RETURN to an Order of the Honourable the House of Commons dated 26th April 1976 for

Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases

Chairman: Rt. Hon. Lord Devlin

Ordered by The House of Commons *to be printed*
26th April, 1976

LONDON
HER MAJESTY'S STATIONERY OFFICE

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The estimated cost of the preparation of this report (including the expenses of the Committee) is £39,923.92 of which £9,681 represents the estimated cost of the printing and publishing of this report.

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PREFACE

On 8 April 1974, the Home Secretary announced in the House of Commons his decision to recommend a Free Pardon to Mr Laszlo Virag. He also referred to the case of Mr Luke Dougherty whose conviction for shoplifting had been quashed by the Court of Appeal the previous month, and said that in view of the serious questions raised by these two cases about the law and procedures relating to identification, he had decided to appoint a small Committee to look into this area of criminal law and police procedure.

The Committee was set up on 1 May with the following membership and terms of reference:

Members:

The Rt Hon Lord Devlin, FBA, Chairman
Mrs John Freeman
Mr D. H. Hopkinson
Mr J. N. Hutchinson, QC
Mr P. D. Knights, OBE, QPM

Terms of Reference:

To review, in the light of the wrongful convictions of Mr Luke Dougherty and Mr Laszlo Virag, and of other relevant cases, all aspects of the law and procedure relating to evidence of identification in criminal cases; and to make recommendations.

Our first meeting was held on 22 May 1974 and we have met altogether 30 times. We regret however that owing to the pressure of recurring industrial disputes in the newspaper of which he is editor, Mr Hopkinson was for a substantial period prevented from attending meetings of the Committee. Consequently, and in the interests of avoiding unnecessary delay in the submission of the Report he felt it right to offer his resignation to the Home Secretary on 29 August 1975.

All those who were concerned at various stages in the prosecution and ultimate exoneration of Mr Virag and Mr Dougherty gave us their full co-operation, both in making records available and in answering our questions. We are grateful for their help. The names of those who contributed to this part of our inquiry are given in Part I of Appendix M. We should wish in particular to mention Detective Superintendent Allen of the Thames Valley Police who at our request prepared two additional reports to supplement his earlier inquiry into the Virag case.

We should also like to express our thanks to those who have assisted us in our more general inquiries, both by way of formal submissions of evidence, and in answer to many queries on points of detail. They are listed in Part II of Appendix M.

We are particularly indebted to Master Thompson, Registrar of Criminal Appeals, who found time not only to meet the Committee but also to respond most helpfully to various inquiries about the law and practice of the Court of Appeal, Criminal Division. We should also record our special gratitude to Mr David Napley for his unfailing readiness to assist us over many matters affecting solicitors.

Our thanks are due to officials of the Home Office and the Criminal Appeal Office who did extensive research into cases of disputed identity which have occurred since the war. Finally, we are most grateful to correspondents in several countries who so willingly supplied the information on law and practice abroad on which Appendix L is based.

CHAPTER 1

INTRODUCTORY

I. Scope of the Report

1.1 Our terms of reference specify that we are to enquire into the law and procedure relating to identification in the light of the two named cases of Dougherty and Virag in each of which the accused was wrongfully identified as the criminal, and other relevant cases. In considering the light thrown on our subject by the two named cases, we have assumed that the Home Secretary wishes to know, and wishes the public to know, exactly how the miscarriages of justice in the named cases occurred, and we have therefore dealt with the facts in each case in detail. In Dougherty's case, as a result of an investigation by *Justice* and of the proceedings in the Court of Appeal where the conviction was quashed, the facts are already known generally, though not in detail. In Virag's case the miscarriage was eventually discovered by enquiries initiated by the police and in the Home Office as a result of evidence obtained when the true criminal was arrested for other offences. This new evidence was so compelling as to cause the Home Secretary to recommend The Queen to pardon and release Mr Virag without a reference to the courts. Consequently the full story in his case has not yet been told. In chapters 2 and 3 respectively of this Report we set out the facts of these two cases and our conclusions about what went wrong. We have studied a number of other relevant cases and these are noted in Appendices G–K. We have made other inquiries which are recorded in Appendix J.

1.2 Honest but mistaken identification by prosecution witnesses was the prime cause of the miscarriages of justice in the Dougherty and Virag cases and thus leads naturally to the third limb of our enquiry, i.e. an examination of the rules and practice governing evidence of identification in criminal cases. We undertake this examination in chapters 4, 5 and 6 of this Report. Chapter 4 deals with procedure at the trial and chapters 5 and 6 with pre-trial and post-trial procedures respectively. We have taken a broad view of our terms of reference and consequently of the scope of these chapters. We have included in chapters 4 and 5 questions of law and practice arising out of the presentation of an alibi. Identification evidence and alibi evidence are not the same thing but they are opposite sides of the same coin. A defendant disputing identity normally puts forward an alibi. If the defence fails, it is usually impossible to say whether it has failed because of the strength of the identification evidence or because of the weakness of the alibi evidence. If such defences are failing when they should succeed, it would be futile to recommend changes in the law and practice designed to prevent or discourage juries from putting too high a value on identification evidence without taking steps to ensure that they do not undervalue alibi evidence.

1.3 Chapter 6 deals with two aspects of post-trial procedure—the admission of fresh evidence in the Court of Appeal and the review by the Home Secretary of

cases in which a wrongful conviction is alleged or suspected. The first of these topics arises out of Dougherty's case and the second out of Virag's case. Both topics might of course arise in cases not concerned with identification. But there is one point common to both, namely, the way in which evidence produced after conviction is evaluated and handled; and this point in one form or another is so frequently present in identification cases that we thought it right to embrace it.

1.4 There are in England two modes of criminal trial—summary trial and trial by jury. We have in chapters 4 to 6 directed our attention to trial by jury. In chapter 7 we consider the application to summary trial of the conclusions we reach in relation to trial by jury. Finally in chapter 8 we summarise our recommendations and conclusions.

1.5 Much of what follows in this Report will give rise to questions about the English system of prosecution. English legal procedure, civil and criminal, is, as is well known, based on the adversary and not on the inquisitorial system. The criminal trial is not (except in the rare case of a coroner's inquest which anyway is no longer significant) preceded by a full judicial enquiry into all the circumstances of the crime. The prosecution must prove its case without the aid of any information from the accused save what he gives voluntarily. In theory, the accused is expected to rely on his own resources to make out the best defence he can. The object of the trial is to determine whether in the end the prosecution emerges as strong enough to justify a conviction.

1.6 A foreign jurist, studying the two cases on which we have to report, might be tempted to attribute the whole trouble in both of them to the lack in the English system of any officer of justice such as the *juge d'instruction*, whose function it is to apprise himself of all the relevant facts, whether they tell for or against the prosecution, to decide upon what charges, if any, the accused is to be arraigned and to place all this material before the court of trial. If there had been such an officer in Dougherty's case, he would have discovered well before the trial was due to begin that the accused had a cast-iron alibi. In Virag's case he would have unearthed material which would have caused the prosecution's case to have been presented quite differently and might, notwithstanding the apparent strength of the identification evidence, have produced an acquittal.

1.7 We shall deal with these points in their appropriate places in chapters 4 and 5. We doubt if we could do so intelligibly to the layman—indeed we doubt if the layman could follow the procedural steps taken in the course of the two cases as set out in chapters 2 and 3—without the aid of some description of the nature and processes of the criminal prosecution in English law and practice. We shall, therefore, devote the next section of this chapter to that subject.

II. Prosecution Procedure

1.8 The discovery of crime and the apprehension of the criminal are the tasks of the police. In the discharge of these tasks the police are not formally subject to any judicial authority. But if the police in making their enquiries act in a way which the judge at the trial considers to be oppressive or unfair he has from time immemorial exercised the power in extreme cases of excluding any evidence thereby obtained and in other cases of commenting adversely in a way that damages the prosecution's case. So that the police have had from the earliest

times a motive, apart from their natural desire to act fairly, for ascertaining what standards the judges are likely to apply; and they have from time to time sought guidance from the judges themselves. This has led to the formulation of codes of conduct on various topics. The most celebrated of these codes is known as the Judges' Rules and covers police questioning of suspects and persons in custody.

1.9 The code with which our enquiry is concerned is the one which regulates the conduct of identification parades and the use of photographs in identifying criminals. It is revised from time to time. The latest edition, issued in January 1969, is contained in Home Office Circular No 9/1969; we reproduce it in full in Appendix A. After two introductory paragraphs the circular is divided into three sections. The main section (paragraphs 3–15) is headed 'Conduct of Identification Parades'; we shall refer to it hereafter as the Parade Rules. There is then a small section, paragraphs 16 and 17, of minor importance, headed 'Identification Parades in Prison'. Then there is another main section, paragraphs 18–24, headed 'Use of Photographs in Identifying Criminals'; we shall refer to this hereafter as the Use of Photographs Rules.

1.10 The identification parade is well over a century old. It appears to have been invented by the police, probably in response to judicial criticism of cruder methods of identification such as a direct confrontation between the witness and the suspect. It exists in those countries in which the English system of prosecution is followed—in the USA it is known as the 'line up'—but appears to occur only rarely in other countries. When the police arrest a man because he answers to the description of one who has been seen to commit a crime, they want to get a positive identification as soon as they can; if they do not get it, they will, unless they have other sufficiently cogent evidence against him, have to release the suspect and continue their search. They want, if they can get it, a better test of recognition than that which results from a simple confrontation between the suspect and the witness. They want the accused, if possible, to be picked out and for this purpose they arrange the parade. A witness, once he has identified the suspect on a parade, is unlikely to be shaken at the trial. So the fair conduct of a parade has become a matter of great concern to the defence. Hence the necessity for rules.

1.11 It is the duty of the police to bring the accused, charged with a specific crime, before a magistrate as soon as practicable. For this purpose crimes can be regarded as divisible into three broad categories. The first consists of petty offences triable summarily by the magistrates. The second consists of indictable offences which must be tried by a jury. The third consists of offences which may be tried either summarily or on indictment; in some cases the accused has the right to choose the mode of trial. The crime with which Mr Dougherty was charged was theft; this falls into the third category, and he elected for trial by jury. The most serious of the charges against Mr Virag was wounding with intent to murder, which falls into the second category. Thus in both cases there was trial by jury, for which the preliminary procedure is as follows.

1.12 The magistrate, known for this purpose as the examining justice (there may be more than one, but it is convenient to use the singular), will either, as in Virag's case, remand the accused in custody, or, as in Dougherty's case, remand on bail. He will, where he considers it appropriate, grant legal aid, that is of a solicitor, who, though appointed by the court, is usually selected by the accused.

The police prepare a bundle of statements made by the witnesses for the prosecution. In the less serious type of case, as in Dougherty's case, these are sent to the solicitor who is to present the case before the magistrate: this may be a solicitor in general practice, a solicitor employed by the police authority or, as in Dougherty's case, a solicitor employed in the prosecuting department of a local authority. In graver cases, as in Virag's case, the papers are sent to the Director of Public Prosecutions and an officer in his department conducts the prosecution.

1.13 The prosecuting solicitor (we include in this term an officer of the Director of Public Prosecutions) selects from the police bundle of statements those which he considers relevant and calls for any others he may need. Before the examining magistrate the prosecution usually relies upon the written statements of the witnesses. The defence can demand that any of these witnesses shall give oral evidence and submit to cross-examination. The defendant can himself give evidence and call witnesses, but rarely does so and did not in either of these cases. At the end of the evidence the magistrate considers whether there is evidence on which the accused should stand his trial. The sufficiency of the evidence was not in dispute in either the Virag or Dougherty cases.

1.14 The accused is then committed for trial. In 1969 when Mr Virag was committed, the court of trial was either a Court of Quarter Sessions or a Court of Assize, and the Virag case was sent to Gloucester Assizes. At the end of 1972 these Courts were abolished and replaced by the Crown Court; Mr Dougherty was committed to the Crown Court at Durham. Some weeks necessarily elapse between committal and trial, and during this period counsel on both sides are instructed and briefs delivered.

