[IN THE COURT OF CRIMINAL APPEAL]

1958 *Present :* **Basnayake, C.J. (President), Sansoni, J., and Sinnetamby, J.**

THE QUEEN *v.* K. A. WIJEHAMY *et al.*

APPEALS 55 AND 57 OF 1958, WITH APPLICATIONS 72, 73, 74 AND 76

S. C. 6—M. C. Colombo, 37797

Evidence—Finger prints and palm prints—Mode of proof—Evidence Ordinance, s. 45.

When, in a criminal case, the prosecution relies on the report of a finger print expert to the effect that the finger prints said to have been found at the scene of the offence were those of an accused person, there must be direct evidence that the finger prints of the accused were handed to the finger print expert.

Evidence should not be elicited from a finger print expert as to the opinion he formed from a comparison of photographs of finger prints, when the photographs are not productions in the case. Under section 45 of the Evidence Ordinance it is for the Court to form an opinion as to the identity of finger and palm impressions, assisted by the opinion of an expert.

APPEALS, with applications for leave to appeal, against certain convictions in a trial before the Supreme Court.

C. S. Barr Kumarakulasinghe, with *T. W. Rajaratnam*, for the 5th accused-appellant.

V. T. Thamotheram, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 21, 1958. SANSONI, J.—

Five accused were indicted in this case on charges of being members of an unlawful assembly, rioting, house-breaking by night, and robbery. The offences were committed in the early hours of 22nd January 1957. The 1st, 2nd, 3rd and 5th accused who were found guilty on all the counts of the indictment appealed. The appeals of 1st, 2nd and 3rd accused were dismissed after hearing, and we reserved judgment in regard to the appeal of the 5th accused.

The case against the 5th accused which the prosecution sought to make out was based entirely on circumstantial evidence. The circumstances relied on by the prosecution were—

(*a*) that he had borrowed car No. CL 8711 from its owner on the evening of 21st January 1957 promising to return it at 2 p.m. the next day,

(*b*) that the car was seen at Weliwita near the scene of the offence at about the time it was committed,

(*c*) that the 5th accused was stopped and arrested at 2.30 a.m. on 22nd January at Ganagama junction eight miles from Weliwita, as he was driving from the direction of that village towards Kotte,

(*d*) that there were in the car—

(i) two finger prints and four palm prints of the 5th accused,

(ii) one finger print and one palm print of the 1st accused.

The finger prints and palm prints do not necessarily connect the 5th accused with the crime, because it is established that the car was loaned to him and it is natural that the car should contain his finger and palm prints. The presence of the 1st accused's finger prints also does not by itself connect the 5th accused with the crime, because the owner of the car who gave evidence for the prosecution stated that the 1st accused went out with him in the car for a driving lesson on the morning of 21st January.

At the trial, but not at the Magisterial inquiry, the prosecution sought to produce evidence of the fact that there was on the ash tray of the car, which was at the rear of the front seat, two finger prints of a man called Obias who was one of the persons originally charged and who died during the Magisterial inquiry. Obias was identified as one of the members of the unlawful assembly.

We shall assume that if the finger prints of Obias were in fact proved to have been found on the ash tray in that car, the 5th accused was rightly convicted in the absence of an explanation by him as to how these finger prints came to be there. We must now consider whether the prosecution did establish by evidence that the finger prints found on the ash tray were in fact the finger prints of Obias.

The first witness whose evidence has a bearing on this point is P. C. 4968 Alagaratnam. He stated that on the 25th of January 1957 on the orders of the Court he took the finger and palm prints of Obias, but he said nothing more with regard to these prints. He did not say what he did with them or whether he gave them to anybody, and if so to whom. What is more, no prints were produced at the trial to be identified by him as the prints in question.

After this witness concluded his evidence, Counsel appearing for the 5th accused pointed out that no finger or palm prints of Obias were productions in the case. He objected to the finger print expert giving evidence in regard to the finger and palm impressions of Obias under these circumstances. In reply to this submission Crown Counsel stated (to quote from the record) : " I am only seeking to elicit from the Registrar of finger prints whether he knows where those prints are ", and the presiding judge then made the order : " I allow that evidence ". It is difficult to understand what Crown Counsel meant by his statement, and what evidence the presiding judge meant to allow. P. S. 1910 Alwis, who is a Police photographer, later gave evidence but nowhere has he stated that he photographed any finger and palm prints

of Obias. The only photographs he spoke to were photographs of 19 palm prints and finger prints, some of which the finger print expert has identified as tallying with the finger and palm prints of the 1st and 5th accused. Another witness P. S. 93 Alwis gave evidence that he visited the scene and had photographs taken by P. S. 1910 Alwis. He identified the 19 photographs taken by the latter as the photographs which he handed to the Registrar of finger prints. The evidence of these witnesses has completely failed to establish that Obias' finger prints were ever handed to the finger print expert. P. C. Alagaratnam in his evidence referred to Obias, but there were significant omissions in that evidence, and neither P. S. 93 Alwis nor P. S. 1910 Alwis made any reference at all to Obias.

It is therefore surprising to find that the Registrar of finger prints (who is also the finger print expert) has in his report P 52, which was produced at the trial, stated that P. S. 93 Alwis handed to him 10 palm prints and 12 finger prints said to have been found by him at the scene of the offence, and of these " two sets of palm prints and one set of finger prints were identified as those of late M. Obias Perera. I produce the remaining prints marked P 20 to P 38 ". This statement in the report that some of the palm prints and finger prints were those of Obias is hearsay, in view of the omissions in the evidence upon which we have already remarked. When the Registrar of finger prints was giving evidence the second question put to him by Crown Counsel was a leading question in the following form :—

Q. Of these 22 sets of finger and palm prints there were two sets of palm prints and one set of finger prints were (sic) identical with those of Obias ?

A. Yes.

Then followed these questions and answers :—

Q. Are you aware where those two finger prints of Obias were ?

A. They were found on an ash tray in a car, the photograph of which was handed to me.

Q. You saw the ash tray with the prints on it ?

A. Yes.

Q. You produce the prints of P 20 to P 38 ?

A. Yes.

Questions and answers of this sort which elicited hearsay evidence must undoubtedly have prejudiced the case of the 5th accused. The jury would have been misled also into thinking that P 20 to P 38 included the finger and palm prints of Obias. In fact it was never proved that Obias' finger and palm impressions ever reached the finger print expert.

But this is not all. The photographs of the alleged palm and finger prints of Obias upon which the finger print expert sought to base his opinion were neither listed among the documents specified in the indictment nor produced at the trial. Evidence should not have been elicited from the finger print expert as to the opinion he formed from a comparison of photographs of those prints, when the photographs were not productions in the case. Under section 45 of the Evidence Ordinance it is for the Court to form an opinion as to the identity of finger and palm impressions, assisted by the opinion of an expert. The non-production in evidence of the impressions or photographs of them rendered the opinion of the expert irrelevant.

In view of the omissions in the proof adduced by the prosecution to which we have drawn attention, the jury should have been directed that there was no evidence upon which they could find that the finger prints of Obias were found on the ash tray. In the result, the verdict of the jury in regard to the 5th accused cannot be supported having regard to the evidence.

The appeal of the 5th accused is allowed, his conviction is set aside and he is acquitted.

Appeal of the 5th accused allowed.