

ADDRESSING THE PROBLEM OF MISTAKEN IDENTITY IN VISUAL IDENTIFICATION EVIDENCE

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Abstract

A wrongful conviction is one of the worst errors of the criminal justice system. Historically, there have been several cases where individuals have been wrongly convicted on the basis of eye-witness identification evidence. Disputes about identity have been the cause of a significant number of miscarriages of justice, both in India and abroad. One obvious problem with identification evidence is that it is difficult to secure the accuracy of witness identification for a variety of reasons (for instance, the ‘vagaries of human perception and recollection’ such as memory distortion and suggestibility; in addition to factors such as stress, rapidity of events, or bad lighting at the time of the initial identification itself. To reduce the number of miscarriages of justice, the formal procedure should be amended in line with current best practices. Visual identification is basically a memory task. Psychology can play more effective role in the area of misidentification by determining the memory capacity of the eye witnesses. Psychologists still have much to contribute in the area of law and law enforcement, to prevent even more miscarriages of justice. Psychologists are still awaited to be recognized as expert witnesses. This paper critically examines the admissibility and reliability of visual identification evidence in the light of *Turnbull* guidelines.

Introduction

In all countries judges in criminal cases overwhelmingly permit eyewitnesses to testify with little or no examination of the truthfulness of their testimony—and this is true in the commonwealth countries, the United States, and in civil law systems as well. The problem in criminal evidence is that visual identification evidence is crept into court with virtually no demonstration of their authenticity. In western common law countries identification of a suspect by eyewitness is a lawful means of identification during a police investigation. However, there is widespread concern about biases in police identification of innocent citizens. The DNA analysis established retrospectively that persons had been wrongly convicted; of those convictions, 90 per cent were based on identifications in which one or more witnesses falsely identified the accused as the perpetrator of the crime.

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Eyewitness identification plays an important role in criminal proceedings, during the investigatory stage and at trial. Visual identification is essentially a memory task. Of particular interests of psycho-legal experts is the general view that eyewitness identification is considered the single most important factor leading to wrongful conviction. Most members of the public would be concerned about falsely identifying an innocent person as the perpetrator of the crime. We also know that it is rather common in criminal trials for the defence and the prosecution to disagree about the fairness of police-conducted identification procedures. Indubitably, in a democracy, the presumption of innocence is of paramount importance. Although there is sometimes natural desire among police officers to seek to prove cases well beyond a reasonable doubt, there is very real need to ensure that such desires do not lead to behaviours that are manifestly unfair and add unjustifiable strength to the prosecution case.¹ This paper will explore the discussion of contemporary debates of the interface between psychology and criminal law on the issue of visual identification of offenders.

Visual Identification Evidence

Most people believe that eyewitness identification is very accurate; thus, visual identification is one of the most compelling types of evidence.² An eyewitness stating, I saw the defendant commit the offence 'can be extremely persuasive to a judge or jury, even when other evidence disputes the identification'.³ Consequently, achieving the admissibility of visual identification of a defendant goes a long way towards obtaining a conviction.

The overreliance on visual identification evidence has led to numerous mistaken identifications of innocent suspects and consequently wrongful convictions.⁴ In approximately 75 per cent of DNA exonerations in the United States, mistaken identification was the principal cause of wrongful conviction.⁵ Furthermore, in 80 to 90 per cent of all DNA exonerations at least one eyewitness made a mistaken identification.⁶ A wrongful conviction

¹ McKenzie, I., Psychology and Legal Practice: Fairness and Accuracy in Identification Parades, *Criminal Law Review*, 200-208 (1995).

² Jill Copeland, Helping Jurors Recognize the Frailties of Eyewitness Identification Evidence (2002) 46 *Criminal Law Quarterly* 188 at 200.

³ Edward Connors and others *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (National Institute of Justice, 1996) at 24 <www.nij.org>.

⁴ Angela Baxter, Identification Evidence in Canada: Problems and a Potential Solution (2006-2007) 52 *Criminal Law Quarterly* 175 at 175.

