

Bavakhan, Roshankhan also signed the document in the presence of the executant Mirjubibi. Another reason in favour of sufficient attestation is the signature of the writer. Adopting the test laid down by Batchelor J. in *Govind Bhikaji v. Bhanu Gopal*,⁽¹⁾ immediately after the execution by Mirjubibi, Hari has signed his own name under the description of the mark. His object in so doing presumably was, and the effect of his so doing, we think, was, to authenticate the mark, that is to say, to vouch the execution; in other words, this last signature was made not as a scribe, but as an attesting witness. These facts and this element suffice to distinguish this case from cases such as the case of *Dalichand Shivram v. Lotu Sakharam*.⁽²⁾ We might also refer to the recent case of *Lakshman v. Krishnaji*,⁽³⁾ where, as here, one of the attesting witnesses was available.

For these reasons, we hold that the deed of mortgage, Exhibit A, of 1895, is admissible and that its execution is proved.

We allow the appeal, set aside the decree of the lower appellate Court and remand the case to it for decision on the merits.

Costs of this appeal to be costs in the remand.

Decree set aside.

J. G. R.

ORIGINAL CRIMINAL

Before Mr. Justice Madgavkar.

EMPEROR v. BABULAL ALIAS SHIVCHARAN BIHARI AND TWO OTHERS.*

Indian Evidence Act (I of 1872), section 45—Opinion of expert—Identity of palm impression—Reasons on points of similarity and dissimilarity admissible in evidence.

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January 10

*Case No. 17, 5th Criminal Sessions, 1927.

⁽¹⁾ (1916) 41 Bom. 384 at p. 389.

⁽²⁾ (1919) 44 Bom. 405.

⁽³⁾ (1927) 29 Bom. L. R. 1425.

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Where photographs of palm impressions are admitted in evidence, the opinion of an expert as to points of similarity or dissimilarity is also admissible in evidence under section 45 of the Indian Evidence Act.

THIS was a criminal case tried before Madgavkar, J., and a Special Jury. On April 28, 1927, a Marwari boy was found murdered in a room and a safe was rifled of valuable ornaments. Among other clues, a *handa* or brass pot of water was found which bore the impression of a palm upon it. That impression was photographed and enlarged and subsequently was compared with 21 palm impressions taken of several persons including those of the principal accused and witnesses and other Pardeshis. The photographs of the palm impressions were admitted in evidence at the trial of the accused before the High Court. An expert in the Finger Print Department was called as a witness for the Crown to depose to the points of similarity or identity between the photographs of the impression on the *handa* and the impression of the palm of the accused. On behalf of the accused it was contended that while the photographs of the impression on the *handa* and the impression of the palm of the accused were admissible in evidence, the opinion of the expert either on points of similarity or identity was not admissible in evidence under section 45 of the Indian Evidence Act.

Bhagat, with him *Kanga*, Advocate General, for the prosecution.

Nadkarni, for accused Nos. 2 and 3.

Daruwala, for accused Nos. 5 and 7.

MADGAVKAR, J. :—The question for my decision is whether the opinion, with its reasons, of the Police Finger Print expert, Mr. Saldanha, on the identity of a certain palm impression of one of the accused with the palm impression on the pot found on the scene of offence on April 28, 1927, is or is not admissible in evidence

The facts shortly are that on April 28, 1927, a Marwari boy was found murdered in a room and the safe rifled of valuable ornaments. Among other clues such as a Bhaiya cap and some mangoes, a *handa* or brass pot of water bore the impression of a palm upon it. That impression was photographed and enlarged and subsequently—the precise dates are not on record—Mr. Patel, the senior expert, and Mr. Saldanha, the junior expert, took and compared twenty-one palm impressions, including those of the principal accused and witnesses and other Pardeshis, with the impression found on the *handa*.

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There has, unfortunately, been considerable delay in the trial of this case. The seven accused were all arrested by May 16; but, as investigation had to be carried on in Cawnpore, Benares and Ahmedabad, the proceedings before the Magistrate did not begin till September 7. Charges were not framed till November 7 and the present trial did not commence till January 5, involving amongst other consequences the loss of the evidence of Mr. Patel, who died of apoplexy in December last.

The question was raised in the opening address for the Crown and objection was immediately taken on behalf of accused Nos. 2 and 3. I then ruled that the photographs of the palm impressions were admissible and reserved my decision as to the admissibility of reasons and opinion until the evidence was tendered. To-day Nowroji, the photographer, and Mr. Saldanha, who has been working for seventeen years in the Finger Print Department and is now the senior expert of the Bureau, have given their evidence.

