Patna High Court

(BEFORE S.C. MISRA AND U.N. SINHA, J J .)

Basudeo Gir ... Appellant;

Versus

State ... Opponent.

Criminal Appeal No. 200 of 1957

Decided on September 24, 1958

Evidence Act--sec. 45—admissibility of expert evidence on the matter of foot-print-- Appellant convicted under S. 397 IPC--evidence against the appellant is that of the sole testimony of P.W. 1 and the foot-print on the gramophone record found in his house—appellant contended that S. 45, in terms, refers to finger impressions only and not to foot-prints, and as such evidence based on the alleged foot print of the criminal compared with his genuine foot-print should not be held to be admissible-- *held,*-- Section 45 of the Evidence Act, as it stood prior to its amendment by Act V of 1899, did not contain the words “finger impressions” evidently, because the Legislature thought that the section as it stood was comprehensive enough to cover the opinion of all experts in foreign law or science or art--word “science” occurring in section 45 should be held to be comprehensive enough to include the opinion of the expert in foot-print as well—even if the evidence of the expert (P.W. 6) be left out of consideration, the evidence of P.W. 1 would be sufficient to uphold the conviction of the appellant—Appeal dismissed. (**paras 8, 11, 17, 19, 23**)

AIR 1954 Pat 131, 1958 Pat LR 246 .....**Referred to**.

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The Judgment of the Court was delivered by

MISRA, J.:— Appellant Basudeo Gir alias Basudeo Gossain has been convicted under S. 397, Penal Code, 1860, by the learned Judicial Commissioner of Chotanagpur, Daltonganj, and sentenced to undergo rigorous imprisonment for seven years. He was tried along with one Arjun Kamar who has charged under S. 395, Penal Code, 1860, but was acquitted, it was alleged on behalf of the prosecution that Ramkishun Ram (P.W. 1) of village Loharsi was changing his dhoti for lungi after his night meal in his house between 8-30 and 9 P.M., on the 5th of July, 1956, when he heard some sound outside.

2. He turned back to see what it was when he was given two lathi blows on his head by someone. He took up a danta and moved forward to defend himself. Then he saw 5-6 men standing immediately out of the entrance door of his house. One of them was the appellant Basudeo Gossain who had a gun in his hand. The others had lathis and torches. He could recognise Basudeo Gossain in the light of the torch flashed by some of the dacoits. Basudeo Gossain immediately fired at him and he was hit in his right leg. He hurried into his house followed by 5 or 6 men who caught him. Two of them were recognised as the persons from whom he had purchased bullock at Sous Bazar. After giving further details with regard to the figure of the dacoits, he stated further that one of the dacoits demanded key from him and he said that it was with his wife. His wife was also given a danta blow and she threw away the key with which they entered into the kotha ghar of Ramkishun. One of them came out and asked Ramkishun where he had kept the other sums of money. He said that whatever he had was kept in the box in the kotha ghar. That man gave him 5-6 fnore lathi blows as a result of which he fainted and fell down.

3. Ramkishun had three brothers, Balo, Ranglal and Thakur Chand. Ramkishun carried on a wine-shop in the western side verandah of his house. His brother Balo had a wine-shop at Chandwa and his brother Thakur Chand is a Police Sub-Inspector. The residential house of Ramkishun (P.W. 1) has the main room known as kotha ghar surrounded by verandahs on all sides, known as dhabas. Ramkishun remained unconscious for 3-4 hours and when he regained hosh in the morning he saw his brother Balo by his side. He asked him how he was. He said that anyhow his life was saved. He asked him our her if he recognised the dacoits. His answer was that he had recognised two or three of them; two of them well enough but one of them slightly.

4. It appears that while he was still unconscious his wife sent some men of the village to Chandwa to call Balo from there, who reached there in the morning. Balo put him on a khatoli and took him to the police station at Chandwa where the party reached at 9 A.M. First information report was accordingly lodtrcd there on his statement. He mentioned therein that a sum of Rs. 840/- in cash besides clothes, three saris, three dhotis umbrellas, chndder etc., were stolen. He also mentioned there -in the name of Basudeo Gossain, the appellant, as the of the culprits.