⁵ Paul Giannelli and Myrna Raeder (eds), *Achieving Justice: Freeing the Innocent, Convicting the Guilty* (2008) 37 *Southwestern University Law Review* 763 at 771.

⁶ Connors and others, *supra* note 3 at 15.

results in two injustices. The first tragedy is to the innocent person. The second is to any victim of the offence and to society, because the real offender is not brought to justice.⁷ Wrongful convictions undermine the credibility of the legal system. Furthermore, public faith in the criminal justice system is diminished when reforms that could prevent a wrongful conviction are not implemented.⁸

Visual identification is essentially a memory task. It outlines the memory process, the factors that affect the accuracy of visual identification and different procedures used to obtain an identification. Memory is inherently unreliable and prone to distortion. An eyewitness to an offence does not simply record the visual appearance of the offender in his or her brain. Memory is an active procedure, which involves a decision making process whereby conclusions are drawn after the available details are evaluated. Accordingly, internal and external sources of additional information influence the accuracy of memory.⁹ The legal system should control the way in which an eyewitness identifies an offender in order to minimize factors adversely affecting identification accuracy.

The memory process consists of three stages: acquisition, storage and retrieval. Certain factors can affect the accuracy of memory at each one of these stages. Therefore, the reliability of eyewitness identifications depends on far more than just what the eyewitness observed. Acquisition is the first stage in the memory process. This involves perceiving an event and encoding the information in memory. The eyewitness's attention, eyesight or age can affect the quality of memory at the acquisition stage. External circumstances, such as the duration of the witnessed event, visibility or lighting will also affect what is encoded in the witness's memory.¹⁰

Storage involves retaining encoded information until later recollection. During this period, memory quality can decline. A person's memory declines rapidly in the immediate hours after encoding, after which this decline becomes more gradual.¹¹ Furthermore, stored memories are susceptible to distortion due to intervening knowledge. An eyewitness may

⁷ Peter Sankoff, *Wrongful Convictions and the Shock Wave Effect* (2006) *New Zealand Law Journal* 134 at 135.

⁸ Richard Wise, Clifford Fishman and Martin Safer—How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case (2009-2010) 42 *Connecticut Law Review* 435 at 511.

⁹ *Id.* at 456.

¹⁰ Copeland, *supra* note 2 at 193.

¹¹ *Id.* at 195.

integrate post-event information into the original memory, affecting the reliability of the memory. Such knowledge may arise from discussions with other witnesses, investigating officers or news sources.¹²

The final stage of memory is retrieval. This requires an eyewitness to recall the information. The way in which the witness recalls the memory can affect the accuracy of the recollection. Cues such as questions and photographs can affect retrieval by providing sources of suggestion that may result in alteration of the memory. The social context in which the eyewitness recalls the information can also affect the recollection; for example, a witness may feel pressure from the police to identify a suspect.¹³

Visual Identification Procedures

There are a number of ways in which to obtain an identification from an eyewitness. Identification procedures aim to test the recognition memory of an eyewitness. Recognition memory is the ability of the witness to remember the person they saw committing the offence, as opposed to merely recalling the offender's appearance or physical description.¹⁴ The identification procedure utilized has important implications on the reliability of the witness's identification.

(a) Identification by Photograph

In western common law countries identification of a suspect by photograph is a lawful means of identification during a police investigation of a criminal offence or as an alternative when a suspect refuses to take part in an identification parade. The most commonly used photo identification procedure is where a witness identifies a suspect from a photo-board, comprising in, for example, one photograph of the suspect and several of others. Photo-board identification is used in criminal investigations when the identity of the suspect is not known and at the evidence-gathering stage when the suspect has been identified.¹⁵

Recently, there has been a trend towards identifying a suspect by means of video-frames or a video-film. With this form of identification, a witness views separate video-frames of several individuals, one of whom is the suspect. Video-frame and video-film

¹² John Turtle, RCL Lindsay and Gary Wells, Best Practice recommendations for Eyewitness Evidence Procedures: New Idea for the Oldest Way to Solve a Case (2003) 1 *Canadian Journal of Police and Security Services* 5 at 6.

