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Present: De Sampayo A.C.J. 1923.

LIVERA *v.* ABEYWICKREME *et al.*

199—P. C. Matara, 27,222.

Evidence Ordinance, s. 32—Hearsay—Watcher found dead at store—Letter addressed to his master that he was unable to resist single-handed robbers who removed things—Suicide of watcher—Charge of robbery against persons disclosed in letter—Is letter admissible in evidence?

A watcher was found dead at the store. He left a letter addressed to his master, stating that accused had forcibly removed five drums of oil, and that single-handed he was unable to prevent it. The accused were charged with murder, but were discharged, as the Magistrate was of opinion that the watcher had committed suicide from a sense of shame at not being able to protect his master's goods. The accused were then charged with robbery and hurt.

Held, that the letter was inadmissible in evidence at the trial on the charge of robbery.

The statement in the letter was not as to cause of his (watcher's) death, but as to robbery. It was not a dying declaration.

"The cause of death contemplated in section 32 (1) of the Evidence Ordinance is an external or physical cause accounting for the death . . . . It does not include a case of death by the persons's own hand, nor does it refer to a moral cause, such as the unhinging of the mind or perversion of the will which is the usual explanation of suicide."

THE facts are set out in the judgment.

Soertsz, for the appellants.

Vythialingam, C.C., for the respondent.

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May 22, 1923. DE SAMPAYO A.C.J.—

The most interesting point in this case has reference to the admissibility of a certain document in evidence, but before discussing that question some of the facts which led up to the present charges against the accused must be stated. One Sedris *alias* Upasaka Appu was the caretaker or wacther of a citronella estate belonging to one Charles Wijetunga. He lived on the estate in a house which included a store room. The first accused, Abeywickreme, was Police Officer of Puwakbadda, and otherwise occupied a good position in the village. He also carried on some trade, and employed the second, third, and fourth accused. He purchased the citronella crop of Wijetunga's estate for Rs. 860, and converted the same into oil at the distillery on the estate. A sum of Rs. 35 was paid in advance on account of the purchase money, and, according to Wijetunga, the arrangement was that the oil after distillation should be stored in the store room and sold with the concurrence of Wijetunga and the money realized should be paid to him until the balance purchase money was liquidated. He admits that in this way he received further sums of Rs. 267 and Rs. 69, for which receipts Y 1 and Y 2 were signed and delivered by his nephew, Wickremesinghe, who acted for him. The first accused denied this alleged arrangement, and he says that in addition to Rs. 267 and Rs. 69 he paid two other sums of Rs. 365 and Rs. 92, leaving at the time of the alleged offences only the sum of Rs. 23 still due. On January 27 last Sedris *alias* Upasaka Appu was found dead, hanging from a beam of the house, and five drums of citronella oil which were in the store room were missing. The Mudaliyar of the district visited the place on January 28, and made a minute examination of the house, and, among other things, he found in an almirah the letter (marked L) written by Sedris, and intended for his master Wijetunga. The letter is undated, but was evidently written on January 26. He stated in the letter that the first accused with the other three accused, all of whom were mentioned by name, had come and forcibly removed the five drums of oil, and that being single-handed he could not prevent the removal.

The accused being suspected of the murder of Sedris, the Police Magistrate on January 31 held an inquiry, the result of which was that the Police Magistrate came to the only possible conclusion that Sedris had not been murdered, but had committed suicide. The Police Magistrate accordingly discharged the accused, but as there was some evidence at the inquiry, especially that furnished by the letter " L," that the accused had assaulted the deceased and had removed the five drums of citronella oil, he directed the headman to enter a prosecution against the accused for robbery and causing hurt. The headman then on February 10 submitted a report to the Police Court charging the accused with those offences. Fresh

proceedings were taken on this report as in a summary case, and the Police Magistrate ultimately convicted the accused, and passed sentences of imprisonment. In the course of these fresh proceedings, the letter "L" was tendered and admitted in evidence, notwithstanding an objection taken on behalf of the accused.

The admission of the document was justified by the Police Magistrate under section 32 (1) of the Evidence Ordinance. Section 32 relates to certain exceptional cases of hearsay evidence, and the case provided for by sub-section (1) is as follows :—

> "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

It seems to me that the "cause" of death here contemplated is an external or physical cause accounting for the death. The words "circumstances of the transaction which resulted in his death" make this more clear. It does not include a case of death by the person's own hand, nor does it refer to a moral cause, such as the unhinging of the mind or perversion of the will which is the usual explanation of suicide. I shall presently examine the foundation of the charges of robbery and assult, but neither of these things was the "cause" of death or "the transaction which resulted in death." The suicide was due to the man's own determination, and not anything external to himself. The Police Magistrate thinks that the man took his own life from an excessive sense of shame for not having been able to protect his master's property effectively. If this is correct, we may see a "reason" for the suicide, but the reason for the suicide is not the same thing as "its" cause. Moreover, the Police Magistrate's theory is not borne out by the letter, or by the ordinary course of human conduct. The deceased does not in any way indicate that he was going to take his life on account of the robbery. His master, from all that appears in the case, is a considerate and reasonable man, and it is difficult to believe that he would have held the deceased personally responsible for the loss of the drums of oil. There is no reason whatever to think that the deceased got into a fit of despair on account of any anticipation of blame. The letter is not inconsistent with another theory, namely, that the deceased was for some serious reason going to take his life, but before he did so he wished to inform his master of the circumstances of the loss of the oil drums. It appears that the deceased's sister got married about three days before the suicide, and the deceased returned from the wedding on the day of the suicide. The first accused says there was the usual dowry to be furnished, and he appears to suggest that the suicide was connected with some trouble on that account. That is, at all events, as good a theory as that of the Police Magistrate. But, for the purpose of the legal question, I will take the

