CRIMINAL LAW REFORM COMMITTEE

REPORT ON IDENTIFICATION

WELLINGTON NEW ZEALAND

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SEPTEMBER 1978

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C O N T E N T S

REPORT OF THE CRIMINAL LAW REFORM COMMITTEE

ON

IDENTIFICATION

TO: The Minister of Justice

Part I

INTRODUCTION AND SUMMARY

1. We have been asked to review aspects of the law and procedure relating to identification, and to make recommendations.

2. Mistaken identification may lead to wrongful conviction. Some say that it is the greatest cause of wrongful conviction. Whether that is so or not, we must seek to keep to the minimum all unfair and unreliable identification procedures.

3. We propose some modifications of the present Police Instructions. First we recommend:

(a) Deletion of Instruction J.18(1) regarding the clothing to be worn by the suspect. (We think the instruction is either impracticable or undesirable in its application.)

(b) Insertion of a provision against the use of leading questions when interviewing a witness who may later be asked to identify the suspect.

4. We adhere to the view expressed in one of our earlier reports that attendance at an identification parade should be voluntary. To remove a possible type of coercion we now recommend that where there has been a refusal to attend an identification parade no adverse comment is to be made on that fact at the trial. We further recommend that a suspect may, if he wishes, have his solicitor present at a parade.

5. We agree with the proposal, now largely favoured in the United Kingdom and Australia, that a photograph of the parade should be taken, but we limit our recommendation to cases where the suspect so requests or he has not had legal advice about going on the parade.

6. There are occasions when a suspect agrees to place himself amongst others in an informal situation (e.g. in a hotel bar) for viewing by a witness. We recommend that similar precautions be taken to those required where an identification parade is held, so far as reasonably applicable.

7. Another method of pre-trial identification is for the police to show a number of photographs to a witness who is asked whether the person he saw is among them. Detailed provisions governing this practice are set out in Police Instructions. We recommend modifications to provide -

(a) that a note be made of the time and place of the viewing, the name and address of the witness, and whether he made a positive identification;

(b) that the photographs used be attached to the note or identified in it; and

(c) that the note and the photographs used be supplied to the defence on request.

We also urge that the decision of the Court of Appeal in Russell [1977] 2 NZLR 20 be particularly drawn to the attention of police officers who may contemplate the use of photographs. (The relevant passage from the judgment is set out in full in our report.)

8. (a) If a witness supplies a description of the offender but later identifies as the offender a person to whom the description scarcely applies, the reliability of the identification is reduced. For this reason it is important, for the defence of persons

wrongly accused, to have access to the descriptions originally given to the police by identifying witnesses. With one dissentient we therefore recommend (in line with overseas law reform committees) that the prosecution is to supply to the defence, on request, the name and address of any person who is known to the prosecution to have seen the offender in the circumstances of the crime. A copy of any description given by that person, and of any drawing or Identikit picture of the offender made by him or based on information supplied by him, is likewise to be supplied.

(b) If it be thought necessary for the protection of any person the police may apply to the appropriate judicial officer for exemption from compliance with the provision that the name and address of a witness be supplied, or for an order imposing special conditions.

(c) If the prior description tallies with the appearance of the person later identified by the witness we think the prosecution should be able to elicit this fact, and we recommend accordingly that the prior description be admissible in evidence for the prosecution.

9. It is already established that at the trial itself the Court will in certain cases warn the jury of the danger of relying on the testimony of eye witnesses called to identify the offender. In England this has now become a general mandatory warning. We recommend that we follow this development in the law of evidence and enact a statutory requirement of a warning where a case depends wholly or substantially on the correctness of visual identification.

10. We make reference to dock identification in unfavourable terms but do not find it necessary to propose any specific amendment to the law in this connection.

11. We refer to the possibility of a directed acquittal where the evidence against the accused consists essentially of unsatisfactory evidence of identity.

12. In summary trials, to which our previous recommendations are inapplicable, we indicate the desirability of Magistrates having regard to the principles underlying the practice and procedure in trials on indictment where identity is in issue.

Part II

PRELIMINARY OBSERVATIONS

13. Identification of a person or thing by a witness is often the most cogent step in convicting an accused person and the ability to observe, remember and recount can be notoriously imperfect. Honest but mistaken evidence of identification has on occasion led to the conviction of an innocent person, and concern about misidentification is not a recent phenomenon. In England public anxiety was first aroused by such cases as Beck, Slater and Sheppard.[1] Since then further injustices have been discovered there, and a special departmental committee chaired by the Rt Hon Lord Devlin was set up to inquire specifically into the cases of Dougherty and Virag[2]. To these the third and well publicised case of Hain[1] was soon added.

14. Our own task was assigned not because identification is known to have caused especial difficulties in this country, but in order to test the adequacy of the safeguards which operate here to reduce the risk of a wrongful conviction. For where an accused person is wrongfully convicted, not only does the individual himself suffer injustice, but public confidence in the system of criminal justice is undermined.

15. The cases mentioned in paragraph 13 are concerned with visual identification and it is with that topic that we must grapple in this report. There can be, to a juror, perhaps no

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1. For details of these cases see:

   Report of the Committee of Inquiry into the case of Mr Adolf Beck (Cmnd 2315, 1904);
   Report of the Tribunal of Inquiry on the Arrest of Major R.O. Sheppard, D.S.O., R.A.O.C. (Cmnd 2497, 1925);
   P. Hunt, Oscar Slater, the Great Suspect (1951);
   W. Rouchead (ed) The Trial of Oscar Slater (4th ed. 1950);
   P. Hain, Mistaken Identity The Wrong Face of the Law (Quartet Books, 1976)

2. The Devlin Committee's consequent report on "Evidence of Identification in Criminal Cases" (HMSO 7684) was presented in 1976.

more dramatic and emphatic evidence against an accused person than the assertion that a witness has seen the accused in circumstances which implicate him in the commission of the crime. Sight is a most highly developed sense in the human species. There may be much better evidence of the accused's presence - such as fingerprints or hair found at a scene - but a visual identification is likely to have a greater impact.

16. Although it seems a relatively straightforward proposition for a witness to assert that he saw the accused in certain circumstances, the witness is in fact asserting much more than that simple fact. As the High Court of Australia pointed out in R. v. Craig (1933) 49 CLR 429, 446 a witness who says "the prisoner is the man who drove the car", while appearing to affirm a simple proposition, is really saying: that he observed the driver; that the observation became impressed upon his mind; that he still retains the original impression; that such impression has not been affected, altered or replaced by published portraits of the prisoner; and that the resemblance between the original impression and the prisoner is sufficient to base a judgment not of resemblance but of identity.

