

TALK GIVEN BY PAUL BOGAN AT THE WORKSHOP ON EYEWITNESS IDENTIFICATION EVIDENCE

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Introduction

1. In this talk I propose to discuss the instructions to witnesses before the video identification procedure and the questioning of witnesses afterwards in context of:
(A) Role of suspect
(B) Partial or qualified identification
(C) Exclusion of suspect

2. Code D's requirements are as follows
A11 Pre-parade:
 - i the witness shall be told that the person they saw on a specified earlier occasion may, or may not, appear in the images they are shown and
 - ii. that if they cannot make a positive identification, they should say so.A12 Post-parade
 - iii the witness shall be asked to say whether the individual they saw in person on a specified earlier occasion has been shown and, if so, to identify them by number ...'

3. **(A) Role of suspect**
The situation is straightforward where there is only 1 perpetrator or, if more, the roles are obviously distinct. However in many instances where a number of people have been involved in a crime, usually of group violence, it may not be clear which offender the witness is purporting to identify.

4. A witness in that situation might typically give a broad description of a group of attackers and later when at parade be asked if s/he can identify 'one of the persons involved in the attack on' But simply identifying a person who was present will often be unsatisfactory to prosecution, defence or both and may fail to serve the interests of justice in the wider sense. I think imperative in such situations that the witness is asked if he or she can ascribe a role and if so a statement should be taken there and then.

5. The potential consequences of a failure to do so are as follows:
 - i If there is a positive identification, whether or not the witness can ascribe a role to the person identified may be of enormous significance. It may be that the witness can't, in which case the person identified may have been present, even part of the so called 'group' but not actually participating in the violence. Ascribing a role after identification may actually exculpate the suspect or have an effect of whether to charge. Equally it may be that the role could make the difference between the type offence, eg murder / manslaughter.
 - ii. It may handicap the prosecution if they do not know what their case is or what

the witness will say, especially if when the witness at trial for the first time reveals a role which contradicts the way the prosecution open the case against the defendant or the evidence of another witness.

- iii. It may handicap the defence in knowing the case they have to meet thus hindering their preparation; left guessing at his or her alleged participation in the criminal activity suggested by the identification until after the trial has commenced.
- iv. The witness is confronted by the question of role for the very first time many months later in court. By that stage his or her recollection may have faded or may have been influenced by information received from the police or other witnesses.
- v. Even the role if correctly recollected, the failure to record these details at the time of the identification may appear to weaken the evidence so much later. 'Why wasn't the account taken contemporaneously? Why only now for first time are you saying he is man with the knuckleduster? Has it been made up since?'

(B) Partial or qualified identification

6. Some of the problems identified above apply equally to the more controversial issue of partial or qualified identification. We all know that between complete failure and a positive identification there are an infinite range of responses. A witness may indicate a person by saying, 'he looks like the person', 'I think that it might be number two' or 'I have a feeling about number six'.
7. The witness is asked for a 'positive identification.' This begs question: how positive? This is generally interpreted as meaning 'must be absolutely certain'. But should the witness be asked about degree of certainty or other comment? The unqualified response 'I can / can't make an identification often masks more complex but potentially helpful evidence. Indeed, as we shall see in the case of *R v George*¹, there may be some valid reason for difficulty in making identification.
8. Historically, as a matter of practice, only positive identification evidence has been admitted. Clearly that must be right if there is no corroborative identification evidence and the ID witness could not be sure. In those circumstances there would be no case since the jury could not be sure. However it is worth noting this curious anomaly: it has never been suggested that a person who gives a description cannot be less than certain eg 'he may have had a moustache' or 'I thought I noticed a scar on one of his hands'.
9. It is worth being reminded of *R v George*: a high profile case concerning the murder of a television presenter. The court at first instance and later the Court of Appeal was invited to conclude that if a witness failed to make an unqualified positive identification such identification as was made should be excluded and the jury should hear no more than the witness failed to make a positive identification. The submission was rejected. It is necessary to consider the decision in the context of the particular circumstances of the challenged evidence.

¹ [2003] Crim L R 282, CA.

10. It was almost a year before the defendant was arrested and thirteen months before he stood on an identification parade. In that time he had grown a full beard. Thereafter he refused to consent to a parade and the remaining procedures were by video. These difficulties were compounded by the further delay before the video parade was prepared and viewed, some 16 to 18 months after the original observation. Of the nine witnesses who gave evidence describing the person observed, only one made an unqualified positive identification. The evidence of three witnesses who did make a qualified positive identification was admitted. The first vacillated between three persons, numbers 1, 2 and 8 of whom the suspect was number 2, before settling on number 8. She said she was 80 to 85% sure. It was apparent that the selection and the defendant were very similar in appearance. In evidence she stated that she found the procedure difficult because of the lapse of time and the fact she could only see the head and shoulders of each person. The second witness also concentrated on numbers 2 and 8. She said it could be either, that she could not tell between them but that her gut feeling was that it was number 2. She concluded by saying 'I would say it was number 2' but refrained from making a positive identification. In her subsequent statement that day she repeated that she couldn't make a positive identification. In a further statement made the following day she stated that number 2 had 'brought something back' to her as had number 8 though not so strongly and explained that she was hindered by not seeing number 2 stand and hence his build. The third witness likewise concentrated on numbers 2 and 8 but when asked if the person she had previously seen was paraded she said that she didn't think so. She explained contemporaneously the difficulty concerning the importance of height and build and that she had not been expecting a moustache or beard.
11. The Court of Appeal upheld the decision to admit the evidence. It was acknowledged that a Defendant must not be convicted on the evidence of a qualified identification alone. However, it might be relevant in at least two situations.

