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Homicide--Uncorroborated Dying Declaration of Victim--Identification of Defendant (People v. Ludkowitz, 266 N.Y. 233 (1935))

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ences.[9] An inference, however, is not a conclusion which the jury *must* reach.[10] But since an inference must be based on a proved fact,[11] it cannot be the foundation of another inference.[12] The admission of the judgment roll in this case would allow the jury to base an inference upon an inference.[13]

J. A. R., JR.

HOMICIDE—UNCORROBORATED DYING DECLARATION OF VICTIM —IDENTIFICATION OF DEFENDANT.—The appellant was convicted of murder in the first degree. Deceased was shot from behind and no one testified to any act on the part of deceased indicating that he turned around or saw his assailant. Appellant was not connected with the crime by eye witnesses. The only evidence offered which might tend to show that appellant was the man who did the shooting was a dying declaration.[1] *Held,* reversed, the dying declaration is insufficient to support a conviction where other evidence of the identity of the murderer is unsatisfactory. *People* v. *Ludkowitz,* 266 N. Y. 233, N. E. (1935).

People v. Loomis, 170 Cal. 347, 149 Pac. 581 (1915); Pribble v. People, 49 Colo. 210, 112 Pac. 220 (1910); State v. Curtin, 28 Dela. 518, 95 Atl. 232 (1914); Johnson v. State, 57 Fla. 18, 49 So. 40 (1909); State v. Wetter, 11 Idaho 433, 83 Pac. 341 (1905); People v. Spencer, 264 Ill. 124, 106 N. E. 219 (1914); State v. Thomas, 172 Iowa 485, 154 N. W. 768 (1915); Ford v. State, 73 Miss. 734, 19 So. 665 (1896); State v. Hill, 65 N. J. Law 626, 47 Atl. 814 (1901); Maas v. Territory, 10 Okla. 714, 63 Pac. 960 (1901); King v. State, 91 Tenn. 617, 20 S. W. 169 (1892); State v. Mewhinney, 43 Utah 135, 134 Pac. 632 (1913); State v. Harris, 74 Wash. 60, 132 Pac. 735 (1913); State v. Pressler, 16 Wyo. 214, 92 Pac. 806 (1907); McNaughten's Case, 1 C. & K. 130, Note a (1843).

Knowledge of the Law: Brunaugh v. State, 173 Ind. 483, 90 N. E. 1019 (1910); State v. Jones, 118 La. 369, 42 So. 967 (1907); Crain v. State, 69 Tex. Cr. 55, 153 S. W. 155 (1913); Taff v. State, 69 Tex. Cr. 528, 155 S. W. 214 (1913).

[9] Since the defendant has the benefit of the presumption of innocence, the court cannot compel the jury to find any fact detrimental to the defendant.

[10] *Supra* note 7, definition of inference.

[11] *Ibid.*

[12] Every inference must be based upon some fact or facts which have already been proved; it may not be based upon another inference. Lamb v. Union Ry. Co., 195 N. Y. 260, 88 N. E. 371 (1909); Warner v. New York, O. & W. Ry., 209 App. Div. 211, 204 N. Y. Supp. 607 (4th Dept. 1924); Plotnick v. Plotnick, 185 App. Div. 15, 172 N. Y. Supp. 584 (1st Dept. 1918).

[13] Using the judgment roll the jury could infer that this contract was unenforceable and, with this as a basis, they could infer that it was secured by the same means; and further, that since this defendant was the agent for the Union for procuring the contracts he was the party who exercised the coercion and uttered the threats.

[1] Made in response to questions written on a regulation police blank.

The rule governing the admission of dying declarations constitutes an exception to the general rule of evidence which prohibits the receipt in evidence of hearsay statements.[2] The general rule is also to the effect that the deceased must at the time of the declaration be under the sense of impending death and without any hope of recovery.[3] Whether the preliminary proof advanced is sufficient to admit the receipt in evidence of a dying declaration presents in each case a question which must be determined by the trial judge.[4] While the preliminary proof may be sufficient to permit the introduction in evidence of the dying declaration still, if it be not clear and satisfactory, it is the duty of the court to instruct the jury as to the weight to be given to such declaration.[5] Dying declarations, when admitted, are not always regarded as of the same value and weight as the testimony of a witness given in open court and under the sanction of an oath.[6] They are received of necessity, in order to prevent a failure of justice upon the theory that the belief of impending death is equivalent to an oath.[7] But in spite of the court's reluctance to accept the burden of expressly stating so,[8] a dying declaration unsupported by other evidence is insufficient to sustain judgment of conviction.[9] The jury should be instructed that the statement was not to be considered as having the same probative value as the testimony of a witness in open court, subject to cross-examination.[10] The reason for receiving dying declarations in evidence should be explained so the jury may be in a position properly to weigh the evidence in arriving at a verdict.[11] Inasmuch as these declarations are substituted for sworn testimony it follows that they must be such narrative statements as a witness might properly give on the stand if living.[12] The declarant must have had actual knowl-

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[2] Shepard v. United States, 290 U. S. 96, 54 Sup. Ct. 22 (1933); People v. Sarzano, 212 N. Y. 231, 106 N. E. 81 (1914); People v. Falletto, 202 N. Y. 494, 96 N. E. 355 (1911).