17. In amplification of the matters set out in Craig it should be noted that in his book Law and Psychology in Conflict (Bobbs-Merrill, 1966) James Marshall, an American lawyer and social scientist, says (p.25):

> "Considerable transformation of a happening and its initial perception occurs in recollection. To demonstrate the fallibility of memory is one of the chief aims of the cross-examiner. Witnesses are historians and autobiographers; on the witness stand they are reconstructing past events. Many of them to their best ability attempt to do it honestly, but it is not strange to find the grossest imperfection even in the memory of an honest man."

He also shows that where there are gaps in an observer's perception those gaps may be filled by his interpretation of the most likely sequence of events.

18. The problem is compounded because cross-examination - the usual means of testing a witness's veracity - is of little

effect against someone who is convinced of his ability to pick out the offender or recognise his face but who is in fact swearing to matters about which he is mistaken. His honest but mistaken testimony may well be enhanced by his truthful demeanour. As Lord Gardiner explained in the discussion that followed Virag in the House of Lords:[3]

> "The danger of identification is that anyone in this country may be wrongfully convicted on the evidence of a witness who is perfectly sincere, perfectly convinced that the accused is the man he saw, and whose sincerity communicates itself to members of the jury who therefore accept the evidence."

19. Although our deliberations were assisted by studies by bodies in Britain and Australia,[4] we have reviewed the current police practice and rules of evidence that pertain here. We conclude that a number of modifications to the law and procedure relating to identification are required and we recommend accordingly in this report.

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3. H.L. Deb Vol. 350 cols. 705-6 on 27 March 1974.

4. Criminal Law Revision Commission of England and Wales Eleventh Report (Cmnd 4991, 1972) paras. 196-203;
Thomson Committee Second Report on Criminal Procedure in Scotland (Cmnd 6218, 1975), chapters 12 and 46;
Criminal Law and Penal Methods Reform Committee of South Australia Second Report: Criminal Investigation (1974), chapters 6 and 9;
Criminal Law and Penal Methods Reform Committee of South Australia Third Report: Court Procedure and Evidence (1975) Chapter 8;
Commonwealth of Australia Law Reform Commission Report No. 2: Criminal Investigation (1975) paras. 117-129.

Part III

THE PRE-TRIAL PROCESS

20. In cases where the identifying witness and the person the police suspect to be the offender are strangers to each other it is usual for the police to carry out some form of identification procedure before the suspect appears in court. This serves two purposes. Not only are the police assured that the person they suspect is in fact the person the witness is describing; but evidence of the pre-trial identification may later be brought to strengthen the value of any identification of the accused by the witness in court. A pre-trial identification may show that the witness identified the accused before the sharpness of his recollection was dimmed by time or before he was aware that the accused was the person under suspicion.

21. One method of pre-trial identification available if the suspect agrees is the identification parade. The suspect takes his place among 8 or more members of the public who have gathered at the police station and who are similar to him in respect of colour, age, height, general appearance and "class of life". The witness is asked to view the suspect and the other persons, who are lined up together in a parade, and invited to identify and point to the offender if he can. Such parades have long been regarded as a legitimate and useful part of police investigation and their conduct is governed by detailed rules set out in the Police Instructions for Identification of Offenders.

We print the Police Instructions for Identification of Offenders in full in the Appendix.

22. Some of us viewed a parade being conducted. Nothing we saw led us to believe that identification parades provide other than a fair and impartial result.

23. At one meeting we were fortunate to have the assistance of two police officers with detailed knowledge of police methods of identifying suspects: Detective Chief Inspector

A.W. Baker of the Wellington C.I.B. and Senior Sergeant N.B. Trendle who is a former Harkness Fellow. Detective Chief Inspector Baker informed us that the trend in New Zealand is away from the use of identification parades in favour of other less formal methods of identification. A suspect who refuses to take part in a parade may agree to a less formal process. In such cases the witness is taken to a place where the suspect has arranged to be, e.g. in a bar with 40 other people, and the witness is asked if he can see the offender among those present.

24. We use the terms "parade" and "showing" to distinguish an identification parade arranged in accordance with the Police Instructions from the process described in paragraph 23. We emphasize that "showing" refers to those occasions where the suspect has agreed to place himself amongst others in an informal situation for viewing by a witness. There will be numerous other identifications carried out daily by police, e.g. when police arrive at the scene of an assault on the street or at a party and are informed that the offender "is that man over there". These occur in such number and variety of circumstances that it is not possible to regulate them by rules.

Police Instructions for Conducting Parades

25. We subjected the Police Instructions for Identification of Offenders to careful scrutiny and our principal comment relates to Instruction J18(1). This requires that a suspect should be:

> "Dressed as near as possible as he was when the alleged offence was committed, except in cases where he was wearing distinctive clothing which may be prejudicial to fair identification."

26. Some of us were uneasy as to how this instruction is interpreted in practice. A literal interpretation would be that a suspect is to be dressed as he claims he was himself dressed at the time the offence was committed. Obviously this could lead to incongruity, if for example the suspect claims

"I was in bed at the time". The alternative interpretation is that the suspect must be dressed as the offender is said to have been dressed. Such a requirement, it appears to us, is undesirable not only because it presupposes that the suspect was in fact the offender, but also because clothing - albeit not per se distinctive - can be inherently suggestive. In the American case State v. Cooper 14 Ohio Misc. 173 (1968) the defendant (although not in an identification parade) was asked to put on a hat, a pair of glasses and an overcoat. He was not identified as the offender until he had done so. There is a risk that a suspect who was dressed in similar attire to the offender's at the time of the offence and who is required to take part in the parade in that clothing pursuant to Instruction J18(1) may be picked out not because he was the offender but because of the strong resemblance in his clothing. This situation could arise where both the suspect and offender are workers wearing overalls or other similar - but not distinctive - clothing provided by their employer.

27. We therefore recommend that Instruction 18(1) be deleted as being either impractical or undesirable in its application. In our opinion the question of dress is already appropriately covered by the requirement in Instruction 16(2) that the parade consists of persons similar in general appearance.

28. Secondly, we advert to what we regard as an omission from the Instructions. Frequently in the course of an investigation a police officer puts questions about the physical appearance of the offender to a witness who is asked later to make a visual identification of a suspect. This practice does not necessarily imperil that identification so long as great care is taken to ensure that the questions put to a witness are not leading or suggestive. Thus instead of asking: "Did the offender have a large gap between his teeth?" when he suspects a particular person with that unusual physical characteristic, the officer should actually put the question: "Did you notice anything unusual about the offender's facial appearance?" Clearly, if attention is drawn to a distinctive physical characteristic the witness may identify the suspect either because he discerns that the

police believe the offender was someone with the suspect's appearance, or because the characteristic put to the witness unconsciously becomes part of what he recollects he saw.

