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Admissibility Of Opinions In Dying Declarations

Connor v. State[1]

Defendant left the house of his former wife, the decedent, after an argument between the two, and entered his parked car. The decedent followed him, and while standing at the door of the car demanded a promised payment of $25. The defendant refused, and the decedent moved directly in front of the car. As the defendant started to slowly drive forward, the decedent refused to move aside, and instead walked backward. There came a time when the defendant did not "see her any more" at which time he "gave it [the automobile] the gas." With this, the automobile moved rapidly forward and crushed the decedent, causing her death some fourteen hours later. The defendant appealed from a second degree murder conviction on the ground, *inter alia*, that evidence admitted at the trial of a statement made by decedent to a policeman at the scene of the crime, in which she classified the defendant's act as "no accident," was inadmissible as a dying declaration due to its opinion form. The Maryland Court of Appeals, in a case of first impression, rejected defendant's argument and stated that a dying declaration is not

[1] 225 Md. 543, 171 A. 2d 699 (1961).

rendered inadmissible merely because the decedent's statement was in the form of an opinion.[2]

Dying declarations, made under certain conditions, are admissible in homicide cases under an exception to the hearsay rule.[3] The justification for the exception is based on two broad grounds: necessity and reliability. The use as evidence of the declaration in the form spoken is necessary since the victim is dead, and it is therefore impossible for him to testify or to rephrase his words; yet he may have been the only eye-witness to the acts and his testimony may be vital.

Other requirements of the exception tend to insure reliability sufficient to warrant reception despite the absence of cross-examination or of the threat of a perjury prosecution. Courts require that the declarant be conscious of impending death[4] and that the declaration be made while so conscious[5] (satisfied in the instant case by the decedent's request for a priest and expressed concern for the care of her baby). In addition, death must actually ensue, although not necessarily immediately.[6] Though the early cases required that the declarant be a believer in the hereafter, the modern American cases admit "declarations of a person who would qualify as a witness in spite of his lack of religious belief."[7] These are the components of the very exacting foundation necessary to make a dying declaration admissible.[8] The substance of the declaration presents further problems. Broadly, it must be in connection with the act which subsequently causes the death.[9] In addition,

[2] The Court, in so holding that the statement of the decedent made to a police officer while she was awaiting the arrival of the ambulance was admissible as a dying declaration, found it therefore unnecessary to discuss the claim that the statement was not part of the so-called *res gestae*. In this connection see statement of Judge Parker in Chesapeake & O. Ry. Co. v. Mears, 64 F. 2d 291, 293 (4th Cir. 1933):

> "[A] statement made by an injured person as to the cause of his injury is admissible if the time which has elapsed since the injury is so short that he is still under the influence of the happening and his statement presumptively a spontaneous expression growing out of it and not the result of reason and reflection."

[3] Hawkins v. State, 98 Md. 355, 57 A. 27 (1904).

[4] The declarant need not make a statement of such consciousness. It can be inferred. McCormick, Evidence (1954) § 259. But if he had any hope of recovery, the declaration will not be admitted. Worthington v. State, 92 Md. 222, 48 A. 355 (1901).

[5] People v. Allen, 300 N.Y. 222, 90 N.E. 2d 48 (1949).

[6] The "test is the declarant's belief in the nearness of death when he made the statement, not the actual swiftness with which death ensued." McCormick, *loc. cit. supra*, n. 4.

[7] 2 Morgan, Basic Problems of Evidence (1957) 260-61.

[8] However, even though this foundation has been laid it does not *necessarily* follow that the passions and prejudices which governed the declarant in life will leave him as he faces death.

[9] Morgan, *loc. cit. supra*, n. 7.

it is sometimes said that there must be no intent of the declarant to suppress part of the truth.[10]

Even though a dying declaration could meet the foregoing requirements of the hearsay exception, there was a common assumption, which the Court of Appeals properly rejected, that it was inadmissible if it was in opinion form.

In a number of cases language can be found which seems to support this common assumption, but, close examination of the cases indicates that the courts might well have rested, and perhaps intended to rest, their decisions on grounds separate from the opinion rule. Sometimes a statement condemned vaguely as opinion — which in such a case ought to involve merely the problem of a statement in a form containing abstraction or conclusion — could be more precisely excluded on such grounds as lack of first-hand knowledge, failure to meet the hearsay exception, or unfair prejudice. In cases involving this sort of false labeling a court, unless it blindly follows the language of its previous decisions, might in a proper situation admit material which is an opinion but unobjectionable on the other grounds. Some examples of arguable false labeling follow.

