

## ON DYING DECLARATIONS

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It has been said that cross examination is “beyond any doubt, the greatest legal engine ever invented for the discovery of truth.” (3 Wigmore on Evidence 1367, p.27 [2d Ed 1923], *US v Salerno* 505 US 317 [1992], Stevens, J., dissenting).

This may be so because a skillful cross examiner can expose the flaws in a witness’ perception or memory, reveal his/her biases for or against a party or otherwise challenge his/her credibility by confronting him/her with prior criminal convictions, bad acts or inconsistent statements.

The ability to get at the truth of the matter becomes much more difficult, however, when the witness who is the source of damning information (e.g. identifying the defendant as the assailant), cannot testify on account of his/her unavailability due to death. For the past three centuries, English common law and American courts has wrestled with the competing notions of not wanting to let killers go free (after silencing their victims who may have been the only witness to their homicidal conduct), and not convicting innocent people on the last words of a mortally wounded person whose perceptions and motivations can never be explored on the witness stand.

An early and oft-cited justification for admitting dying declarations was the idea that the fear of divine retribution would dissuade people from leaving this world for the afterlife with a lie on their lips. Consequently, a dying declaration, while far less preferable to sworn testimony from a live witness, was deemed to have been uttered with the solemnity and seriousness of one who takes the oath.

As stated on *Rex v Woodcock*, 168 Eng Rep 352, 353 (1789), “...the general principle on which this species of evidence is admitted is that they are declarations made in extremity when the party is at point of death and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful, (it) is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.”

Or, as stated more recently by the New York Court of Appeals in *People v Sarzano* 212 NY 231 (1914), a murder case from Erie County, “dying declarations are received in evidence (upon a proper foundation), because the mind, impressed by the awful idea of approaching dissolution, acts under a sanction equally powerful with that with which it is presumed to feel by a solemn appeal to God upon an oath...Safety in receiving such declarations lies only in the fact that the declarant is so controlled by a belief that his death is certain and imminent that malice, hatred, passion and other feelings of like nature are overwhelmed and banished by it.” To be admitted, however, the Court continued, “the evidence should be clear that that the declarations were made under a sense of impending death without any hope of recovery.” (Citing *People v Conklin* 178 NY 333 [1903]).

The spiritual rationale for allowing dying declarations was eventually supplemented if not supplanted by the more secular idea that dying persons who are aware of their impending final fate are governed by psychological factors (whether resignation, clarity or a new sense of perspective), that incline them toward truthfulness. (*People v Nieves* 67 NY2d 125 [1986], citing, *inter alia*, *People v Bartelini* 285 NY 433 [1941]).

Some legal scholars have questioned the idea that dying declarations are somehow inherently truthful as wishful thinking unsupported by any real, affirmative empirical evidence. (See generally, *Reliability of Dying Declarations*, Timothy T. Lau *Georgetown Law Journal*, *American Criminal Law Review* Vol. 55 Issue 2, [Spring, 2018]).

As noted in *State v Dickinson* 41 Wisc. 299, 303 (1877), “physical or mental weakness consequent upon the approach of death, a desire for self-vindication or a disposition to impute the responsibilities for a wrong to another, as well as the fact that the declarations are made in the absence of the accused and often in response to leading questions and direct suggestions, and with no opportunity for cross examination...all these considerations conspire to render such declarations a dangerous kind of evidence.”

It would seem that while honest, well-meaning victims may well approach death, true to form, with an honest recitation of the facts pertaining to their fatal predicament (and an accurate identification of the perpetrator), others who are scoundrels in life may not necessarily be inclined to change their colors at the eleventh hour when confronted with the prospect of their imminent and certain demise.

Whatever the case, New York courts have been cautious in admitting dying declarations, recognizing that they can, as stated in *Rex v Woodcock supra* and *People v Bartelini supra*, be “dangerous” (certainly to the accused) inasmuch as they are made with no fear of prosecution for perjury or their story tested by cross examination which is “the best method known to bring out the full and exact truth.” (citing *People v Falletto* 202 NY 491 [1911]).