29. We recommend that attention be drawn to this danger in the Police Instructions.

Legal Representation of the Suspect at a Parade

30. In our 1972 Report on the question whether an accused person under arrest should be required to attend an identification parade we emphasised that an accused should not be so compelled. We reaffirm this view and suggest that the reasons against compulsory attendance apply equally to a person before arrest. We recommend that a suspect or accused be informed not only that he is not obliged to take part in a parade, but also that he may obtain legal advice if he wishes before doing so.

Reservations were expressed by Chief Inspector McLennan in this regard, on the ground that such advice may militate against the best type of visual identification being carried out.

31. Other committees examining the question have been divided on the desirability of the suspect's having his solicitor present at the parade. The Devlin Committee (paras. 5.37-39), Thomson Committee (para. 12.08) and Australian Law Reform Commission (para. 124) favoured the presence of his solicitor at the parade if the suspect so wishes. However none regarded such presence as a sine qua non. The Thomson Committee recommended that the parade be proceeded with if the solicitor fails to appear within a reasonable time, and clause 40(1) of the Commonwealth of Australia's Criminal Investigation Bill 1977 (introduced as a result of the Law Reform Commission's report) requires that the lawyer be present within two hours.

On the other hand, the South Australian Committee (Second Report, para. 3.2.3) saw no advantage in the suspect's having

his solicitor present and, further, resiled from putting a solicitor into the position of a witness against the police in a matter in which his client is implicated.

32. In this country if a person takes part in a parade he does so voluntarily. We think that an accused or suspect should be entitled therefore to have his solicitor present if he wishes. His solicitor's presence may ensure that the parade is run "in the fairest possible manner" as Police Instruction J15 requires.

We add to this recommendation no proviso that the solicitor be available within a prescribed time. In our opinion, to provide that the parade may proceed in the solicitor's absence after the expiry of that time would be inconsistent with the voluntary nature of the parade.

Adverse Comment on Refusal

33. We also considered the desirability of adverse comment being permitted at a trial on the refusal of the accused, or suspect who is subsequently charged, to take part in a parade. In the ordinary course, evidence of his refusal would be irrelevant or not sufficiently relevant to any issue before the court to be admitted. It is possible, however, that the matter of his refusal could be alluded to accidentally by defence counsel, or perhaps deliberately by the prosecution. Once evidence of the refusal were before the court, under the present rules the judge or either party could comment upon it.

34. We see some danger of it being suggested to a recalcitrant accused or suspect that his refusal to attend a parade will be the subject of adverse comment at his trial. It follows that an accused or suspect may be coerced into cooperating before he has the opportunity to take legal advice or otherwise reflect on his position, and this we would regard as an abrogation of the principle we stated in our 1972 report that an accused should not be compelled to attend a parade. Accordingly we recommend that adverse comment on a refusal to attend a parade should be prohibited by statute.

Police Instructions for Showings

35. We think that the principles governing police practice should be the same for both the parade and the showing. We recognise that specific rules for showings may be difficult to formulate but nonetheless recommend the drawing up of Police Instructions to regulate the conduct of showings. Even if the express terms of such Instructions cannot be complied with in practical details on occasions, their spirit may be taken as indicating the proper practice.

36. The content and form of the Police Instructions relating to parades could be adapted with a little modification to regulate showings. Such provisions should include:

(a) a direction that the police conduct the showing of a suspect in the "fairest possible manner";

(b) a requirement that where practicable the showing be supervised by a police officer not connected with the particular investigation and, where possible, by an officer of non-commissioned rank;

(c) a requirement that before allowing a witness to look at the persons included in the showing the police officer supervising the showing ensure, as far as he is reasonably able to do so, that nothing relating to:

(i) the place to be used for the showing;

(ii) the number, race, age, general appearance or class of persons included in the showing; or

(iii) their likely behaviour during the showing

will unfairly prejudice the suspect or suggest to the witness which of the persons included in the showing is the suspect;

(d) a direction that where reasonably practicable the police officer supervising the showing records particulars of the showing (including the place where and the time when the showing was held and the approximate number of persons present);

(e) a direction that the witness not be assisted, induced or influenced by descriptions of the offender or suspect, nor subjected to leading questioning by, nor offered opinions or advice by any member of the police. If more than one witness has come to the showing the witnesses should view the showing individually, and care should be taken to ensure that they do not communicate with one another before or after the showing. Witnesses should be told not to hurry in making their identification and should be accompanied by the police officer supervising the showing;

(f) a direction that the police officer investigating the offence shall not cause or permit a witness to view the suspect alone or in circumstances which would prejudice an identification later.

Photograph of a Parade or Showing

37. The worth of photographing the parade has been considered in overseas investigations. It was argued that a photograph would give the Court direct visual evidence of the conditions under which the identification took place and would also disclose whether the suspect was unfairly distinguished from the other participants.

The Devlin Committee (paras. 5.48-49) favoured a single black and white photograph of the parade with provision for the accused to object to the taking of a photograph and for the destruction of the photograph after the trial. The Australian Law Reform Commission (para. 121), while preferring that the parade be recorded on videotape or photographed in colour,

contented itself for the present with a recommendation that a still photograph (colour if possible) be taken and a copy given as soon as practicable to the accused or his lawyer.

On the other hand the South Australian Committee in its Second Report (pp. 80-81) considered that to visually record a parade would be too great an imposition on those ordinary citizens taking part in it.

38. We asked Detective Chief Inspector Baker and Senior Sergeant Trendle what the position would be here if an accused or suspect requested that the parade be photographed, and were informed that it is unlikely that such a request would be denied. If it were, the accused or suspect could thereupon refuse to cooperate in attending the parade. The officers did not think that a requirement that the parade be photographed would hinder the process of investigation. Their only reservations related to any practical or administrative difficulties that might arise. They added however that a request that a parade be photographed should not be able to be used as a device for causing unreasonable delay.

39. We recognise that a photograph can provide only a limited visual record of the parade, but nonetheless believe that this limited record could assist a judge or jury to assess the fairness of what took place. This may be of particular importance in those cases where the suspect has not had legal advice before going on the parade and subsequently challenges the fairness of the identification process.

On other occasions, however, any requirement that the parade be photographed as a matter of course would simply impose an unnecessary burden on the police and an unwarranted cost on the community. We therefore recommend that a photograph of a parade be taken where practicable in the following circumstances -

(a) if the accused or suspect requests it; or

(b) if before going on the parade the accused or suspect has not had legal advice as to his attending the parade.

Initially the photograph need be no more than a single black and white record of the parade as a whole. In the future when such considerations as cost and practical difficulties have been properly assessed more elaborate alternatives may be possible.

40. We realise that some members of the public who are asked to assist as neutral participants in a parade may be apprehensive at featuring in a photograph likely to become part of the permanent police record of an investigation. We therefore recommend that the Police Instructions be amended to provide for the security and ultimate destruction of all prints and negatives if a photograph of the parade is taken. Also, the officer in charge of the parade should inform those taking part that the parade will be photographed and explain briefly the reason for the photograph and the precautions against its possible misuse.

