely, "knowing I am likely to die," etc., and "I think I am going to die." The medical attendant had informed her that she would die, and that there was no hope for her; and we consider that the learned trial Judge was right in admitting the statement alluded to as a dying declaration.

The verdict, and the sentence of the Court are therefore confirmed.

DRAKE, J.: This is rather an exceptional case. The deceased, who met her death at the hand of the prisoner, was an Indian ignorant of the English language, and her statement was obtained by an Indian interpreter and by him translated to Dr. Williams, who took it down in writing. The deceased at the time was in a dying condition and suffering in addition to the gun-shot wounds, from traumatic pneumonia, and was enjoined by the doctor to speak as little as possible. According to the doctor's evidence she was quite capable mentally of giving her statement, though very weak in body. Mr. *Macintyre* objected to the reception of this evidence on several grounds. First, that it was not shewn clearly and distinctly that the deceased was in fear of impending death, or rather that her knowledge of impending death was not without hope of recovery. I think when the whole of the evidence is read that this contention cannot be supported. Dr. Williams had informed her more than once that she was dying. This standing alone is his opinion, and it does not follow that the deceased accepted this view. But here Dr. Williams says that she recognized the truth of his statement, and there is no suggestion that she at any time expressed a contrary opinion, and in her statement she reiterates the fact that she is about to die; and Brazil says that the deceased said "I think I be dying." Indians use the term "think" generally as a statement of fact. In my opinion the statement was made at a time when she was in fact dying, and there never was any chance of recovery.

The next point raised is that this statement was obtained by question and answer. The statement does not shew that, but the evidence of Brazil is that Simmons asked the questions and he put them to the deceased woman. Sometimes she nodded her head and sometimes spoke in reply. Dr. Williams had told her not to speak if possible. Mr. *Macintyre* contends that under the authority of *Reg. v. Mitchell* (1892), 17 Cox, C.C. 503, both the questions put as well as the answers given should be taken down. This was contrary to what was previously held: see *Rex. v. Fagent* (1835), 7 C. & P. 238; Rex v. *Woodcock* (1789),1 Leach, 500. *Reg. v. Smith* (1865), L. & C. 607, was a case decided by Erle, C.J., and four other Judges. The evidence was obtained by question and answer, and was admitted. Channel, B., there says when the Judge has decided on the admissibility of the declaration a question arises what does the declaration amount to? That is for the jury; and he goes on to point out that if a declaration had not been reduced into writing, and two witnesses gave different accounts of it, it is for the jury to determine how much of the statement was true, and if reduced into writing, what weight should be attached to it, and the case of *Reg. v Mitchell* was not followed. In *Reg. v. Whitmarsh* decided by Darling, J., 22nd October, 1898, with the assistance of the Recorder, the above cases were then cited and considered.

In dealing with Indians and Chinese in our Province who have to have all their evidence filtered through an interpreter, who is seldom acquainted with the niceties of the language into which he interprets the native tongue, one has to take what is the actual purport of the statement without criticising the terms in which it is couched. Here, Brazil the interpreter, swears that the interpretation was correct and true and was taken down in reply to questions by Mr. Simmons. The answers were accurately taken down by Dr. Williams and the document was signed by him and Mr. O'Keefe, a Justice of the Peace. It is not necessary that a dying statement be reduced into writing if the witnesses present can speak to the words used. If it is reduced into writing it is better that it should be read over to the person making the statement, but this is not absolutely essential if the evidence is clear that the interpreter properly translated the statement, and the person who wrote it down properly took the language down that was used. Here both these requisites were distinctly sworn to. If it is read over to the declarant it has to be translated back, so it does not lend itself to

greater accuracy. I may mention that *Reg. v. Mitchell* was dissented from in *Rex v. Bottomley*; *Rex v. Earnshaw* (1903), 115 L.T.J. 88, tried before Mr. Justice Lawrence at Liverpool, in May last, and the only authorities absolutely binding on this Court are the decisions of the Supreme Court of Canada and of the Crown Cases Reserved, the decisions of a single Judge sitting at *nisi prius* ought to be considered, but not of necessity followed.

MARTIN, J. (oral): I agree with the judgments read by my learned brothers confirming the course taken by the learned trial Judge, and need only add that in the same volume of the Law Times which they have referred to (May 9th, 1903), at p. 27, is contained a note of the case of *Ryan v. Ryan* which supports the view, if it required support, that acquiescence by nodding in answer to some of the statements or questions was quite sufficient in view of the doctor's direction to his dying patient to speak as little as possible.

Conviction affirmed.