1.15 From the above it will be seen that by the end of the committal proceedings the defence has learnt the whole of the prosecution's case, while the prosecution knows about the defence only what the defendant may have been willing to disclose. There is one exception to this state of affairs. The Criminal Justice Act 1967, section 11, provides that on a trial on indictment the defendant shall not, without the leave of the court, adduce evidence in support of an alibi unless he has given notice of particulars of the alibi, including the name and address of any witness. The object of this inclusion is to enable the police to interview the alibi witness before the trial. When the Bill was in Committee an amendment was moved to prohibit the police from interviewing except in the presence of the defence solicitor. This was rejected by the Government, but an assurance was given that the police would, whenever possible, give the solicitor for the defence reasonable notice of their intention to interview and a reasonable opportunity of being present. The attention of Chief Officers of Police was drawn to this point in Home Office Circular No. 212/1967, paragraph 5, and again in the Consolidated Circular of 1969.

1.16 It is, of course, not uncommon for a defendant to deny at the time of his arrest that he was the man concerned and to indicate some sort of an alibi, in which case the police may well have made enquiries at an earlier stage. This was what happened in Virag's case. But Mr Dougherty, for reasons which will appear, although when arrested he denied that he was the man concerned, did not indicate the nature of his alibi. In both cases a formal notice of alibi was given after the committal proceedings.

1.17 This is a brief account of prosecution procedure insofar as it relates to points germane to our Report. Basically the procedure adheres to the adversary system, but it incorporates substantial modifications. At the root of the adversary system there are two great principles. The first is the protection of a suspect or accused against self-incrimination. The second is open justice: the parties prepare in secret their respective cases, but after that everything is open. These principles are of even greater importance to the criminal law than they are to the civil. Nevertheless, the theory of the adversary system has proved too strong for modern ideas of criminal justice and so in practice it has been diluted. The theory is based on the presumption that the resources of the parties are sufficiently near to equality to ensure a fair fight. The presumption may be sound enough in criminal proceedings when they come to trial, now that legal aid is available. But in the preparation of the criminal case it is manifestly unsound. For in criminal cases the State has in the police an agency for the discovery of evidence superior to anything which even the wealthiest defendant could employ.

1.18 The way in which the law has met this situation is not by the formal amendment of the existing system. It has met it by imposing *ad hoc* restrictions on the police and prosecution all tending in the same direction, namely towards the end that they exercise their powers impartially and as much for the benefit of the defence as for their own benefit. One of the most striking examples of this is the requirement already noticed (paragraph 1.13) that the prosecution must disclose to the defence before the trial the whole of its case. This is not merely as much as is necessary to make a *prima facie* case; if the evidence put forward before the examining magistrate does not constitute the whole of the prosecution's case, the remainder must be added by notice of additional evidence. This result, which is not embodied in any statute or procedural rule, was obtained by judicial pressure during the first half of the 19th century.

1.19 Other requirements have been made, but never in formal or in general terms. We have seen, for example (paragraphs 1.8–9), how the conduct of police questioning and of identification parades has been put under control. Conceivably the result in time may be that the police—or maybe the prosecuting solicitor or maybe some new functionary altogether—will be formally invested with quasi-judicial powers and duties similar to those of a *juge d'instruction* or a procurator fiscal. But so long as the matter is in the hands of the judges, they are likely to continue to act as occasion requires, solving each problem as it comes along. This is the way the common law was made. It has many advantages but it means that there are always uncertain areas of law and practice. In particular it means that in many situations the police do not know whether they are supposed to be acting as adversaries of or as friends to the defendant and have nothing to guide them except the general notion that they should act fairly to everybody.

1.20 Each of the named cases gives rise to a question about the extent and meaning of this general notion.

In Dougherty's case the prosecution and police have been criticised for continuing a prosecution which they knew or ought to have known was bound to fail, or at the least for not enquiring thoroughly into the alibi evidence and seeing that the court was fully informed about it. The question here relates partly to the general duty of the police in preparing the trial and partly to what

may be a special duty of enquiry arising out of the provisions of the Criminal Justice Act 1967. We consider this in chapter 5, section VI.

In Virag's case the police at an early stage of the investigation discovered that certain fingerprints, evidently made by a thief on the stolen property (Mr Virag was charged with theft as well as with the wounding of a police officer in the subsequent pursuit) were not the prints of Mr Virag. Ought this evidence, if it was not to be made part of the prosecution's case, to have been communicated to the defence?

1.21 Apropos of the first of those two questions it may be asked why the prosecution or the police should have to enquire into the material for an alibi (or any other like topic which falls naturally to be initiated by the defence) and to assess its value. Should not this sort of enquiry be made by the examining magistrate in the committal procedure (paragraphs 1.11–13)? This is an aspect of the question which we shall consider; but to set it in its true light it is necessary to say a little more about the committal procedure. This procedure certainly ensures that the case for the prosecution will not be sent for trial unless it amounts to a *prima facie* case. But the production of a *prima facie* case, though the most important, is not the only condition necessary to justify the bringing of a prosecution. There must also be a reasonable possibility that in the light of the known facts the prosecution will succeed. Evidence that a person was seen in the act is always *prima facie* evidence, even if the witness appears to be untrustworthy or mistaken. In Dougherty's case there were two credible witnesses identifying him as the thief and therefore there was unquestionably a *prima facie* case; yet the alibi showed the identifying witnesses to be mistaken.

1.22 So the police in practice, before launching a prosecution, consider not only whether there is a *prima facie* case, but also whether in all the circumstances the case is likely to succeed. In considering this wider aspect they are discharging a task which the relevant statute appears to have intended for the examining magistrate. We have noted (paragraph 1.13) that in the committal proceedings the accused is entitled to give evidence and call witnesses; he cannot be compelled to do so and unless he gives evidence cannot himself be questioned. But if the defence puts forward a case the magistrate must take it into consideration in deciding whether there is 'sufficient evidence' to justify a committal. As it is put in Halsbury's Laws of England[1] in a passage approved by Lord Chief Justice Widgery[2]:—

> Although the justices have not to try the case, yet, if the evidence for the defence is such in their opinion that there is a strong or probable presumption that the jury would acquit the accused, if he were committed, they should dismiss the charge.

But they are thought so unlikely to do it that it is very rare for the defence to rate the prospect of success as worth the price of failure, the price being the pre-trial disclosure of the defence. Yet it is unsatisfactory that a prosecution should be launched simply on the likelihood of ultimate success. It may well have been intended that the examining magistrate should ensure that this did not happen, but without the assistance of the defence he may be powerless. His powerlessness

[1] 3rd Edition, Vol 10, p 365, note (g).
[2] *In re United Artists Corporation Ltd.* (CCC, 21 May 1974, unreported).

creates a vacuum and, as will be seen from some of the criticism in the Dougherty case, there is a tendency to think that it ought to be filled by the police.

III. The Nature of the Problem

1.23 No system of justice can eliminate the possibility that witnesses for the prosecution may be untruthful or unreliable and that consequently a miscarriage of justice may occur. With the weapon of cross-examination the defence seeks to expose untruthfulness and unreliability. The former can be shown by demeanour as well as by contradictory answers; defective memory or observation are often discovered when the story a witness tells cannot be reconciled with the circumstantial evidence.

Over and above this, and to diminish generally the risk of miscarriage, our criminal process is weighted against conviction by such requirements as proof beyond reasonable doubt and the unanimity or near unanimity of the jury. But safeguards such as these do not operate selectively; they make it harder to convict the guilty as well as the innocent.

1.24 The problem peculiar to identification is that the value of the evidence—we develop this point in paragraph 4.25—is exceptionally difficult to assess. The weapon of cross-examination is blunted. A witness says that he recognizes the man, and that is that or almost that. There is no story to be dissected, just a simple assertion to be accepted or rejected. If a witness thinks that he has a good memory for faces when in fact he has a poor one, there is no way of detecting the failing. Lord Gardiner in a discussion in the House of Lords on 27 March 1974[1] said truly:—

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

1.25 We have not as a result of our deliberations discovered any special method by which mistakes in identification evidence can be detected. Modern research, which we consider in paragraphs 4.12–14 below, confirms the general risk of error in memory and observation, but does not as yet offer any convincing means of differentiating the good witness from the bad. Our examination of the processes peculiar to identification cases, such as the parade, has not revealed any defect in the machinery which substantially increases the risk of error in those cases. Consequently the only way of diminishing the risk is by the erection of general safeguards which will inevitably increase the burden of proof. To some extent we can be selective about this, increasing the burden at points where we think that the risk of error is greatest. But in the end and overall our recommendations are bound to mean that the benefit of a higher acquittal rate will be bestowed on the guilty as well as on the innocent. Some of the guilty will be violent criminals. In making our recommendations we have borne this constantly in mind and have endeavoured to strike a tolerable balance. Liberal-minded critics of the existing law and practice rarely, so far as we have seen, essay to count the cost of the reforms they suggest in terms of the criminals who will go

[1] Official Report, Vol 350, cols 705–6.

free. In this country we are prepared to pay a very high figure in those terms, but it cannot be unlimited.

1.26 The problem which we have to consider has (among other problems) been considered recently by three bodies. In its Eleventh Report presented in June 1972 (Cmnd 4991) the Criminal Law Revision Committee (which we refer to hereafter as the CLRC) under the chairmanship of the Right Honourable Lord Edmund-Davies considered the problems of identification in paragraphs 196 to 203 and 222. We were permitted to look at the minutes of the discussions relevant to these paragraphs and have made grateful use of the work done. We are indebted also to the work of a committee presided over by the Honourable Lord Thomson, whose Second Report on Criminal Procedure in Scotland was presented in October 1975 (Cmnd 6218). This Report, which we refer to as the Thomson Report, dealt with problems of identification in chapters 12 and 46. The Thomson Committee was sitting contemporaneously with ourselves and we were supplied with advance information about their conclusions on matters of interest to us. The Report No. 2 Interim of the Law Reform Commission of Australia on Criminal Investigation was published as we were concluding our work. Chapter 4, paragraphs 117–128, deal with identification parades and the use of photographs in identification.

CHAPTER 2

THE CASE OF MR DOUGHERTY

I. The Offence and Investigation

(1) *The Offence and the Suspect*

2.1 The British Home Stores is a small supermarket in Sunderland. Its layout is of the usual type and the staff is necessarily on the alert for shoplifters. During August 1972 Miss Telford, a young sales assistant, frequently saw in the shop a youth and an old woman whom she suspected of being a shoplifting team. On 23 August she saw this couple, together with an older man, behaving suspiciously; and before she went for her lunch break at 11 a.m. she pointed them out to Miss Mallin, her supervisor. Miss Mallin kept them under observation; she observed that the woman had a pronounced limp in the right leg. Not long after 11.30 Miss Mallin summoned Mr Butterfield, the assistant manager. They both saw the three suspects at the curtain display and saw the older man place some curtains in a shopping bag he was carrying. The group then split up and made for different exits. Mr Butterfield followed the older man into the street and asked him to return to the store. The man on re-entering the store swung the door back hard against Mr Butterfield, who was taken by surprise, and then escaped by way of another exit leaving the bag behind him. The bag contained three sets of curtains valued at £11.25.

2.2 Mr Butterfield telephoned to the police station to report the occurrence and PC Anderson was sent to investigate. PC Anderson, who was aged 26, joined the force in January 1972 and had completed his initial training only shortly before the incident. His notebook shows that he arrived at the British Home Stores at 12.15 p.m. and saw Mr Butterfield who described the incident to him. He recorded Mr Butterfield's description of the older man as 'aged approximately 55 years, 5 ft. 8 tall, ginger hair cut short, well-built, wearing glasses, dark brown-green coat'. He recorded also that Miss Mallin had seen the man, but he did not ask her for a description. He arranged for both witnesses to come to the police station the next day to look at photographs. He was told about the other two suspects, but he made no note of it, nor did he make any report about them to his superior officer.

