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Article 6

Evidence - Admissibility of Dying Declaration

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RECENT DECISIONS

Evidence — Admissibility of Dying Declaration — Lee H. Allen was convicted in the Ontario County Court for manslaughter in the first degree, and from a judgment of the Appellate Division of the Supreme Court, affirming the County Court's judgment on the verdict, defendant appealed. *Held:* The Court of Appeals reversed, holding that statements by the victim about twelve hours before her death were inadmissible as dying declarations. *People v. Allen, 90 N.E.(2d) 48 (1949 New York).*

The principle upon whice dying declarations are received in evidence is that the mind, impressed with the idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath. Safety in receiving such declarations lies only in the fact that the declarant is so controlled by a belief that his death is certain and imminent that malice, hatred, passion, and other feelings of like nature are overwhelmed and banished by it. The evidence should be clear that the declarations were made under a sense of impending death without any hope of recovery.[1] However, the admissibility of dying declarations does not depend upon any particular form of expression. There is no unyielding ritual of words to be spoken by the dying,[2] and the fact that the declaration is made some days or weeks prior to the death of the declarant does not render it incompetent.[3]

What is decisive is the state of mind of the declarant. Even so, the state of mind must be exhibited in evidence and not left to conjecture. The patient must have spoken with the consciousness of a swift and certain doom.[4] In *Shepard v. United States,* Mr. Justice Cardozo said,

> "Fear or even belief that illness will end in death will not avail of itself to make a dying declaration. There must be a "settled hopeless expectation" that death is near at hand, and what is said must have been spoken in the hush of its impending presence."[5]

If the declarant thinks there is a slight chance of living, the declarations are inadmissible.[6]

The declarant's certainty that he is about to die and the lack of all hope of recovery may be proven by his express language or conduct, or inferred from his physical condition and obvious danger, or acquiescence in the opinions of doctors or others stated to him, or other adequate circumstances.[7] But, as the guarantee consists in the subjective

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[1] People v. Sarzano, 212 N.Y. 231, 106 N.E. 87 (1914).
[2] People v. Bartelini, 285 N.Y. 433, 35 N.E. (2d) 29 (1941).
[3] State v. Elias, 205 Minn., 156, 285 N.W. 475 (1939).
[4] Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933).
[5] *Supra,* Note 4.
[6] Ibid.
[7] State v. Sanford, 44 N.M. 66, 97 P.(2d) 915 (1939).

effect of the approach of death, the declarant should appear to have had a consciousness of the approach of death; and this consciousness must of course exist at the time of making the declaration.[8]

Thus if a declarant believes and exhibits the belief that his death is imminent and because of this belief makes a statement naming his assailant, the declaration should be admissible as a dying declaration. However, the peculiar facts and circumstances of each case are applied to the rule and if the rule is satisfied then the statement is admissible. In the instant case, the declarant, Mrs. Allen received the last rites of her church shortly after arriving at the hospital, suffering from an abdominal wound inflicted by a bread knife. She made repeated statements to various people that she thought she was going to die, and during the 5 days she lived, she never once expressed any belief or hope of recovery. There was no evidence to indicate that Mrs. Allen thought her death was imminent or that she made her statement because of the fear of imminent death. The declaration in dispute was made to the declarant's mother about twelve hours before death in narrative fashion recounting the events of the stabbing.

It is the opinion of the writer that the Court of Appeals was correct in holding the declaration inadmissible because, applying the rule to the facts in the instant case, it is clear that the declarant, Mrs. Allen, did not speak under a sense of impending death and as a result of the sense of impending death. Therefore since the rule was not satisfied the Court of Appeals in the instant case could only reverse the judgment, assuming the settled rules as to dying declarations may not be broadened except by statute.[9]

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Labor Law — Evidence Necessary to Sustain Allegation of Discriminatory Discharge — Complainant union brought this action against respondent employer alleging that respondent was committing unfair labor practices in violation of the Wisconsin Employment Peace Act.[1] The Wisconsin Employment Relations Board found the following facts: respondent in its wholesale hardware business maintained a large warehouse in the city of Madison, Wisconsin; merchandise was shipped

[8] People v. Becker, 215 N.Y. 126, 109 N.E. 127 (1915).
[9] Sowell v. State, 30 Ala. App. 18, 199 So. 900 (1941).
[1] Section 111.06(1) provides "It shall be an unfair labor practice for an employer individually or in concert with others: (a) To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in section 111.94 . . . (c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, . . ." Section 111.04 guarantees to employes freedom in joining or refusing to join unions. Wis. Stat. (1949), Chap. 111.