1931

Evidence--Dying Declarations

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Recommended Citation

Hankes, F. H. (1931) "Evidence--Dying Declarations," Kentucky Law Journal: Vol. 20 : Iss. 1 , Article 11. Available at: https://uknowledge.uky.edu/klj/vol20/iss1/11

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guilty of violations, but there was no evidence that the officers had knowledge of these previous violations, or reasonable grounds of suspicion. The court held in this case that there was not sufficient grounds to sustain the defendant's request that the question of entrapment be submitted to the jury. The words of the court as to reasonable suspicion are: "That an agent manufactures an offense against the law and then incites a person against his will to commit that offense for the purpose of prosecution is the gist of the defense of entrapment."

"When any evidence of this situation appears, the question whether such a person was approached as an innocent man, or one suspected of violating the law, becomes important. * * * There is no evidence here, however, that the agent manufactured the crime or induced its commission. The lack of evidence then that the agent did not have a belief or suspicion of a violation of the law becomes immaterial." This statement of the rule of law as to the defense of entrapment is a novel one.

In the great majority of similar cases it has been at least tacitly admitted that proof of reasonable suspicion and good faith on the part of the government agents was proper if not necessary. Grounds for reasonable suspicion have been proven as a guide to the origin of intent. Whether or not the agents of the government acted in good faith upon reasonable suspicion has been used as one of the criteria for determining the legality or illegality of the means used to entrap the person. According to the above rule, the court looks first to the origin of intent. They determine whether the accused was induced to commit the acts. Finding these in favor of the defendant, the court then allows him to raise the question of reasonable suspicion. Otherwise it is immaterial.

The conclusion seems to be that this case is not in harmony with the majority of cases. They support the rule that proof of reasonable suspicion that the law is being violated is essential to rebut the plea of entrapment where more than mere request for violation is made by government agents. The rule of this case requires that the defendant prove all other elements of entrapment before the question of reasonable suspicion can be brought into issue. Thus, the case of the government becomes less burdensome, and that of the accused becomes more so.

J. Darwin Bond

Evidence—Dying Declarations.—In a recent Kentucky case, the Court of Appeals admitted as dying declarations statements made by deceased and held that the statement "Oh, Lordy, I am going to die, I can't live long this way," was sufficient predicate for admission of dying declarations, in view of the nature of the wound. Cochran v. Commonwealth, 236 Ky. 284, 33 S. W. 230 (1930).

The law in Kentucky on admission of dying declarations is well settled and is in accord with the general weight of authority. The court in the above case stated the law as "consciousness on the part..."
of the declarant that he was dying or was actually in extremis may be inferred not only from his statements, but also from the nature of the wound and other circumstances. * * * The deceased was shot in the abdomen and bullets pierced his intestines in fourteen places. While he lived five days, the wound was of such a character that deceased must have recognized its seriousness. It is not necessary that deceased say in so many words that he is conscious of impending death; but it is sufficient if the judicial mind is convinced by legally sufficient evidence that deceased believed he was about to die."

Dying declarations have been admitted since the early 1700's, and early customs sanctioned the special trust reposed in death bed statements. Shakespeare expressed in verse the opinion of the times in King John, V, 4 Melun, about 1595:

"Why should I then be false, since it is true
"That I must die here and live hence in truth?"

Necessity is given as the reason for admitting in evidence the unsworn testimony of the deceased. The necessity of having witness' only available trustworthy statement is evident in those cases where there are no other witnesses to the transaction.

At first, dying declarations were admitted in both civil and criminal cases, but very early the courts limited the admissions to criminal cases only. This limiting of the admissions was due to a chapter on homicide by Sergeant East, 1803 Sergt. East, Pleas of the Crown, 1, 353, and in 1860 Justice Redfield in his edition of Greenleaf's Treatise gave it the widest credit and led to its widest acceptance. Greenleaf on Evidence, Redfield Ed., Vol. 1, section 156, editorial note. The rule now being that dying declarations are admissible only in cases of homicide where the declarant's death is the subject of the charge and only that part of the declaration that pertains to the facts leading up to, concerning or attending the injurious act which resulted in declarant's death.

Some courts have put a further limitation on the admissions by applying the "Opinion Rule." Wigmore, Evidence Vol. 3, section 1434, says that the Opinion Rule cannot be rightfully applied to dying declarations. In cases where the witness is living, all the facts can be ascertained from his testimony and the jury can form its own opinion but in cases where the witness is dead, all the facts are not available and his opinion may be every thing when so few facts are had. Also, this rule gives rise to rather arbitrary decisions. It is one thing to exclude some parts of a testimony that are not relevant or that could not be used if the witness were on the stand, but it is quite a different matter to reverse on some arbitrary matter to which the jury is fully competent to give proper weight. Kentucky applies the opinion rule and cases have been reversed because it was held incompetent to admit in dying declarations such a trivial statement as, "He shot me for nothing." Collins v. Commonwealth, 12 Bush 271 (1876) and Jones v. Commonwealth, 20 Ky. Law Rep. 355, 46 S. W.
The guarantee of the truth of the declarant's statement is the solemnity of the occasion; where every motive to falsehood is silenced and every hope of this world is gone.