2.3 On the next day, 24 August, Miss Mallin and Mr Butterfield went to the station. They were each given an album of photographs of men known to the police and asked to examine them. The examination took place in a corridor in the police station, about 8 feet wide. The two witnesses were 5 to 6 yards apart and were instructed not to confer with each other. They state that they each independently picked out the photograph of Luke Clement Dougherty and were later told that they had identified the same man. PC Anderson then went to Dougherty's house to bring him to the station, but did not find him at home.

2.4 Luke Clement Dougherty was at this time aged 43. His description in the Criminal Record Office gives his height as 5 ft. 5½ ins., fresh complexion, black hair and brown eyes. He was unemployed and had been so at least since September 1970 when his wife left him with four children to look after. He lived in a council maisonette or flat at 7 Lawrence Court, Hendon, Sunderland. For ten months past he had been associating in an intimate way with Mrs Hall who lived nearby; she is a divorced woman with two children. Mr Dougherty has had a long career of petty crime, mostly dishonesty. He has been convicted 19 times in all, the first time being in the juvenile court at the age of 13. The last two convictions, for which he received suspended sentences, were for shoplifting on 16 September 1970 and burglary on 17 January 1972.

(2) *Inquiry and Arrest*

2.5 No further steps were taken in the Dougherty case until 6 September 1972. The explanation given for the delay is that PC Anderson was doing administrative duties within the station as part of his probation training. On 6 September he went again to Mr Dougherty's home, found Mr Dougherty in and told him that he had reason to believe that he was responsible for the theft from British Home Stores. Mr Dougherty denied it vehemently but agreed to accompany PC Anderson to the station. At the station he was cautioned and details were given him of the theft; he said that he knew nothing about it. Asked where he was at the material time, he said that he was not quite sure. Asked if he had any objection to an identification parade, he said:— 'None whatsoever'. Mr Dougherty was then bailed to return to the police station at 7.30 p.m. on Friday, 15 September for the parade, although there is some doubt about what happened to the bail form on which these particulars were given.

2.6 Miss Mallin and Mr Butterfield went to the station on the Friday evening for the parade. PC Anderson had asked Miss Telford and another member of the staff at the British Home Stores who had seen the thieves to attend the parade also, but for various reasons they excused themselves. The police were unable to assemble sufficient volunteers and Mr Dougherty did not appear; so the parade was abandoned. The decision was then taken at the police station (it was not clear how or by whom) that no further attempt should be made to hold the parade and that Mr Dougherty should be arrested and charged. Accordingly, on 16 September PC Anderson went to Mr Dougherty's home, arrested him and took him to the police station where he was charged. He was asked why he had failed to answer to his bail and replied that a mistake had been made about the day. Otherwise he made no statement. He was released again on bail to appear at the Magistrates' Court on 18 October.

(3) *The Visit to Whitley Bay*

2.7 When Mr Dougherty got home he talked to Mrs Hall and she reminded him that on 23 August, the day of the theft, he had taken her and her children on a coach trip to Whitley Bay. The next day Mr Dougherty confirmed with the coach proprietors that the day of the trip had in fact been 23 August. The coach left about 11.50 a.m. from the Queen's Hotel which is 7 minutes brisk walk from the British Home Stores. One must allow for some uncertainty about the exact time of the theft, but it cannot have been much earlier than 11.45; and no-one has ever imagined that Mr Dougherty could have committed the theft, collected

Mrs Hall and four small children and caught the bus at 11.50. Thus from the start it was clear that if Mr Dougherty was on the bus, he was not the thief.

(4) *The Preparation of the Defence*

2.8 Mr Dougherty has for some considerable time been a client of Mr P. A. Hamilton, a solicitor whom he has consulted about domestic troubles and such-like. He was, Mr Hamilton says, 'a constant visitor'. Mr Hamilton is a partner in the firm of Freedman, Hamilton and Emmerson and is a very experienced solicitor, in practice, apart from war service, since 1937; from 1953–1967 he served also as Clerk to the Justices. Ninety per cent of his firm's work is in crime and they have about 20 or 30 criminal cases a week.

2.9 On 17 September—that is, the morning after he was charged—Mr Dougherty took the charge sheet round to Mr Hamilton. 'It just could not have been me', he said, 'because there is a whole bus load of people who can say I was somewhere else'. They had a general discussion about the alibi. Mr Dougherty said there were 40 people who could be called as witnesses; he says that Mr Hamilton told him that the legal aid would not pay for more than 5 or 6. Mr Hamilton agrees that he said that 'half a dozen good sound citizens' would be sufficient, but not that he said that the legal aid would not pay for more. (He added later that the question of calling or not calling witnesses was never affected by the fact that the costs were being paid by legal aid.) It was left to Mr Dougherty to select 5 or 6 witnesses and to send them along to Mr Hamilton's office so that statements could be taken. Mr Dougherty knew most of the passengers as friends or neighbours and Mr Hamilton emphasised that the witnesses selected must be of good character.

2.10 There was a discussion about mode of trial. A charge of theft, however small, carries with it a right to trial by jury, though in fact the great majority of such cases, about 90%, are tried by the magistrates. This would have had the advantage in an alibi case that the defence witnesses would not have far to go to court whereas trial by jury would be in the Crown Court at Durham. It was, however, decided to go to the Crown Court; Mr Dougherty says on Mr Hamilton's advice, while Mr Hamilton says that it was because Mr Dougherty, who 'was fairly knowledgeable about the procedure', wished it. The difference of recollection is not important since Mr Hamilton thinks that he would probably have advised it anyway for the reason that Mr Dougherty's face is known to the magistrates.

2.11 There was also some discussion about the identification. Mr Hamilton is certain that he would have asked Mr Dougherty how he came to be linked with the theft and that Mr Dougherty replied that the police said a woman in the shop had seen him. Mr Hamilton had a strong suspicion that this woman would have been in the police station while Mr Dougherty was being interviewed; the ground for this suspicion is simply that it is, in Mr Hamilton's opinion, 'fairly common procedure' for a witness to be sitting in the corridor of the police station so as to identify the accused while he is being taken into the interview room. Mr Dougherty did not mention the parade he had missed. Sometime later he told Mr Hamilton that he had asked for a parade and that the police had refused it; Mr Hamilton said it was then too late. In fact Mr Hamilton distrusts identification parades. He would not advise a client to refuse to go on a parade because that would be bad tactics, but he would not positively advise him to go

on one. Mr Dougherty, he told us, has a fairly distinctive appearance; he doubted whether the police could have got 6 or 8 people particularly like him and thought he would have been picked out immediately.

2.12 The Dougherty file was prepared at police headquarters for transmission to the Prosecution Department, the supervisory officer being Detective Inspector Armstrong. The Inspector, on an occasion when he met Mr Hamilton in the magistrates' court, had some casual conversation about the case, which caused him when he sent the file to the prosecuting solicitor on 12 October to write on it:— 'I understand he will possibly claim that he was on a bus trip at the material time with 50 others'. Mr Hamilton (who has no recollection of the conversation but does not dispute it) apparently mentioned the alibi in rather a light way and the Inspector of course knew of Mr Dougherty's criminal record; so he put the note on the file, he says, for the purpose of alerting the prosecuting solicitor to the possibility of a phony defence.

(5) *The Alibi: Notice and Investigation*

2.13 On 18 October 1972 Mr Dougherty appeared before the magistrates, elected to go for trial and was remanded on bail until 10 November for the committal proceedings. Miss Mallin and Mr Butterfield were in attendance and heard Mr Dougherty plead Not Guilty; they say that they both simultaneously recognised him as the thief. On 10 November Mr Dougherty was sent for trial to the Durham Crown Court. On this occasion Mr Dougherty and his solicitor discussed the alibi in front of Mr Carney, the prosecuting solicitor, for the latter noted on his file: '54 witnesses to be called. Def. on bus trip!!—alibi.' Mr Dougherty gave Mr Hamilton the names and addresses of 5 witnesses and on 13 November Mr Hamilton despatched the Notice of Alibi which read as follows:—

> We hereby give you notice that at the trial of the above case the defence will plead the following Alibi:—
>
> On 23rd August, 1972, the Accused boarded a coach owned by Redby Coaches of Whitburn at 10.50 a.m. at the Queens Hotel, Hendon Road, Sunderland. The Accused travelled on the coach to Whitley Bay with his four children arriving at Whitley Bay at 12.07 p.m.
>
> The following witnesses will be called in support of the Alibi.
>
> 1. Mrs. B. Reeves of 72 Burley Garth, Sunderland.
> 2. Miss Iris Donaghue of 25 Lawrence Court, Sunderland.
> 3. Mrs M. A. Hall of 7 Hendon Square, Sunderland.
> 4. Mrs. Thomas of 6 Lawrence Court, Sunderland.
> 5. Mr Edward Pearson of 65 Lawrence Court, Sunderland.

It is to be noted that the times of the departure and arrival of the coach are incorrectly given. The name of the fourth witness is also incorrect; she was Mrs Thoms, the organiser of the trip. The first witness had, whether or not this was known to Mr Dougherty, a number of previous convictions for offences that included shop-lifting.

2.14 It seems plain from the notes made by Detective Inspector Armstrong and Mr Carney that the prosecution were not taking the alibi very seriously. A month passed before they took any steps to investigate it. It must be remembered that phony alibis are not uncommon and that a bus load of 50 passengers does not

sound an unlikely setting for one; it might be thought not to be too difficult for Mr Dougherty to persuade 4 or 5 of his friends and neighbours that they must have seen him on the trip. The alibi had emerged at the latest possible stage of the case after Mr Dougherty had told the police that he was not sure where he was on the day.

2.15 It seems equally plain that Mr Hamilton also was not taking the alibi very seriously, and for exactly the opposite reason: he says that he had no doubt about it at all and indeed he thought that when the police had investigated it they would drop the case. He says that one of his clerks verified the time of departure of the bus, but, if so, he or she got it wrong. He left it to Mr Dougherty to select the witnesses though he says that, since he knew the neighbourhood extremely well, he vetoed some names. He did not verify that the witnesses had no previous convictions, though Mrs Reeves, who had, was a client of his. The brief delivered to counsel shows that only the most perfunctory investigation was made. The alibi story is put in one paragraph as follows:

> On 23 August 1972 he went on a coach trip to Whitley Bay. He left the Queens Hotel at Hendon Road, Sunderland at 10.50 am with his four children. He arrived at Whitley Bay at 12.30 pm and spent the rest of the afternoon there.

Mr Dougherty's proof repeats the story in four lines and substantially the same words. Mr Hamilton says that he took statements from two of the witnesses, Mr Pearson and Mrs Reeves, who were clients of his; Mrs Reeves said that no statement was taken from her. Mrs Thoms, the most important witness, is quite clear that she was interviewed by no-one except Policewoman Stephenson and that 'until then she was completely in the dark as to what it was all about'. Mrs Hall says that she made no statement to a solicitor. The proofs of the witnesses which accompanied the brief were as bald as the brief itself; no attempt was made to select from the 30 or 40 witnesses available those whose recollection would enable them to give the most convincing picture.

2.16 It would not have been difficult to fill in the picture. When Mr Dougherty was in prison he wrote out himself the following account.

