Dying Declarations in Pakistan and India: A Case Law Study of their Evidentiary Value

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Abstract:
The paper analyses the evidentiary value of one the most important pieces of evidence, i.e. dying declaration. It catalogues the basic principles in this regard as pronounced by the Superior Courts of Pakistan. There are also a few references to the Indian cases as the law applicable in the both jurisdictions is similar on this point. It has been held in these jurisdictions time and again that uncorroborated dying declaration can be relied upon for conviction if it is proved to be trustworthy and genuine, and the necessity of corroboration would only arise in those circumstances in which a court’s conscience is not satisfied as to its genuineness. The paper also seeks to elaborate evidentiary value of dying declarations in different situations which are of recurring nature in criminal trials. These situations are dying declarations contained in F.I.R., statements of deceased persons made to Police before their death, and more than one dying declaration by the same declarant.

Key Words: Dying Declaration; Evidentiary Value; Pakistan; India; Case law

I. Introduction:
Dying declarations are those statements which are made by the victims of homicide offences as to the cause of their death. The law pertaining to dying declarations is embodied in Article 46 of the Qanun-e-Shahadat Order, 1984 which is a meticulous reproduction of Section 32 of the Indian Evidence Act, 1872. The latter law was applicable in Pakistan till its substitution by the former. The law states that the statement of dying man is relevant and admissible in evidence; it does not address the issue of its evidentiary value. This dimension has been amply dealt with by the case law. There is no dearth of decisions of the superior courts, both in Pakistan and India, which have discussed the issue of evidentiary value of dying declaration and its exact place in prosecution’s evidence. This richness of case law manifests the propensity of human beings to attach great importance to the statement of dying man as it is assumed that a man in such a situation would not tell lies or fabricate stories to implicate innocent persons. At the same time, taking in view this natural tendency, the superior courts
always tend to caution the subordinate courts that dying declarations should be subjected
to close scrutiny and viewed in their attending circumstances.

The paper is divided into five sections in addition to this introduction and a
conclusion. The next section will explain the general principles as to evidentiary value of
dying declarations. The section following this will catalogue the criteria evolved by the
courts for determining the genuineness of dying declarations. Thereafter, one section
each will take up the issue of evidentiary value of dying declarations with respect to the
following issues: dying declarations contained in F.I.R., statements of deceased persons
made to Police before their death, and more than one dying declaration by the same
declarant

II. General Principles:
The general principle regarding the evidentiary value of dying declaration is that it
can form the sole basis of conviction without further corroboration from independent
sources. This principle has consistently been enunciated by the courts for decades. In one
of the pre-partitioned cases, In re Guruswami (1940), Sir Lionel Leach C.J. presiding
over the full bench of Madras High Court observed that “it is not possible to lay down
any hard and fast rule when a dying declaration should be accepted, beyond saying that
each case must be decided in the light of the other facts and the surrounding
circumstances, but if the Court, after taking everything into consideration, is convinced
that the statement is true, it is its duty to convict, notwithstanding that there is no
corroborated in the true sense.” There are decisions of other High Courts delivered in
proximity to the above case wherein the same principle was upheld, e.g. (Muhammad
Arif 1941) and Gulabrao Krishanjee 1945).

The same pattern of pronouncing the conviction on the sole evidence of
uncorroborated dying declaration has been followed by the judiciary in Pakistan. In one
of the famous cases Abdul Raziq (1964), the Peshawar High Court affirmed this principle
in an indirect manner by stating that “it has now been irrevocably held that it cannot be
laid down as an absolute rule of law that a dying declaration cannot form the sole basis of
the conviction unless it is corroborated.” The court further observed that a dying
declaration can be relied upon without jeopardizing the justice when the court is ‘fully’
convinced of its truthfulness and genuineness. To arrive at this decision, the court
referred to the Judicial Committee of Privy Council that held in Chandrasekera (1937)
that a dying declaration may by itself sustain a conviction provided it is found to be
reliable.

