1945 *Present:* **Howard C.J. and Jayetileke J.**

SINGHO APPU, Appellant, *and* THE KING, Respondent.

50—D. C. (Crim.), Colombo, 606.

Evidence—Foot-print—Charge of housebreaking and theft—Foot-print found on a table, the only evidence—Inference of guilt—Evidence Ordinance, s. 45.

Where, on an indictment for housebreaking and theft, the only evidence against the accused was that of a foot-print which was found on a table at the scene of the offence and which was identified as that of the accused by an expert who gave adequate reasons for his opinion—

Held, that the Court could convict the accused on the evidence of the foot-print though it was the sole ground of identification.

APPEAL from a conviction by the District Judge of Colombo.

L. A. Rajapakse, K.C. (with him *S. W. Jayasuriya*), for the accused, appellant.—The appellant has been convicted of housebreaking and theft. The conviction is based solely on the opinion of a finger-print expert that a foot-print found at the scene of the offence is that of the accused. Finger impressions only, and not foot impressions, are mentioned in section 45 of the Evidence Ordinance. The evidentiary value of foot-prints is of a doubtful nature and not as high as that of finger-prints, and a Court should not convict on the evidence of foot-prints alone—*Doole v. Charles* [1]; *R. v. Matambo* [2]; *R. v. Mlanto* [3]; *Vol. 52 S. A. L. Journal, p. 359.*

A. C. Alles, C.C., for the Crown, respondent.—The evidence of the foot-print in this case is very clear and was given by an expert of great experience. Knowledge regarding foot impressions has today reached the exactness and status of a science. Further, the words " science " and " art " in section 45 of the Evidence Ordinance are to be construed widely. The conviction in this case is right—Wilder and Wentworth on Personal Identification (1918 ed.) p. 26; Wills on Circumstantial Evidence (7th ed.) p. 230; *Sidik Sumar v. Emperor* [4]; *In re Mylaswami Goundan* [5].

Cur. adv. vult.

January 16, 1945. HOWARD C.J.—

This is an appeal from a decision by the District Court of Colombo convicting the appellant of (*a*) housebreaking under section 443 of the Penal Code and (*b*) theft of a clock and other articles under section 367 of the Code. The only evidence against the appellant was that of a foot-print found on a table. It is contended by Counsel for the appellant that the latter could not be convicted on this evidence alone. On the

[1] *(1928) 6 C. L. W. 79.*
[2] *S. A. L. R. (1935) O. P. D. 143.*
[3] *S. A. L. R. (1935) E. D. L., April 11.*
[4] *(1941) 43 Cr. L. J. 308 at 309.*
[5] *(1937) 39 Cr. L. J. 149.*

night of January 21, 1942, a burglary took place at 46, Horton place. In the morning various articles were found missing. On the same morning an Inspector of the Criminal Investigation Department visited the house in question and found a decipherable foot-print on a table. This foot-print on the same morning was photographed by the C. I. D. photographer. On September 15, 1943, the appellant was arrested by the Bambalapitiya Police and five foot-prints were taken with his consent. On September 16, 1943, the photograph of the foot-print taken on January 22, 1942, at 46, Horton place, was compared by Inspector Wijemanne, the Finger-print Registrar, with the foot-print of the appellant. Enlarged photographs had been made of both foot-prints. The Inspector found 37 sequent points of similarity and was of opinion that the two prints are of one and the same person. In giving evidence the Inspector stated that before he compared the foot-print of the appellant with the foot-prints on the scene, he compared over 700 other foot-prints. None of them tallied. He also stated that, apart from the 37 points of similarity, the pattern, formation and shape of the foot-print found on the scene are similar to the appellant's foot-print. Mr. Wijemanne also stated that he had received special training at Scotland Yard and had had considerable experience with regard to finger-prints as well as foot-prints. In both identifications he adopted ridge details. The appellant did not call any evidence.

Counsel for the appellant placed considerable reliance on the decision of Lyall Grant J., in *Doole (S. I. Police) v. Charles* [1]. The learned Judge in that case held that section 45 of the Evidence Ordinance does not entitle a Court to convict a person of theft merely on the opinion of a finger-print expert that a foot-print found at the place where an offence has been committed is that of the accused. In coming to this conclusion Lyall Grant J. states that the Magistrate does not say in his judgment that he is satisfied from a personal comparison of the foot-prints that the one on the car is that of the accused but relies entirely on the opinion given by the expert. I am of opinion that the case of *Doole v. Charles* does not have the far reaching effect contended for by the appellant's Counsel and is not an authority so far as the present case is concerned. Mr. Wijemanne is not only a finger-print expert, but he has also made a special study of foot-prints. The learned Judge has also relied not merely on the opinion of Mr. Wijemanne, but also formed his own opinion from a comparison of the two photographs. He states that in view of the points of similarity there can be no doubt about the identification which is absolute and positive. The evidence of Mr. Wijemanne concludes the matter, particularly as the appellant has offered no explanation for his foot-print being found on the table.