> Sir, on the 23 of August from approx 8.30 in the morning I was getting my children ready to go to Whitley Bay, washing the children and dressing them, having done that I made sandwiches packed them, with lemonade ready for the trip, about 10.45 Mrs Hall came over with her children, she looked my children over to see if everything was alright, about 11 o clock, we went down stairs, and sat on the wall. I remember, a woman over the road shouting through the window, that the buss was not dew until, I think she said 11.30, so Mrs Hall myself and the 4 children, walked up to the Queens Hotel, Joe who was manager then, asked me to bring all the children in, off the street till the buss came. I was standing with Mrs Hall having a glass of beer, when the buss come, we took hold of the smallest children and walked to the buss, the managers wife and children were with us then, Mrs Hall and me sat next to each other, the children were sitting 3 to a seat, on the other side, behind me were Mrs Wright and Mr Pearson, then just as Mrs Thoms was calling the names out Mrs Reeves and Miss Donaugh came. I got up and took her baby off her, and sat it on my nee till they got settled, when the buss had been going for about 10 minutes, Mrs Thoms came round with a domino Card, 28 number

each number cost a shilling, the winer got one pound, the driver was asked to nominate a domino, because we had none, when the card was open I won with no 5, then all the children started to sing. When we got in to Whitley Bay aprx 12 15, we got off the bus walked through the show ground, on to the grass there was some empty Markee, with a few chairs and tables in. Mr Pearson and me put a table up. Mrs Hall me Mr Pearson and Mrs Wright and all the children had a meal then we went on the beach for a while, then we split up, I watch the Bairns while Mrs Hall had a game of Bingo, I was sitting on a seat when Mrs Hall came back, I seen Mrs Halliday and her children going for a walk, there was a lot of people off the trip buss sitting around.

2.17 Convincing corroboration of the incidents mentioned in this account was easily obtainable. The party on the bus consisted almost entirely of women and children, so that the two men, Mr Dougherty and Mr Pearson, stood out; Mr Dougherty was already known, at least by sight, to most of the party. Mr Stirk, husband of one of the ladies on the trip, remembers the Dougherty party sitting on the wall; he had a conversation with Mr Dougherty about his new suit; he saw him get on to the bus. The woman over the road who shouted through the window was Mrs Old, who has known Mr Dougherty for 23 years; she remembers asking him to bring her some rock back from Whitley Bay. Mrs Maughan, the manageress of the Queen's Hotel, who was going on the trip, remembers the Dougherty party coming in the hotel and Mr Dougherty and Mrs Hall having a drink in the bar; they all left the hotel together to get on the bus. Two women, who were employed as cleaners at the hotel, remember Mr Dougherty at the bar; they talked about the trip and he tried to persuade them to come. Mrs Thoms, the organiser, lives in the flat immediately below Mr Dougherty. Mr Dougherty suggested to her that she should run a domino card on the trip and he got the domino cards. She and numerous other passengers on the trip remember that Mr Dougherty was the winner with No. 5 and it was she who paid him the £1 she had collected in small change. Mrs Wright, who with Mr Pearson joined Mr Dougherty's party, corroborates what he says. Mrs Halliday, who is also mentioned in Mr Dougherty's account, did not know Mr Dougherty personally, but knew who he was and where he lived. She remembers his helping with the children on the trip. The investigation made after Mr Dougherty's appeal had been dismissed disclosed other corroborative details. We have in this paragraph given only those which would have emerged at once from any questioning of Mr Dougherty before the trial.

2.18 On 12 December 1972 Detective Policewoman Stephenson was instructed to investigate the Dougherty alibi. In the Home Office Consolidated Circular to the Police, 1969, section IX, paragraph 5 it is stated that the defence solicitor should be given an opportunity of being present when the alibi witnesses are being interviewed. Policewoman Stephenson, who has been in the force for 6 years, was unaware of this requirement. It would in any event have been the duty of her superior officer to take the necessary steps. But it is said that there is a practice in Sunderland for the defence solicitor to signify on the Notice of Alibi whether or not he desires to be present and that Mr Hamilton had not so signified. Mr Hamilton says that he has never heard of the practice, nor indeed of the Home Office Circular. Policewoman Stephenson interviewed all the witnesses except Mr Pearson whom she could not find. She checked that the coach had in fact left at 11.30 a.m.; she interviewed the driver, Mr Smith, but he did

not know Mr Dougherty. On 22 December 1972 she handed in her report; the most material paragraph reads as follows:—

> All of the people agree that Dougherty boarded the coach to go to the outing. Mrs Hall, who is rumoured to be Dougherty's girl-friend, states that he spent the whole day in her company with his children. Mrs Thoms who organised the outing, stated that she definitely would not appear at court to support the alibi. None of the people wished to make statements. The driver's records have been checked and the coach left the Queen's Hotel at 11.30 a.m. on the 23 August 1972. The driver has been interviewed but he was unable to help with the enquiry as he does not know Dougherty. Attached are copies of previous convictions of Reeves and her sister Donoghue.

Miss Donoghue had in fact been convicted only two days before of shoplifting on 18 November 1972 at the British Home Stores. Mrs Thoms had an invalid husband and a baby and was at that time making a daily visit to hospital. She says that Policewoman Stephenson told her that she would not be required to go to court once she had made a statement. Miss Stephenson disputes this and says that Mrs Thoms said that she would not attend because of the health of her child. The other witnesses agreed that they declined to make statements; Mrs Reeves says this was because she expected to make a statement to Mr Dougherty's solicitor.

2.19 Policewoman Stephenson's report was duly sent to the prosecuting solicitor's department. Mr Carney, the assistant solicitor who had advised that there was a *prima facie* case, had left the department at the end of November. The report did not lead to any further enquiries or to any reconsideration of the merits of the case. Mr Olson, then the chief prosecuting solicitor, has told us that it was not felt that there was any substance in the alibi. Moreover, he does not consider that there is any obligation upon the part of the police or prosecution to investigate alibis of this type; the police should investigate only if they feel that they can produce evidence which destroys the alibi.

II. The Trial

2.20 The case had been placed on the reserve list at Durham Crown Court for the week beginning 11 December 1972, but it was not reached. It was then listed to appear on 30 January 1973, but as the case before lasted longer than expected, the date had to be vacated. The hearing finally took place on 22 February. Meanwhile, Mr Dougherty was left with the task of seeing that his witnesses came to court; Mr Hamilton says that Mr Dougherty was always quite sure that they would do so. On 26 January 1973 he wrote to Mr Dougherty, reminding him to ensure that his witnesses attended court on the 30th instant and saying that if there was any doubt about the willingness of any of them he could arrange to issue witness summonses. He wrote again on 19 February to tell Mr Dougherty to attend court on 22nd at 9.30 a.m. prompt and to warn the witnesses. Mr Dougherty received this letter on 20 February and immediately went to see the witnesses. Mrs Thoms told him that she had to take the baby to the hospital in the morning of the 22nd, but that she might be able to come in the afternoon; she said that the police had told her that she need not attend if she had made a statement. The others said that they would come and Mr Dougherty booked a taxi to take the party to Durham. He did not tell his solicitors about Mrs Thoms

until 9 o'clock on the morning of the trial when he telephoned a message. After he had telephoned, he found that Miss Donoghue had not turned up; but the remaining three witnesses went to Durham with Mr Dougherty in the taxi.

2.21 The brief for the defence had been sent by Mr Hamilton to the Chambers in Newcastle of Mr David Fenwick. Mr Hamilton sends most of his work to these Chambers. In the case of a small brief of this sort, we were told, it would not be usual to ask counsel to advise on evidence or for the solicitor to have a conference with him before meeting at the court on the day. Moreover, in the case of such a brief Mr Hamilton would not mark it for a particular counsel, but would leave it to the barristers' clerk to allocate it to a man who was free on the day. It was a brief which would naturally go to a younger member of Chambers, but the one to whom it was provisionally allocated turned out not to be free. It was understood that Mr Dougherty was a difficult client (there is confirmation from other sources that he has an excitable temperament) and it was decided that Mr Fenwick would do the case himself; he took over the brief at 5 o'clock on the evening before the trial. Mr Fenwick is a barrister of great experience; he has been in practice since 1948 and his practice is now almost entirely criminal.

2.22 The trial was due to begin before Judge Gill at 10.30 so that there was approximately an hour before that for counsel to confer with his solicitor and client. Mr Hamilton could not be present until quite late in the day and had sent an articled clerk. The clerk on Mr Fenwick's instructions ascertained that Mrs Reeves had previous convictions and so reported to Mr Fenwick who decided that she should not be called. Mr Fenwick himself could not get much out of Mr Dougherty; he was so concerned to protest his innocence that it was difficult to get him down to hard facts; he blamed his solicitor for not getting more witnesses.

2.23 What however struck Mr Fenwick was the weakness of the prosecution's case on identification. It was vulnerable at three points. First, the brief informed Mr Fenwick that Mr Dougherty had said that he would be prepared to attend an identification parade, 'but none seemed to be held'. Secondly, Mr Fenwick ascertained from counsel for the prosecution, Mr Wrightson, that both the witnesses who were to identify his client had previously been shown police photographs. Thirdly, only one of the two witnesses had at the time given a description of the thief and the colour of the hair in the description was quite different from Mr Dougherty's. It is necessary to elaborate a little on the first two of these three points.

2.24 It may occur that a witness, who saw an accused for the first time when the offence was committed, does not have an opportunity of seeing him again until he is in the dock. If then there is any sort of similarity between the man he saw and the man in the dock, he naturally tends to identify the man in the dock as the criminal. It is the avoidance of this situation that is the main object of the identification parade. If a suspect refuses to attend a parade, there may be no alternative to a dock identification. Mr Fenwick satisfied himself that the prosecution was not in the circumstances going to assert that Mr Dougherty's failure to attend was equivalent to a refusal; Mr Wrightson did not in fact cross-examine Mr Dougherty on the point. So it was a case of dock identification which could have been avoided, and there is good authority for saying that dock identifications are undesirable. Obviously they must be weak.

2.25 Mr Fenwick had a second string to his bow. The witnesses had both been shown photographs of Mr Dougherty. There is a danger that when a witness, who has been shown a photograph of the accused, is subsequently confronted with him in the flesh, whether in the dock or on a parade, he will be likely to recognise the photograph he has studied rather than the man of whom at the scene of the crime he may have had only a brief glimpse. The point is dealt with in Home Office Circular No. 9/1969[1] from which we quote two paragraphs.

> 18. Photographs of suspects should never be shown to witnesses for the purpose of identification if circumstances allow of a personal identification. Even where a mistaken identification does not result, the fact that the witness has been shown a photograph of the suspect before his ability to identify him has been properly tested at an identification parade will considerably detract from the value of his evidence.
>
> 20. If a witness makes a positive identification from photographs, other witnesses should not be shown photographs but should be asked to attend an identification parade.

In Dougherty's case there had been a breach of paragraph 20. Either Miss Mallin or Mr Butterfield, but not both, should have been shown the photographs. The circular was prepared by the Home Secretary in consultation with the Lord Chief Justice, and in its introduction it states 'that failure to observe its provisions may well result in the judge, in his summing up to the jury, commenting on the reliability of the evidence obtained'.

2.26 There is another aspect of photographic identification. As a general rule the previous convictions of an accused are kept from the jury. The rule does not cover defence witnesses, which is one reason why witnesses to an alibi who are not of good character are if possible avoided; previous convictions not only affect their creditworthiness but also, since they are usually associates of the accused, may inspire the jury to speculate about *his* record. A like case for speculation would be created if the jury learned that the accused had been identified from an album of photographs shown by the police, since inclusion in such an album suggests a criminal record. Defence counsel has the difficult decision to make: is the advantage to be gained from attacking the identification on the ground that the witness had previously seen a photograph worth the risk that the jury may thereby be led to suspect the accused has a record? If the prosecution's evidence on identification is thin and the judge has been asked to withdraw the case from the jury on the ground that a conviction would be unsafe or unsatisfactory—this Mr Fenwick intended to do—a judge might be influenced by the thought that he knew of a weakness in the identification evidence about which the jury would not be told.