41. To require that a showing be photographed would be impractical in many, if not most, circumstances. However, our draft Instructions in paragraph 36(d) would require the police officer supervising the showing to record particulars of the place where, and time and approximate number of persons present when the showing took place. While we consider that a showing need not be photographed, we recommend that the police record of the showing be supplied to the defence on request.

Use of Photographs

42. A third method of pre-trial identification is for the police to show a number of photographs to a witness. The witness is asked if he can identify the offender therefrom.[5] It is of course quite improper for a police officer to attempt to prompt an identification : see R. v. Dwyer, R. v. Ferguson [1925] 2 KB 799.

43. Instruction J20 of the Police Instructions governs the use of photographs for the purpose of establishing an

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5. For a recent study of the use of photographs in England refer: D.F. Libling, The Use of Photographs for the Purpose of Identification [1978] Crim LR 343. The article appeared after this report was formulated.

offender's identity. The Instruction requires that the witness be shown a selection of at least 8 photographs; that no aid to identity be given to the witness, and no consultation with other witnesses be allowed; and, where one witness is able to identify an offender from photographs, that any further witness(es) be reserved for a subsequent parade. The Instructions further state that if a suspect is available for a parade photographs should not be shown to the witness as an alternative to holding a parade.

44. The jury should know if a witness has been shown a photograph of the accused before making a positive identification of him as the offender (at a parade or in court) because that viewing may have influenced his recollection. However the likelihood is that the jury, if informed that photographs have been used, will be aware that such photographs came not from some neutral source but from official police records, suggesting that the accused has a previous conviction, or is at least known to the police, and so is a person of bad character.

45. In Russell [1977] 2 NZLR 20 the New Zealand Court of Appeal examined this dilemma, together with the general risk of prejudice that the use of photographs involves. We quote at length from p.28 of that judgment and urge that the Court's dicta be drawn to the attention of police officers who are investigating offences and may contemplate the use of photographs.

> "... [G]reat care should always be taken with the use of photographs shown to anyone who may later become a witness as to the identification of a suspected person. Further, only in exceptional cases should photographs be used at a stage when some particular person is directly suspected by the Police and they are able to arrange an identification parade or some other satisfactory alternative means whereby the witness can be asked directly to identify the suspected person. When photographs have been used it is quite clear, as was accepted in the present case, that in normal cases the Crown should not produce the photographs themselves as exhibits in the course of evidence in chief. A more difficult question is whether or not evidence should be led in chief that photographs were indeed shown to a witness. Circumstances vary

> infinitely and it is impossible to lay down any general rule. But in general terms it seems to us undesirable that such evidence should be given unless it adds in a real way to the other evidence as to identification available to the Crown. Thus if an identification parade is held very shortly after the photographs have been shown to a witness there would generally be no particular point in referring to the use of the photographs, so far as the strength of the Crown case was concerned. We say this because there are suggestions in some of the decided cases that the calling of such evidence is justified because it makes sure that the defence is aware that photographs have been used and thus enables counsel for the defence to explore the way in which the photographs were used with a view to showing a risk that the actual identification made by the witness at some later date was really by reference to the photograph rather than to the witness's memory of the person identified. This type of identification is referred to in R. v. Doyle [1967] VR 698. However when the evidence as to the use of photographs does not seem to add in any real way to the strength of the Crown case and is not to be called then we think the proper course is for the defence to be informed that photographs have been used so that the defence itself can raise the matter. This course will enable the defence to test the use of the photographs in cross-examination if so desired."

46. We recommend that Instruction J20 be amended. Any officer who uses photographs to effect the identification of a particular person whom he suspects to be the offender should be required to prepare a record on each occasion he shows photographs to a witness. The Instruction should also provide that the record is to be supplied to the defence on request. The record would need to comprise a note of the time and place of the viewing and the name and address of the witness, and include an indication as to whether the witness made a positive identification. The actual photographs used should be attached to or identified in this note.

47. We further recommend that Instructions J.20(4), (5) and (6) be amended by inserting after the word "parade" where it appears in those subclauses the words "or showing". This amendment merely recognises that a showing (if carried out in accordance with the Instructions for Showings we recommended in paragraph 36) would be a satisfactory alternative in the circumstances to which Instructions J.20(4), (5) and (6) refer.

48. We considered but decided against a proposal that the photographs so used be of persons of similar appearance to the suspect (as Instruction J16 requires in the case of parades). However, if the actual photographs used are retained as part of the record, their availability for scrutiny by defence counsel and the court will encourage the choice of a fair selection of photographs.

Descriptions of the Offender

49. A witness who attends an identification parade or a showing has nearly always given the police beforehand a written or oral description of the offender. If the witness identifies someone at the parade or showing as the offender the reliability of the identification is strengthened if the person picked out closely matches the prior description, especially if some very distinctive features have been mentioned. On the other hand marked discrepancies lessen the confidence that can be placed in the identification. Proposals have therefore been made -

(i) that evidence of the previous description should be admissible for the prosecution where it tends to confirm the witness's evidence of identification;

(ii) that the previous description should be supplied to the defence and should be admissible in evidence for the defence where it weakens the case for the prosecution.

50. Where the verdict depends substantially on the correctness of an identification the risk of wrongful conviction is such that exceptional measures need to be taken to minimize the risk. This has led several committees to endorse the proposal that prior descriptions be recorded and be supplied to the defence. In 1972 the Criminal Law Revision Committee of England and Wales in their Eleventh Report (para. 200) said:

> "It would also help, in our opinion, to reduce the danger of convictions on mistaken identification if the police made it a practice in all cases to supply the defence with copies of any descriptions of the offender which any likely witness has given to them. This would assist the defence to challenge the value of the witness's identification of the accused. This proposal was discussed with the police representatives who came to one of our meetings, and they agreed that it would be desirable."

51. In 1975 the Australian Law Reform Commission dealing with identification parades stated (para. 123):

> "... Part of the record of the parade should be a written description by the witness of the person he is seeking to identify before he views the parade. If his recollection prior to the parade is of a short, fat, blond man then clearly his identification of a tall, dark, lean one at the parade will be less than persuasive. The defence ought to be able to place before the jury the arguments that inevitably arise from such discrepancies. The point still holds in less extreme cases ... The requirement of a prior written description was supported by both the South Australian Committee (Report pp. 78-81) and the English Criminal Law Revision Committee. The records referred to in this paragraph should be kept and made available to the accused or his legal representative, if desired, before the hearing of any charge."