Mr. Rajapakse has also invited our attention to two South African cases, *Rex v. Steven Mlanto* [2] and *Rex v. Matambo* [3]. In both of these cases the appeal had been allowed because the apellant had been convicted on the evidence of foot-prints alone. But in both cases this evidence was neither conclusive nor satisfactory. On the other hand the evidence of the foot-prints in this case is of a very different character.

[1] *6 C. L. W. 79.*
[2] *E D. L. 11.4.1935—S. A. Law Journal, Vol. 52 (1935) p. 359.*
[3] *S. A. Law Rep. D. F. S. Prov. Div. (1935) p. 143.*

At page 230 of the 7th Edition of Wills on Circumstantial Evidence a reference is made to the evidentiary value of foot-prints in the following terms:

> " The impressions of shoes, or of shoe-nails, or of other articles of apparel, or of patches, abrasions, or other peculiarities therein, discovered in the soil or clay, or snow, at or near the scene of crime, recently after its commission, frequently lead to the identification and conviction of the guilty parties (Menochius, De Praesumptionibus, Lib v. praes 31; 2 Mascardus, De Probationibus Concl. DCCCXXXI; Mittermaier, Traite de la Preuve, c. 57). The presumption founded on these circumstances has been appealed to by mankind in all ages and in inquiries of every description, and is so obviously the dictate of reason, that it would be superfluous to dwell upon its importance or upon the grounds of its acceptance ".

There is also a note making a reference to a number of Indian decisions to the effect that evidence of tracks and foot-prints should always be accurate and unless there is independent evidence to corroborate, it cannot lead to an inference of guilt. The comparison made in the present case was undoubtedly accurate. The foot-print on the table was photographed on the morning after the burglary had taken place. There is no suggestion that the testimony of the foot-print was fabricated with the intention of diverting suspicion from the real offender or that the evidence of the Police Officers was not thoroughly reliable and trustworthy. I can find no Indian case to formulate the proposition that in such circumstances the Court could not convict. In *Sidik Sumar v. Emperor* [1], it was argued in the Sind Chief Court that statements as to facts made by persons skilled in identifying foot-prints should be held to be excluded by section 45 of the Indian Evidence Act. The case against the accused did not rest on the sole testimony of foot-prints. But Weston J., at page 309, dealt with the argument addressed to him with regard to such marks in the following manner:—

> " Evidence that there were foot-prints at or near a scene of offence or that these foot-prints came from a particular place or led to a particular place, is relevant evidence under s. 7 Evi. Act., and there is no reason why statements as to these facts made by persons skilled in identifying foot-prints, as undoubtedly many trackers in Sind are so skilled, should be held to be excluded by s. 45, Evi. Act. The learned Judge's argument is that as this section was amended in 1899 to include opinion as to identity of foot impression, evidence as to the identity of an accused person's foot impression or impressions seen by a witness at the scene of the offence and later in a test is not admissible. We do not think this view is correct. The words ' science ' or ' art ' in s. 45, Evi. Act according to the authorities are to be construed widely. The amendment relating to finger impressions appears to have been made to meet particular decisions which had been given by the Courts, and we do not think that this amendment operates to limit in any way the wide meanings which should be given to the expressions ' science ' or ' art '. There is no doubt that, particularly

[1] *43 Cr. L. J. 1942, p. 308.*

in the Province of Sind, there are trackers who, though they may have difficulty in explaining their methods, have a very high degree of skill in observing, tracking and comparing the foot-prints of persons. Whether a particular tracker called upon to assist, is or is not an expert in this art or science, is of course a matter to be decided by the Judge or Magistrate, before reliance can be placed upon his evidence. But if it is established to the satisfaction of the Court that the tracker is a person capable of distinguishing and identifying foot-prints, there is no reason why his evidence should not be given such consideration as it may deserve ".