2.27 So Mr Fenwick was confident of an acquittal on these grounds regardless of the state of the alibi evidence. He moved immediately into the attack. After Mr Dougherty had been arraigned and in the absence of the jury he submitted to the judge that he should not permit a dock identification; this would mean, of course, that, since there could be no other proof of identity, the prosecution would collapse. The judge, however, thought that a dock identification might be

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[1] See Appendix A.

avoided if the prisoner left the dock and was seated among the jurors in waiting; the witnesses could then be asked if they could point out the thief from those in court. He directed that the case should proceed.

2.28 Miss Mallin in evidence said that she had seen the thief on two occasions—first, when from about 40 ft away she had had a good view of the front of his face for about two minutes, and secondly, from about 3 ft when she had had a side view. She picked out Mr Dougherty from among the jurors. She described his hair as dark brown.

2.29 Mr Butterfield also picked out Mr Dougherty. He said that he had the thief under observation for about a minute, a full view from two or three feet away. He agreed that he was mistaken about the gingery brown hair. He agreed also that Miss Mallin and he had already seen through the glass doors of the court Mr Dougherty standing in the dock while he was being arraigned. So that the precautions taken to prevent a dock identification had been in vain. They were vain anyway, though no-one in court apparently knew it, because the witnesses had already seen Mr Dougherty in the dock at the magistrates' court; see paragraph 2.13 above.

2.30 Mr Fenwick, having made his point about photographic identification to the judge, did not refer to it again in the presence of the jury. At the end of the prosecution's case he submitted to the judge that, since the attempt to prevent the dock identification had failed, the case should be stopped on the ground that a conviction would inevitably be unsafe or unsatisfactory. This raised a point for the exercise of judicial discretion and the judge ruled against him.

2.31 Mr Dougherty then went into the witness box and Mr Fenwick examined him very shortly, getting only what was in the proof, the bare fact of the bus trip and the times in question. The judge asked him whether the bus went every day or was it a special occasion, and he replied that it was 'an organised special occasion'. The details began to emerge in cross-examination. Who was the organiser? Mrs Thomas (*sic*). What was her address, was she still living there and in good health? No, she was not in good health. She went to hospital every morning by bus or ambulance and was brought back home at midday. She was not going to hospital each day in August? No. When did she, a young woman of 32, begin to get so ill that she had to go to hospital every day? Mr Dougherty thought it was after the birth of her baby. He was asked what time he got on to the bus and he answered 11.20 to 11.30. It was not then accurate to say, as in the notice of alibi, that he boarded the coach 10.50? No, that was a mistake. How long had he known Mrs Hall? Ten months. He agreed that she was a close friend and had been at his house when the police came. They sat next to each other on the bus, and were talking during the trip. Then there came the following question and answer.

Q. On any particular topic or just general conversation?

A. A very particular topic. During the course of this ride to Whitley Bay we decided to run a domino draw—a domino card, a small piece of paper sealed with 25 numbers on, and someone picks a domino, and on the side of the card there is a domino number, unfortunately we did not have any dominoes so the driver of the bus was asked to nominate the domino num-

ber which he did and when it was opened the number was no 5 and I was given £1.

2.32 This was the cardinal incident of the trip, the hinge of any alibi, and it came out not in his evidence in chief, as a natural part of the story, but as if it was an invention by a hard-pressed witness; it created 'really a very bad impression' Mr Fenwick told us. The bus driver, Mr Wrightson suggested to the witness, had played quite an important part in the incident: what was his name? Mr Dougherty had known it, but had now forgotten it. Had he tried to ascertain it from the bus company? No.

He was asked whether he had discussed the case with Mrs Hall.

What I said to Mrs Hall like I said to my barrister, I am an innocent person and I can prove it now in front of everyone present.
Judge Gill: You are doing that at the moment.
The witness: I can prove it easier if I was given the opportunity.

He was then asked about another topic, but a minute or two later the judge reverted.

Judge Gill: You said something, you said you could prove your innocence here and now?
A. I could, yes.
Judge Gill: Is this something—do you know what it is?

This question was addressed to Mr Fenwick, who replied that he did not know, and the judge suggested that he should confer with his client.

2.33 Mr Fenwick appreciated that he was in effect being offered an adjournment to call the bus driver or other witnesses. He did not know whether the bus driver would support the story; if he denied it, it would be disastrous. He believed that he had an unanswerable case on appeal, not realising, as he said to us, until he got to the Court of Appeal that the discretion of the judge was overriding. He could not, as he said, conduct a long conference at the back of the court with judge and jury looking on; it was a case for a snap decision and his responsibility to take it. He told Mr Dougherty that he advised against an adjournment, that unless he (Mr Dougherty) insisted he was not going to ask for one and that he had unanswerable grounds for appeal. Mr Dougherty then returned to the witness box.

Mr Fenwick: Is what you wanted to do, if you were so advised, to bring everybody you could get on the bus to give evidence for you?
A. Yes.
Q. But I advised you that if there were two witnesses that would be enough?
A. Yes.
Q. Are you content to have your guilt or innocence tried with two witnesses?
A. I will carry on with the case today.

Mr Pearson and Mrs Hall were then briefly examined and cross-examined. The jury knew that there were five witnesses mentioned in the notice of alibi and that only two of them had been called, one being the lady whom Mr Pearson referred to as Mr Dougherty's 'lady friend'.

2.34 Judge Gill delivered a fair and balanced summing up which everyone has agreed is beyond criticism. He told the jury that they must look with particular care at evidence of identification. Corroboration was not required, 'but the jury has to be carefully advised and directed that identification mistakes are very easy to make and you should approach evidence of identification with extreme scepticism, so that in the end you look for something that convinces you that the identification is right'. Later he said: 'Dock identifications are extremely dangerous'. Miss Mallin and Mr Butterfield were both certain and the question for the jury was 'whether that identification does convince you to such an extent that you can say, we are sure that this is the man who was in the shop stealing'.

2.35 The jury retired at 3.42 p.m. At 5.17 the judge sent for them to enquire whether they were hopelessly divided or somewhere near a verdict. The foreman said that they were near a verdict. After a further retirement of 25 minutes they returned a unanimous verdict of guilty. The Bench imposed a sentence of 6 months' imprisonment and ordered that the suspended sentences (see paragraph 2.4) should take effect, thus making 15 months in all. Mr Dougherty protested his innocence.

III. After the Trial

2.36 20 or 30 people in Sunderland now knew beyond a shadow of a doubt that an innocent man had been sent to prison. What was their knowledge must soon be the knowledge of the neighbourhood and then the town, for the truth was easily ascertainable. A few reliable witnesses, who should have been called at the trial, could put things right quite simply. So that to a layman there seemed to be no reason why the truth should not immediately prevail. For the lawyer and administrator, however, the verdict of a jury is a solemn thing and cannot easily be disturbed. The ensuing months were to be occupied—unsuccessfully as it turned out—by an attempt to convey the truth through necessarily restricted channels to the Court of Appeal.

2.37 From its inception in 1908 the Court of Criminal Appeal (replaced in 1966 by the Criminal Division of the Court of Appeal) has had power to receive fresh evidence 'if they think it necessary or expedient in the interests of justice'.[1] The power was however used very sparingly. As was said in 1968 in the Court of Appeal, 'public mischief would ensue and legal process could become indefinitely prolonged were it the case that evidence produced at any time will generally be admitted by this Court when verdicts are being reviewed'.[2] One example of 'public mischief' is obviously the possibility that an accused or his advisers may seek to gain a tactical advantage by keeping some part of the defence in reserve. From the first the Court of Criminal Appeal said that it was only in exceptional circumstances and subject to exceptional conditions that it would receive fresh evidence; and the first of four conditions, reformulated as late as 1961, was that it must be evidence which was not available at the time.[3]

2.38 One of the difficulties that used to face the Court of Criminal Appeal was that if it received fresh evidence it had to re-try the case itself and perhaps sub-

[1] Criminal Appeal Act 1907, s 9.
[2] *R.* v. *Stafford & Luvaglio* (1968), 53 Cr App R 1, *per* Edmund Davies LJ at 3.
[3] *R.* v. *Parks* (1961), 46 Cr App R 29.

stitute its decision for the verdict of the jury. In 1964 the Court was given power in such cases to order a new trial before a new jury.[1] It was stated in the House of Commons on the authority of the Lord Chief Justice that the Court of Criminal Appeal would review its practice in the light of this power.[2] The report of a committee presided over by the late Lord Donovan led to a further liberalisation, which is now embodied in the Criminal Appeal Act, 1968, section 23, the material parts of which read as follows:

> (1) . . . the Court of Appeal may, if they think it necessary or expedient in the interests of justice . . . receive the evidence, if tendered, of any witness.
>
> (2) Without prejudice to subsection (1) above, where evidence is tendered to the Court of Appeal thereunder the Court shall, unless they are satisfied that the evidence, if received, would not afford any ground for allowing the appeal, exercise their power of receiving it if—
>
> (a) it appears to them that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
>
> (b) they are satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it.

2.39 It will be observed that subsection (2) *requires* the Court of Appeal to admit relevant evidence notwithstanding that it was not adduced at the trial, if there is a reasonable explanation for the failure to adduce it. Moreover, in subsection (1) the section preserves the power—without imposing a duty to exercise it—to admit fresh evidence where 'necessary or expedient in the interests of justice'. The law is now as stated in Thompson and Wollaston:[3] 'There is a discretion to hear evidence under section 23 (1) (c) if the Court think it necessary or expedient in the interests of justice, and the duty under section 23 (2) is imposed without prejudice to this discretion'.

2.40 Mr Dougherty had been defended under the legal aid scheme. This covers a limited amount of 'post-operation' service, including advice on whether there are grounds for appeal, and if there are, their preparation. If as a result of the advice an application for leave to appeal is made, it will in the first instance come before a judge of the Criminal Division of the Court of Appeal who in this connection is usually referred to as 'the single judge'. The single judge usually considers the application on the written material and without hearing oral argument. He has to decide whether to refuse leave or to grant it or as an intermediate course to refer the application to the full court for oral argument. If he takes the second or the third course he will usually grant legal aid. If all that is required is oral argument, the grant will normally be limited to counsel only; but if there is need for further preparation, a solicitor will also be assigned. Usually the solicitor and counsel will be those employed at the trial. If the appellant wishes to call fresh evidence, he must make a separate application for leave to do so. This application will be dealt with in the way already described except that, if there is a need to take statements from prospective witnesses, a solicitor will be assigned for the purpose.

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[1] Criminal Appeal Act 1964, s 1.
[2] Official Report, Vol 694, col 722.
[3] D. R. Thompson and H. W. Wollaston, *Court of Appeal Criminal Division* (1969), p 122.

IV. The Appeal

2.41 Immediately the case was over Mr Fenwick dictated an Opinion advising on the question of an appeal. He had seen his client after the conviction and Mr Dougherty had expressed his concern about the bus load of witnesses who could have supported his alibi. Mr Fenwick in his Opinion approved the line taken by Mr Hamilton on this question and explained why he, Mr Fenwick, had not sought an adjournment. He expressed his wish that Mr Dougherty, if dissatisfied with his conduct of the trial, should seek independent advice. The ground of appeal which he formulated was against the decision of the judge in the exercise of his discretion to leave the dock identification to the jury. He advised that there was an arguable case for the submission that the conviction was unsafe and unsatisfactory. On 6 March an application for leave to appeal, based only on this ground and with counsel's Opinion attached, was filed.

2.42 It is apparent that Mr Fenwick's view of the chances of success had now become much less optimistic than that which he had expressed to his client at the trial. The authorities which he had then in mind culminated with the case of *R.* v. *Howick*, [1970] Crim LR 403 in which the Court of Appeal said that a dock identification was 'usually unfair'. In *R.* v. *John*, however, which was not reported in the Criminal Law Review until February 1973 (page 113), the Court permitted a dock identification, saying only that it should be avoided if possible. This led Mr Fenwick to fear that the Court of Appeal in Dougherty's case would treat the matter as one for the discretion of the trial judge.

