R. v. KAYAMBILA.

A Criminal Review Case of 1933.

Murder—identification of footprints—accused during the trial made to walk with five other natives in various places and then witnesses tested as to ability to pick out footprints of accused—evidence so obtained improper—conviction quashed.

An accused person cannot be made to give his footprints or fingerprints during the trial and evidence obtained from such footprints or fingerprints is evidence improperly obtained; in such a case the conviction will be quashed.

Hall, J.: At the close of the case for the prosecution, the following appears on the record:

> "At this stage the Court adjourned to make a test to see whether witnesses Samahango, Sipalo and Likando could pick out the footprints of accused from those of others.
>
> Six men including accused *were made* to walk in three different places and in each case the three witnesses Samahango, Sipalo and Likando were successful in at once picking out the footprints of accused. Each witness was examined separately one at each testing place."

I can only deduce from the words "were made" *supra* that the accused had no option in the matter. If he consented to this course it should have so appeared on the record. In any event, I do not consider it fair that an illiterate native should be asked to do such a thing, as he would probably be afraid to refuse. I have not lost sight of the fact that accused was defended by Mr. T....., cadet, but, with all respect to him, he may not have realised the seriousness of what was being done.

At this stage of the proceedings, the Court did not know what line accused was going to take, yet it forced the accused to do something which might weigh heavily against him (as it did in this case). In fact, when the defence was called on, accused only made a statement from the dock and so avoided cross-examination. He was quite entitled so to do and that was all he need do. The line adopted by the Court went to convict accused as it were out of his own mouth when he elected that he would not give the prosecution the chance so to convict him.

The nearest case to the present that I have been able to find in the short time at my disposal is that of *Goorpurshad* v. *R.* (1914), 35 N.L.R. 87, in South Africa.

> "Accused cannot be compelled to give his fingerprints in Court.—Evidence obtained by compelling an accused to give his fingerprints in Court is improperly obtained, and a conviction resulting therefrom must be quashed."

This case is very nearly on all fours with the present.

Turning to the opinion of the assessors and the judgment of the Magistrate, it will be seen what serious effect this irregular proceeding had on their minds. Mr. Hughes said:

> " and we have been given ample proof of their ability to distinguish accused's footprints from others."

Mr. Law said:

> " Seeing that the footprints have so much importance in this case I must add that the principal witnesses were put to a stiff test here and proved conclusively their ability to identify Kayambila's footprints from amongst other peoples in similar soil to that in their own district."

The Magistrate said:

> " The footprints test done at the trial was most convincing and to the Court a revelation."

What would have been the result of this trial, which depended upon circumstantial evidence, if the test had not been made ? Who can tell ? The Court and assessors may have felt that this test put the matter beyond all reasonable doubt and, therefore, convicted the accused.

What is to be done ? I have the power to order a new trial, and to direct if necessary that such new trial shall be in the High Court. I could direct the Provincial Commissioner, Mongu, to retry the case with fresh assessors, but it is impossible to think that he or any assessor in such a small place will not have heard about this test. In such case, their minds would not go to the case free of that knowledge, which is essential. I am in the same position. I am, of course, used to disregarding inadmissible evidence, but it is impossible to say how much one's mind might be affected subconsciously by such a test as this with all its serious implications. There is no other Judge.

It would not be practicable in this country, I think, to move the trial to another province altogether and so doing would, undoubtedly, make the Crown witnesses more hostile to the accused, owing to the inconvenience, etc., caused to them.

I must, therefore, quash the conviction and the accused must be discharged. A telegram must be sent to that effect saying that a letter follows.

" 10. I would also call attention to another irregularity in the trial. . . . "

(This paragraph is not material to the decision reported here.)