52. A very thorough examination of the whole question was made by the Devlin Committee which reported in 1976. The first part of para. 5.15 of their report reads:

> "Our conclusion is that descriptions are not of sufficient evidential value to be made the subject of legal rules whose operation might handicap the search for the criminal. There should, however, be an administrative rule that the police are to obtain descriptions wherever practicable, which we believe will be in the great majority of cases. We think that there should be a legal duty to supply a description if one has been obtained. Consequently there will be a need for two statutory provisions with regard to descriptions, the first to impose the duty as we have just indicated it and the second to make admissible by an identifying witness evidence of an earlier description."

53. Various objections to these proposals have been raised. Some are discussed in the foregoing reports. The English

Criminal Law Revision Committee conceded (in para. 200) that the consequence might sometimes be that the defence secured an unjustified acquittal by over-insistence on discrepancies between the witness's original description and the appearance of the accused, because many people are very bad at describing appearances.

> "Sometimes people mention only a particular feature of the offender which struck them. An informant who had been robbed might be frightened when giving his description and it might be unreliable as a result. In a murder case a witness described the murderer as being a person of seventeen or eighteen but later identified a man of forty-one, indisputably correctly, as the murderer. But none of our members or of the police representatives regard this possible danger as a reason for not making the recommendation."

54. The Devlin Committee in para. 5.8 of their Report dealt with the matter in a similar way:

> "It is generally accepted, as the CLRC noted, that 'many people are very bad about describing appearances'. Psychologists, fortified by the agreement on this point of experienced practitioners, say that such evidence is more prone to error than facial identification; they say that many persons who can remember a face cannot describe it adequately or correctly. Nevertheless, the fact remains that a reference to the initial description is one way of testing a witness's powers of identification and a way which we think should be made available to the defence."

55. We are divided on this subject. A minority report is annexed. The majority agree with the opinion there expressed that incorrect details in a description may be used to discredit a perfectly correct identification. We regret that this is so. Nevertheless on balance we regard as the greater evil the very real risk of wrongful conviction based on honest but mistaken identification and the concomitant result that the real offender remains free. Following in the main the proposals of the Devlin Committee (para. 8.10) we recommend that:

(i) The Police Instructions for Identification of Offenders be amended to provide that the police

should, wherever practicable and to the extent that is appropriate in the circumstances, obtain and put into writing descriptions of an alleged offender. The proposed rule is intended to be limited in its application so that it does not impede the police inquiry. When first descriptions are being taken, the overriding need is to narrow the field of search for the criminal. Therefore no formality should be imposed which might impair the speed and success of the search. The first description may have to be taken rapidly and informally at the scene of the crime. The investigating officer must be free to ask questions which he thinks may help in finding the offender.

(ii) The prosecution should be required by statute to supply the defence on request with the name and address of any person who is known to them as having seen the offender in the circumstances of the crime, together with a copy of the description, if any, of the offender given by that person. In addition to verbal descriptions this should apply to drawings or Identikit pictures of the offender made by a person or based on information supplied by him.

(iii) There would need to be power to grant exemption in some cases from the requirement that the name and address of a witness be supplied. There may be very good reason to fear that if this information is given, the witness or some other person associated with the witness may be in danger. We were informed that in some extreme cases the police have moved a key prosecution witness from his home in the interests of his safety and have kept him in a secret place with a protective guard. The strict application of our previous proposal would impede precautions of this nature. We therefore recommend a procedure whereby a court order may be obtained granting complete exemption

from this requirement or imposing special conditions (e.g. that the defence may see the witness only by appointment at a police station).

(iv) When a witness for the prosecution has given evidence identifying the accused as a person whom he saw in the circumstances of the crime, any description of that person given to a police officer before a first identification of the accused by the witness should by statute be made admissible in evidence to show that the witness's identification is consistent with the description as given.

Part IV

EVIDENCE AND PROCEDURE AT THE TRIAL

56. We now turn our attention to the trial itself. We do this because it appears to us that the majority of wrongful convictions due to faulty identification which have occurred in England were probably attributable more to the honest but mistaken evidence tendered by witnesses than to any latent defects in the pre-trial procedures used. Human evidence shares the frailties of those who give it, and evidence of identity is particularly subject to inaccuracy owing to the inherent unreliability of human perception and memory. A recent article in the Stanford Law Review suggests that the American experience supports this conclusion.(6)

Evidence of Identity

57. The case law in this regard is synthesized by Sir Francis Adams in his text Criminal Law and Practice in New Zealand (2nd ed, 1971 para. 3966 et seq). Briefly, evidence given in court by a witness that he identifies the accused as the offender, or has on some past occasion identified him, is admissible. The only real question is the weight to be accorded such evidence in the particular circumstances of the case. If an identification has taken place in circumstances which tend to make it unreliable, the trial judge must warn the jury of the dangers of accepting evidence of this identification as proof of the accused's identity as the offender.

58. Such a warning is required for instance where an unsatisfactory method of pre-trial identification has been used. The Court of Appeal in Fox [1953] NZLR 555 said:

> "Where a person is identified by a witness who has not previously seen or known him, and who has had

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6. Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stanford Law Review 969 (May 1977).

> only a short period to form an impression as to his identity and appearance, the first identification should, where possible, be upon a properly conducted identification parade without any preliminary circumstances tending to lead the witness to identify the person concerned with the guilty party. Where there has been no such confirmation, it is the duty of the trial judge to warn the jury of the danger of relying on an identification arising in such circumstances."

59. However in Jeffries [1949] NZLR 595 the Court of Appeal had earlier pointed out that the admission of evidence of an imperfect or unsatisfactory identification would not of itself enable the jury's verdict to be impugned - for an appellate court will not set aside a verdict if the jury was adequately directed that such evidence was open to objection and there is other evidence, direct or circumstantial, indicating that the accused was the offender. For an appeal to succeed on the grounds that unreliable evidence of identity was admitted it must appear to the appellate court that in all the circumstances of the particular case a miscarriage of justice has occurred.

Statutory General Fairness Provision

60. Although all evidence of identity is prima facie admissible, nonetheless it is clearly established that a trial judge has a general discretion to exclude any evidence that is disproportionately prejudicial or patently unfair to the accused. In Russell (supra) where identity was in issue, Richmond P. delivering the judgment of the Court of Appeal said:

> "The real question in all cases is whether or not the trial Judge ought to have exercised in favour of the accused his discretion to exclude admissible and relevant evidence on the ground that its prejudicial effect is out of proportion to its true evidential value, or on general grounds of 'unfairness'."

61. The Australian Law Reform Commission thought that where an identification parade is shown to have been unfairly conducted the judicial discretion should be used to exclude any evidence thereby obtained. To this end, para. 120 of

their report recommends a statutory general fairness provision to "signpost" the exclusionary discretion.

62. We considered the merits of this recommendation, not only in relation to parades, but also having regard to its possible application to showings and photographs because the trend here is towards the use of these less formal methods of identification. However we concluded that such a provision would merely declare the law and the passage we quote from Russell indicates that it would be superfluous. Accordingly we do not recommend the enactment of a statutory general fairness provision.