5. The officer-in-charge of the Chandwa police station after having recorded the first information report examined Ramkishun and the other persons from the village who had accompanied him. He left for the place of occurrence at 12 O'clock and arrived at the village at 3 P.M. on the same day. He inspected the house of Ramkishun and found things scattered hero and there; papers were thrown about. But the investigating officer knew that the Inspector of Police had received some special training in the scientific detection of crimes, so that he did not touch nor did he allow anyone to touch anything in the room. Only he scraped some blood from near the entrance door and prepared a sketch map.

6. He examined Ramkishun's wife. He then proceeded to the house of Basudeo Gir which he searched in his presence at 5-30 P.M. He recovered a pistol (exhibit XXX). He lecovered two round lead balls (exhibits XXXI and XXXII) and some small lead balls, all kept in a packet, and a small packet of yelow Mansil Potash (exhibit XXXIV) and one three-celled touch-light (exhibit XXXV). He seized them in presence of witnesses Sheonarain Seth, Abdul Rahman and Rameshwar Singh and prepared a seizure list. The Inspector of Police also came there and halted in the village for the night. At 7 A.M. the following morning, the investigating officer along with the Inspector went to the place of occurrence for examination of the articles. On a careful examination, the Inspector observed portion of a foot-print on a gramophone record which was seized (exhibit XXXVI).

7. They took charge also of the boxes and other things. The investigating officer wrote to the Superintendent of Police, Daltonganj, requisitioning the services of the Range Photographer to take photograph of the foot-print on the gramophone record. Basudeo Gir was sent to the Latehar Jail. Jagdish Prasad, Photographer, came to the village on the 12th July and took photo of the record and also took the record. On 30-8 -1956, D.N. Singh, who was officer-in-charge of Balumath Police Station, received requisition from his Inspector to take the foot-print of Basudeo Gir and others in Latehar Jail and with the permission of the Sub-divisional Officer he took the foot-print of Basudeo Gir and six others. He took the print of each accused in triplicates. All the 21 prints were sent to the Inspector to be forwarded to the Sub-Inspector, Chandwa. P.W. 7 was requested to take the prints as he had received training in the Advance Training School. The investigating Officer submitted charge-sheet against the appellant and Arjun Kumhar, who were committed to Sessions, duly after the preliminary enquiry by a Magistrate, and the learned Judicial Commissioner tried them with the result mentioned above.

8. Evidence against the appellant is that of the sole testimony of P.W. 1 Ramkishun Ram and the foot-print on the gramophone record found in his house. (After discussion of the evidence of P.W. 1 and P.W. 6 the foot-print expert His Lordship concluded that the conviction of the appellant rests on incontrovertible evidence and cannot be disturbed.)

9. Learned Counsel for the parties, however, in this Court referred to a number of decisions of this Court as well as Allahabad High Court bear on the ??? of the value of expert evidence on the matter of foot-print. Learned counsel for the appellant has contended that the so-called science of detection of crime by means of for-prints, alleged to have been left by a criminal at the scene of ??? is still too undeveloped to

give any basis for forming any judicial opinion with regard to the guilt or other vise of the accused persons.

10. Learned counsel for the State, however, has contended that the science has developed to such

an extent that valuable clues to the presence of an accused can be derived from an examination of the foot-print of a culprit left on the scene of occurrence or at relevant points while running away. The first question for consideration in this connection is whether there is any provision in the Indian Evidence Act to make foot-prints legally admissible. Section 45 has been referred to in this connection, which runs thus:

> "When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting (or finger impressions), the opinions upon that point of persons specially skilled in such foreign law, science or art, (or in questions as to identity of handwriting) (or finger impressions) are relevant facts."

11. The section deals generally with what is called expert evidence. It has been contended on behalf of the appellant that S. 45, in terms, refers to finger impressions only and not to foot-prints, and as such evidence based on the alleged foot print of the criminal compared with his genuine root-print should not be held to be admissible.

12. Reliance is placed in support of this contention on the cases of *In re, Oomapany*, AIR 1942 Mad 452 (2); *In re, Paramban Mammadu*, AIR 1951 Mad 737; *Ganesh Gogoi* v. *The State,* (S), AIR 1955 Assam 51; and *Pritam Singh* v. *State of Punjab,* (S), AIR 1956 SC 415. The case reported in AIR 1942 Mad 452 is a single Judge decision of Horwill, J. where it has been laid down that experts in foot-prints are not recognised by the Evidence Act. There is no reference, however, made to any particular section of the Act. It was, however, further held in that case that

> "a Magistrate is entitled to take into consideration the evidence of a person, who has seen a foot-print and taken the foot-prints of the accused and found that they are very similar. That evidence is not, however, sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another."