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Police Magistrate's view as correct. Is the case, then, against the accused for robbery and hurt, a case in which the cause of Sedris' death "comes into question?" I cannot say so at all. The matter of the inquiry into the cause of Sedris' death had been concluded, and the accused had been discharged. The case of robbery and hurt is a new and different case altogether, and was tried in separate proceedings. The death or suicide, on the theory of the Police Magistrate, may be incidentally connected with the history of the new case; but the cause of the death was finally determined, and once for all disposed of at the previous magisterial inquiry, and it does not come into question again in the new case. It is true that under the Evidence Ordinance, as distinguished from the English Law of Evidence, a dying declaration is admissible, not only in a case where the death of the deceased is the subject of the charge, but also in a case where, whatever the nature of the proceedings may be, the death of the person who made the statement comes into question. This extended scope of the Evidence Ordinance is illustrated by an example stated under section 32 (1). Suppose the question is whether A died of injuries received in a transaction, in the course of which she was ravished; a statement made by A as to the cause of her death is admissible on the charge of rape. The death being due to injuries received from the rape, the cause of death comes into question on the charge of rape. This is exemplified by the very case which was cited for the respondent at the argument of the appeal, namely, *Queen v. Bissounjim Mookerjee.*[1] There, too, the victim had died as a result of injuries received from being ravished. The ravisher was indicted on two charges of murder and rape. He was acquitted of murder, but convicted of rape, and the Court held that the girl's dying declaration was admissible on the charge of rape. In the present case Sedris' death was not due to injuries received in the course of the robbery or at the hands of the robbers, and Sedris' statement was not as to the cause of his death, but as to the robbery. He was quite unharmed when he wrote the letter, and his statement was not a dying declaration. It is clear to my mind that in this case the cause of Sedris' death does not come into question within the meaning of the Ordinance.

In my opinion the letter "L" was not admissible at the trial of the accused on the charges of robbery and hurt. There remains the oral evidence of two witnesses, named Punchi Appu and Hinni Appu. The Police Magistrate accepts the evidence of these two witnesses, principally because it accords with the statements in the letter with regard to the accused. It is, of course, impossible to say what the impression of the Police Magistrate would have been if the letter had been effectually eliminated from consideration. But even if this evidence is taken as substantially true, the matter

[1] *6 W. R. (Criminal rulings), p. 75.*

is not thereby concluded. Punchi Appu is the man who says he saw the accused on the day in question on a path, each carrying a drum of oil. I have above shortly stated the circumstances under which, according to Wijetunga, the oil was stored in the store room. The oil, even according to Wijetunga, was the property of the first accused, but I take it that theft may be committed of one's own property, if it be taken from the possession of a person who has a right to such possession. Wijetunga may be said to have had a kind of lien on the oil, but the lien would terminate if the money due to him has been paid. There is a conflict of evidence on the question of payment. With regard to the disputed items of payment, Wijetunga's agent, Wickremasinghe, who used to receive payments, has not been called. Moreover, the first accused says that after liquidating the money due to Wijetunga, except as to a small balance of Rs. 23, he delivered to the deceased, Sedris, 106 bottles of citronella oil, and he points to a memorandum made by Sedris on the back of the receipt Y 1 acknowledging that he had 106 bottles of citronella oil on first accused's account. The memorandum is undated, but the Police Magistrate makes no comment as to its genuineness or as to the time of its being made, and I do not at present see any reason why the first accused's statement should not be accepted. There is no doubt that even if the debt was wholly liquidated, the first accused should have taken away the balance oil with the consent of Wijetunga or Sedris, but assuming the facts are as stated by the first accused I cannot regard the removal of the oil without such consent as amounting to robbery. The fact appears to be that the dispute is a matter for civil proceedings, and not for a criminal prosecution. I should have said that there is also a charge of house-trespass, but that goes with and falls with the charge of robbery.

The charge of causing hurt depends on the evidence of Hinni Appu, who says that on the day in question he saw the deceased and the four accused in a scuffle, the deceased being in the centre of the group, and the accused holding him by the waist. He speaks to no blows or other acts of violence. But his account technically amounts to the offence of causing hurt under section 314 of the Code, and as the Police Magistrate accepts his evidence, the conviction for that offence may be sustained.

The conviction and sentence for robbery and house-trespass are set aside. The conviction on the charge of causing hurt under section 314 of the Penal Code is affirmed, and the first accused is ordered to pay a fine of Rs. 20, and in default of payment to undergo rigorous imprisonment for the period of one month, and each of the other accused to pay a fine of Rs. 10 each, or in default to undergo rigorous imprisonment for two weeks.

Varied.