

1933

Present : Driberg J.

REX *v.* CARUPIYAH *et al.*

23—P. C. Matala, 8,189.

[SECOND MIDLAND CIRCUIT.]

Footprint impressions—Right of Court to order an accused's footprints to be taken—Photographs of impressions taken by police—Admissibility in evidence—Method of proof—Criminal Procedure Code, s. 73.

A Court has no power to order an accused person to submit impressions of his foot to be taken for the purpose of allowing a photograph of such impression to be used as evidence against him. Photograph of an impression taken by the police at the police station without objection by the accused may be led in evidence.

It is open to the jury to examine the photograph of the impression and to compare it with certain blood-stained footprints, the identity of which with the accused's it is sought to establish.

THE accused in this case was charged before the Supreme Court with murder of one Victoria Jesudasen. The Crown Counsel asked the Court for a ruling on the admissibility of certain evidence he proposed to lead. The facts appear from the order.

R. S. S. Goonewardene, for first accused.

Mackenzie Perera, for second accused.

R. St. L. P. Deraniyagala, C.C., for the Crown.

Cur. adv. vult.

October 3, 1933. DRIEBERG J.—

While opening the case for the prosecution, Crown Counsel asked for a ruling on the admissibility of certain evidence he desired to lead.

On the floor of the house, in which Victoria Jesudasen was found dead of injuries, were blood-stained footprints; one of these was photographed (exhibit P 31A). For the purpose of comparison, two impressions were taken of the right foot of the accused, one by the police when the accused was at the police station—the photograph of this is P 54; the Court ordered the other impression to be taken and the photographs of this are P 32 and P 33.

The photograph P 31 (shows certain marks on the ball of the foot and on the heel which it is said are scars, and it is sought to produce for comparison the photographs of the impressions taken of the foot of the first accused. The question is whether these are admissible in evidence. Two questions arise, firstly whether evidence can be led of the impressions taken, and secondly whether, if these photographs are admissible, in what manner and to what extent they can be utilized as evidence.

The impression, of which P 32 and P 33 are photographs, was taken on the order of Court despite the objection of the first accused. It was contended by Crown Counsel that the Court had the power to order the impression to be taken, and I was referred to the case of *The King v. Suppiah*¹. In that case the Court ordered the accused to give an impression of his fingerprints for comparison with finger impressions found on

the broken glass panes of a building he was charged with having broken into. The decision is in itself of little help in this case, for it proceeded on the construction of section 73 of the Evidence Ordinance which enables a Court to direct any person present in Court to submit impressions of his fingers. It was held that this provision extended to an accused, and in my opinion the judgment could have been based on the reason only that the provision applied to any person in Court and there was nothing to exclude its application to an accused.

In this case it is said that the first accused has certain scars on the sole of his right foot which can be seen in the impression of it and that traces of similar scars are to be found in the footprint in the room (P 31A). Section 73 empowers a Court to direct anyone present in Court, and that includes an accused, for purposes of comparison to write words or figures or give fingerprint impressions, but this does not empower a Court to direct an accused to submit for examination and comparison the impression of any other part of his person. Lyall Grant J. in *The King v. Suppiah* (*supra*) referred to the case of *The King Emperor v. Tun Hlaing*¹, where it was held that the taking of fingerprints was an entirely different matter to putting questions to an accused person, and that in giving the prints the accused could not be said to be providing evidence against himself "since what really constituted the evidence, namely, the ridges of his thumb, are not provided by him any more than the features of his countenance". I have not had the advantage of seeing the report of that case, but I cannot agree with the principle laid down in it.

The Police Magistrate had no power to ask the first accused whether he had on the sole of his right foot scars, and on what part of the sole they were. He could only question him as provided by section 295 of the Criminal Procedure Code, and such a question would not be for the purpose of enabling him to explain any circumstance appearing in the evidence against him, but would be for the express object of obtaining evidence against him, that is, of procuring proof that he had on the sole of his right foot marks which would identify him with the person who left the impression of his foot in the room where Victoria Jesudasen was murdered. If the Magistrate could not obtain this evidence by questioning the accused regarding the appearance of the sole of his foot, could he obtain it by compelling the accused to show it for inspection? In my opinion the Police Magistrate could not, for I can see no difference in this connection between the Police Magistrate asking the accused, "Have you got these scars on the sole of your right foot?" and his saying to the accused, "Show me the sole of your right foot so that I may see for myself whether you have these scars on it"; the latter does not lose the character of an interrogation for the reason that the answer is not in words but is displayed to the eye. A person in reply to a question whether he has a thumb of one hand missing may answer it by showing his hand as well as by saying "Yes" or "No". I am of opinion that the impression taken in Court must be regarded in the light of an answer to a question which the Magistrate had no power to ask the accused, and that it is not admissible in evidence.

Different considerations apply to the impression taken by the police at the station. This was given by the first accused without objection. But apart from this, there is nothing so far as I know to prevent a police officer from questioning an accused and there are no limitations on the questions which might be asked, but if an answer amounts to a confession it cannot be proved against him. In *The King v. Francis Perera*¹, the accused were charged with forgery, and when they were in custody the police got them to write certain words on paper and it was sought to compare these with the writings said to be forged. It was held by a Bench of three Judges that the writings obtained from the accused, though they suggested an inference of guilt on comparison with the alleged forgery, were not confessions for the reason that they were not statements; a statement being an expression of fact or opinion or the formal embodiment in language of facts or opinions. A confession is an admission of a certain nature made by an accused, and an admission is a statement oral or documentary which suggests certain inferences—section 17, Evidence Ordinance. The principle of this decision applies to foot impressions and I hold that the photograph, P 54, is admissible in evidence.

There remains to be considered the manner in which the photograph of the impression of the first accused's foot can be used in evidence. The similarity, if any, between it and P 31A is not a matter on which the opinion of an expert can be received. It does not concern a matter of science like the proof of identity by fingerprint impressions, and is therefore outside the scope of section 45 of the Ordinance. The similarity, if it exists, is a matter on which the Judge and jury are entitled to form their opinion. The position is similar to that of comparison of fingerprint impressions in India before sections 45 and 73 were extended to include fingerprint impressions. In the case of *Rex v. Fakir Mohamed*², which was before the inclusion of finger impressions by Act 5 of 1899, it was decided that though the opinion of an expert on the similarity of the impressions was not admissible under section 45 it was open to the Court itself to make such a comparison. It was said that they would be admissible under section 9 if the similarity of the impressions could establish identity, or under section 11 if their dissimilarity made such identity improbable. I have not seen the report of this case, and I quote from the reference to it in Ameer Ali's *Law of Evidence* on page 432 (8th edition).

I hold therefore that it is open to the jury to examine the photograph of this impression, to compare it with that of the impression in the room, and to form their opinion of the similarity or dissimilarity of the impressions.

These questions were argued in the absence of the jury. I gave my fuling at the time but said I would give my reasons in writing later.

The Registrar will show this to counsel for the prosecution and for the defence, but it must not be shown to anyone else until the conclusion of the trial.

¹ (1906) 9 N. L. R. 122.

² (1896) 1 C. W. N. 33 and 34.