

Amanda Bowring (CPS) The CPS's perspective on identification issues

In this presentation, I intend to cover 4 headings:

Firstly, how video identification parades are working in practice for prosecutors;

Secondly, issues that have arisen in relation to video id;

Thirdly, modern technology and its impact on identification;

Fourthly, perspectives on the important questions of whether ID is in dispute.

The Code for Crown Prosecutors must be applied by prosecutors when reviewing all cases, initially and throughout the life of a case. It sets out a two stage test which a case must pass if it is taken forward. Firstly, is there enough evidence to provide a realistic prospect of conviction? And secondly, is a prosecution in a public interest? In answering the evidential question, prosecutors must consider whether the evidence can be used in court and whether it is reliable. Whether evidence can be used means is it likely to be excluded because of the way it was gathered? Or to put it another way in the context of identification cases, is it likely that a judge will use his discretion under s. 78 PACE and exclude the evidence of identification because:

“having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.” A section 78 argument is the one that the defence will employ if there is any arguable breach of PACE Code D.

Whether a case is reliable may depend upon (paragraph 5.4d):

“If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?” This question should turn a prosecutor's mind to Turnball (1976) 63 Cr.App.R. 132 which sets out the direction to be given to a jury in cases of disputed id and which highlights the facts that should be assessed when reviewing the strength of the evidence.

Although the questions of strength and admissibility are straightforward in themselves, the answers are not. Identification is a complex subject, the actual substance of the evidence can be difficult to grasp, many of the cases that supply the law turn on their own unique facts and it can be occasionally hard to reconcile apparently contradictory decisions. Moreover, these problems were compounded by the unwieldy, logistically difficult to organise id parades, and which would take an inordinate length of time (10 weeks in some cases) to organise. Parades provided ample opportunity for the defendants and their representatives to derail the investigation and later at court, make s. 78 application on the basis of what did or did not occur. I am sure you are all familiar of the defence tactics of making identification as difficult as possible for the witness, by requesting that everyone sit down, wear hats, etc in order to hide the physical characteristics that help others identify us. Another common tactic was to dispute that the volunteers were a similar likeness or that the individual way the parade was held, was somehow unfair to the suspect.

This issue became more acute after the House of Lords decision in Forbes 2001 2 WLR 1, in which it was held that it was mandatory to hold an id parade in any case in which the id of the suspect was disputed. This included cases, such as the circumstances in Forbes, when a witness identified the suspect on the street very soon after the offence had occurred.

Forbes was (and still is) seen as placing a heavy procedural burden upon the prosecution, particularly in the street id scenarios. There was a certain degree of reluctance to hold a parade when it appeared little point after a street id, as all the witness will do is pick out the person they picked out of the street.

All in all, there was a common perception amongst prosecutors that they were in a no win situation. If there was no parade, there would be judicial criticism, if there was a parade, then there would be some issue raised by the defence or you would have to convince sceptical officers that there should be a parade. To top it all of, prosecutors were reviewing cases post-charge when it is very difficult to remedy such any evidential deficiencies.

Although the legal and factual difficulties are still present, video id coupled with statutory charging have greatly strengthened the prosecution process in disputed id cases. And for prosecutors the benefits of video identification go hand in hand with statutory charging and as I hope to demonstrate to you.

The 2003 revision of Code D provided that video identification should be used in preference to parades and currently at 3.14, it states that a video id must be initially offered unless it is not practicable or a parade is more practicable and more suitable. As you all aware, video identification is relatively inexpensive, easy to set up, far more impervious to defence tactics, and it is very quick. And it cannot be emphasised enough how important speed is – not merely because the sooner a witness can participate in an id procedure, the fresher the memory will be but also because of the greater emphasis within the CJS to prosecute cases efficiently and quickly.

In 2004, the CPS began to roll out across the country, the charging programme which meant that in all but the most minor of cases, prosecutors have assumed responsibility for the charging decisions – whether a suspect should be charged and what should a suspect be charged with. This has led to a different mentality amongst prosecutors, as we are now in police stations, working closely with officers and are available to advise during the investigation stage of a case. Although advising pre-charge is something we have always been encouraged to do, it is now explicit in the Code at paragraph 2.4:

‘Crown Prosecutors should provide guidance and advice to investigators throughout the investigative and prosecuting process. This may include lines of inquiry, evidential requirements and assistance in any pre-charge procedures. Crown Prosecutors will be proactive in identifying and, where possible, rectifying evidential deficiencies...’

In reality, this means that prosecutors are now able to advise the police pre-charge, ensure that all id cases are highlighted and dealt with accordingly, and be on hand to give advice on the application of the Codes or case law. Id can take place pre-charge and quickly, sometimes within hours of an offence occurring.

As a result, identification procedures are being used more readily in a multitude of different cases of varying levels of offending, flushing out the weaker cases earlier and building stronger cases from the start, which do not merely stand up evidentially but are robust against legal challenge.

Despite this prosecutorial endorsement of video identification, there are some general problems which prosecutors have highlighted to me:

Firstly, there is the view that the procedure is too simplistic inasmuch it only allows identification from a 2 dimensional picture on a screen, whereas identification is a more complicated process in which height, build, gait, etc. all contribute to a person recognizing another.