See also *People v Mleczo* 298 NY 153. 161 [1948]: “dying declarations made without the test of cross examination, without fear of prosecution for perjury, and with only the uncertain promptings of fear of punishment after death to assure truthfulness, and, at a time when the body is in pain, the mind agitated and the memory shaken by the certainty of impending death...experience shows that dying declarations are not always truthful and that dying persons have made... false accusations to destroy their enemies and false excuses to save their friends.”

In fact, when New York State trial courts admit a dying declaration into evidence, they are obliged, upon the defendant’s request, to give a special instruction to the jury (derived from *People v Mleczo supra*), which states:

While the law permits testimony regarding a statement of the deceased made under a sense of impending death and with no hope of recovery, “experience shows that such testimony is not always true and that dying persons have made self-serving declarations such as false accusations to destroy their enemies or false excuses to save their friends. The law instructs that such testimony be carefully evaluated, and further, that (it) not be accorded the same value and weight as the testimony of a witness given under oath in open court and subject to cross examination.”

## SO WHAT QUALIFIES AS A DYING DECLARATION?

A dying declaration is a statement of the deceased in a HOMICIDE prosecution (People v Becker 215 NY 126, 145 [1915]), which qualifies as an EXCEPTION to the hearsay rule and is therefore admissible in evidence if it is established that:

a. it is based on PERSONAL KNOWLEDGE of the deceased/declarant (rather than upon speculation or information from others) (People v Gumbs 143 AD3d 403 [1st dep't 2016]).

b. the deceased/declarant was IN EXTREMIS (i.e. "at the farthest reaches") while under a SETTLED SENSE OF IMPENDING DEATH with NO HOPE OF RECOVERY (i.e. he/she really believes that he/she is a goner);

c. the declaration relates to the cause and circumstances of the deceased's impending death (including an identification and/or description of the killer[s]) BUT NOT a narrative of past occurrences. (People v Smith 172 NY 210 [1902]).

Key to the admissibility of a dying declaration is the STATE OF MIND of the declarant when the declaration was made i.e. that when he /she was in extremis, he/she knew that death was on the immediate horizon and that all hope of recovery was lost. A belief that death might or probably will come is not enough. (People v Sarzano supra). Rather, there must be a settled, hopeless expectation of impending death with no hope of recovery. (See also People. Ludkiewicz 266 NY 233 [1935]).

Some factors to be considered in determining whether to admit a statement as a dying declaration, as set forth in People v Nieves 67 NY2d 125 (1986) include:

- .statements made by the victim about his/her condition;
- .statements made to the victim by medical personnel or others;
- .the nature and severity of the victim's injuries (and the victim's awareness of them);
- .whether the victim has made any statements ("tell my children I'll see them on the other side"), or taken any steps indicating an expectation of imminent death (i.e. getting his/her affairs in order);
- .request for administration of last rites.

In People v Falletto 202 NY 491 (1911), the defendant was convicted of Murder stemming from the robbery and throat slashing of an elderly merchant in his store. The defendant, apparently hoping for a Manslaughter conviction, argued that he fought with the victim and intended only to cut his face rather than slit his throat.

About a half hour after the attack, the victim was taken to the hospital where a surgeon sutured his wound, thereby restoring his ability to speak, albeit in a whisper. When the doctor asked the victim how he was feeling, he replied, " I don't know what I did in this i world to deserve such an end." Shortly thereafter, he was administered last rights (Vivi) in Hebrew after which he directed his family members who had assembled at his bedside to pay off his creditors. Noticing that the victim was experiencing congestion (from blood dripping into his lungs), the doctor observed that his heart was getting weaker and that death appeared inevitable.

Prior to expiring, the victim asked his family if they'd heard what happened to him. Over defense objection, the trial court allowed the doctor to testify to the victim's recitation that an

Italian man had come into his store inquiring about a coat for sale. He then tried it on, took it off and throw it over the victim's head whereupon he pushed him onto a sofa and cut his throat. (The defendant was later arrested wearing a coat which had cash in the pockets). The victim's statements were made on a Saturday night and he hung on until early Monday morning before expiring.

In upholding the lower court's decision to admit the statements as dying declarations into evidence, the Court said that while such evidence must be considered with great caution, it can constitute competent evidence in a homicide prosecution when the statements set forth facts, and not opinions, relating to the circumstances of the crime and the perpetrator thereof.