¹³ *Ibid.*

¹⁴ Gary Wells —What Do We Know About Eyewitness Identification? (1993) 48 *American Psychologist* 553 at 556.

¹⁵ *Alexander v. R* (1981) 145 CLR 395.

identification, like photo and photo-board identification, is admissible evidence. In England and Wales, the photograph of a person who has been arrested may be taken at a police station only with his/her written consent¹⁶ but, if certain criteria are met, it may be taken without their consent but force may not be used. Photographs of offenders known to the police are routinely kept at police stations and are used in local criminal investigations in an attempt to identify a culprit. In addition, within police forces there usually exists a criminal identification unit that keeps and updates State/national collections of such photographs. Such photographs are carefully indexed and catalogued and kept in albums and are sometimes also available on computers for police personnel and crime witnesses to search.¹⁷

Identification from police photographs is admissible evidence in most jurisdictions. Like other identification evidence the photo identification can also involve a serious risk of misidentification. In England and Wales, Annex D of Police and Criminal Evidence (PACE) Act (1984) provides some safeguards against such misidentification when a witness photograph identification takes place. In such a case, a police officer of the rank of sergeant and above shall be responsible for supervising and directing the showing of photographs to a witness; only one witness shall be shown photos at any one time; the witness shall be shown no more than twelve photos at a time which shall, as far as possible, all be of a similar type; the witness shall be told that the photo of the person he saw may or may not be amongst the photos to be shown.

(b) The Show-ups Identification

A show-up is an informal procedure that involves presenting a single suspect to the eyewitness for identification. The police use show-ups for convenience and may conduct a show-up in a variety of ways. A show-up may be biased because it suggests to the witness that the suspect is the offender and there is no way to prove whether the witness was mistaken.¹⁸ Due to potential unreliability, visual identification evidence of a defendant obtained using a show-up will be more difficult to offer as evidence in his or her criminal trial. In *R v. Burchielli*¹⁹ the show-up identification was ruled inadmissible on the basis that it involved a high risk of mistaken identification.

¹⁶ PACE, 1984: Code D4.1.

¹⁷ Kapardis, Andreas, *Psychology and Law* (U.K.: Cambridge University Press, 2003), pp. 265-266.

¹⁸ Levi, A.M., Some Facts Lawyers Need To Know about the Police Lineup (2002) 46 *Criminal Law Quarterly* 176 at 180.

¹⁹ (1981) VR 611.

Annex C of PACE (1984) provides the following procedure shall be followed in England and Wales for confrontation by a witness:

- Before a confrontation takes place, the witness is told by the confrontation identification officer that the person he/she saw may or may not be the person they are to confront and, also, that they should say so if they cannot make a positive identification.
- Before a confrontation takes place, the suspect or his/her solicitor should be provided with details of the first description of the suspect provided by any witness who is to confront the suspect. Also, if it is practicable to do so and will not unreasonably delay the police investigation, the suspect or his/her solicitor should be provided with whether material the police released to the media in order to identify the perpetrator.
- Each witness should confront the suspect independently of other witnesses, friend or interpreter and should be asked 'Is this the person?' This is done in the presence of the suspect's solicitor, unless it would cause unreasonable delay to the police investigation.
- Normally, the confrontation should take place in a police station in a normal room or in one equipped with a mirror screen that allows the witness to see the suspect but not be seen. If the confrontation is to take place in a room equipped with a screen, then the suspect's solicitor or friend or appropriate adult is present or the confrontation is videotaped.
- If the police released to the media any material such as video-films or photographs in order to identify the perpetrator, after the procedure the identification officer should ask each witness whether they have seen any films or photographs in the mass media or heard any broadcast regarding the crime in question and should record the witness's reply.