When the above referred case of Peshawar High Court came before the Supreme
Court in Abdul Razik (1965), Chief Justice Cornelius made some valuable observations.
It was observed by him that believing or disbelieving dying declaration is not “an
exercise in application of law” rather it is “an application of simple human judgment”.
Thus, whatever manner is followed to ascertain veracity of any statement in a court that
manner ought to be pursued in this matter as well. The C.J. stated that the statements of
dying men should not be believed if they happen to be inconsistent with the physical and
surrounding circumstances as it would be going against “the safe dispensation of justice”
(Abdul Razik 1965).
The above rule is similar to the one laid down by the court in *In re Guruswami* (1940) that “the court must of course fully convinced of the truth of the statement and naturally it could not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility.” Therefore, the general rule that uncorroborated dying declaration may form a sole basis of conviction is subject to a cautionary proviso that such statements must be scrutinized in the physical and surrounding circumstances of each case. This cautionary proviso is important to be resorted to in majority of the cases because of the fact that “the accused...had no opportunity of testing the veracity of the statement by cross-examination” (M. Anwar 1984).

There is an important question often raised with respect to dying declarations in general that are such statements a weaker type of evidence? There are cases (e.g. Muhammad Sulaman 1997) in which it has been observed that it is a weaker type of evidence than the one which is adduced in a court. The reason extended for such a preference is that the former statement could not be subjected to cross-examination. This question has extensively been debated by judges of Supreme Court (Zarif Khan 1977). The Bench was consisted of Justices Anwarul Haq, Muhammad Akram and Dorab Patel. It was a majority decision by Justice Anwarul Haq and Muhammad Akram on the one side, while Justice Dorab Patel on the other. Justice Durab was of the opinion that dying declaration is a weaker type of evidence. He relied on observations made by Beaumont C.J. in Emperor (1933). He also quoted passages from Woodroffe and Taylor for substantiating his contention (Zarif Khan 1977 at 619-20).

In the instant case, Justice Anwarul Haq strongly denounced expressions attributing any weakness to evidentiary value of a dying declaration. He made it clear that when the Legislature has incorporated dying declaration as relevant piece of evidence then there was no justification to lay a general rule as to its weakness as an evidence owing to the reason that the accused did not have an opportunity to cross-examine the declarant. He observed that “the sanctity attached to such statement by the statute should be respected unless there are clear circumstances brought out in the evidence to show that a dying declaration is not reliable for any reason” (Zarif Khan 1977 at 627). The same is the stance of Indian superior courts that no hard and fast rule can be laid down as to general weakness of a dying declaration (Khushal Rao 1958).

There are decisions to the effect that a dying declaration has a degree of sanctity under the law because it is made by the dying man who is suffering under immediate apprehension of separation of his ties with the mundane affairs, so he would not tell lie to implicate the innocent person (Jamait Ali Shah 1993). It is important to observe that Article 46 which deals with dying declarations is not based on such assumptions. The relevancy of a dying declaration depends on the premise that in the circumstances no better evidence can be provided than the statement of a dying man. Thus, the courts ought to be cautious while attributing unquestioned sanctity to dying declarations on any basis except their intrinsic veracity. It was rightly observed by the Lahore High Court in Mian Khan (1954) that “in one case a statement, even though not made by a person under expectation of death, may have very great weight, while in another even a statement made by a person who is at death’s door may not be very convincing".
In one of the pre-partitioned cases (Khurshid Hussain Salihon Shah 1941), the court distinguished between cases in which only one person is implicated in contradiction to those where several persons are alleged for commission of an offence. The court observed that in the former category of cases, a dying declaration happens to be the strongest piece of evidence, while it cannot be acted upon for conviction in the latter category without corroboration. This rule of general application has now been overruled by the courts in Pakistan and India (Muhammad Khan 1961; Harbans Singh 1962). The reason for such decisions is that the number of implicated persons does not have anything to do with credibility of a dying declaration rather its credibility depends its conformity with the attending circumstances and the integrity of the declarant.

III. Criteria for Determining the Genuineness of a Dying Declaration:

There is no cavil with the assertion that ascertaining the genuineness of a dying declaration is an exercise into a question of fact (Omar Ali 1962). That is why the courts have articulated the different benchmarks for determining the veracity of a dying declaration. In Taj Mahmud (1960), the court enumerated the following factors in this regard:

i. “Whether intrinsically it rings true,
ii. Whether there is no chance of mistake on the part of the dying man in identifying or naming his assailants, and
iii. Whether it is free from prompting from any outside quarter and is not inconsistent with the other evidence and circumstances of the case.”

