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*June 24.

ALEX. DEBORTOLI .....APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Evidence—Homicide—Admission of dying declaration—Admissibility upheld by court of appeal—Motion for leave to appeal to Supreme Court of Canada under S. 1024A Cr. Code—Alleged conflict with decision in Allen v. The King, 44 Can. S.C.R., 331.

A person suffering from a wound from which she later died made a signed declaration that the wound was inflicted by a knife in the hand of the accused. At that time she had not that settled hopeless expectation of death requisite to the admissibility of a dying declaration. Shortly before her death her said statement was read to her (she being first told that the statement about to be read was the one she had made previously) and she assented to its correctness and signed it by her mark. This latter declaration and evidence thereof was admitted at the accused's trial, and its admissibility was upheld unanimously by the Court of Appeal for British Columbia. Application was made on behalf of accused for leave to appeal to the Supreme Court of Canada under s. 1024A of the Criminal Code, on the ground that the judgment of the Court of Appeal conflicted with the judgment of the Supreme Court of Canada in *Allen* v. *The King*, 44 Can. S.C.R., 331.

Held, that the judgment of the Court of Appeal did not conflict with the judgment in the *Allen Case*, and the application was dismissed.

MOTION for leave to appeal to the Supreme Court of Canada, under section 1024A of the Criminal Code, from the judgment of the Court of Appeal for British Columbia upholding the admissibility in evidence at the trial of the accused of a certain dying declaration. The material facts of the case are stated in the judgment now reported.

J. A. Ritchie K.C. for the motion.

D. Donaghy contra.

NEWCOMBE J.—In this case a dying declaration of the murdered woman was admitted at the trial. The accused was tried at Vancouver and found guilty. He appealed from his conviction to the Court of Appeal for British Columbia upon two grounds, which are stated in the notice of appeal as follows:—

(*a*) the said conviction cannot be supported having regard to the evidence.

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(*b*) the learned judge of Assize wrongfully admitted an alleged dying declaration or ante-mortem statement of one Pearl Prosser (also known as Pearl Travesey), and evidence thereof.

The appeal was dismissed unanimously by the learned justices of appeal who heard the case. Application is now made on behalf of the prisoner for leave to appeal to this court under s. 1024A of the Criminal Code, on the ground that the judgment of the Court of Appeal, dismissing the prisoner's appeal to that court, conflicts with the judgment of the Supreme Court of Canada in *Allen* v. *The King* (1).

It appears that the woman was taken to the hospital in a taxi-cab on 27th November, 1925, suffering from a severe wound from which she died on 16th January, 1926. On 8th January she had made a declaration, which was taken down, and which she signed, and in which she declared that the wound was inflicted by a knife in the hand of the prisoner. But at that time she had not that settled hopeless expectation of death which is requisite to the admissibility of a dying declaration. Her condition became worse, and when, on 15th January, she was asked to make the statement which was used at the trial, and about the admissibility of which the question arises, what occurred is stated by Roderick McLeod, a detective of the Vancouver police force, who gave the following evidence before the jury:—

> The doctor reported to me her condition. I then turned to Earl Robinson (the magistrate who had taken down her statement on the 8th) who was at the table and addressed the woman. I said this was the man who had taken a statement from her on a previous occasion and I said: "This gentleman is going to read to you Pearl the statement that we got from you before, and I am going to ask you if it is correct. You will tell me if it is or not." So Earl Robinson proceeded to read the statement that he had in his book * * * The statement he read was the statement that she gave to us the week previously.

Then follows Mr. McLeod's account of the reading of the previous statement, question and answer, and of the woman's assent. When the writing was finished she tried to sign, but was too weak, and she made her mark.

It is urged that according to the principle of the decision of this court in *Allen* v. *The King* (1), the statement so obtained, which was admitted and read at the trial, and subsequently held admissible by the Court of Appeal, was inadmissible because of the evidence which identifies the woman's narrative of what took place when the fatal blow

(1) [1911] 44 Can S.C.R. 331.

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was struck with her account as given a week previously, when she still entertained hope of recovery.

In *Allen* v. *The King* (1) a witness had testified at the preliminary investigation who was not produced at the trial, and the requirements for the admission of his deposition under s. 999 of the Criminal Code were not established. When the prisoner came to give his evidence however he was cross-examined with regard to some of the statements which this witness had made and which were taken down at the preliminary inquiry, and it was held by a majority of this court that the result of this was that a material portion of the deposition taken before the police magistrate had been given to the jury without the conditions of the Act being complied with, and that the evidence was therefore inadmissible.

The Court of Appeal of British Columbia has determined that the declaration now in question was admissible, and of course it is not for me to review that decision. The question I think is whether that court should have held otherwise upon the proper interpretation and application of the decision in *Allen* v. *The King* (1).

The evidence produced before the jury shews that the declaration in proof was elicited by a communication to the deceased that the statement about to be read to her was that which she had signed on 8th January, followed by the reading to her of that statement, and that her declaration of 15th January was identical in its description of the facts of the tragedy with the one made by her on the previous occasion, when she did not realize that she was going to die. It may be that these facts affect only the weight or credibility, not the admissibility, of the declaration, that is not for me to decide, but if that were the view of the Court of Appeal, I find nothing to conflict with it in the judgment of this court in the *Allen Case* (1). Indeed, after the most careful consideration, I have reached the conclusion that ingenuity cannot suggest anything involved in the judgment in *Allen's Case* (1) with which the judgment of the Court of Appeal upholding the admission of the declaration of 15th January is necessarily in conflict.

I must therefore dismiss the application.

Motion dismissed.

(1) [1911] 44 Can. S.C.R., 331.