

he identified any one amongst them as his assailant. Then Morrison asked him who did it, and Dutki answered "Short man with the fellow named John." When John Nassadick was brought before Dutki, Dutki said, "That man said 'Hold up your hands or I shoot,' but his friend shot me." Dutki said, "Go get his friend." Dutki added, "I don't know who he was, he was with John." Asked as to the appearance of Dutki when he said "I am killed," Morrison answered, "The appearance of a dying man."

This conversation between Morrison and Dutki took place at about 8.50 o'clock in the evening, or about 5 minutes after Morrison had heard the shooting.

At about 9 o'clock, Dr. Harcourt arrived at Checkley's, and, on ascertaining the nature of Dutki's wounds, reached the conclusion that they would prove fatal and that Dutki would die within a day. Dr. Harcourt was also of opinion that Dutki realised the serious nature of his wounds. Dr. Stewart, who was also present at the Checkley house, considered the wounds fatal and that death was a matter of hours only.

The wounded man was removed to the hospital to be operated upon, and his spiritual adviser was sent for. At 11 o'clock he was placed under an anæsthetic, and an operation was commenced, but he died at about 1 o'clock, before the completion of the operation, the medical testimony being to the effect that death was caused by the wounds.

I was of opinion that, when the deceased made the dying declaration objected to, he was in actual danger of death from his wounds and fully realised their serious nature and regarded them as fatal, and had abandoned all hope of recovery, and that his words "I am killed" were used in their literal meaning.

I therefore admitted his dying declaration—and the question is, "Was I right in so doing?"

The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

T. C. Robinette, K.C., for the prisoner.

Edward Bayly, K.C., for the Crown, was not called upon.

MEREDITH, C.J.O., delivering the judgment of the Court, cited with approval the statement of the law on the subject of dying declarations from Phipson's Law of Evidence, 5th ed., p. 300: "The deceased must be proved to the satisfaction of the Judge to have been, at the time of making the declaration, in actual danger of death, and to have abandoned all hope of recovery." The Chief Justice said that there was no question that the deceased was in actual danger of death, and, having regard to the circumstances of the case and to the statement "I am killed," it was shewn that the deceased had abandoned all hope of recovery.

The question, therefore, must be answered in the affirmative.