In another case Abdur Rahim (1997), the criterion for evaluating the genuineness of a dying declaration was laid down as under:

i. “there was no chance of mistaken identity,
ii. the deceased was capable of making statement,
iii. the deceased made the statement without much length of time after sustaining the injury,
iv. the statement rings true,
v. the statement was free from promptness of outsiders, and
vi. the deceased was not a man of questionable character.”

In Munir Ahmad (1986), some of the main factors for ascertaining the veracity of a dying declaration were enumerated as following:

i. “Whether the maker had the requisite capacity to make the dying statement,
ii. Whether the maker had an opportunity to recognize the assailants,
iii. Whether there were chances for mistake on the part of dying man in identifying and naming his assailants,
iv. Whether it was free from prompting from any outside quarter, and
v. Whether the witnesses who heard the deceased making his statement heard him correctly and whether their evidence can be relied on.”

Some factors cause a fatal blow to the value of a dying declaration, e.g. tutored and touched up dying declaration does not have any value. If it is proved that a dying declaration was prompted by the relatives, the courts generally keep such statements out of consideration. In one of the pre-partitioned judgments it was affirmatively required by the court that Magistrate should take every step to ensure that “no influence is brought to
bear on the declarant and... [should] not [be] prompted or aided in any way in making his statement” (Nem Singh 1934). Dying declarations recorded in presence of deceased’s relatives are generally accorded less value owing to the possibility of promptness or tutoring. In Nazim Khan (1984), dying declaration was recorded at Police Station in presence of deceased’s relatives. The court refused to attach any evidentiary value to it. In another case (Wahiduddin 1977), the court has categorically held that dying declaration recorded at Police Station in presence of deceased’s relatives is “suspect and certainly less worthy of credence than one recorded by a Magistrate after excluding the relatives.”

On the other hand, it should be kept in mind that mere presence of relatives at the time of recording of a dying declaration does not always lead to the presumption of being tutored. The court has observed in The State (1986) that “in present society particularly in rural areas people consider it highly improper and immoral to leave a dying man unattended. In such a situation the scribe of the dying declaration is required to ensure that nobody should prompt or tutor him while his statement is being recorded and see that he makes the statement freely without any extraneous influence.” The court also admitted that absence of deceased’s relatives at the time of recording the statement would add to its value, “but it cannot be made a rule of general application that even if it satisfies all the essential requirements of its genuineness it must be discarded simply for the reason that at the time of it’s recording some of the relatives of the deceased were present near him...” The reason for discarding the statement made in presence of deceased’s relatives is possibility of tutoring and exchange of common caution, and mere presence might not lead to that situation. So, if it is proved that common caution took place between the relatives and the declarant then the statement becomes unsafe to be relied upon for conviction (Abdul Majid 1989).

IV. Dying Declarations Contained in F.I.R.:

According to Section 154 of Criminal Procedure Code 1898, any information relating to the commission of a cognizable offence is to be reported to Police Station. Such information is termed as “First Information Report”, though this phrase is not employed in the Code but it is understood to refer to information recorded under this Section. The main purpose of this report is to bring the investigating agency into operation. Thus, the Section does not envisage that such report may be used as a substantive piece of evidence, but there are circumstances in which it may be treated as such. For instance, when first information is lodged by the victim who happens to die afterwards, then such a report can be converted into a dying declaration and regarded as a substantive piece of evidence (Abdul Rehman 1995).

In Fazar (1951), after the occurrence of the incident, the victim was taken to the Police Station where he lodged the F.I.R. Thereafter, the victim was sent to the hospital as he was in a serious condition. The victim died in the hospital, whereupon the prosecution used his report as a dying declaration. An objection was raised on the use of F.I.R. as such by the accused. It was held by the court that “the use of F.I.R. as dying declaration was not improper” as the law applicable envisages all kind of statements made by the deceased as to his cause of death and does not specifically exclude the statement recorded in F.I.R.
The courts have not only used F.I.R.s. as dying declarations in those proceedings which are carried out under the Qanun-e-Shahadat Order 1984; they have also shown inclination to treat them as such in those situations where this law does not apply. For instance, in Ghulam Muhammad (1986), the first information was lodged by the victim under the Criminal Law (Special Provisions) Ordinance (1986). According to the provisions of the said Ordinance, the Evidence Act was not applicable to such proceedings. The report lodged by the victim was converted into a dying declaration after his death and used as a substantive piece of evidence. An objection was raised on the basis that the Evidence Act was not applicable to the proceedings, thus such use of the F.I.R. was unwarranted. It was held that merely on this account the dying declaration contained in the F.I.R. cannot be excluded from consideration.