As the court observed, "this exception to to the general rule excluding hearsay evidence is founded on public NECESSITY, and the (hearsay) rule yields to the exception to PROTECT THE INNOCENT and PUNISH THE GUILTY. (And), inasmuch as the (victim) cannot testify, his unsworn statement of what happened to him is considered to be the BEST EVIDENCE ATTAINABLE and, hence, is admitted as legal evidence in order to PREVENT AN INJUSTICE after all reasonable precautions have been taken to secure a truthful statement." The court also acknowledged that such evidence is by no means preferable to testimony from a witness whose testimony under oath can be tested by cross examination. (citing *People v Kraft* 148 NY 631 [1896]).

The Court in *Falletto* was swayed by the combination of factors ensuring the reliability of the declarations including the severity of the injury, the victim's apparent resignation to impending death ("what have I done to deserve an end like this"), his receipt of last rites and instructions to pay off his debts which bespoke of a person getting his business in order before leaving this world.

In contrast, see *Peopel v Sarzano* 212 NY 231 (1914), where the victim described being shot in the back room of his saloon by a man named Mike who walked in, drew a gun and refused the victim's order to leave whereupon he fired five shots, hitting him with three.

At the Erie County Hospital, the assistant medical examiner, (apparently realizing the gravity of the victim's condition), told him " your condition is critical, we expect you're going to die from your condition (so much for bed side manner), and we want your statement to use later." (Clearly, the doctor was thinking in terms of obtaining incriminating evidence from a dying man for future use in court, which by today's standards, would clearly be considered to be testimonial hearsay under *Crawford v Washington* 541 US 36 [2004]).

The doctor had the victim sign his "X" on a written form that contained boilerplate language which read: " I consider my condition critical and am under the influence of an impression that I am about to die and have no hope of recovery from the effects of my wounds. I make this statement under that impression." The doctor then filled in the narrative after which he had the victim make his mark.

In the Court's view, despite the tidy narrative, there was no evidence that the victim even knew he was speaking to a doctor or knew that he was about to undergo surgery. There was also no indication, other than the form language on the document, that he actually believed he was going to die. Moreover, even though a doctor reportedly informed the victim that he was not going to recover, in this case, it was insufficient to establish that the victim believed that there was no hope of recovery. (citing *People v Chase* 79 Hun 296).

Noting that a declarant's belief in the certainty of imminent death can be gleaned from his own words or inferred from the circumstances including his physical condition, obvious danger or acquiescence in the representations of doctors, here, the proof, consisting only of the doctor's

pre-printed form (clearly created for just such an emergency), without the victim's actual acknowledgment of the dire nature of the situation was not enough to establish that he believed death was imminent and recovery impossible.

In *People v Acomb* 87 AD2d 211 (4th dep't 1982), the Fourth Department found that the shooting victim's own words to doctors and nurses ("am i gonna die?", "don't let me die"), reflected uncertainty about his fate and a desire to live but hardly a settled expectation that death was coming without possibility of reprieve. (citing, inter alia *People v Liccione* 63 AD2d 305 [4th dep't 1978] and *People v Ludkiewicz* supra). Consequently, his statement to his father that "uncle Bruce shot me, I saw the SOB," was deemed to have been properly excluded. (The defendant's conviction, however was reversed on other grounds including the erroneous admission of certain out-of-court statements as "verbal acts" where there was no equivocal conduct that required explanation).

Similarly in *People v Nieves* supra, the Court of Appeals held that the trial court erred in admitting the victim's statements to ER personnel that her jealous boyfriend (who, along with a friend, brought her to the hospital in the guise of Good Samaritans), stabbed her at a party, because the circumstances did not support the inference that the victim (who complained of chest pain and said, "I don't wanna die,") had the requisite state of mind (i.e. settled certainty of imminent death and no hope of recovery) to support a dying declaration.

The Court noted that no one told the victim that she was dying, and even though the wound (to the heart) ultimately proved fatal, it was not such that its nature would necessarily have been obvious to her. And, according to detective who testified, the victim did not intimate that she she expected to die and her condition appeared to be stabilizing when they spoke.