2.43 Meanwhile Mrs Thoms was taking action. On the day of the trial she had been at the hospital with her husband from 9.30 a.m. to 5 p.m. When she read the report of it in the Sunderland Echo on the next day, 23 February, she was—although, as she says, she had 'no great liking for Luke Dougherty'—shocked at the result. She went straight round to the police station to protest. There she was referred to the defence solicitors. She went to their office on 26 February but failed to see anyone. A journalist friend advised her to write to the *Sunday People*. This she did. She was interviewed by a staff reporter and as a result there was a piece in the *Sunday People* for 4 March headlined 'Alibi of Man in Jail', reporting on the campaign to free him and giving 'the key to his innocence' as described by 'campaign leader, Mrs Sheila Thoms, 26'.

2.44 Mr Dougherty in prison started to take a line of his own, filling up application forms of all sorts, for leave to call witnesses (filed on 12 March with a long list of names) and for bail and for leave to be present at the hearing of the application (filed on 13 March). It was to fortify these that he wrote out the statement referred to in paragraph 2.16 above. Some time in March both he and Mrs Thoms made contact with *Justice*, which is the British Section of the International Commission of Jurists. *Justice* is an all party association of lawyers—barristers, solicitors and teachers of law—concerned among other things with the fair administration of justice and the reform of out-of-date and unjust laws and procedures.

2.45 The backbone of an application to call fresh evidence must consist of convincing statements from the new witnesses and the obtaining of them would be work for a solicitor. But Mr Hamilton's retainer under the legal aid scheme had come to an end and, as explained in paragraph 2.40 above, until a fresh grant of

legal aid was made, he was incapacitated from doing any work for which he would be remunerated. So the urgent need was for a grant of legal aid covering both counsel and solicitor. On 4 April 1973, Mr Briggs, the legal secretary of *Justice*, wrote to the Registrar of Criminal Appeals, enclosing a letter from Mrs Thoms and suggesting 'that this might be an appropriate case for the granting of legal aid, limited to obtaining statements from the people mentioned in Mrs Thoms' letter'. On 10 April the Registrar[1] replied that 'it is not considered appropriate for the Registrar at this stage to grant legal aid so that a large number of people, available at the time of the trial but not called upon the advice of counsel, may be interviewed': but he said that the letter would be placed before the Court when it considered Mr Dougherty's application for legal aid. *Justice* is a body supported by voluntary subscriptions and it has not the resources which would enable it as a matter of course to undertake an expensive investigation. So Mr Briggs decided to send out a questionnaire to the persons whose names he had been given. This he did on 27 April.

2.46 On 9 May 1973 the application for leave to appeal was considered by the single judge. Dealing first with the ground advanced in Mr Fenwick's Opinion, i.e. the dock identification point, he took the intermediate course (see paragraph 2.40 above) of referring the application to the Full Court for argument by counsel on behalf of the applicant: so he granted legal aid for counsel. He stated that he did not consider that the requirement as to calling fresh evidence was satisfied and in the circumstances decided that a solicitor was not required. It is not customary for the single judge to give reasons for his decision and in fact he did not do so on this occasion; the statement above is taken from a letter which the judge later authorised to be sent to counsel. At the time *Justice* was told only that the application for leave to appeal had been referred to the Full Court and that Mr Fenwick had been assigned as counsel. Consequently *Justice*, supposing that the application for leave to call fresh evidence was still unconsidered, continued its efforts to have a solictor assigned to take statements.

2.47 *Justice* had received ten replies to their questionnaire, all confirming that Mr Dougherty was on the bus. On 22 May 1973 Mr Briggs wrote to Mr Fenwick confirming this; and on 1 June he sent him the replies, observing that, while they were not themselves sufficient for an appeal, they did establish the need for a solicitor to take proper statements. On 23 May Mr Fenwick wrote to the Registrar saying that in the circumstances he felt a solicitor must now be assigned and on 1 June Mr Dougherty himself from prison made an application on the appropriate form. On 6 June the Registrar replied to Mr Fenwick. He said that before referring the matter back to the single judge he must know 'precisely what it is that you consider necessary to be done by a solicitor'. He was not at liberty to disclose the observations made by the single judge, but he could say that he 'appears to have been more impressed by the grounds you settled yourself rather than the applicant's own grounds. The latter involves the prospect of the court being asked to hear a succession of witnesses who, it would appear, were available to have been called at the trial (though they had not been included in the alibi notice).'

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[1] We use this term as denoting the office: actually it was a Deputy Assistant Registrar who handled the matter.

2.48 On 7 June Mr Fenwick replied that if the appellant desired to press the ground in his own notice of appeal relating to fresh evidence, obviously a solicitor would be required to enlarge it and prepare it for presentation; the appellant must be the final arbiter on the decision to press this second ground. 'If the Appellant wishes to press the "fresh evidence" ground, and indeed really, in any event, it seems to me . . . that the Appellant MUST have a solicitor to advise him, and entirely fresh counsel, also.' If the appellant, after he had been separately advised, wished Mr Fenwick to argue the appeal on the identification point, then he would be willing to do so, but only on that ground.

2.49 On 18 June the Registrar wrote to Mr Fenwick to say that the single judge had refused to extend legal aid to include a solicitor. He sent a second copy of the letter 'so that you can send it to the applicant and explain its effect to him'. In an accompanying letter the Registrar said that it would unquestionably be best in Mr Dougherty's interest that Mr Fenwick should continue to represent him since he was aware of what happened at the trial and had settled the grounds which the single judge considered should be argued before the Full Court. Moreover, if his client insisted on pressing his application to tender fresh evidence, Mr Fenwick could draw the Court's attention to the papers and ask at least for an adjournment and extended legal aid so that there could be an investigation of what the prospective witnesses would say. There was still a chance that the hearing could be fixed for that term.

2.50 There followed a telephone call between Mr Fenwick and the Registrar and an exchange of personal correspondence. We can best deal with this by summarising what emerged.

First, it is clear that both the Registrar and Mr Fenwick thought the application to call further evidence pretty hopeless. The single judge had plainly thought nothing of it. The Registrar told Mr Fenwick that 'this kind of case is unlikely to get off the ground', and added that there were unreported cases of unsuccessful applications in which counsel had at the trial refused to call witnesses in spite of his client's request that he should do so. Mr Fenwick's view as expressed to us was: 'Up until this moment it has always been axiomatic that the Court of Appeal would not let you call additional evidence if with due diligence you could have got it at the time.'

Secondly, Mr Fenwick was not prepared himself to argue the point. He felt it would be too embarrassing; he had himself advised his client not to accept an adjournment but to proceed with two witnesses; indeed he had virtually decided that matter on behalf of his client and this decision stood as an obstacle in the way of the application: some other counsel should attack it.

Thirdly, Mr Fenwick was not prepared to write to Mr Dougherty or to see him in prison without a solicitor.

Accordingly, it was arranged that the Registrar should write to the applicant to explain the position.

2.51 On 20 June the Registrar despatched a long letter to Mr Dougherty in prison and sent a copy of it to Mr Fenwick. The letter began with the reference to the refusal of the single judge to grant legal aid for a solicitor and continued:

> The point shortly is that the circumstances in which this Court will hear fresh evidence are rare, especially in cases where the additional witnesses were

known to the defence or could have been traced before the trial. On the face of it you must have known, or known how to find, most, if not all, the persons you now want the Court to hear. This is no doubt the principal reason why the Judge said that he did not consider the requirements as to calling fresh evidence were satisfied.

If Mr Fenwick were to attempt, despite the Judge's decision, to resubmit the applications for leave to call fresh evidence he would be in difficulty as a great deal of preliminary work by a solicitor would be necessary before the applications could be perfected for presentation. The Judge has refused him the assistance of a solicitor.

If Mr Dougherty wanted to try to get the Full Court to consider the question of fresh evidence, the letter went on, Mr Fenwick thought he should be represented by someone else. On this the Registrar made various observations. The identification point was the only one concerning which the single judge's decision gave any hope of success. The preparatory work necessary for an application to call fresh evidence would inevitably cause delay in the hearing: Mr Fenwick was clearly in the best position to present the case. 'If you do not wish to accept Mr Fenwick's services on the only basis on which he can act, the whole matter, including an application for change of counsel, will have to be referred to the Full Court as a non-counsel application . . . If anyone other than Mr Fenwick were to represent you it is likely that a full transcript would be necessary. If so there would be many weeks more of delay.'

So Mr Dougherty must decide whether Mr Fenwick should continue to represent him, 'it being understood that he is unable to present your application for leave to call further witnesses'. The Registrar urged a prompt reply; there would then be a fair chance that the application could be heard before the end of July; otherwise the delay might be considerable.

On 22 June Mr Dougherty replied: 'I have all faith in my barrister and accept that he handles my case in Full Court without any witnesses being present.'

2.52 Some communication took place between the Registrar and Mr Fenwick relating to the *Justice* questionnaire and the answers to it. On 19 June Mr Fenwick sent the papers to the Registrar 'for safe-keeping if he insists to you on pressing the fresh evidence aspect'. On 21 June the Registrar replied that it was a misunderstanding to suppose that he could act as a solicitor and that the papers should not be left with him. On 25 June Mr Fenwick invited the Registrar to retain the papers 'until Dougherty has decided precisely what he wants to do'.

2.53 On 5 July Mr Dougherty made an application to be present at the hearing of the appeal. He said in his letter that he understood about the witnesses and that it was not Mr Fenwick's fault or his. The Registrar replied on 9 July that arrangements had been made for him to be brought to the cells in the Royal Courts of Justice and that the Court itself would decide whether or not to give him leave to be present at the hearing.

2.54 On 12 July 1973 the application was heard by the Court of Appeal in open court. Mr Dougherty had been brought up to the cells; prisoners cannot travel in the ordinary way and the cost of the expedition with two warder escorts was £66.08. Mr Fenwick did not see him and did not apply to the Court for him to be present and the Court made no order. Mr Fenwick said to us:

I was not prepared to embarrass myself by seeing him. I know he stayed down below and was not allowed up . . . I was not prepared to go down and see Dougherty and have him say, 'Will I get off? Will the appeal succeed?' I had a pretty fair suspicion that the appeal would not succeed.

2.55 The case was strenuously argued by Mr Fenwick. He appreciated that the principal difficulty in his way lay in the strength of the warning that the judge had given the jury; he urged that it could not be safe to convict in a case in which such a strong warning was necessary. The Court dismissed the application. They held that the effect of the authorities was 'that it is undesirable to have dock identifications, which should be avoided if possible'. But the most recent case of *R* v. *John* made it clear that the dock identification was relevant evidence and that the only ground for excluding it lay in the judicial discretion to exclude legally admissible evidence, the prejudicial effect of which, in the opinion of the judge, would exceed the probative value. Accordingly, 'the Learned Judge in the exercise of that discretion was fully entitled to let the matter go before the jury provided he did give explicit warnings of the dangers of that type of evidence. Those warnings he undoubtedly gave.' The Court said that it was desirable that photographs should only be shown to witnesses in strict conformity with H.O. Circular 9/1969; and it was also desirable that an identification parade should be held. But there being some doubt as to why an identification parade was not held, the Court felt that there would be no useful purpose in saying more.

2.56 Some, if not all, of the material relating to the fresh evidence was before the Court. The Court remarked in its judgment that the case had been brought to the attention of *Justice* who had raised the matter very properly with the Criminal Appeal Office. Mr Fenwick told us that he said that he could not argue that point. Whatever he said, it is evident that the Court treated it as an abandonment of the application. They said that counsel in his discretion had not pursued it and that they considered that he had accurately exercised his discretion. Two of the witnesses named in the alibi notice had been convicted of shoplifting and the bus driver 'could not be called without grave risk to the interests of the applicant without counsel and solicitor knowing in detail what the evidence was to be'. The Court affirmed that the decisions taken by Mr Fenwick were beyond criticism, and added, 'Moreover, it would seem to us that even if he had taken a different course that the conditions necessary before such evidence could be received before this Court could not be fulfilled'.