The law laid down by the courts is unequivocal on the point that F.I.R. can be used as a substantive piece when a dying declaration is recorded in it. The question now arises as to the mode of ascertaining the veracity of such dying declarations. In other words whether the courts should treat such dying declarations on the same footing as any other dying declaration or certain kind of sanctity ought to be attached to them owing to the fact that they were recorded while performing an official duty. The courts in Pakistan have consistently observed that when F.I.R. is regarded as a dying declaration, then it is to be tested on the same principles on which any other dying declaration is scrutinized. So, when it is proved that a dying declaration is in conformity with its physical and surrounding circumstances, then it can be relied upon, otherwise it is not worthy of any credence.

In Taj Muhammad (1985), the F.I.R. was treated as a dying declaration. The court before relying on the dying declaration tested its veracity that whether it was in conformity with its physical and surrounding circumstances. It turned up during the proceedings that the F.I.R. was promptly recorded. It was not challenged at all in cross-examination. The Police officer who recorded the F.I.R. suggested neither that it was not genuine document nor that it was not written at time and place where it purports. The name of the accused, motive, the names of the witnesses and weapon of offence were mentioned in it. The defense was unable to shake it and could not criticize this piece of evidence on any other ground. So, the use of the F.I.R. as a dying declaration was held to be justifiable.

If there are minor omissions in recording of F.I.R. which are not likely to affect the veracity of the deceased’s statement they may be ignored by the court. In Ghulam Hussain (1961), the victim after being wounded by firearm was taken to the Police Station where he made a brief report/F.I.R. mentioning the earlier incident but omitted to name one of the three eye-witnesses. The declarant died after three hours of making the declaration/F.I.R. It was held by the court that the omission of one of the eye-witnesses was “not of significance considering frame of mind of deceased at relevant time.”

If a dying declaration is recorded in suspicious circumstances, the mere fact that it is contained in F.I.R. is not sufficient to give it evidentiary value. In Nawab (1989), the F.I.R. was lodged at a place other than the Police Station. The circumstances of the case also suggest that it was recorded after preliminary investigation. Furthermore, the deceased was accompanied by a number of his relatives at the time of recording of the F.I.R. leading to the presumption that they would have helped him in making the
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The court held that it is against the dispensation of justice to treat the F.I.R. as a dying declaration in such circumstances. In another case (Ghulam Rasool 1989) of the same fate, the appellant with his brother allegedly caused death of two persons. The F.I.R. was lodged by one deceased while the other was in coma at that time. It was proved during the proceedings that persons inimical to the accused were present in the Police Station at the time of recording of the F.I.R. It was observed by the court that prompting/tutoring to the deceased from outside quarters could not be ruled out in the circumstances of the case; thus, the F.I.R. does not have any evidentiary value as a dying declaration.

V. Dying Declarations during Police Investigation:

During the investigation of crimes, statements amounting to dying declarations may be recorded by Police Officer/Investigation Officer. Such statements are not used in trial before the courts. According to Section 161 of Criminal Procedure Code 1898 (hereafter referred to as Cr.P.C.), Police Officers are competent to examine the witnesses but this record can only be used for limited purposes as mentioned in Section 162(1) of the same Code. Those who make such statements are not required to sign them nor can these statements be used for any purpose at any inquiry or trial. Section 162(2) provides that the restriction embodied in the Section 162(1) does not apply to dying declarations which means that such statements may be used as dying declarations if they are proved to be authentic. The same was held in Muhammad Abbas (1984). In this case, the declarant made the statement to the Police during investigation which was treated as a dying declaration. The defense counsel assailed the use of such statement owing to the fact that it was recorded by the Investigation Officer under Section 161 Cr.P.C. It was asserted that such statement cannot be treated as a substantive piece of evidence as it was a mere Zimni. It was held by the court that mere fact of recording the statement of the deceased by the Police Officer during investigation did not make it inadmissible in trial as the Section 162(2) specifically excludes dying declarations from the restrictive application of Section 161(1).