It is contended for accused Nos. 2 and 3 that, while the photographs of the impression on the *handa* and the impressions of the palm of the accused are

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admissible, it must be left to the counsel to bring to the notice of the Court and jury points of similarity and that the opinion either on the points of similarity or of identity of the so-called expert is not admissible under section 45 which in terms confines the admissibility of opinion to points of science or of art, or identity of finger impressions under the section as now amended. For the Crown reliance is placed on section 7, illustration (b) of the Indian Evidence Act; and it was argued that knowledge of the impression of the palm is sufficiently organised to fall within the term "science" employed in section 45.

There can be no question in my opinion and I hold that it is as open to the Crown to question Mr. Saldanha as to the similarities between the two palm impressions as it is open to the defence to cross-examine him on the dissimilarities. No section of the Indian Evidence Act prevents any such similarities or dissimilarities which have been observed by Mr. Saldanha himself from being recorded in his evidence. Evidence of similarity of the impression of the foot, 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. In this light photographs have been put in recording fifty-seven such similarities. Mr. Saldanha swears that out of the twenty-one palm impressions he picked out one accused's as the only one which tallied with the impression on the *handa*, and this without knowing at the time that any particular person was the person suspected of having made the impression on the *handa*.

The question as to opinion presents some difficulties. The wording of the section admits opinion as to finger impressions. Does this include palm impressions, and is there a science of such impressions? As is observed by Woodroffe and Ameer Ali, 8th Edn., p. 427 "The

words 'science or art' if interpreted in a narrow sense would exclude matters upon which expert testimony is admissible both in England and America, such as questions relating to trades and handicrafts." The general rule laid down by Taylor, Vol. II (11th edition), section 1418, is that "the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study, in order to obtain a competent knowledge of its nature."

In the present case it is apparent from photographs and these fifty-seven prints that without Mr. Saldanha's assistance it would be next to impossible to appraise the similarities or otherwise of the impressions. As regards science Mr. Saldanha has gone to the length of saying that he is prepared to swear that the impression on the *handa* cannot be the impression of any one but that particular accused, because these ridges and furrows on the palm do not change and are different in the case of each individual.

The skin of the finger and the palm is after all one and the same, belonging to one organ, the hand, and possessing precisely the same characteristics. But while the whorls and the loops of the fingers have been observed in the case of millions of individuals and accurately classified so that the probabilities are millions against a mistake as to the identity of the finger prints in the case of two individuals, scientific observation, classification and inference in the case of palm prints is neither so accurate nor so great. Mr. Saldanha himself admits that this comparison of palm prints has not been decisive in any previous case in his own observation.

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It is also to be observed that in India the opinion of expert illiterate trackers called "pugges" has invariably been admitted by Courts in different provinces, including, to my own knowledge, Sind, without any exception having been taken, as far as I am aware, and has been valued as evidence. Under these circumstances I think that palm impressions are akin to finger impressions. The knowledge of both is a study for the same class of experts. They are in fact a portion of the same science, though it has not been found necessary by the police and other experts to develop the science of palm impressions to the same extent that finger impressions properly so called have been developed. It appears to me on the whole that such opinion should be admitted rather than excluded, to be weighed by the Court and the jury for whatever it is worth. Accordingly, I hold the opinion of Mr. Saldanha as to identity is admissible under section 45 of the Indian Evidence Act.

[*Note.*—In his statement to the Court on the following day this accused admitted that he had stained his hand with the blood of the deceased and had grasped the *handa* in order to wash his hands.]

J. S. K.

CIVIL REFERENCE

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump.

HERBERT WHITWORTH, LIMITED (ORIGINAL PLAINTIFFS), APPELLANTS v. JAMNADAS NEMCHAND MEHTA (ORIGINAL DEFENDANT), RESPONDENT.*

1927
August 16

Passing-off action—Trade-mark—Colourable imitation—Infringement—Injunction, form of.

The plaintiffs had for a number of years imported into and sold in Aden pieces of white shirtings under two tickets—one having the figure of a Somali male on horse-back, and the other bearing the figure of a Somali girl. The former class of goods which bore No. 4444 came to be known in the market as Abu Kheyl: the other, bearing No. 3333 was known as Abu Sherifa.

*Civil Reference No. 17 of 1926.