Dock Identification

63. This is the term used in other jurisdictions for the practice, sometimes employed in cases where identity is in issue, of asking the identifying witness whether the alleged offender is in the courtroom although the witness has not picked out the accused previously at a pre-trial identification process. In many countries the accused is seated in the dock throughout a trial, but in New Zealand, the practice is for the accused to be seated in the body of the courtroom during hearings in both Magistrates' and Supreme Courts. The more correct description here is accordingly "Courtroom Identification" and the difference should be borne in mind when the term of art "Dock Identification" is used when referring to the practice in other countries.

64. Dock identification has been soundly criticised by the Courts both here and elsewhere. In Howick [1970] Crim LR 403 the English Court of Appeal, quashing the appellant's conviction, held that it is usually unfair to ask a witness to make an identification for the first time in court because it is so easy for the witness to point to the defendant in the dock. The High Court of Australia was more elaborate in its criticism in Davies and Cody (1937) 57 CLR 170 where it was said (181):

> "[I]f a witness is shown a single person and he knows that that person is suspected of or charged with the crime, his natural inclination to think

> that there is probably some reason for the arrest will tend to prevent an independent reliance on his own recollection when he is asked whether he can identify him. This tendency will be greatly increased if he is shown the person actually in the dock charged with the very crime in question."

The Court went on to say that where this happens the jury should be clearly warned of the dangers. In that case a new trial was ordered owing to the absence of a warning.

The foregoing extract from Davies was quoted with approval by the New Zealand Court of Appeal in Fox (supra). Fox and the earlier case of Jeffries [1949] NZLR 595, wherein Davies similarly was applied, leave no doubt that identification methods which convey to the witness that the prisoner is the person suspected or charged are not only unsatisfactory but unfair. If an unsatisfactory method of identification - such as a dock identification - is used, and there is no proper direction to the jury as to the weight and force of that evidence, the appellate court may well determine that this amounts to such a miscarriage of justice as requires its quashing the conviction.

65. Dock identification drew the close attention of the Devlin Committee (see paras. 4.89-4.109 of its report) because in the case of Dougherty - the circumstances of whose wrongful conviction the committee was charged to look into - there would have been no prosecution case without a dock identification. The committee heard submissions that dock identifications should be banned in all cases where identity is disputed, but recognised that there could be occasions where it would be inappropriate to prohibit such evidence. However the committee preferred not to leave the law as it is, with admissibility entirely at the discretion of the trial judge. They recommended a statutory provision severely restricting dock identification.

66. We agree that for the prosecution to ask a witness to make a dock identification, without prefacing it with evidence of the accused's earlier identification by that witness at some pre-trial process, is a most unsatisfactory means of eliciting evidence of identity.

The same criticism applies, though less cogently in some cases, to a courtroom identification (as we use the term in para. 63). Although the accused is seated in the body of the courtroom rather than in the dock it is nevertheless apparent to an astute witness, or to one familiar with the layout of a courtroom, who the accused is. The witness is still in effect confronted with someone he knows is charged with the very offence in question.

67. Obviously there must be an explicit warning to the jury of the dangers of this type of evidence. However, it is clear from the cases we cite in para. 64 both that our judiciary are keenly aware of the particular dangers associated with dock identification and that there is no need to alter the present law to require such a warning.

Use of the Voir Dire

68. Our discussions led us to consider whether, in cases where the fairness of a pre-trial identification or other evidence of identification is impugned, use of the voir dire would be appropriate.

Briefly, the voir dire (commonly described as a "trial within a trial") is the examination on oath of a witness by the Court in the absence of the jury and with the judge determining disputed facts. Sometimes the voir dire involves an examination of the witness's competency to give evidence and therefore takes place prior to his examination in chief. On other occasions the voir dire takes the form of an inquiry into collateral matters or incidental issues arising during the testimony of the witness. For instance, a confession that the prosecution is seeking to tender may be challenged on the grounds that it was not made voluntarily, or the witness himself may claim that he is privileged from answering a particular question.

Whatever the situation, however, the importance of the voir dire is that it ensures that the jury hear evidence to which the defence objects only after the judge has decided that that evidence is not prejudicial or unfair to the accused, or was not unfairly obtained, or is not privileged, or has otherwise

ruled it to be admissible. It follows that where the fairness of an identification is challenged, use of the voir dire would enable the issue to be determined without disclosing to the jury either the identification itself or the circumstances relating to it.

69. We realise that the same end may be achieved in other ways. A judge has inherent power to dismiss the jury while hearing arguments as to the admissibility of evidence. Therefore we do not recommend that use of the voir dire be prescribed as a mandatory procedure to determine questions that may arise regarding evidence of identification. In this matter the court is best left untrammelled by statutory rules of procedure. We merely point to the voir dire as a convenient way of determining the fairness of the identification and related issues.

The Judicial Warning

70. In many areas of criminal evidence judges are obliged to warn the jury of the dangers of acting on uncorroborated evidence. Such a warning is required, generally speaking, because the evidence in respect of which it is given is inherently unreliable. The cases mentioned in para. 13, together with an increased appreciation of the frailty of human perception and memory, and imperfection in the retelling, have removed any doubt that unreliability is a feature of all types of evidence of identity. Accordingly, it has been suggested that a judicial warning be required in respect of all such evidence, and not merely where dock identification or a similar practice has been employed or where other special circumstances render it manifestly suspect.

71. The courts did not prove sympathetic to this argument at first. In England the accused in Long [1973] Crim LR 577 was convicted of robbery where the case against him depended on his identification by three strangers and on his knowledge of the robbery and his behaviour afterwards. He appealed, submitting that in every case where the issue is identification and guilt depends on visual identification by witnesses who did not know

the accused the judge should warn the jury of the dangers of such evidence and alert them to the need for caution. The Court of Appeal rejected this submission. The Court made it clear that in its view the law does not require a judge always in cases depending on identification to give specific warning of the danger of a wrongful identification. Still less does it require him to use any particular form of words, though a summing up may lack the required quality of fairness if it fails to point out the circumstances in which an identification was made and the weaknesses in it.

72. Since Long was decided an English Court of Appeal comprising a full court of five judges has re-examined the question of judicial warning. In disposing of three separate appeals in the decision commonly known as Turnbull [1976] 3 All ER 549 the Court endeavoured to lay down guidelines for trial judges who have to sum up to juries in cases where the prosecution depends wholly or substantially on the correctness of one or more identifications of the accused which the accused alleges to be mistaken. The Court directed that in such cases:

> "... the Judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. This warning need be in no particular words but should include the reason for the warning, the possibility of a mistaken witness being a convincing one and a caution that several witnesses may all be mistaken."