13. In substance, therefore, it was held that such evidence could be looked into by a Court of law although a person making such comparison could not be regarded as giving expert evidence as provided in Section 45 of the Evidence Act. In the case of AIR 1951 Mad 737, which is a bench decision of that Court, delivered by Horwill, J. (supra), the learned Judge held that the opinion of a footprint expert is not admissible as evidence.

14. The learned Judge has, no doubt, referred in detail to the value of such evidence giving reasons why such weight should not be attached to such evidence. As regards the Evidence Act, however, there is no reference to any particular provision of the Act nor any discussion of the legal position. In my opinion, therefore, this case cannot be looked upon as a considered authority on the applicability of Section 45 of the Evidence Act to decide whether evidence of a foot-print expert can be acted upon by a Court of law as good evidence. In the case of *Ganesh Gogoi,* (S), AIR 1955 Assam 51, it was, no doubt, observed that the word "foot-print" does not occur in S. 45 unlike the word "finger-print," so that foot-print cannot be taken as included within the ambit of that section. The evidence of the witness having held the comparison of the foot-print was yet held to be admissible on the ground that the Judge and Jury could see for themselves as to what extent the footprints coincided. This case, thus, can be

taken to have followed the ratio in AIR 1942 Mad 452. In the case of (S) AIR 1956 SC 415, there is an observation to the effect that the science of identification by foot-prints is a rudimentary science and much reliance cannot be placed on the result of such identification.

15. The track evidence, however, can be relied upon as a circumstance which, along with other circumstances, would point to the identity of the culprit though by itself it would not be enough to carry conviction to the mind of the Court. That decision also does not lay down that such evidence is not admissible under the provisions of the Indian Evidence Act. If anything, the observation would point to the conclusion that such evidence would not be inadmissible but that much reliance could not be placed on such evidence on account of the undeveloped stage of scientific knowledge in regard to the foot-print. Learned counsel for the State, however, has drawn our attention to the case of *Mannan Velayudhan*, which is a bench decision of the Madras High Court consisting of Govinda Menon and Mack, JJ., printed in that Bihar Criminal Intelligence Gazette, dated 6-7-1956, where there is an elaborate consideration of the applicability of section 45 of the Evidence Act to the evidence given by an expert on the foot-print under consideration in the criminal trial.

16. With respect, I agree with the observation of Govinda Menon, J. when his Lordship held the opinion of an expert in foot-prints admissible under the heading "science" occurring in S. 45. Their Lordships in their judgment expressed their disagreement with the view adopted in the case of AIR 1951 Mad 737 and the case of AIR 1942 Mad 452. In my opinion, the word "science" which has been defined in the *Universal Dictionary of English language*, referred to by the learned Judge, as great proficiency, dexterity, skill based on long experience and practice, is sufficiently wide to include the evidence of an expert.

17. The learned Judge has referred in that connection also to a book "Modern Criminal Investigation" by Dr. Harry Soderman, Chief Director of the National Institute of Technical Police, Sweden, wherein he has referred to the fact that some maternity hospitals in America, where prints of the sole of new born babes are taken for identification purposes, it is considered to be a reliable test for identifying the child. I may also refer in this connection to the fact that Section 45 of the Evidence Act, as it stood prior to its amendment by Act V of 1899, did not contain the words "finger impressions" evidently, because the Legislature thought that the section as it stood was comprehensive enough to cover the opinion of all experts in foreign law or science or art.

18. There was, however, a decision of the Calcutta High Court in the case of *Queen Empress* v. *Fakir Mohammad Sheikh*, 1 Cal WN 33 where it was held by Banrrjee, J. that the opinion of an expert as to the identily of thumb impression was not admissible under Section 45 of the Evidence Act. It was with a view to obviate the conclusion of the learned Judge in that case that the Legislature thought it fit to incorporate the words "finger impressions" in specific terms. The reasons for the amendment quoted by Sarkar in his book on the Law of Evidence in India are relevant for the present purpose as well. The quotation runs thus;

> "The system of identification by means of such impressions is raining ground and has been introduced with considerable success, especially in the Lower Provinces of Bengal. It seems desirable that expert-evidence in connection with it should be admitted, and with that object it is proposed by cl. 3 of this Bill, expressly to amend the law on the subject."