"Statements of a wounded person are competent as a dying declaration where the proper preliminary foundation for its introduction has been laid upon the theory that the consciousness of impending death removes all incentive to state an untruth or fail to state the whole truth, and dispenses with the ordinary necessity for an oath and cross-examination." Whitehead v. Commonwealth, 200 Ky. 440—225 S. W. 93 (1920).

This guarantee is recognized universally and courts to further limit the exceptions to the Hearsay Rule have set out certain criteria to be followed. The deceased must be actually in extremis, must have a sense of impending death, apprehension of immediate death, abandonment of hope of recovery, and in possession of mental capacities.

These mental and physical conditions are held necessary in all jurisdictions with the exception of apprehension of immediate death. This is the most mooted question of any arising in the consideration of the general subject of dying declarations. Kentucky adopts this view along with the majority.

All the above rules are set out in the case of Walston v. Commonwealth, 16 B. Mon. 15 (1855):

"The court stated that the English authorities fully establish, as a principle of the common law, the admissibility of dying declarations as evidence; but it seems to be well settled that they are admissible, as such, only in cases of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declarations. That the principle upon which they are admitted rests upon the ground of public necessity to preserve the lives of the community in bringing the manslayer to justice. That the argument against their admissibility is that they form a very dangerous description of testimony, made frequently under feelings of revenge, calculated to affect the truth and accuracy of the statements, and that the rule which admits them, not only deprives the accused of the right of cross-examination, but also of the constitutional right "to meet the witnesses face to face" that are produced against him. That the answer to the objection made to the policy of the rule admitting dying declarations is that such evidence must, from the necessity of the case, be admitted to identify the accused, and to establish the circumstances from which the death resulted; otherwise the guilty would frequently escape, where no third person witnessed the transaction, for the want of testimony to designate the perpetrator of the homicide, and to explain the manner in which it occurred. And that, as these declarations, to be admissible, must be made in extremis, under a solemn sense of impending dissolution, it is considered that the constant expectation of immediate death will silence every motive to falsehood, remove every feeling of revenge, and the mind will be induced by the most powerful considerations to adhere strictly to the truth; the awful situation of the individual creating, in legal contemplation, an obligation equal to that which is imposed by an oath administered in a court of justice."
We have seen in general, in order to admit statements of a person who has been killed by another in evidence on the trial of that other person for the killing, as dying declarations of the deceased, such statements must have been made when the latter was in extremis, under a sense of impending death, and the sense or apprehension must have been that such death would be almost immediate, and all hope of recovery had been abandoned, and the decedent was in reasonable possession of his mental faculties. The question which naturally follows is, how is such a state of affairs to be established or proved?

Several methods are used by the courts, the most common being the statements of the deceased and the surrounding circumstances combined. It is also sufficient if the declarant by his statements expresses his recognition of impending dissolution. And further it is sufficient to prove such a state of affairs, in absence of a statement, by circumstances such as, the seriousness of the wound, the opinion of attending physician, sending for a priest or minister, arranging his business, or witnesses.

"The law does not require as a condition to the competency of statement or a dying declaration, that the injured party shall, in express words, declare that he is about to die, or that he shall make use of equivalent language. His recognition of impending dissolution may be shown in this way but the law does not limit it to this mode alone. People v. Commonwealth, 87 Ky. 487, 9 S. W. 509 (1888)."

This view is also shown in Mattox v. U. S., 146 U. S. 140 (1892); Gerald v. State, 128 Ala. 6, 29 So. 614 (1901); and People v. Lem Deco, 132 Cal. 199, 64 Poe 265 (1901) says, "where taking all the evidence together, and considering all the attending circumstances" it was sufficiently shown that the deceased made the dying declarations under a sense of impending death.

Wigmore on Evidence, Vol. 3, section 1442, says, "We may avail ourselves of any means of inferring the existence of such knowledge; and if in a given case the nature of the wound is such that the declarant must have realized his situation our object is sufficiently attained. Such is the settled judicial attitude."

The above statement is followed to the letter in Kentucky and the principal case cites it as authority and quotes it in the opinion.

Kentucky courts in a few instances have made some rather unique holdings. Sending for a doctor has been allowed in evidence to show that deceased entertained a hope of recovery which would disqualify his statements as dying declarations. Methedy v. Commonwealth, 14 Ky. Law Rep. 182, 19 S. W. 977 (1892). This is only followed in Kentucky, 56 A. L. R. 414 e. Where the circumstances were such that would show deceased was in extremis it merely meant that deceased wished to have temporary relief. State v. Evans, 124 Mo. 397, 38 S. W. 8 (1894); McQueen v. State, 103 Ala. 12, 15 So. 324 (1894).

In one instance Kentucky has allowed statements to be admitted as dying declarations where the declarant expressed a hope of recovery to his family but the circumstances showed that he must have known
that death was near at hand. This is unusual and against the weight of authority and only used in Kentucky, 6 Bush 312, Minnesota, 122 Minn. 91., 141 N. W. 1113, and Pennsylvania, 2 Ashm. (Pa.) 41.

A few jurisdictions have allowed dying declarations in cases of abortion where death occurred. In these jurisdictions it was let in because the offense may be prosecuted for felonious homicide and come under the rule that dying declarations are allowed only in cases of homicide. 87 Ky. 487, 9 S. W. 509 (1888).

The law on dying declarations is well settled throughout the United States and England, and Kentucky is in accord except in one or two minor details as set out above. The holding in the principle case would be the same in all jurisdictions. F. H. HANKEs