The Court also held that the AD, while also rejecting the dying declaration rationale (citing *People v Allen* 300 NY 222 [1949]), erred in upholding the statements as excited utterances (which the People raised for the first time on appeal). In the Court's view, the victim's statements at the hospital lacked the spontaneity and timeliness to conclude that they were made while she was still operating under the stress and excitement of the startling event before the opportunity for studied reflection presented itself. (citing, inter alia *People v Caviness* 38 NY2d 227 [1975]).

On the issue of excited utterances and dying declarations, in *People v Medina* 2008 NY Slip op. 06027 (4th dep't 2008) the Fourth Department upheld that defendant's convictions for Murder 2d degree and Criminal Possession of a Weapon 4th degree, finding that the victim's one word responses to his friend concerning who shot him were properly received as excited utterances because they were not made under the impetus of studied reflection. (citing *People v Edwards* 47 NY 2d 493 [1979]).

The record revealed that the friend questioned the victim while trying to console him about five minutes after he was mortally wounded and in obvious pain. The court found that the victim's responses qualified as excited utterances because they were made while the victim was under the continuing influence of the stress and excitement generated by the startling event. (citing *People v Brown* 70 NY2d 513 [1987]).

The court rejected the defendant's argument that the trial court erred in not instructing the jury with respect to excited utterances because, unlike dying declarations, excited utterances do not require any special instruction. (*People v Corbin* 284 AD2d 408 [2d dep't 2001]). And, because the statements were properly admitted as excited utterances, it made no difference that the court referred to them as dying declarations in its instructions (a question which the AD declined to reach).

The AD also noted that the defendant failed to preserve his argument that the victim's statements identifying the defendant as the shooter violated the Confrontation Clause. In any event, the court found that the inquiries of a concerned friend hardly qualified as the type of formal interrogation (intended to elicit information for future use as evidence at trial) that the courts associate with testimonial hearsay. (People v Bryant 27 AD3d 1124 [4th dep't 2006]).

In People v Clay 88 AD3d 14 (2d dep't 2011), the Court held that the victim's statement to a police officer identifying the defendant as the shooter ("it was Tom"), was testimonial (rather than elicited to help law enforcement meet an ongoing emergency, because the officer in question was not the first on the scene and the circumstances objectively indicated that he was there to gather evidence by giving the victim (who had been shot six times) a final opportunity to "bear witness" against his killer.

The officer first asked, "who shot you?" When the victim did not respond, the officer said, "I don't think you're gonna make it. Who shot you?" The victim gave a name and the officer replied, "Todd?" The victim said, "no, Tom, Tom." (The victim's wife and a cooperating witness also identified the defendant as the shooter).

Although the victim's statement was deemed to be testimonial, the AD concluded based on dicta from Crawford v Washington and the common law history with respect to the use of dying declarations, (citing, inter alia, US v Mattox 156 US 237 (1895), that they qualify as a limited exception to the rule prohibiting the introduction of testimonial hearsay from a non-testifying witness who does not qualify as unavailable and with respect to whom there was no opportunity for cross examination.

See also People v Corey 157 NY 332 (1898): The statutory provision (Code of Crim. Pro. Section 8 par. 2), that the defendant in a criminal action is entitled to be confronted with the witnesses against him in the presence of the court was not intended to abolish the admission of dying declarations.

In People v Allen supra the Court of Appeals, in an opinion by Hon. Charles Desmond, reiterated the "absolute and unvarying" requirement for the admissibility of dying declarations ie. that the victim be IN EXTREMIS and under a SETTLED SENSE OF IMPENDING DEATH without any hope of recovery.

There, the Court held that: 1. hearsay statements of the victim made to a tenant that her husband, Al had stabbed her (which he did not deny) did not qualify as an adoptive admission (by silence) because he was too intoxicated to support the inference that he heard and understood the accusation; and 2. statements made by the victim to her mother at the hospital 12 hours before she died, did not qualify as dying declarations because, even though she got last rites on arrival and off-handedly remarked to relatives that "I don't think I'll ever get well... I know I'm going to die," no doctor ever told her that she was going to die. (In fact, as of the time she had spoken to her mother, her doctor thought that she was going to make it).