V. After the Appeal

2.57 Mrs Thoms resumed her campaign. She wrote to her MP and so did Mr Dougherty. On 21 October there was another article in the *Sunday People*. The BBC began to prepare a film which was to be a reconstruction of the coach trip featuring Mrs Thoms, Mrs Hall and Mr Pearson; it was to be shown in the programme 'Man Alive'.

2.58 The most effective action came from *Justice*. When Mr Briggs returned from his holiday on 16 August 1973 he read a copy of the judgment of the Court of Appeal and considered the conviction very doubtful. The Council of *Justice* decided to instruct a solicitor to take statements. On 25 September 1973 Mr Brown of Patterson, Glenton and Stracey, of South Shields, made a report to the

Secretary of *Justice* to which he attached 13 detailed statements which he felt left the conviction 'open to the gravest challenge'. On this *Justice* prepared a memorandum for submission to the Home Secretary, and on 29 October 1973 this was despatched under cover of a personal letter from Lord Gardiner, the Chairman of *Justice*, to the Home Secretary, Mr Carr; the letter asked him to institute urgent enquiries with a view to Dougherty being released from prison with the minimum of delay. The letter also called attention to four 'defects in our system of criminal justice', namely,

1. The laxity with which identification evidence is obtained and accepted by the court.
2. The danger of allowing the police to decide upon and press charges without control of independent prosecuting authorities.
3. The lack of adequate provision for legal advice and aid on appeal.
4. The rigidity with which the Court of Appeal applies its rules regarding the admission of fresh evidence and in particular its insistence that the appellant has to bear the consequences of any negligence or inefficiency on the part of his defence lawyers.

2.59 On 6 November 1973 the Home Office sent this material to the Chief Constable of Durham asking him as a matter of urgency for a brief report. The Chief Constable replied by return of post that if the evidence supplied by *Justice* and in his own preliminary enquiries had been available at an earlier stage, 'it is very likely that Dougherty would not have been charged with the offence or, alternatively, no evidence would have been offered at his trial': he had decided to institute a full and impartial enquiry by an officer from another force. Detective Chief Superintendent Bailey of the Northumberland Constabulary was subsequently appointed for this purpose.

2.60 On or about 14 November 1973 the Home Secretary exercised his powers under section 17 of the Criminal Appeal Act 1968 and referred the case to the Court of Appeal for further consideration. The Court thereupon ordered Mr Dougherty's immediate release on bail; he was in fact due for release in the normal course on 21 December. On 14 December Mr Bailey delivered his report, to which he attached detailed statements from 19 witnesses. On 21 December the Court of Appeal directed that the evidence of these witnesses should be taken before an Examiner under section 23 (4) of the Criminal Appeal Act 1968. The examination took place in February 1974, the defence being represented by new counsel and solicitors. On 13 February, after a number of witnesses had been heard, the prosecution decided not to continue to resist the appellant's contention that the verdict was unsafe and unsatisfactory. The appeal was heard on 14 March 1974 and at the conclusion of the argument the Lord Chief Justice gave the judgment of the court as follows:

> This matter has been dealt with very fully and clearly by Mr Anns in opening the Appeal, and it seems to us quite unnecessary that we should go through the facts again.
>
> It is not in dispute that following the final enquiries into this matter a very large number of statements have been obtained all of which go to show that Mr Dougherty was on the bus in question and was not committing an offence

at the supermarket as alleged, and the Court is entirely in agreement with the submission of Mr Baker that in those circumstances, looking at the wording of Section 12 of the Criminal Appeal Act 1968, the Appeal should be allowed and the conviction set aside, on the ground that under all those circumstances the conviction is unsafe or unsatisfactory.

We feel that that is as far as we can or should properly go today, but the case has undoubtedly disclosed a number of matters which require urgent and careful consideration hereafter, and that is a matter which we must look after in our way and in our own time.

The Appeal will be allowed, the conviction is quashed and so far as this case is concerned, Mr Dougherty may be discharged.

2.61 On 16 March 1974, the Chief Constable of Durham requested Chief Superintendent Bailey to continue his enquiries in order to investigate police involvement in the case with a view to establishing whether an officer was negligent in his duties. On 16 April, Mr Bailey made a further report as a result of which disciplinary charges were brought. PC Anderson pleaded guilty to a charge of neglect of duty (in failing to investigate or report the complicity of the three persons alleged to have been involved in the original theft) and to a charge of disobeying orders (in allowing photographic identification by more than one witness), PC Anderson's supervisory sergeant pleaded guilty to two charges of neglect of duty (in failing to supervise PC Anderson properly or to ensure that Mr Dougherty was traced and interviewed as soon as he had been identified). Det. Insp. Armstrong pleaded not guilty to one charge of neglect of duty in failing to make all possible inquiries to check the validity of Mr Dougherty's alibi and to re-examine the facts on which the charge was based. After hearing the evidence, the Chief Constable found him not guilty.

2.62 On 21 January 1975 Mr Dougherty was paid *ex gratia* £2,000 compensation for his wrongful conviction and its consequences.

VI. Commentary

2.63 A very unusual number of things went wrong in the case of *R* v. *Dougherty* and it gives rise to a number of points for consideration. In the following paragraphs we tabulate them, giving a brief commentary on each and indicating how we propose to deal with it in this Report.

(1) *Prosecution's Incomplete Investigation*

2.64 PC Anderson failed

a. to make a full report of the whole incident,

b. to obtain or record a description of the thief by Miss Mallin.

We shall not in respect of this or any other act or omission by the police endeavour to apportion where the blame lies as between a particular officer and his superiors. This has been done by the Chief Constable who recognised from the first that there were faults and has dealt with them (paragraphs 2.59 and 2.61).

As to a., the failure contributed to the miscarriage of justice. A team is easier to discover than a single operator, and an elderly woman with a limp more easily

identified than a man without distinguishing marks. An inquiry about the woman would at once have produced the name of a suspect, and she would have been a woman with whom Mr Dougherty would not have been known to have any association.

As to b., the obtaining of a description is an important part of identification procedure. We deal with the general question in paragraphs 5.6–15 below.

(2) *Photographic Identification*

2.65 This was improperly conducted; see paragraph 2.25 above. This also is an important part of identification procedure and we deal with it generally in paragraphs 5.16–28 below. In the particular case of Dougherty, however, the fact that there was no identification parade reduced the effect of this impropriety.

(3) *No Identification Parade*

2.66 No copy of the bail notice was kept so that it is impossible now to say whether or not Mr Dougherty was at fault in failing to attend. Even if he was, this was not a sufficient reason for abandoning the parade. No officer of sufficient seniority and competence was in charge of the arrangements. If he had been, it is quite possible that Mr Dougherty would have been sent for and found and the parade held. The omission to hold a parade was a serious one and unjustified and may have contributed to the miscarriage of justice. We deal generally with the subject of identification parades in paragraphs 5.29–82 below.

(4) *Preparation of Alibi*

2.67 We have considered in paragraphs 2.13–18 above what was done and what could have been done. We have heard something of the difficulties of solicitors in doing this type of work and we consider this and other aspects of the question under the head of Alibi in paragraphs 5.96–120 below. But even under the most limited standards we think that the work done in this case was quite inadequate. This inadequacy was in our opinion the main cause of the miscarriage of justice.

(5) *Police Report*

2.68 There are two points here of general importance and we shall deal with them both in chapter 5, section VI. The first is the failure of the police to notify the defence that they were going to interview the witnesses. We doubt if in this particular case it mattered much; Mr Hamilton did not give us the impression that, if he had been notified, he would have done anything about it. The second point is that the report led to no reconsideration by the prosecution of the merits of their case. There are two views about the duty of the prosecution in relation to a notice of alibi. One is that they should investigate the alibi evidence with the same thoroughness as they investigate initially the evidence against the accused and that, if they think the alibi to be sound, they should drop the case. The other view is that, the case having been committed to the Crown Court, the prosecution is not under any responsibility to make up their mind whether the alibi is sound or not; their duty is to investigate it simply in order to make sure that any material which might rebut it is brought before the court. As noted in paragraph 2.19 above, the prosecuting solicitor in this case belonged to the

narrow school. While we do not go as far as he did, we take in substance, for reasons which we give below, the second view; we think that it is only in the most exceptional case that the police should assume the responsibility of deciding whether an alibi is good or bad. In the Dougherty case the prosecution's evidence was thin; there was no circumstantial evidence to support the visual identification and there had been no identification parade. In these circumstances we think that the prosecution might have called for a fuller report. But if in the end they had decided that a court of law was the proper place for settling a conflict of evidence there should, in our opinion, be no criticism of such a decision.

(6) *Dock Identification*

2.69 Without this the prosecution had no case. We shall consider in chapter 4 whether the law and practice on this point ought to be altered.

(7) *The Decision Not to Accept an Adjournment*

2.70 Now that all the facts are known this is seen to have been the wrong decision. The Court of Appeal regarded it however as a reasonable one for counsel to have taken in the circumstances (with this we respectfully agree) and indeed on the material before them they thought it to be the right decision on the facts. What effect should a decision of this kind have on an application to call fresh evidence? We consider this question in chapter 6.

(8) *Appellate Procedure*

2.71 The decision of the Court of Appeal which acquitted Mr Dougherty on 14 March 1974 could, if all the details had been before the earlier court, have been given on 12 July 1973. If it had been, Mr Dougherty would have been released 4 months earlier than in fact he was. Why were the details not before the court? As we suggested in paragraph 2.36, the public must find it difficult to understand why things could not have been put right simply and quickly. Part of the explanation we have already given in paragraph 2.37. There must be some rule restricting the admission of fresh evidence. In chapter 6 we shall consider suggestions that the existing rule should be widened.

2.72 But while it would not have been easy in the circumstances of this case to have got the Court of Appeal to admit fresh evidence, why, it may be asked, was the attempt not made. Clearly Mr Fenwick, with the Registrar concurring, thought that it would be bound to fail; see paragraph 2.50. Two things may have contributed to this despondency. In the first place, neither Mr Fenwick nor the Registrar knew of the overwhelming strength of Mr Dougherty's case. They had the replies to the *Justice* questionnaire, but, as Mr Briggs pointed out (paragraph 2.47), these were not in themselves sufficient; it is the statements of the witnesses, which by their detail virtually exclude the possibility of untruthfulness or mistake, that make the case irresistible. In the second place, it may be that the effect of the alteration in the law made in 1966[1] was not fully appreciated and in particular that it was still thought, ignoring the discretionary power in subsection (1), that the admission of fresh evidence was governed exclusively by

[1] Re-enacted in the Criminal Appeal Act 1968, s 23. See paragraph 2.38.

sub-section (2). In *R* v. *Sharratt*[1] an application to call new evidence was dismissed by reference only to sub-section (2).

2.73 It is of course true that the Court of Appeal had before them Mr Dougherty's own application to call fresh evidence, supported by the *Justice* material, and that they dismissed it. But it does not necessarily follow that if the application has been vigorously presented by counsel, stressing the power under sub-section (1), it would not have succeeded, at least to the extent of obtaining an adjournment and a further grant of legal aid to enable a solicitor to investigate. If it did so follow, if a court is expected to ascertain for itself the strength of a case from the material before it, there would be no point in advocacy.