The case of *Rogers*²⁰ provides a British example of the use made of show-ups by police. Two witnesses reported to police seeing a person damaging cars; they tackled him and noticed he had slurred speech. Upon investigating the matter, the police found a person whose speech was slurred sleeping inside an industrial unit. The two witnesses attended and, through a window, recognized the person concerned. Clothing found in the defendant's car was also recognized by the same two witnesses as the same as that worn by the defendant

²⁰ (1993) Crim LR 386.

earlier. The defence appealed against conviction on the grounds that the identification was inadmissible because it had not been carried out in accordance with the Code of Practice provided by PACE (1984). The Court of Appeal dismissed the appeal on the grounds that it was not uncommon for the police to take a witness to attempt to identify a suspect and, also, it would have been rather difficult for the police to justify the arrest before having the defendant identified by witnesses. As the Court of Appeal put it, 'it would make criminal investigations of this sort quite responsible if the police had to arrest everybody who might answer the description, and arrange an identification parade thereafter'. One person show-ups are also frequently offered as evidence that a suspect is indeed the perpetrator of the crime.²¹

(c) Dock Identification

A dock identification refers to the situation where a witness identifies the defendant as the offender during a criminal trial. This involves the witness stating that the person in the dock is the offender, whether having previously identified the defendant out-of-court or not.²² However, the identity of the defendant is usually clear to all in the courtroom. Thus, a dock identification will provide little probative value with potentially significant prejudicial effect. This led the Court of Appeal in *R v. Peato* to suggest that dock identifications, where the witness is purporting to identify the defendant for the first time, would be inadmissible under sections 45 and 8(1).²³ Furthermore, the Supreme Court in *Harney v. Police* expressed that a dock identification should only occur in—the most exceptional circumstances.²⁴ In most cases, dock identification is supported by out-of-court identification. In a small percentage of cases, however, dock identification of the defendant may be the only identification by a witness. In such cases dock identification is not an adequate form of identification unless the witness previously knew the defendant. In the English case of *Thomas*²⁵ a shopkeeper who had been the victim of robbery first recognized the defendant in the group identification. Another shopkeeper did not recognize the defendant in the group identification but subsequently identified him in court when giving evidence in the dock. The trial judge told

²¹ Wagenaar, W.A. and Veeffkind, N., Comparison of One-Person and Six-Person Line-ups, in Losel et al. (eds.), *Psychology and Law: International Perspectives* (New York: Walter de Gruyter, 1992), p.274.

²² *R v. Young* (2009) NZCA 453 at (29).

²³ S 8(1) (a) of the Evidence Act 2006 (New Zealand) requires the judge to exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding; *R v. Peato* (2009) NZCA 333, (2010) 1 NZLR 788 at (59) and (65).

²⁴ *Harney v Police* (2011) NZSC 107.

²⁵ (1994) Crim. LR 128.

the jury that dock identifications are very rare for they are believed to be unfair but failed to also point out that the defendant may well have been recognized by the shopkeepers as a result of unconscious transference. The conviction was overturned on appeal on the grounds the judge's warning to the jury was insufficient.²⁶

(d) Line-ups

A lineup is a formal procedure in which the suspect is placed among other people to see whether the eyewitness can identify the suspect as the offender. Lineups may be performed either live or by using photographs. Lineups have clear advantages for obtaining identifications compared to informal procedures. The other members of a lineup, called distractors, are known to be innocent. The distractors provide a safeguard on misidentifying an innocent suspect. It is therefore possible to know whether the witness is mistaken in certain circumstances. If a witness identifies a distractor as the offender, the Police would dismiss the identification as an error on behalf of the witness.²⁷ Distractors also help control for chance, decreasing the likelihood that an eyewitness who is merely guessing will identify the suspect. Furthermore, the use of distractors helps ensure that the identification is based on recognition memory, testing the witness's memory by using similar looking people.²⁸

A lineup takes place under strict conditions that are aimed at controlling for potential sources of bias and unreliability in an identification. Thus, a lineup results in a more reliable identification, compared to the use of an informal procedure such as a show-up. Line-ups can differ in terms of their size as well as the extent of similarity between the suspect and the foils. In the typical line-up procedure used in Britain, Australia and New Zealand, for example, a suspect is included in a line together with seven foils (innocent distractors) side by side and the suspect can choose his or her position in the line. The witness gets to view the lineup simultaneously. As Thompson points out, 'the standard method of identification parades is not unlike multiple-choice questions'. Such a procedure, of course, means that there is scope for each foil to somehow 'let the witness know' that they are not the suspect and, if for some reason, all or some of the foils know who the suspect is, the potential is there

²⁶ Kapardis, *supra* note 17 at 271.