'First, where although the weight of the evidence will still be less than a positive identification, it supports or at least is consistent with other evidence that indicates the defendant committed the crime with which he is charged. Secondly, the explanation for a non or qualified identification may help to place the non or qualified identification in its proper context and so, for example, show that other evidence given by the witness may still be correct. Otherwise a non or qualified identification could be used to attack the credibility of other evidence given by a witness when the explanation for this may show that such an attack is unjustified.'
12. Thus spontaneous explanatory remarks at the procedure concerning the difficulty caused by the lapse of time or the additional facial hair were, the Court of Appeal held, correctly adduced. Such explanation might also be permissible at trial. Court went on to give guidance on the approach to admissibility of this evidence at trial.
13. The judgment is not *carte blanche* to introduce qualified identification evidence. In *R v George* there were exceptional difficulties rarely encountered. Nevertheless the case demonstrates the potential value and use of partial or qualified identification.
14. This then begs the question: should partial or qualified identification should be encouraged. Encouraged in the sense that where a person does not spontaneously give

some explanation beyond 'I identify number 6' or 'I can't make an identification' there is some further questioning.

15. For a person who makes a positive identification the question is 'how sure? One alternative after a positive identification would be to ask, in open form, how sure the witness was. Another might involve a simpler model of the type of gradations used by scientific experts. Before embarking on the view the witness would be told that in the event of identifying someone, the identification officer would ask whether the person was possibly, probably or certainly the same person as previously seen.
16. If no identification is made the witness might be asked whether anyone on parade resembles the person previously seen. Interestingly the Devlin report² considered such an option in 1976:
Q1. Can you positively identify anyone on the parade as the person you saw?
Q2. If not, does anyone on the parade closely resemble the person you saw?
If there is then a qualified identification then, the further question about degree would be asked. The proposal considered in the Devlin Report was rejected on the ground that it might confuse the witness.
17. It is worth noting that the procedures for group identification and showing photographs make provision for a witness who makes a selection but is unable to confirm the identification. The witness is then asked how sure he or she is: Annex C23 and E.7 respectively.
18. Evidentially the advantages and disadvantages of further questioning may appear to depend upon which side of the fence you are. For example a person who made an unqualified identification might, with the encouragement of further questioning, add a tiny note of doubt and hence weaken what might otherwise have been an apparently certain identification. This is balanced by the converse situation: a person being only 98% certain and who conscientiously therefore does not identify might in fact have a very helpful evidential contribution. S/he may even explain what caused the 2% doubt, for example a difference in hair length when it could be established that the suspect had had a haircut in the meantime.
19. Sometimes witness's identification firm up between identification and evidence. This may occur by the influence of some external factor, for example the witness has been told that another witness had made positive identification or that the police have other evidence against the accused. It may be that simply seeing the accused in the dock creates its own pressure on the witness: feeling that the case is dependant upon his or her identification evidence, the witness does not want to let the team down or feel responsible if the defendant is acquitted.
20. Conversely the witness evidence could become infested by doubt between parade and trial. This too may be the result of external influence such as the knowledge that a colleague or friend who also witnessed the offence and attended an identification procedure did not select the accused. The doubt may simply arise because the

² Report to the Secretary of State for the Home Department Committee on Evidence of Identification in Criminal Cases Cmd 338, 1976, paragraphs 5.58 to 6.62.

witness's recollection of the assailant has faded over time and, seeing the defendant in the dock, he or she no longer possesses the degree of certainty at the parade which took place shortly after the offence.

21. What these situations have in common and the reason I think that some development of the procedure should be considered is that either way one is more likely to get accuracy and hence the truth. Surely it is preferable to have the witness on the record stating, at the time of the identification, the degree of certainty and any influencing factors for the consideration of a judge and jury than the witness being confronted by awkward questions many months later.

(3) Exclusion of suspect

22. The present procedure allows only a positive identification. A failure to identify could connote a state of mind anywhere in the range between 'It might well be number 4' to 'the assailant is definitely not one of those on the parade'. In practice the failure to make a positive identification is usually construed as an inability to identify rather than the positive exculpation of the suspect. Yet a negative identification by a witness who could well remember the features of the person previously seen would be significant exculpatory evidence. There can be little reason not to ask whether the witness can exclude the persons viewed.

23. The Devlin report³ considered but did not recommend such an option in 1976:
Q1. Can you positively identify anyone on the parade as the person you saw?
Q2. If not, does anyone on the parade closely resemble the person you saw?
Q3. If not, can you say that the person you saw is not on the parade?

Conclusion

24. In my opinion some development of the questioning of identification witnesses is necessary. Clearly, as in all aspects of identification of evidence, there are potential dangers in this and the precise nature of the questions and the circumstances in which they should be asked would have to be considered very carefully. Certainly research into this area would be most welcome. Of one thing though I am certain. It is in no-one's interest for a witness to be giving explanatory identification evidence for the first time in court, possibly under pressure, many months later when memory may either have failed or have been influenced.
25. Any further questioning should, as with the procedure itself, be done in the presence of the suspect's representative and be filmed. Where appropriate a statement should be taken immediately afterwards.
26. Two final points. First, as noted earlier, witnesses regularly make unsolicited qualifying comments so the issue is, in effect, whether they should be encouraged to do so by further questions. Second and importantly, especially in cases where a person makes a tentative identification, the evidence is always subject to the trial process in which its admission and exclusion can later be litigated. Thus further

³ Report to the Secretary of State for the Home Department Committee on Evidence of Identification in Criminal Cases Cmd 338, 1976, paragraphs 5.58 to 6.62.

questioning merely provides an option and it may very well be the case, and perhaps should be the case, that, as in *R v George*, only in exceptional situations will the type of exceptional evidence in that case be admitted.

Paul Bogan

Doughty Street Chambers
10 - 11 Doughty Street
London WC1N 2PL