The afore-mentioned decision of the Federal Shariat Court was challenged before the Shariat Bench of the Supreme Court in Muhammad Abbas (1984). It was contended on the basis of the view taken by a learned Single Judge of the Lahore High Court in Abdul Majid (1976) that “the statement of deceased recorded by the A.S.I…could not be used as dying declaration as it was merely a statement under Section 161 Cr.P.C. It was not recorded in the presence of the doctor nor did the A.S.I. care to get it recorded through a Magistrate or any other independent official and the prosecution never pressed it as a piece of evidence against the accused/appellant.” However, the same High Court expressed the contrary view in Muhammad Nawaz (1979) wherein it was stated that a statement recorded under Section 161 Cr.P.C. can be treated as a dying declaration if the maker of the statement dies after making the statement. After going through the apparently contradictory decisions, the Supreme Court, in Muhammad Abbas (1984), held categorically that a dying declaration recorded by the Investigation Officer “without addition or omission” was a relevant document which may be relied upon for conviction affirming the above-referred decision of the Federal Shariat Court.

In Ali Gull (1980), a dying declaration was recorded by the Police in a hospital. It was contended by the appellants that the dying declaration was not worthy of reliance as when it was recorded the deceased was not expecting to die. It was further questioned
that how the statement of the deceased recorded in the hospital could be admitted in
evidence which did not bear signature of the deponent and the same was not
countersigned by any doctor of the hospital as well. The court refuted both of the above
objections. Firstly, the law of evidence in Pakistan did not require that dying declaration
should be made under expectation of death. Secondly, the criminal procedure applicable
in this country did not prohibit admission of the deceased’s statement made to the Police
in evidence. Such statements could be admitted in evidence without signature of the
declarant.

Once it is settled judicially that a statement of deceased made to Police can be used
as substantive piece of evidence in form of a dying declaration, the next important
question is what will be the manner of scrutinizing these statements. Generally these
statements are required to be scrutinized in the same manner as any other statement in the
court, i.e. whether the statement is in conformity with its physical and surrounding
circumstances. The criteria is similar to the one applied with respect to dying declarations
in general, and we have already seen its functioning regarding dying declarations
contained in F.I.R. in the previous section of the paper. In Mateeullah (1986), a dying
declaration was recorded by the Police under Section 161 Cr.P.C. in a hospital where the
victim was lying in injured condition. The court held that although statement under
Section 161 Cr.P.C. can be treated as a dying declaration but mere recording of such
statement would not lead to the conclusion that it was correctly recorded; hence, the same
ought to be scrutinized.

In Altaf (1986), the statements were recorded by the Investigation Officer. The
Investigation Officer in examination-in-chief stated that he had recorded the statements
but he did not state that he had correctly recorded those statements, i.e. without making
any additions or alterations. The court rightly observed that no evidentiary value can be
attached to such statements unless they were authenticated by the writer. Theoretically
and legally speaking the statement made to a Police officer or to any other person stand
on the same footing. But at the same time, we should also be conscious of the fact that
Investigation Officers are normally interested in success of prosecution cases that is why
the courts should take additional measures to determine the veracity of such statements.
Bearing this aspect in mind, the Supreme Court of India has observed in Dalip Singh
(1979) that the practice of recording the dying declarations by Investigation Officers
should be discouraged and it is better to have such statements recorded by Magistrates.
Knowing its own limitations that the law does not prohibit recording of such statements
by Investigating Officers, the court also made it clear that no hard and fast rule can be
laid down in this regard.