²⁷ Elizabeth Luus and Gary Wells, Eyewitness Identification and the Selection of Distractors for Lineups (1991) 15 *Law and Human Behaviour* 43 at 44.

²⁸ *Ibid*, at 45.

for them to communicate that knowledge to the witness in a subtle way, whether consciously or unconsciously.²⁹

In England, Annex A of PACE (1984) provides detailed guidelines of all aspects of conducting a line-up. *Inter alia*, it provides for: an identification officer; affording a suspect reasonable time to have a solicitor or friend or interpreter present; that the line-up can take place in a normal room or one with a screen permitting a witness to see the line-up without being seen; for providing the suspect or his/her solicitor with the witness' first description of the witness and with any material the police released to the media in connection with the suspect in the case under investigation; line-ups in prison; informing the suspect of the procedures involved before the line-up; including only one suspect in a parade unless there are two suspects of roughly similar appearance, in which case they should be paraded together with twelve other people; no more than two suspects can be in line-up; different parades shall comprise different members; line-ups consisting of police officers; asking the suspect if he/she has any objections to the line-up and, where practicable, the identification officer should remove the suspect's grounds for objection; the suspect selecting his/her own position in the line-up and, after each witness leaves the room, the suspect can change position; preventing any contact between witnesses and between a witness and the suspect or the line-up members before or after the parade; the identification officer shall not discuss the line-up or a previous witness with a witness; only one witness at a time inspects the parade and just before doing so is told by the identification officer that the person he/she saw may or may not be on the parade and if they cannot make a positive identification they should say so and should only make a decision after seeing all members of the line-up at least once; the witness may request that a member of the line-up speak, or moves or adopts a specified posture; and finally, that the line-up should be photographed in colour or be videotaped.

It may be noted here that in *Alexander v. R.*,³⁰ the High Court of Australia held that an identification parade is the best and fairer method of obtaining evidence of identification of suspects by witnesses. Such parades normally comprise a number of persons (eight or more in Australia and in the U.K.) of the same sex as the accused being lined up, and with the

²⁹ Thompson, D.M., *Eyewitness Testimony and Identification Tests*, in N. Brewer and C. Wilson (eds.), *Psychology and Policing* (Hillsdale, NJ: Erlbaum, 1995), p. 143.

³⁰ (1981) ALR 1 at 34.

accused placed amongst them, to be viewed by the witness who will decide whether the offender they saw in a previous incident is one of them.

People who are suspects in a criminal investigation are often identified by witnesses and the identification of a suspect will be relied on by the prosecution in a criminal trial. Visual identification evidence is considered unreliable and innocent people have been convicted of crimes based on visual identification evidence. There are a number of logical reasons why such identification evidence is not reliable. Among these are:

- Poor lighting conditions, bad weather or the distance from which the witness saw the person
- The eye-sight of the witness may be in question
- The witness may have been in shock or may have only seen the person for a brief moment.

In a number of cases the US Supreme Court has held that whilst there are more substantial risks of bias in show-ups than in line-ups, the admissibility of such evidence is decided by considering not so much whether the show-ups was necessary but by considering the circumstances affecting the likely accuracy of the identification. In the case of *Neil v. Biggers*,³¹ the Supreme Court considered an appeal against conviction in a rape case in which the victim identified her assailant in a show-up seven months after the crime on the grounds that she had spent 'up to half an hour' with the defendant, she had been under a great deal of stress, she was very confident, and had not identified anyone else in another identification procedure. However, in *Manson v. Braithwaite*,³² the Supreme Court reaffirmed its view that the acceptability of any identification procedure must be evaluated on the basis of the totality of the circumstances surrounding it.