The test of whether or not a dying declaration is an opinion, according to one court, is "whether the statement is the direct result of observation through the declarant's senses, or comes from a course of reasoning from collateral facts. If the former, it is admissible; if the latter, it is inadmissible."[11] Query: Is this not going to the testimonial qualification of the declarant — i.e., his first-hand knowledge of the facts — rather than the inadmissibility of opinions?[12]

Dying declarations have also been excluded as "opinion" when in fact the justification for exclusion was failure to meet the hearsay exception requirement of reliability. In *Adams v. The People*,[13] the declarant stated that the act of the accused was "accidental." The court said this was opinion but later added that the dying declaration "affords no evidence of anything more than a truly Christian spirit . . . of one who . . . , in his dying agonies, was willing to forgive the malefactor." Though the result seems proper,

[10] *Ibid.*

[11] House v. State, 94 Miss. 107, 48 So. 3, (1909).

[12] The following cases failed to make the distinction and treated first-hand knowledge problems as opinion problems: Riddle v. State, 210 Ark. 255, 196 S.W. 2d 226, 228-229 (1946), where case turned on declarant's first-hand knowledge; State v. Teeter, 65 Nev. 584, 200 P. 2d 657 (1948); Hollywood v. State, 19 Wyo. 493, 120 P. 471 (1912).

[13] 47 Ill. 376, 380 (1868).

it appears that absence of compelling motive to speak the truth was the true ground for the exclusion.

Another opportunity for false labeling occurs where the statement is not in connection with the act. In *Walthall v. State*[14] the court said the dying declaration in which the decedent blamed herself was a "conclusion" but ended its reasoning by stating, "It [the dying declaration] would convey to the jury no idea whatsoever of any part which the deceased played in the particular transaction." If this were so, the dying declaration was inadmissible simply because it did not relate to the act and should have been excluded on this valid hearsay ground.[15]

In the cases just mentioned, the courts, it is believed, reached the correct results. However, even though they mentioned the inadmissibility of opinions in dying declarations as the basis for their decisions, they are doubtful authority for such an assertion, and should not be followed on that ground.

Sometimes a dying declaration in opinion form is sensibly excluded because it has special characteristics not present generally in opinions. For example, some courts purporting to exclude dying declaration opinions have distinguished dying declarations which are submitted against the accused from those submitted in his favor. In the former case, wherever the statement is inflammatory, it is excluded mainly because of creation of undue prejudice. If the declarant were alive and testifying, he would not be permitted to use an opinion form of expression likely to inflame the passions of the jury, and the danger from such opinion may justify exclusion of the dying declaration if the offensive language cannot be excised. If the declaration is offered in the defendant's favor, this danger is absent.[16]

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[14] 144 Tex. Crim. 585, 165 S.W. 2d 184, 186 (1942). The dying declaration which was branded a "conclusion" and to which the quotation noted in text referred was, "Please don't blame Bob; I was as much to blame as he was — you know he had been sick for so long and didn't have a job. He felt like the world was down on him — I aggravated him."

[15] In Commonwealth v. Knable, 369 Pa. 171, 85 A. 2d 114, 117 (1952), the Pennsylvania court, a proponent of the modern trend, excluded a dying declaration containing an opinion because it "did not concern the circumstances of the declarant's injuries." In citing this opinion in the subject case, it is hoped that the Maryland court has indicated an intention to carefully examine each dying declaration wherein an opinion is given to determine whether or not it contains any hearsay infirmities, rather than simply excluding all dying declarations containing opinions.

[16] In Haney v. Commonwealth, 5 Ky. L. Rep. 178 (1883), the dying declaration was, "I did not think the Negro would kill me; I was to blame for the whole thing." — admitted; in Stewart v. Commonwealth, 235 Ky. 670, 32 S.W. 2d 29, 31 (1930), "You have accidentally shot me . . . and the gun went off and accidentally shot me." — admitted; in State v.

Whether or not the opinion is accompanied by supporting facts has also been considered as a controlling factor in determining the admissibility of dying declarations.[17] The courts reason that with the ingredient of added facts the jury will be able to weigh the opinion and thus offset much of its prejudicial effects. In extreme situations such considerations may render a dying declaration in opinion form so unreliable or dangerous that exclusion is justified. However, it would seem that usually, with proper cautionary instructions to the jury, the risk of these harmful possibilities is outweighed by the advantage of getting the crucial story of the dying declarant before the trier of fact.

Although the modern trend is away from it, the traditional view in the United States has been that opinions of witnesses are generally inadmissible. Courts adhering to this view often apply it as well to opinions of declarants in dying declarations.[18] Since the dying declaration is a substitute for sworn testimony, this view requires it to satisfy the requirements of sworn testimony.[19] Since the right of cross-examination is missing, it is impossible to determine the grounds upon which the declarant's opinions may have been predicated.[20] This aspect of unreliability causes some courts to reject them.[21] The jury, it is feared,

Ashworth, 50 La. Ann. 94, 23 So. 270, 273 (1898), the court said: "the rules relative to the admissibility of such declarations are not to be as rigorously applied when . . . they are in favor of the accused, as when they are sought to be urged against him"; see also, 40 C.J.S. 1278, Homicide, § 299.