73. The Court went on to say that the judge must also indicate any specific weaknesses in the prosecution evidence and invite the jury to examine the circumstances in which the identification was made. Where the evidence is of good quality it may be put to the jury without more, subject to the warning being given. However, where in the opinion of the judge the identification evidence is of poor quality he should direct an acquittal unless there is "other evidence which goes to support the correctness of the identification".

74. "Other evidence" may be corroboration or something else convincing. An example of supporting evidence not amounting

to corroboration in the technical sense is an unexplained coincidence of the type found in Long. In that case the three identifying witnesses had only fleeting glimpses of the accused; but his behaviour after the robbery was unusual and it was an odd coincidence that the man identified had behaved in this way.

75. A view that Turnbull may be of limited application and confined to the "fleeting glimpse" type of identification has been expressed recently by a writer in the Criminal Law Review. In an article entitled "Identifying Turnbull"(7) Edward Grayson examined a number of unreported Court of Appeal judgments since Turnbull and concluded that practitioners in England are seeking to require a Turnbull type of warning in circumstances for which it was not intended.

76. We are not convinced by Grayson's argument and point to a reported judgment of the English Court of Appeal which suggests that application of the guidelines set out in Turnbull is not so limited. In Hayes [1977] 2 All ER 288 the accused applied for leave to appeal against conviction on the grounds that the quality of the identification was so poor that the judge should have withdrawn the case from the jury at the close of the case for the Crown. The Court, dismissing the application, praised the judge's summing up which sounded "every note of caution required to be sounded in accordance with the principles enunciated in Turnbull". Although there were other factors adverse to the quality of the identification the case was not of the "fleeting glimpse" type.

77. The mandatory warning which Turnbull now requires of a trial judge had not been insisted upon by the English courts until recently.(8) Many of the difficulties and potential injustices in visual identification evidence were brought out by the Criminal Law Revision Committee and the Devlin Committee. Both the Criminal Law Revision Committee (in para. 199) and the Devlin Committee (para. 4.83) recommended the

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7. [1977] Crim LR 509

8. The history of the warning is exhaustively discussed in the report of the Devlin Committee, paras. 4.43-4.52.

giving of a warning where the case depends on visual identification of the accused.

78. In our opinion, as visual identifications can constitute a major source of potential injustice in criminal trials a clear warning by the trial judge of the dangers of convicting on such evidence should be required and should go some distance towards checking potential errors. We recommend the statutory requirement of a warning in any case in which the case against the accused depends wholly or substantially on the correctness of one or more visual identifications of him. The substance of the warning should not be elaborated in the statute but the wording of such a warning could follow the general rule in Turnbull as set out in paragraph 72.

79. Although it is our view that there need be no further elaboration in the statute we consider that, if the circumstances are appropriate, the trial judge should turn the jury's attention to a number of factors[9] including:

(a) whether the witness had seen the accused before;

(b) whether the offender had any special peculiarities which impressed themselves upon the witness at the time;

(c) the period between the time when the witness first described the offender and the time when he first saw the accused;

(d) the period during which the witness observed the offender;

(e) the circumstances under which the witness observed the offender;

(f) the pre-trial procedure by which and circumstances in which the witness first identified the accused as the person he saw offending; and

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9. Attention is drawn to similar comment by Sir Francis Adams in Criminal Law and Practice in New Zealand (1971 2nd ed) 3970.

(g) the possibility that a witness giving his evidence honestly and confidently may be mistaken.

A warning should be given notwithstanding that such factors indicate that the identification is of good quality.

Directed Acquittal

80. We view with equal favour the other aspect of the Turnbull decision - viz. the approach recommended by the English Court of Appeal with regard to directed acquittal in cases dependent on the correct identification of the accused. The Court said (at p.553):

> "When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

We agree that if evidence of an identification is of poor quality, and the correctness of the identification is not supported by other evidence or circumstances, the trial judge - rather than merely warning the jury - should direct an acquittal.

Summary Trials

81. The proposals we make in the preceding paragraphs regarding the judicial warning and directed acquittal have no direct application in a summary trial. A Magistrate who is trying summarily a case which depends wholly or substantially on the correctness of an identification of the defendant is himself the sole trier of fact. But the special need for caution in such cases as described in Turnbull should be in the forefront of his mind when identification is in issue.

82. Again, if it appears at the close of the informant's case that the identification is of poor quality and its

correctness is not supported by other evidence, the Magistrate should consider whether to dismiss the information on the basis of the paucity of the evidence that is in.

83. We therefore conclude that it is desirable that, in summary trials where identification of the defendant is in issue, Magistrates have regard to the principles which underlie the recommendations we make regarding trials in the Supreme Court.[10]

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10. Cf. Recommendations of the Devlin Committee in Chapter 7 of its report.

Part V

RECOMMENDATIONS

84. Our recommendations are:

A. POLICE INSTRUCTIONS

That the Police Instructions for Identification of Offenders be amended:

(1) By deleting Instruction J.18(1) (which relates to the dress of a suspect in an identification parade). Para. 27

(2) By providing that where a suspect has any distinctive physical characteristic, no member of the police, when putting questions about the offender's physical appearance to a witness who may later be asked to identify the suspect as the offender, shall put to the witness any leading question that would have the effect of drawing attention to that physical characteristic. Paras. 28, 29

(3) By providing that where it is proposed to hold an identification parade the suspect or accused shall be informed that -

(a) He is not obliged to take part; and

(b) He may if he wishes obtain legal advice before deciding whether to take part; and

(c) If he does take part, he is entitled, if he wishes, to have his solicitor present at the parade. Paras. 30, 32

(4) By providing that, where practicable, a photograph of an identification parade be taken if -

(a) The suspect or accused requests it; or

(b) Before going on the parade, he has not had legal advice about doing so. Para. 39

(5) By providing that if a photograph of an identification parade is to be taken -

(a) The officer in charge of the parade shall inform those taking part that it will be photographed, and explain briefly the reason for the photograph and the precautions against its possible misuse; and

(b) All prints and negatives of any such photograph shall be kept in a secure place and shall be destroyed when no longer needed for the purposes of the case. Para. 40

(6) By adding provisions regulating the conduct of "showings", i.e., cases where a suspect, instead of taking part in an identification parade, agrees to appear amongst other persons in an informal situation for viewing by a witness: paras. 24 and 35. Such provisions should include the directions and requirements set out in para. 36, and should also require that any police record of the showing (see para. 36(d)) be supplied to the defence on request: para. 41.