VI. More than One Dying Declaration:
A declarant may make more than one statement as to his cause of death which may
subsequently be treated as dying declarations. In such a situation, the courts have to
ascertain the uniformity among them. If these statements are found to be consistent and
uniform in material circumstances, then minor omissions will not adversely affect their
evidentiary value. But if these statements are replete with contradictions, then relying
upon them would be a gross miscarriage of justice. Let us analyze a few cases of this
genre to gather the stance of the superior judiciary.
In Janat Gul (1968), the deceased made two statements: one at the place where he was shot and another was made to the Police Officer in Police Station. The former statement was made in front of witnesses and recoded by one of them. It also contained his thumb-impression. The latter dying declaration of the deceased omitted to mention about the earlier statement. Despite this omission, both statements were found to be in pari materia with one another and exactly alike in sequence of the incident. The court observed that the omission to mention the first statement in the subsequent one was immaterial in such circumstances. In another case (Muhammad Afzal 1960) of the same kind, the deceased made two dying declarations: one was brief and another was detailed. In the former dying declaration the deceased mentioned the name of the accused only, while in the latter he also told about the names of the witnesses. In other respects both dying declarations were found to be consistent with the surrounding circumstances. The both statements were held to be admissible by the court as brevity of the one and detail of another do not adversely affect their veracity when they are in conformity as to material facts.

If dying declarations by the same declarant are found to be contradictory with respect to material particulars or there are omissions which are not immaterial per se, such statements are liable to be excluded from the evidence. In Fazal Ahmad (1971), the prosecution relied upon two dying declarations: one was contained in F.I.R. and another was made before the Magistrate. There were some material discrepancies in the both dying declarations. In the F.I.R. the deceased stated that she had illicit relations with the appellant for last two years. While in the second dying declaration she stated that her illicit relations with the appellant were for the last one year. In addition to this, the second dying declaration omitted to mention some material facts which were told at the time of the first statement. In such circumstances, the dying declarations were held as not creditworthy. The same was the fate of Bakhat Jamal (1969) and Gulab Jan (1984). In these cases the courts refused to attach any value to the dying declarations of the deceased keeping in view material inconsistencies and self contradictions between them.

There is another trend gleaned on the analysis of the cases in Pakistan that to place reliance on one of the dying declarations which is proved by the most reliable evidence without testing the veracity of others. Though this mode of preference is helpful in dispensation of justice, but the same may prove to be dangerous if the courts shut their eyes about inconsistency between such dying declarations. That is why the courts while preferring one dying declaration over another always look into their consistency as inconsistency between such statements is bound to raise question about the integrity of their maker. A caution made in this regard by Karachi High Court (Pir Muhammad Khan, 1970) is worthy to be reproduced verbatim, “the veracity of the two declarations cannot be divisible as a natural consequence. If anything is said in one impairing the integrity of the maker, it is a matter for serious consideration whether the other can be treated on better footings. To extend preferential and favorable treatment to any one of them, there must be some strong grounds to eliminate every possibility of doubt.”

Let us refer to two reported cases substantiating the ratio laid down in the above referred case. In Matiur Rehman (1984), two dying declarations were made by the deceased: one was recorded by a Magistrate and another was recorded under Section 161 Cr.P.C. a day earlier. Both statements were narrating the same facts and circumstances that the deceased had been fired at by the accused. It was held that both statements were
reliable and complementary to each other, but the trial court should have relied upon the
dying statement recorded by the Magistrate as it was the most reliable mode of recording
such statements. In another case (Abdul Rahman 1971) of the same sort, the deceased
made three statements: one at the very spot, another at his house and the last was to a
doctor at hospital. All dying declarations implicated the same five accused and they were
consistent with respect to material circumstances. The court, without commenting upon
the veracity of the first two dying declarations, relied on the last one for conviction as it
was most formally and reliably recorded.

VII. Conclusion:
The law of evidence as applicable in Pakistan states that a dying declaration is a
relevant piece of evidence. Thereafter, the law is silent as to its evidentiary value. This
subject has been dealt with by the courts in their pronouncements. According to which a
truthful and genuine dying declaration is sufficient to sustain a conviction without any
independent corroboration. Furthermore, ascertaining the veracity of a dying declaration
in any particular case is an exercise into a question of fact and not of law. Thus, the usual
aids employed by the courts for determining the truthfulness of any statement would all
be relevant for evaluating a dying declaration. Each and every dying declaration is liable
to be scrutinized in its attending circumstances as well as on the basis of integrity of its
maker. Therefore, any observation made in any judicial pronouncement purporting to lay
down legal rule as to evidentiary value of a dying declaration should not be followed in
another judicial proceeding without thoroughly considering the material circumstances of
the both.

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