[17] The cases include Sweat v. State, 107 Ga. 712, 33 S.E. 422 (1899), where the court rejects a dying declaration but intimates that had it been accompanied by facts, it might have been admissible; State v. Proctor, 269 S.W. 2d 624, 630 (Mo. 1954), where declarant characterized the act as "accidental," the court stated that "accidental" standing alone was objectionable as a conclusion but since all of the surrounding facts were in as evidence, the declaration was admissible. *Cf.* State v. Lee, 58 S.C. 335, 36 S.E. 706 (1900), where the court admitted the dying declaration that the shooting was "willful and malicious" even though it was not accompanied by facts because testimony of others at the trial tended to show that the declarant had within his knowledge facts on which he might have based his opinion.

[18] 1 WHARTON, CRIMINAL EVIDENCE (12th ed. 1955) § 309; 2 JONES, EVIDENCE (5th ed. 1958) § 305.

[19] State v. Wright, 112 Iowa 436, 84 N.W. 541, 544 (1900). The dying declaration was that declarant thought defendant crazy and that he did not believe that accused intended to shoot him. In reference to this, the court said, "Declarations made under the solemn sense of approaching death are only competent as to facts which the witness might testify to if living." Riddle v. State, 210 Ark. 255, 196 S.W. 2d 226, 229 (1946).

[20] Jones v. State, 21 Ala. App. 33, 104 So. 878 (1925).

[21] Another reason, previously mentioned for excluding dying declarations in opinion form, is the prejudicial effect the opinion sometimes has upon the jury. In the words of Mr. Justice Cardozo, "The reverberating clang of those accusatory words would drown all weaker sounds." Shepard v. United States, 290 U.S. 96, 104 (1933).

will often take the opinion of the declarant to be conclusive and close its ears to other testimony.

There are cases which identify the problem as one of the opinion rule, point out no valid special circumstances justifying exclusion, but still exclude dying declarations simply because they are in opinion form.[22] In these cases the courts were squarely faced with the problem of choosing between the traditional view which excludes dying declarations containing opinions and the modern trend which admits such dying declarations — and they choose the former.

The modern view,[23] of which the instant case is an example, holds that dying declarations, if admissible in all aspects other than their recital of opinions, are admissible notwithstanding such recital. The growing acceptance of dying declarations in opinion form can be analogized to the evolution of the opinion rule itself. At one time the opinion rule was regarded mainly as a rule of exclusion; consequently, it could be argued that if an opinion was to be categorically rejected when presented by a witness in court, it should also be rejected when offered as a dying declaration. However, today the opinion rule is looked upon as being a rule of preference requiring witnesses, wherever meaning can be conveyed as effectively to the trier of fact, to state facts rather than opinions since such opinions are superfluous and can be as readily reached by the jury as by the witness.[24] When the witness is in court it is always possible for counsel to reframe the question to avoid harmful opinions. This is not true of dying declarations and to reject such declarations "mistakes the function of the opinion rule and may shut out altogether a valuable item of proof."[25] It is indeed impossible to require the declarant to restate his observations in the form of

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[22] In Gardner v. State, 55 Fla. 25, 45 So. 1028, 1029 (1908), the dying declaration, "She shot me on purpose," was excluded. There, the husband (decedent) chased his wife, who took a pistol she had in her possession, turned and shot her husband. In People v. Alexander, 161 Mich. 645, 126 N.W. 837, 838 (1910), the dying declaration, "My husband deliberately shot me," was excluded.

[23] In Pippin v. Commonwealth, 117 Va. 919, 86 S.E. 152, 154 (1915), the court broadly intimated that Virginia admits opinions. Going a step further, the court stated in Pendleton v. Commonwealth, 131 Va. 676, 109 S.E. 201 (1921) that a "dying declaration is not inadmissible in evidence merely because it states a conclusion of fact." *Cf.* Davis v. Commonwealth, 204 Ky. 809, 265 S.W. 316, 318 (1924). A stronger statement may be found in Commonwealth v. Knable, *supra*, n. 15, 117, where the court said "the opinion rule has no application to dying declarations." See also Commonwealth v. Plubell, 367 Pa. 452, 80 A. 2d 825, 828 (1951).

[24] 5 WIGMORE, EVIDENCE (3d ed. 1940) § 1447.

[25] MCCORMICK, EVIDENCE (1954), § 18.

facts;[26] therefore, the opinion is not superfluous and the declaration is admitted on the basis of *necessity*.[27] The trier of fact should not be deprived of the declaration, for what it is worth, even though in the form of an opinion, if it meets all the requirements of an admissible dying declaration.

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[26] Indeed the declarant when he made the declaration might not have been able to state the facts because of his physical condition.

[27] 5 WIGMORE, *loc. cit. supra*, n. 24:

> "The theory of that rule [opinion rule] is that, wherever the witness can state specifically the detailed facts observed by him, the inferences to be drawn from them can equally well be drawn by the jury, so that the witness' inferences become superfluous. Now, since the declarant is here deceased, it is no longer possible to obtain from him by questions any more detailed data than his statement may contain, and hence his inferences are not in this instance superfluous, but are indispensable."