Secondly, striking features – scars and tattoos were problematic. Code D annex B permits in live parades for unusual features, which cannot be replicated on other members of the identification parade, to be concealed if the suspect and their solicitor, or appropriate adult, agree. For example, by use of a plaster or a hat. Initially in relation to video identification, this proved a problem as there was no analogous provision for replicating or disguising such features on the video images. This has been rectified by the recent amendment to Code D Annex 2 2A that provides that if a suspect has an unusual physical feature which does not appear on the images of the other people that are available to be used for video identification, steps may be taken to:

(a) conceal the location of the feature on the images of the suspect and the other people; or

(b) replicate that feature on the images of the other people.

We will see how this turns out but so far, no problems.

Thirdly, disclosure of the compilation CDs of the procedure, which would contain images of the volunteers from the database. There are concerns that while the CDs are being exhibited and therefore served on the defence, then the integrity of the database is compromised by it being released into the public domain and that future volunteers may be discouraged. We are currently working to solve this issue. One solution is not to release the exhibits to the defence but allow them reasonable access. However, this could cause problems particularly if the defendant is in custody and they may wish to view and discuss the evidence with him/her. The alternative is to not to rely on the material, thereby rendering it unused and removing any obligation to serve the material on the defence unless it meets the disclosure test. However, this does depend on police officers ensuring that evidential statements are written tightly, that prosecutors are robust in relation to disclosure and that the judiciary are on side.

Fourthly, is the question of a witnesses are being shown a complete set of still images in gallery or matrix format after viewing sequentially the moving images. This makes the procedure more analogous to a “live” parade in that the witness is able to see all images at once. The procedure has apparently led to a 25% increase in the ability of witnesses to make a positive identification. The only problem is that it appears to breach 3.5, which states that there must be a moving set of images. Our view is that it is a highly technical breach of Code, and it can be argued that as moving images are initially shown in sequential order then this is in accordance with D3.5. However, there is some uncertainty in the minds of many prosecutors.

However, these problems should not detract from the hugely positive impact that the new technology of video identification procedures have had upon cases. And the interaction between technology and general identification principles continues apace. The use of increasingly sophisticated technology in photos, videos and CCTV footage has forced the courts to deal with a number of unique situations in the context of

identification and recognition that are not specifically covered by the then existing Codes of Practice.

One situation that has come to the fore over recent years is when CCTV captures an offence being committed, most notably in large scale public order offences. If there are images of an offence being committed, then these can be shown to the jury and the jury asked to make up their own minds as to whether the defendants are the people committing the offence (Dodson and Williams (1984) 79 Cr.App.R. 220). As the Court of Appeal said in Blekinsop (1995), if a judge gives a sufficiently careful and thorough direction warning the jury of the perils such as quality of image, changes in appearance, exposure of facial features and remind the jury of the fact that they must be sure that the defendant is the man in the image then:

“we envisage no injustice arising from this manner of evaluation evidence with the aid of what the juror’s eyes tell them is a fact which they are sure to exist.”

In Attorney General’s Reference (No 2 of 2002) (TLR 17.10.02 CA) the Court of Appeal gave four examples when photographic/CCTV evidence would be permitted to go before the jury:

- Where the photographic image was sufficiently clear the jury could compare it to the defendant in the dock;
- Where the witness know the defendant sufficiently well to recognise him as the defendant depicted in the image he could give evidence of;
- Where a witness who did not know the defendant but had spent substantial time viewing the photographic images, thereby acquiring specialist knowledge that the jury could not have, he could give evidence of an identification based on the comparison between those images and a reasonably contemporary photograph of the defendant;
- A suitable qualified expert could give evidence using facial mapping.

The ability to rely on CCTV footage is hugely beneficial. It is normally used during the investigative stage and can be shown to suspects and their defence representatives in interview, and prevents spurious id defence arguments being run. For example, CCTV footage of the riot between Millwall and Birmingham City supporters led to guilty pleas to violent disorder, as suspects were shown good quality footage of them leading or participating in the disorder. Last year, a man pleaded guilty to rape after the assault was captured on CCTV despite the fact that the witness never came forward. Query for prosecutors is when an offence has been captured on CCTV and there is an eyewitness, is there a need for an id procedure to be carried if id is disputed? A current reading o 3.12 would appear to require this.

Finally, I just want to say a word about the difficult issue of whether identification is a disputed issue in cases when a defendant has made a no comment interview. In a number of cases, particularly *Karia v DPP* and *McCartney and others* (2003) EWCA Crim 1372 the appellate courts have held that ‘a witness disputing id’ meant a dispute that was expressed and notified to the prosecution. A no comment interview meant that there was no denial nor admission as to the offence, and there was a need for a positive assertion in order to make id a disputed issue.

However, the prosecution must still be able to answer the question of “can we prove beyond a reasonable doubt that the suspect is the offender.” D3.13 allows an id procedure to be held if the investigation officer believes it could have a useful purpose. This can opensup difficult tactical issues in cases that are not evidentially strong. Should an id procedure be undertaken although not strictly necessary, with the attendant risk of a witness not identifying the suspect and weakening the case. This is

a difficult question of judgement, which prosecutors are frequently making with the officers, and reflect the changing nature of the prosecutors role.

In conclusion, because of the flexibility and speed of video identification procedures, prosecutors believe that evidentially better cases are being built earlier. The increasing use of CCTV and other modern technology is having an increasing evidential importance over the traditional id procedures as prosecutors and courts become more adept at dealing with it. However, id cases are still challenging and individual facts of cases still throw up difficult questions of judgement for officers and prosecutors.