[3] *Supra* note 2.

[4] People v. Smith, 104 N. Y. 491, 10 N. E. 873 (1887); People v. Kraft, 148 N. Y. 631, 43 N. E. 80 (1896); People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690 (1908).

[5] Instant case; WIGMORE, EVIDENCE (2d ed. 1923) §§1440, 1441, 1442.

[6] Armstrong v. United States, 41 F. (2d) 162 (1930); People v. Corey, 157 N. Y. 332, 51 N. E. 1024 (1898).

[7] WOOD, PRACTICE EVIDENCE (2d ed.) 326: "A charge that it was the jury's duty to take a dying declaration into consideration as competent testimony as it had all the sanction of evidence that the law could ascribe to evidence was held to be error"; People v. Kraft, *supra* note 4.

[8] Instant case at 240.

[9] People v. Kraft, *supra* note 4; People v. Corey, *supra* note 6; People v. Ledwon, 153 N. Y. 10, 46 N. E. 1046 (1897); People v. Pignataro, 263 N. Y. 229, 188 N. E. 720 (1934).

[10] Instant case; People v. Corey, *supra* note 6.

[11] Armstrong v. United States, *supra* note 6; State v. Valencia, 19 N. M. 113, 140 Pac. 1119 (1914).

[12] People v. Olmstead, 30 Mich. 434 (1874); State v. Reed, 137 Mo. 125, 38 S. W. 574 (1897).

edge or opportunity for observation of the fact which he relates.[13] A declaration must be rejected when it would be impossible for the declarant to have had any adequate source of knowledge of his assailant.[14] To permit a conviction to stand where no motive was shown for the act, and no evidence corroborating the dying declaration was offered, would shock one's sense of justice.[15]

J. J. G.

INSURANCE—AEROPLANE ACCIDENT—PASSENGER NOT "PARTICIPATING IN AERONAUTICS."—The life of George W. Martin was insured by the defendant company. The policy, in which plaintiff was named as beneficiary, contained a *double indemnity clause* by force of which, double indemnity would be payable upon receipt of due proof that the insured died as a result of bodily injury effected solely through external, violent and accidental means—provided that the double indemnity shall *not* be payable if death resulted—from "participating in aeronautics." The insurance having been in force for more than two years the liability of defendant was conceded as to single indemnity. The insured was invited by one Gregory, an aeroplane pilot, to accompany him as a guest on a pleasure flight. While in flight on this trip the aeroplane accidently crashed, killing the insured instantly. The insured had no knowledge of aviation and did not, before said accident, use aeroplanes as a means of transportation. *Held,* a person riding in an aeroplane as an invited guest is not "participating in aeronautics" within the exclusions of the double indemnity clause of the above mentioned policy. *Martin* v. *Mutual Life Insurance Co.,* 189 Ark. —, 71 S. W. (2d) 694 (1934).

In reaching this decision the court in construing the meaning of "participating in aeronautics" refused to be bound by the connotation given by those learned in the niceties of language and accustomed to its precise use, but rather considered that meaning which the majority of the thousands of persons who seek insurance would understand by the term and considered it as the equivalent to "engaged in aeronautics." Words and phrases used in insurance policies should be construed by their meaning as used in the ordinary speech of the people and not as understood by scholars[1] unless an artificial or technical meaning was intended to express the mutual

[13] Walker v. State, 39 Ark. 225 (1882); Jones v. State, 52 Ark. 347, 12 S. W. 704 (1889).

[14] State v. Wilks, 278 Mo. 481, 213 S. W. 118 (1919); State v. Williams, 67 N. C. 12 (1872).

[15] State v. Phillips, 118 Ia. 660, 92 N. W. 876 (1902); People v. White, 251 Ill. 67, 93 N. E. 1036 (1911).

[1] Missouri State Life Insurance Co. v. Martin, 188 Ark. 907, 69 S. W. (2d) 1081 (1934). See, U. S. Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 Sup.