(7) By amending Instruction J.20 to provide that whenever a member of the police shows photographs to a witness to effect the identification of a particular person whom the police suspect to be the offender -

(a) The member shall make a written note of the time and place of the viewing, the name and address of the witness, and whether the witness made a positive identification; and shall attach the photographs to the note or identify them in it; and

(b) The note so made, and the photographs used, shall be supplied to the defence on request. Para. 46

(8) By inserting in Instructions J20(4), (5) and (6) after the word "parade" in each case, the words "or showing". Para. 47

(9) By providing that the police should, wherever practicable and to the extent that is appropriate in the circumstances, obtain and put into writing descriptions of an alleged offender. Para. 55(i)

B. LEGISLATION

That statutory provision be made -

(10) That where an accused has refused to attend an identification parade, whether before or after his arrest, no comment adverse to him shall be made on that fact at his trial. Para. 34

(11) (a) That the prosecution shall supply to the defence, on request, the name and address of any person who is known to the prosecution as having seen the offender in the circumstances of the crime, and a copy of any description of the offender given by that person, and a copy of any drawing or Identikit picture of the offender made by that person or based on information supplied by him. Para. 55(ii)

(b) That a Judge or, as the case may require, a Magistrate may at any time, on the application of a member of the police, make an order that the name and address of any specified person be not so supplied, or be supplied only subject to such conditions as the Judge or Magistrate thinks fit, on the ground that such an order is necessary for the protection of any person. Para. 55(iii)

(12) That when a witness for the prosecution has given evidence identifying the accused as a person whom he saw in the circumstances of the crime, any description of

that person given to the police before a first identification of the accused by the witness is admissible in evidence to show that the witness's identification is consistent with that description. Para. 55(iv)

(13) That where the case against the accused depends wholly or substantially on the correctness of one or more visual identifications of him the Judge shall warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identifications. The warning need not be in any particular words but should indicate the reason for the warning and the possibility of a mistaken witness being a convincing one, and, where there is more than one identifying witness, should include a caution that all may be mistaken. Para. 78

C. SUMMARY TRIALS

(14) That in deciding disputes as to identity in summary trials Magistrates' Courts should have regard to the principles which, if our recommendations are accepted, will apply to trials on indictment. Para. 83

September 1978

Chairman

MEMBERS:

Mr R.C. Savage Q.C. (Chairman)
Associate Professor B.J. Brown
Professor I.D. Campbell
Mr A.A.T. Ellis
Mrs J.E. Lowe*
Chief Inspector R. McLennan
Mr P.G.S. Penlington
Mr A. Satyanand
Mr P.B. Temm Q.C.
Mr D.A.S. Ward C.M.G.
Mr G.W. David (Secretary)

* Became member of committee after report was formulated

MINORITY OPINION

Descriptions of the Offender [see para. 55]

My basic objection to any requirement that the defence be provided with descriptions of offenders for subsequent use at any proceedings is that this obscures the distinction between a person's ability to describe another person and his ability to recognise that person again. These two processes are quite distinct and the ability to perform one does not necessarily relate to the ability to perform the other. This distinction is recognised by the overseas reports as quoted in paras. 53 and 54.

The Devlin Committee, in my view wrongly, nevertheless asserts in para. 5.8 of their report that reference to the witness's initial description is one way of testing a witness's powers of identification. However the relevant factors in testing this are those set out in para. 79 of this report. Placing emphasis on an ability to describe an offender will wrongly elevate that ability in many cases to being one of the criteria on which the correctness of an identification will be determined. Any acquittals based on that proposition will be acquittals for a wrong reason.

Further, it is conceded by the English Criminal Law Revision Committee (see para. 53) that over-emphasis on incorrect details in a description may be used to discredit a perfectly correct identification. It is also not difficult to imagine situations where over-emphasis on discrepancies will result in a bewildered and confused witness whose evidence generally will lose its rightful impact.

From my objections to the majority's proposal it follows that a requirement for the police to obtain descriptions for the purposes of advancing this proposal is also not supported. Also, however such a requirement is expressed, it may result in a confusion of priorities in a policeman's mind at a time when he may often need to act quickly. It also follows that I do not support the majority's third proposal (see para. 55(iv)).

I am however in favour of a proposal that there be an administrative rule that the prosecution provide a witness's description to the defence when this is substantially at variance with the appearance of the person charged. I see this as consistent with the traditional responsibility on the prosecution, and to support that proposal the court should be able to require production of descriptions for examination in cases where a real doubt arises as to the correctness of a witness's identification (e.g. when strong alibi evidence has been provided.)

R McLennan

Chief Inspector R. McLennan

APPENDIX

We set out the Police Instructions for Identification of Offenders as they are at present prescribed.

Means of Identification

J15 The Police shall conduct in the fairest possible manner the identification of persons suspected of committing offences.

Arranging Identification Parade

J16 (1) If an identification parade is to be held, it should, where possible, be conducted by a non-commissioned officer.

(2) He shall ensure that:

(a) The place to be used for the identification parade has good light

(b) The parade consists of eight or more persons (not Police) who are of the same colour as the suspect and similar in age, height general appearance, and class of life.

(c) The persons forming the parade stand about 3ft apart.

(d) The names, ages, occupations, and addresses of those in the parade are recorded and attached to the police file.

(e) Persons in the parade are requested to wear or remove their hats or to speak or walk individually, if it is considered that this would assist any witness.

Positions of Investigating Member

J17 The member in charge of the case may be present, but shall not take part in the particular procedure connected with the identification, except in unavoidable circumstances.

Position of Suspect

J18 The suspect should be:

(1) Dressed as near as possible as he was when the alleged offence was committed, except in cases

where he was wearing distinctive clothing which may be prejudicial to fair identification.

(2) Invited to stand where he pleases in the parade and to change position after each witness has had the opportunity for recognition.

(3) Asked if he has any objection to any of the persons or to the arrangement.

Witnesses at Identification Parade

J19 (1) Witnesses should:

(a) Not be permitted to see the suspect before he is placed in the identification parade.

(b) Not be assisted by verbal or written description or expression of opinion by any member of Police.

(c) Be brought in one by one and directed to stand in front of the person they identify and point to him.

(d) Be told not to hurry in making their identification.

(e) Be accompanied along the parade by the member conducting it.

(f) Not be permitted after leaving the parade to talk with witnesses who are waiting.

(2) Should a witness indicate a person but be unable to identify positively, or should a witness pick out some one other than the suspect, the member conducting the parade shall ensure that these facts are recorded.

Identification by Photographs

J20 (1) If it is not known who committed the offence photographs may be used for the purpose of establishing the offender's identity.

(2) In order to establish identity a number of photographs (at least eight) may be shown to a witness with the object of his making a selection.

(3) All names or other identifications of identity on photographs shall be kept out of sight and no aid to identity given to a witness or consultation with other witnesses allowed.

(4) If one witness is able to identify an offender from photographs, any further witness should be reserved for an identification parade.

(5) If a suspect is available for an identification parade photographs shall not be shown to a witness.

(6) Where a witness has seen photographs in accordance with clauses (1) and (2) hereof, there is no objection to his being asked to identify a suspect at a parade.

E. C. KEATING, GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND—1978

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