The concern of opponents of the use of show-ups is based on the belief that show-ups are significantly more likely to lead to false identification than line-ups because they are far more suggestive. Malpass and Davine argued that a 'line-up is in principle more fair than a show-up because it distributes the probability of identification of an innocent suspect across the line-up foils, reducing the risk of an identification error'.³³ According to Gonzalez *et al.*,

³¹ (1972) 409 US 188.

³² 432 U.S. 98 (1977).

³³ Malpass, R.S. and Devine, P.G., Measuring the Fairness of Eyewitness Identification Lineups, in S.M.A. Lloyd-Bostock and B.R. Clifford (eds.), *Evaluating Witness Evidence: Recent Psychological Research and New Perspectives* (Chichester : Wiley, 1983), p.85.

witnesses exercise greater caution because of the presence of foils in a line-up and this is another argument against show-ups. Gonzalez *et al.* maintain, however, that show-ups and line-ups involve different decision-making strategies; more specifically, line-ups require 'comparative, relative strategies because the witness selects from several alternatives. Show-ups elicit absolute strategies because the witness must decide if the suspect is or is not the perpetrator'.³⁴

In recent years, increasing concern about the unreliability of evidence identification can be seen in the close scrutiny with which the courts treat such evidence. Line-up identification evidence is a case in both the way they conduct line-ups as well as for point. Police can be criticized for failing to hold a line-up. As in other countries, there is no rule of law in India and in England and there must be a police identification parade for the purpose of identification.³⁵ However, the courts have indicated that visual identification of an accused should take the form of an identification parade ('line-up'). The exception is where the offender is well-known to the witness³⁶ or if the accused does not consent to an identification parade.³⁷ In addition, a suspect him/herself may request an identification parade and/or ask for a lawyer or a friend to be present and police standing orders in some jurisdictions provide for such requests.

As noted above, in England and Wales, Annex A of PACE (1984) provides detailed guidelines on all aspects of conducting a line-up. *Inter alia*, it provides for: an identification officer; affording a suspect reasonable time to have a solicitor or friend or interpreter present; that the line-up can take place in a normal room or one with a screen permitting a witness to see the line-up without being seen. A parade may occasionally involve a witness being asked to identify an object used in the commission of a crime such as vehicles, premises, firearms and other weapons, tools or instruments or clothing³⁸ or other physical objects or even an animal. The same legal principles apply to both person and object identification parades.³⁹ From the court's point of view, the line-up is used to make certain

³⁴ Gonzalez, R., Ellsworth, P.C. and Pembroke, M., Response Biases in Lineups and Show-ups, *Journal of Personality and Social Psychology*, 64, 525-37 (1993) at 527.

³⁵ *R. v. Preston*, (1961) VR 762.

³⁶ *Davies and Goody v. R.* (1937) Cr.LR 181.

³⁷ *R v. Clune* (1982) VR 1.

³⁸ *R. v. Hickin and others* (1996) Crim.L.R. 584 CA).

³⁹ *R v. Turnbull*, 1976 3 All ER 54.

that the ability of the witness to recognize the suspect or an object has been fairly and adequately tested. In most countries such parades are normally conducted at police stations for a number of reasons but occasionally there is a need to do so elsewhere, including inside a prison.