The question of the relevancy of the testimony of a witness who has made a study of the prints made by the human foot was also considered by Burn J. in the case of *in re Mylaswami Goundan* [1] in the following passage:—

" Mr. K. Krishnamurthi for accused No. 2 has contended that the evidence of the expert was inadmissible and referred to s. 45, Evidence Act. He points out that though provision is made for expert evidence regarding finger impressions, there is no provision for expert evidence regarding impression of feet. He also contends that the study of foot-marks is not worthy of the name of science and that therefore the evidence regarding foot-marks cannot be brought under the general description given in s. 45. There is some force in this contention. It is quite clear that the science, if it could be so-called, of foot-prints has not yet progressed very far. There is equally no doubt whatever (as was observed in *Emperor v. Babulal* [2]) about the fact that—

> ' Evidence of similarity of the impressions of the feet, shod or unshod, is admitted by the Courts in India and in Great Britain, and as far as I know in every other country, though there is no science of such impressions '.

The fact is that such evidence comes under the head of circumstantial evidence: *vide* Wills on Circumstantial Evidence, page 285. In a case of this kind it is not the opinion of the expert that is of any importance but the facts that the expert has noticed. It is quite clear that a person who has made a study of the prints made by the human foot is better qualified to notice points of similarity or dis-similarity than one who has made no such study. He is able to lay these points before the Court and from his evidence the Court draws its own conclusions. That is precisely what has been done in the present case ".

Here again the testimony against the accused did not rest solely on the evidence of foot-prints. Applying the principles formulated by the Courts in these two cases it would appear that the learned Judge in the present case was entitled to construe the words ' science ' or ' art ' so widely as to include within its ambit the testimony of a person who had studied foot-prints. If he was satisfied that such person was capable of distinguishing and identifying foot-prints, he was also entitled to rely on his testimony.

[1] *39 Cr. L. J. 151.* [2] *A. I. R., Bombay, 1928, 158.*

In *Chanan Singh v. Emperor* [1] the appellant had been convicted of robbery on the evidence of foot-prints and possession of the stolen property. It was held that the foot-print evidence was of no value inasmuch as the comparison was made about two months after the occurrence when the original tracks were no longer preserved. Similarly it was held in *Pathana and Another v. King Emperor* [2] that track evidence is hardly of any value when the comparison has been made 8 or 9 days after the affairs. In the present case the foot-print was examined at once and preserved by photography.

In *Indar Singh v. Emperor* [3] it was held that foot-prints made by shoes and not by bare feet identified as similar to those of the accused and found some little distance from the scene of the offence, coupled with the pointing out by the accused of the place where the stolen property is concealed, is not sufficient evidence to justify his conviction. It has been held that the foot-prints of boots are less valuable than those of bare feet.

That the evidence of foot-print experts is admissible in the Indian Courts is evident from the judgment of the Court in the *King-Emperor v. Biseswar Dey and Others* [4]. At page 221, it is stated as follows:—

> " The learned Sessions Judge has stated in his letter of reference that foot-print found close to the pool of blood was according to the foot-print expert the foot-print of the accused Biseswar; but we can find no such statement in the evidence given by the foot-print expert, Inspector Anansa Kumar Chakravarty (P. W. No. 20). He has stated in detail the points of similarity and dis-similarity between the impression that was taken of Biseswar's foot-print and the foot-print found at the scene of the murder. But he has not stated that the points of similarity preponderate over those of dis-similarity nor has he expressed his opinion as an expert that the two foot-prints are of one and the same person. We are told by the learned Counsel for the Crown that he did give evidence to this effect before the Committing Magistrate. But this deposition was not put in evidence at the session trial and cannot be considered by us. In the case of Biseswar we therefore hold there are no materials on the record to justify our setting aside the unanimous verdict of the jury ".

In the present case Mr. Wijemanne has stated his opinion as an expert that the foot-prints are of one and the same person.

In *Ronki v. Emperor* [5] it was held that track evidence of a flimsy nature should not be believed without sufficient corroboration.

It would appear, therefore, that there is no authority for the contention that a conviction cannot rest on the evidence of the similarity of foot-prints alone. When such evidence is inconclusive and unsatisfactory there must no doubt be corroboration. In the present case the comparison was made by an expert of undoubted experience who gave ample and

[1] *A. I. R. 1933, Lahore, 299.*
[2] *A. I. R. 1914, Lahore 431.*
[3] *A. I. R. 1921, Lahore, 385.*
[4] *A. I. R., 1923, Calcutta, 217.*
[5] *A. I. R. 1915, Lahore, 469.*

adequate reasons for his opinion that the foot-prints were made by one and the same person. That evidence was accepted by the learned Judge who also had the opportunity of examining the photographs and forming his own conclusions. In these circumstances the conviction can be supported and the appeal must be dismissed.

Affirmed.