

## APPELLATE CRIMINAL.

*Before U Bo Gyi, J.*

KYIN HOKE (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).\*

H.C.  
1948

Sept. 23.

*Code of Criminal Procedure, s. 162 (2), s. 302 (2), Penal Code—Mode of proof of statement made to the Police—Evidentiary value of denunciation made by the deceased.*

*Held*: That when prosecution or defence seek to contradict a witness or impeach his credit in pursuance of the provisions of s. 162 of the Code of Criminal Procedure as amended, the Police Officer concerned must not be examined in the midst of the examination of the witnesses for the purpose of proving the statement of the witness to the police. Without proving such statement the witness may be cross-examined on the lines indicated in s. 145 of the Evidence Act. The attention of the witness must be called to those parts of his statement to the Police which are to be used for the purpose of contradicting him. Thereafter the Police Officer should be examined.

Denunciation made by a deceased person should be treated with caution. Three essential points should be borne in mind:—

- (i) Danger of perjury in fabricating declarations, the truth or falsity of which it is impossible to ascertain.
- (ii) Danger of letting in incomplete statements.
- (iii) The experienced fact is that implicit reliance cannot in all cases be placed on the declaration of a dying person.

*Nga Ba Thein v. King-Emperor*, 1 B.L.T. 84, followed.

C. C. Khoo for the appellant.

O. S. Woon (Government Advocate) for the respondent.

U BO GYI, J.—Appellant Kyin Hoke, a Sino-Burman of Thongwa, has been convicted under section 302 (2) of the Penal Code, as amended, for the alleged murder of one Maung Mya Maung of Nyaungni at that village

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\* Criminal Appeal No. 914 of 1948 being appeal from the order of the 6th Special Judge of Hanthawaddy, dated the 16th August 1948, passed in Criminal Regular Trial No. 11/12 of 1948 (amalgamated).

which is a few miles distant from Thongwa on the night of the *lagwe* of *Taboung* last (9-3-48) and has been sentenced to seven years' rigorous imprisonment.

Before proceeding further, I would note that the learned Special Judge should never set out the words "Intentionally (or knowingly)" in a charge of murder. There is another matter that calls for comment, which is that where either the prosecution or the defence seek to contradict a witness or impeach his credit in pursuance of the provisions of section 162 of the Code of Criminal Procedure, as amended, the police officer concerned must not be examined in the midst of the examination of the witness for the purpose of proving the statement of the witness to the police. The prosecution will naturally have access to police papers, while on the other hand, the accused may under section 162 (2) of the Criminal Procedure Code, as amended, request the Court to see that copy of the witness's statement to the police is supplied to him. Then, *without at first proving such statement*, the witness may be cross-examined on the lines indicated in section 145 of the Evidence Act. *The attention of the witness must be called to those parts of his statement to the police which are to be used for the purpose of contradicting him.* Then, and then only, the copy of the recorded statement can be proved, and this may be done by examining the police officer, when his turn comes, as to whether the copy before the Court is a "True" copy of the witness's statement to the police and whether the original statement as recorded has been made by the witness and accurately recorded. *The copy should then be marked as an exhibit in the case, an appropriate letter or number, as the case may be, being given to it.*

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[The learned Judge then discussed the evidence in great detail and proceeded as follows:]

In *Nga Ba Thein v. King-Emperor* (1) in which also the basis of the conviction was the denunciation alleged to have been made by the deceased, it was held that such denunciations should be treated with caution. The head note to the report runs: "In considering the weight to be attached to dying declarations it is necessary to bear in mind three things—

- (1) the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain,
- (2) the danger of letting in incomplete statements,
- (3) the experienced fact is that implicit reliance cannot in all cases be placed on the declaration of a dying person."

No doubt dying declarations are on the whole useful and necessary. But at the same time in basing a conviction on a dying declaration the above considerations must be steadily borne in mind.

Now, the facts of the case put in a nut-shell are that while the deceased and his companions were proceeding to Aye Maung's house along with the appellant and his companions as well as some other villagers, the deceased received a mortal wound in the lane in front of Aye Maung's house. It was a dark night. Nobody saw the actual assault. No one can give evidence as to the circumstances which immediately led to the assault. The most the witnesses could say was that they heard shouts. Shortly afterwards the deceased was found lying in front of Maung Kywet Oh's house a short distance from Aye Maung's house. U Po Kyai states that the deceased denounced the

appellant. But he is contradicted by Kyaw Lay and Tun Hlaing and also by his own conduct. He went to the headman to report, but obviously he did not report to the headman that the deceased had denounced the appellant. Actually, the headman arrested Kyaw Lay on the charge of murder and sent him in custody to the police-station.

In view of the above, I am of opinion that at first Kyaw Lay was suspected of the murder and was accordingly reported to the headman. Kyaw Lay is however a resident of the village and has apparently relatives and friends there, and it was only after he had been sent off to the police-station that it occurred to U Po Kyai and others to implicate the appellant, a resident of Thôngwa.

For all the above reasons I find that the prosecution have not proved that it was the appellant who stabbed the deceased. The conviction and sentence are accordingly set aside and the appellant will be acquitted and released so far as this case is concerned.

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