(Compare with People v Falletto, supra where last rites and the victim's ruminations about ending his long life as a stabbing victim augured in favor of admissibility. Unlike the victim in that case, here, the victim made no formal pronouncements (e.g. "pay off my debts") suggesting a settled awareness of impending death).

In the Allen Court's estimation, the evidence did not meet the strict requirements of the dying declaration exception inasmuch as there was no evidence of certainty on the victim's part with respect to imminent death or the "slightest intimation that her statements to her mother (about her husband stabbing her), were made under a sense of, or because of or were controlled by any such belief. (Further), her predictions of death were made casually not solemnly, and her

accusations against her husband were not shown to have any close temporal relation (or in thought) to her expressions of death”.

The two “unyielding requirements” of the dying declaration exception, in the court’s analysis are that: 1. the declaration must be the product of considered certainty that death is near and 2. the declaration must be made under (or the result of) a PRESENT SENSE OF IMPENDING DEATH. Any relaxing or broadening of the rule, according to the Court, could only be accomplished by statute rather than by judicial decree. (citing *People v Becker* 215 NY 126 [1915]).

As is evident, dying declarations can be deadly dangerous for defendants especially where there is other evidence corroborating the victim’s statements describing the homicidal act and implicating the defendant in it. Trial courts are (and should be) careful in deciding whether to admit such evidence (taking into account the myriad factors set forth in *People v Nieves* supra, above), and if they do, defense counsel should be sure, whenever possible, to challenge their reliability (e.g. was the victim intoxicated, high on drugs, attacked from behind, in the case of multiple declarations, are there significant inconsistencies or contradictions, (see *People v Corey* 157 NY 332 [1898]), and when warranted, attack their veracity (e.g. did the victim have an axe to grind or other reason to falsely accuse the defendant?).

In this regard, counsel should also be mindful of NY Evidence Guide (Rule 8.23) which states that “...when hearsay evidence is admitted, the credibility of the declarant may be impeached by any any evidence that would be admissible (e.g. testimony demonstrating a bad reputation for truthfulness, extrinsic evidence of bias), if the declarant had testified as a witness.” (*People v Fratello* 92 NY2d 565 [1998]).

Counsel should also be sure to request the special jury instruction and foreshadow its key admonitions in summation to wit: that dying declarations do NOT carry the same weight as live testimony and that experience teaches that SUCH TESTIMONY IS NOT ALWAYS TRUE and that, sometimes, dying people make SELF SERVING STATEMENTS including FALSE ALLEGATIONS TO DESTROY THEIR ENEMIES and FALSE EXCUSES TO SAVE THEIR FRIENDS. It may not undo the damage entirely, but it may soften the blow and cause the jury to think a little longer and harder before deciding to convict someone on the unchallenged word of a dead person.

#### UPDATE/CORRECTION ON NOTICE REQUIREMENTS FOR MOLINEUX AND SANDOVAL EVIDENCE:

My November 4th 2020 article on Molineux and Sandoval evidence (“Two Sides of the Same Coin”), indicated that while the People are not statutorily obligated to give pre-trial notice of their intent to introduce prior bad act evidence in their case-in chief (e.g. to prove motive, intent, identity, common scheme or plan etc), they were required by CPL 240.43 to provide pre-trial notice (immediately before jury selection or, if the court so orders, three calendar days before the start of jury selection), of their intent to use such evidence to impeach the defendant if he testifies.

The new automatic discovery rules under CPL Article 245, (eff. 1/1/20) have changed that.

CPL 245.20 (3) (Supplemental Discovery), states that the prosecution SHALL DISCLOSE to the defendant a list of ALL CRIMINAL ACTS of the defendant not charged in the (accusatory instrument) which the prosecution intends to use at trial for purposes of a. IMPEACHING THE

CREDIBILITY OF THE DEFENDANT or b. as SUBSTANTIVE PROOF of any material issue in the case.

The prosecution must also DESIGNATE whether it intends to use each listed act for impeachment and/or as substantive proof.

Pursuant to CPL 245.10(3), the prosecution shall perform its supplemental discovery obligations under CPL 245.20(3) as soon s practicable, but NOT LATER THAN 15 CALENDAR DAYS PRIOR TO THE FIRST SCHEDULED TRIAL DATE.

Happy New Year to everyone! TF