Mistaken Identity and the Turnbull Guidelines

The problem of mistaken identity has been a recurrent problem in the dispensation of criminal justice since the trial of Adolph Beck. Beck was convicted twice in 1896 and 1904 on the evidence of mistaken identity and doubly pardoned. The mistaken identification of Beck led to the setting up of a Committee of Inquiry, the report of which in 1905 led to the establishment of the Court of Criminal Appeal by the Criminal Appeal Act, 1907.⁴⁰ Two other cases of mistaken identity which led to the prosecution and exoneration of Luke Clement Dougherty and Lazlo Virag led to the setting up of the Departmental Committee on Evidence of Identification in Criminal Cases on 1 May 1974 under the chairmanship of Lord Devlin. In a Report published on 26 April 1976, the Committee made several recommendations on the various means of identification. The recommendations were followed by the Court of Appeal in *R v Turnbull*⁴¹ where the following guidelines were enunciated. In the *Turnbull* case, the Court of Appeal laid down important guidelines for judges in trials where identification evidence was disputed. Warning that has to be given to juries in identification cases:

- (a) Amount of time the suspect was under observation by the witness
- (b) Distance between suspect and witness
- (c) Visibility at the time the witness saw the suspect
- (d) Obstructions between suspect and witness
- (e) Knows suspect or has seen him/her before
- (f) Any particular reason for the witness to remember the suspect
- (g) Time lapse since witness saw suspect
- (h) Error or material discrepancy in the description given by witness

⁴⁰ Archbold, *Criminal Pleading, Evidence and Practice* (London: Sweet & Maxwell, 2000), p. 1303.

⁴¹ *Ibid.*

The *Turnbull* guidelines should always be followed by judges where the possible mistaken identification of an accused is an issue. As stated in *R v. Oakwell*,⁴² a *Turnbull* warning is generally required in all cases where identification is the sole or substantial issue. Finally, the *Turnbull* guidelines apply equally to police who are identifying witnesses.⁴³

Conclusion

Despite guidelines, mistaken identification continues to be a significant source of miscarriages of justice everywhere. Psychologists still have much to contribute in this area of law and justice system, to prevent even more miscarriages of justice. To this end, psychologists should play a more active role in educating investigating lawyers, the judiciary and the police at large about the need to strike a balance between, on the one hand, crime investigators' wish to solve the crime problem and see the guilty convicted and, on the other, the need to minimize various dangers for the innocent suspect that are inherent in police identification procedures.

In criminal proceedings where the identification of the offender is disputed, eyewitness identification can be extremely persuasive. However, the inherent unreliability of memory, combined with the difficulty of determining the accuracy of an identification, leads to a risk of mistaken identification and potentially, a wrongful conviction.

The Indian Evidence Act, 1872 codifies the admissibility of visual identification evidence to promote the reliability of an identification. Under s 45, the judge determines whether the jury can legitimately rely upon the identification. However, reliability does not amount to accuracy. Additional safeguards may be available during a criminal trial, including cross-examination, judicial warning and expert evidence, which aim to protect against a jury relying on inaccurate identification evidence. In reality, such safeguards have a contested effect on juror decision-making and thus are insufficient to protect against the risk of mistaken identification. Therefore, the police should use an identification procedure that increases the reliability of visual identification evidence. Increasing the rigor of the identification process prior to any trial will mitigate some of the dangers associated with visual identification evidence.

To guard against wrongful convictions based on mistaken identification evidence, the formal procedure should be amended in line with current best practice. These reforms include utilising the match-to-description method, rather than the match-to-suspect method, for selecting distractors in the lineup. Decreasing pressure on the witness would involve mandating a double-

⁴² (1978) 66 Cr.App.R.174.

⁴³ *Reid v. R* (1990) A.C. 363 PC.

blind procedure, which would reduce the potential for the conducting officer to bias the identification. Furthermore, rewording the warning and instructing the witness that it is just as important to clear the innocent from suspicion as it is to identify the guilty perpetrator will help prevent the eyewitness from resorting to guesswork.

A wrongful conviction is one of the worst errors of the criminal justice system. Alarming, mistaken identification is one of the principal causes of the conviction of an innocent person. Psychological research demonstrates conditions aimed at achieving a reliable identification. To guard against wrongful convictions based on mistaken identification evidence, the formal procedure should be amended in line with current research to increase the reliability of visual identification evidence. In this context, psychology can play more effective role in the area of misidentification. Psychologists still have much to contribute in the area of law and law enforcement, to prevent even more miscarriages of justice. To this end, psychologists should play a more active role.