19. In my opinion, that amendment indicates the policy V of the Legislaure regarding progress in science and, accordingly, I agree with the opinion of Govinda Menon, J. that the word "science" occurring in section 45 should be held to be comprehensive enough to include the opinion of the expert in foot-print as well.

20. Learned counsel for the appellant has, however, contended that at least in the present case the evidence of the expert should be discarded as valueless, because there was no complete footprint found on the gramophone record but only a partial foot-print. Even the expert admitted in his evidence that no positive opinion of identity could be given by him since the full foot-print impression was not available. The expert, however, stated further:

> "There is no chance of the photo A being of any other person. The chance is very remote, we are very conservative in our opinion, and unless we get full data we do not give positive opinion. If certain features in one point agree with relative position in another point, then the remaining portion if appeared would also have agreed.
>
> In this particular case the prints of bridge and the heels were necessary for giving a positive opinion. Bridge and heels are missing in the photo marked A."

21. Giving reasons for his opinion, he said as follows:

> "I compared the print marked 'A' with all the nine specimens of the nine suspects, including the prints X, X-1 and X-2. Print marked A by me was found to be similar with the correlative right foot print portion of the suspect Basudeo Gossain marked X, X-1 and X-2. The common correlative peculiarities have been marked out by me on the photographs marked A and X by me. The reasons of my opinion are follows: They are similar in physiognomy. The distribution of the toes is similar. The nature of the lines at central portions in the toes are similar, which are clear in A and very clear in X. The second toes and the toes are close in both. The fourth toes and the fifth toes in both are apart. The zanjeii lines below the toes are similar in both, in their concavities and convexities. The ball portion below the zanjeri lines so far available are similar in both. For superimposition check chart, I have, traced A and X both on a sheet of glass, and have superimposed the tracing of A and X, and of X and A, and they fail in their correlative positions.

22. A look at the photograph of print A, however, shows that the second and third toes are joint, which is not the case on the genuine foot-print of the portion marked X, X-1 and X-2. The expert (P.W. 6), who came to the Court to explain the position, stated to us that a slight difference was due to the medium. The two fingers appear to be joint because there might be an external medium such as mud or sweat sticking to the toes of the appellant. That matter, however, has not been explained in the evidence given by him in the Count of the Judicial Commissioner.

23. In the circumstances, even if the evidence of the expert (P.W. 6) be left out of consideration, the evidence of P.W. 1 Ramkishun Ram would be sufficient to uphold the conviction of the appellant. This evidence, however, stands corroborated also by the fact that he admitted in his examination under Section 342 of the Cr PC, that he was made to give his foot-print on a gramophone record by the investigating officer holding out a temptation that he would be let off if he agreed to do so. I have already held that this explanation is palpably false. It is obvious, therefore, that the Court would be justified in holding that the foot-print on the gramophone record was his, and the circumstance could be put in weight against him.

24. In the result, it must be held that this appeal has no merit and it must be dismissed.

25. U.N. SINHA, J.:— I agree. In this connection I would like to mention two previous decisions of this Court. The first is the case of *State* v. *Karu Gope*, AIR 1954

Pat 131. In that case, one item of evidence against Bhorik Gope was a blood-stained foot-print on a piece of paper. The prosecution had tried to prove that an impression of his right foot taken by the prosecution, tallied with the blood-stained foot impression. The question was considered by this Court on merit without any reference to Section 45 of the Indian Evidence Act. An expert Lad been examined in Court who had given reasons for identifying the enlarged photograph of the bloodstained foot-print with the impression of the right foot of the accused Bhorik Gope. As against Karu Gope, it was alleged that he had left an impression of the left palm on a wall. The same expert; had given reasons for comparison of Karu Gope's palm impression on the wall with his specimen impression. This Court accepted the opinion of the expert as against Karu Gope, again without any discussion of Section 45 of the Indian Evidence Act. The second decision of this Court is the case of *Ramkaran Mistri* v. *State of Bihar*, 1958 Pat LR 246. The facts of this case indicate that Mahesh, one of the accused persons, was said to have left a foot-print on the chadar of a gaddi. The foot-print was compared with the specimen fool-prints and an expert was examined in that connection. The opinion was considered by this Court and was accepted for reasons given by their Lordships. It may again be mentioned that no-provision of the Indian Evidence Act was dealt with in this case also.

K.S.B.

26. *Appeal dismissed*.