

Excerpt from Riddle v. State, 210 Ark. 255, 196 S.W.2d 226 (1946)  
explaining (?) part of Hammon v. State!

It is contended, however, that the trial court erred in the admission of the dying declarations. It may first be pointed out that appellant made no objection to the testimony of Mrs. Ashmead in which she related the dying statements of her husband. This court has held, even in cases where the defendant has been convicted of a capital offense, that objections must be made to the proceedings in the trial court in order to obtain a review of the alleged [\*260] errors in this court. *Morris v. State*, 142 Ark. 297, 219 S. W. 10; *Snead v. State*, 159 Ark. 65, 255 S. W. 895; *Sullivan v. State*, 161 Ark. 19, 257 S. W. 58; *Howell v. State*, 180 Ark. 241, 22 S. W. 2d 47.

It is earnestly [\*\*\*10] insisted that it was dark and that, since deceased was shot in the back from a distance of 20 yards, it was physically impossible for him to have seen or recognized his assailant. In support of this contention, appellant relies on the case of *Jones v. State*, 52 Ark. 345, 12 S. W. 704. In that case deceased was shot at night by his fireside by someone who fired through a crack from the outside, and it was held that a declaration by deceased that a person other than defendant shot him was inadmissible, because a mere opinion, it having been a physical impossibility for the deceased to have seen who shot him. The court there said: "A mere expression of opinion by the dying man is not admissible as a dying declaration, and it is immaterial whether the fact that the declaration [\*\*229] is mere opinion appears from the statement itself, or from other undisputed evidence showing that it was impossible for the declarant to have known the fact stated. If, upon any view of the evidence it is possible for the declarant to know the truth of what he states, his declarations, being otherwise competent, should be received and considered by the jury in the light of all the evidence."

[\*\*\*11] It is also well settled that a dying declaration is only admissible to the extent that the deceased could have testified had he been alive at the time of the trial, and such declaration should not contain matter which would be excluded if the declarant were a witness. *Walker v. State*, 39 Ark. 221; *Rhea v. State*, 104 Ark. 162, 147 S. W. 463; *Underhill's Criminal Evidence*, 4th Ed. § 217. When tested by these rules, most of the dying statements attributed to Ashmead in the case at bar would have been competent testimony had he been alive, and on the stand, as a witness. Nor can we say, from all the circumstances, that it was physically impossible for the deceased to have seen or known who shot him. The testimony of Mrs. Ashmead to the effect that it was not dark when she reached [\*261] her husband is to some extent corroborated by the testimony of John King, a witness for appellant, who stated that it was "beginning to get a little dark" when the children reported the tragedy to him some 20 or 30 minutes later.

Nor does the fact that deceased was shot in the back necessarily preclude the admission of the dying declaration when considered in connection with [\*\*\*12] the other facts in the case. As was stated by the Alabama court in *Marshall v. State*, 219 Ala. 83, 121 So. 72, 63 A. L. R. 560, "One may not see another shoot him in the back, and yet may look so quickly that what he sees justifies him in swearing as a fact that a certain person shot him in the back. This must be carefully distinguished from instances where he could not have known, but only expressed a surmise based upon suspicion."

The trial court did not err in admitting the statements attributed to Ashmead as dying declarations. After such statements are admitted, it is then the province of the jury to determine the circumstances under which they were made and the weight and credit that should be given to them. *Evans v. State*, 58 Ark. 47, 22 S. W. 1026;

Burns v. State, 155 Ark. 1, 243 S. W. 963. The Kings and Arley Keeter testified on behalf of appellant to statements made by deceased which were similar to some of those testified to by Mrs. Ashmead, but none of these witnesses heard deceased say that appellant shot him, nor did they hear deceased make such statement to the deceased's two children. But these differences in the testimony of the witnesses [\*\*\*13] were matters affecting the credibility to be given them by the jury as evidence in the case. Gray v. State, 185 Ark. 515, 48 S. W. 2d 224.

Riddle v. State, 210 Ark. 255, 259-261 (Ark. 1946)