2.74 Mr Fenwick was in an unenviable position. Some counsel in that position would have thought it right to press the application as hard as possible, whatever the personal embarrassment that might be involved. Mr Fenwick thought otherwise. Since the main obstacle in the way of an application to call fresh evidence was his decision not to ask for an adjournment, he thought that the application must be presented by another counsel. It is fair to say that this is not just a question of embarrassment; there must be a real doubt whether the original counsel can be, or can be thought to be, an effective advocate. Mr Fenwick begged the Registrar to appoint another counsel; he stressed the need, if the application was to be presented, for a solicitor; he made it quite clear that he would not argue on the application (paragraph 2.48). The Registrar left the choice to Mr Dougherty, and Mr Dougherty, in view of the delay which a change of counsel would cause, chose Mr Fenwick on his own terms (paragraph 2.51).

2.75 The situation, as we have outlined it in the preceding paragraphs, is not one that can be accepted as suffering from no more than the vagaries that are liable occasionally to affect even the best run system. The root of the trouble in our opinion lies in the fact that Mr Dougherty was not after the trial provided with a new counsel and solicitor. It was not indeed until *Justice* did at its own expense what ought to have been done by legal aid that things began to go right. Apart from the work of investigation, the preparation of the appeal shows, as we have recounted it, the need for a solicitor at every stage. In particular, the Registrar ought not to be put in a position where, because of the lack of a solicitor, he has to write a letter of the sort set out in paragraph 2.51. The letter was dealing with questions that ought to have been the subject of a solicitor's advice. As was foreshadowed by the Lord Chief Justice (paragraph 2.60), changes in the system have already been made. We shall discuss the question of legal aid generally in chapter 6.

2.76 There is another aspect of the procedure on which we must comment. It will strike many as very odd that Mr Dougherty, having been brought at considerable expense to the Royal Courts of Justice, was confined outside the Court in which proceedings which vitally concerned him were being heard. In paragraph 2.44 we referred to his filing an application for leave to be present. The need for leave arose simply out of the fact that he was in custody; had he been at large he could, of course, have been present if he wished. It was urged upon

[1] CA, 8 December 1973, unreported.

the Donovan Committee[1] that there should be no distinction in this respect between an appellant in custody and an appellant at large. The Committee thought that in the abstract that was right, but that it would involve unacceptable administrative burdens if every prisoner who so wished has to be brought to court.

2.77 Since the number of those in custody who can attend appellate proceedings has to be limited, it seems obviously to be right that the Court of Appeal should prescribe the classes of case in which an appellant is entitled to be present (they did not include the Dougherty case) or in special cases should give leave. But this should not obscure the fact that the difficulties in the way of appellants being present are administrative and not legal. In Mr Dougherty's case, for good reasons or bad, they had been surmounted; we understand that he was brought under a rule which allows for a conference with counsel within the precincts of the court if other arrangements cannot be made. We can hardly doubt that if an application had been made to the Court of Appeal or even if the Court had known that he was in the building, his attendance at the proceedings would have been allowed. It was very unfortunate that it was not. To safeguard against any repetition, we think it would be desirable that there should be a general direction that when an appellant in custody has been brought to the building, he should normally be admitted to the court.

(9) *Conclusion*

2.78 Our chief purpose in examining this and other cases of mistaken identity is to discover the way in which an error in identification can lead to a wrongful conviction and to consider in the light of what is discovered what safeguards against error can be devised. For this purpose the ideal case to examine is one in which the only flaw in the proceedings was the wrong identification. *R* v. *Dougherty* is not such a case. When a case is so bungled as this one, injustice is likely to result whatever the nature of the case, whether the matter in dispute be identification or anything else. So *R* v. *Dougherty* will never be a leading case on misidentification, and does not illuminate the central point of our investigation. But it throws light on a number of important incidental points which, as we have indicated, we shall consider later in this Report.

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[1] Report of the Interdepartmental Committee on the Court of Criminal Appeal (Cmnd 2755), 1965, paragraph 127.

CHAPTER 3

THE CASE OF MR VIRAG

I. The men involved

3.1 At the Gloucestershire Assizes on 11 July 1969 Laszlo Virag was convicted of offences committed at Liverpool on 19 January 1969 and at Bristol on 23 February 1969. The offences consisted at each place of the theft of parking meter coin boxes, coupled with at Liverpool the using of a firearm to resist arrest and at Bristol the wounding of a police officer with intent to cause grievous bodily harm or to resist arrest. Mr Virag was sentenced to 3 years' imprisonment for the Liverpool offences and 7 years for the Bristol offences consecutively, making 10 years in all. On 5 April 1974 the Home Secretary recommended the grant of a Free Pardon to Mr Virag who was immediately released. After examination of the evidence which we summarise below we have reached the conclusion that the Bristol offences were committed not by Mr Virag but by a man known as Georges Payen; and we consider it to be probable that this man also committed the Liverpool offences.

3.2 Laszlo Virag was born in Budapest, Hungary on 16 December 1938. He came to Britain as a refugee in January 1957. He spent 6 months at a school in Scotland to learn English; and thereafter obtained a job as a machinist in London which he held for 6 months, leaving of his own accord. On 24 January 1958 he was convicted of stealing from a meter and placed on probation. Since then he has been convicted on 8 occasions for offences of stealing, shopbreaking and the like; he has never been convicted of any offence involving the use of violence or of firearms. The longest sentence of imprisonment was 2 years from which he was released on 25 August 1966. From 1958 onwards he has had no regular employment except that in 1961 he worked in partnership for a short time as a painter and decorator. After his last release from prison he had casual work as a painter and decorator until June 1968. Thereafter he worked as a croupier at the Trojan Club, which is a gambling club in Kensington, relying on tips for wages. At the material time in 1969 he was a married man with two young children, drawing social security benefit of £14 15s 0d a week, and living in a flat in Sinclair Road, London, W14, for which he paid £7 per week rent.

3.3 Roman Ohorodnyckyi, who for a considerable time past has been known as Georges Payen, was born in the Ukraine on 26 December 1934 and came to Britain as a refugee in 1950. He is not known to have held any employment. On 30 July 1954 he was convicted of stealing and placed on probation. On 20 January 1955 he was again convicted of stealing and sent to Borstal. He escaped from Borstal on 24 September 1956, but was captured after 3 days and by order of the Home Secretary the unexpired period of Borstal training was commuted to an equal term of imprisonment. On 10 September 1964 he was sentenced to

12 months' imprisonment for housebreaking. In 1969 he had not got any convictions involving violence or the use of firearms.

3.4 Payen and Virag have different characters. Virag is composed and uncommunicative; Payen, voluble and easily agitated. Whereas Virag during the whole of his trial uttered only two words of protest, Payen, when later tried for other offences (see paragraph 3.80), was talkative and troublesome, dismissed his counsel and solicitors and defended himself, and after repeated warnings had to be removed from the dock because of his interruptions. As a criminal Payen is much more sophisticated than Virag. He speaks several languages and has travelled a lot. When arrested he was found in possession of a U.K. and a U.S. passport and a Belgian identity card in different names. Photographs of the two men are reproduced at page 66. Virag measures 5 ft 10 ins and Payen 5 ft 11½ ins; Virag's hair is dark and his eyes brown, while Payen's hair is brown and his eyes green; both men have fresh complexions. Those who have seen them both differ about the impression of similarity. The most noticeable difference between them is in the hairline; while Virag's hair comes down to his forehead, Payen's recedes. In the operations recounted below the criminal was never seen without a hat.

II. The Liverpool Offences

3.5 At about 1.35 a.m. on Sunday, 19 January 1969 Police Constables CALLON and ROBERTS[1] were in a police landrover in the centre of Liverpool when they saw a man walking in the street who appeared to have something concealed under his clothes. PC CALLON shouted to him to stop but he continued to walk away. CALLON got out of the landrover and walked after him. When CALLON was about 10 feet away the man turned to face him, brought out a revolver, pointed it at CALLON and told him to go away or he would shoot. CALLON shouted a warning to the landrover and was almost immediately joined by PC ROBERTS. They remained where they were while the man backed away towards a stationary Triumph car. He got into it and drove away. The man was wearing a corduroy trilby hat which did not conceal his features. The street lighting was from overhead and was described by PC ROBERTS as good enough to read by. In a search made after the man had gone a home-made key for opening meters was found at the spot in the road where he had first been seen; and two parking meter cash boxes on the road surface at the place where he had got into the car.

3.6 The officers concerned gave details of the incident by telephone to the Police Information Room and Operation Search (a pre-arranged system to alert all other mobile police vehicles about an incident) was put into action at 2.10 a.m.; it was cancelled at 3.45 a.m., having been unproductive. Divisional CID officers on night duty attended but no fingerprints of value were found. At 9 a.m. PCs CALLON and ROBERTS were interviewed by a Detective Sergeant and from the details which they gave an identikit impression was prepared. On 22 January the offence was circulated in 'General Crime Information' with a description of the offender and of the home-made key; the identikit impres-

[1] The names of witnesses who were called to identify Mr Virag at the trial and who did identify him are printed in capitals; the names of those who did not identify Mr Virag at the trial are in bold print; those in ordinary print were not called at the trial.

sion was circulated on 24 January. Local inquiries were made and a check made on all stolen vehicles in the city which answered the description of the Triumph. None of this yielded any result. The enquiry remained dormant until on 25 February 1969 an express message was circulated by the Chief Constable of Gloucestershire giving details of a similar offence at Bristol on 23 February and thereafter the two forces kept in touch.

III. The theft of the Triumph Vitesse

3.7 On 27 January 1969 Mr Dannenberg, the owner of a Triumph Vitesse car, Index No. PYE 544F, advertised it for sale. On Sunday, 2 February a prospective purchaser came to Mr Dannenberg's home in Tenterden Gardens, NW4. He gave his name as Pollock; Mr Dannenberg took him for a mid-European; the foreign accent was noticeable. The two men inspected the car and went for a drive on the M1 Motorway; during the drive Pollock offered Mr Dannenberg a Tom Thumb cigar. They agreed upon a price and it was arranged that Mr Pollock should bring the money on the following Thursday. They were together for about an hour.

3.8 At some time on the night of the following Monday the Vitesse car was stolen from the driveway of Mr Dannenberg's house. On Thursday Mr Pollock telephoned to say that he would be a little late for the appointment; he asked if everything was all right and nothing missing. Mr Dannenberg, who had his suspicions, told him that everything was in order and that he looked forward to seeing him. Mr Pollock did not appear.

IV. The Bristol offences

3.9 At about 8 a.m. on Sunday, 23 February 1969, Mr **Cunliffe**, a handyman, parked his car about half way down Small Street in the centre of Bristol. He observed a man opening meters. He was suspicious and asked the man what he was doing. The man replied that he was from the Council and just checking, but he immediately walked away in the opposite direction to that in which he had been going. Mr **Cunliffe** was still suspicious and followed him down Small Street where he turned left into Corn Street and then left again into Broad Street, crossing the road and getting into a Triumph car which was parked opposite the Grand Hotel. Mr **Cunliffe** decided to take the car number. He got out his diary, wrote down in it the letters HLG, looked up to get the figures and noticed that the passenger door was open with a gun being pointed between the hinges directly at him. He turned round and ran as fast as he could down Broad Street and left into Wine Street. He heard the car behind him and took shelter under some seats on the pavement. The car turned into Wine Street and Mr **Cunliffe** saw it go into Union Street and then towards Newgate. He telephoned at once to the police, a message was circulated from the Operations Room saying that an armed man had been disturbed at Small Street tampering with parking meters and had driven off in a green Triumph Herald HLG.

3.10 Police Constables SMITH and **Organ** got the police message at about 8.15 a.m. while they were on patrol duty at the Almondsbury Interchange; this is the junction of the M4 and M5 about 10 miles east of the centre of Bristol. About 8.20 a Triumph Vitesse car came very fast along the M5 from the direction of

Bristol and continued along the M4 in the direction of London. The patrol car gave chase at high speed. After 2 miles the Vitesse stopped on the shoulder of the motorway and the patrol car closed up, observing the number of the Vitesse to be HLG 770E. The driver of the Vitesse got out of the car and as the patrol car came to a standstill close behind the Vitesse, he stood facing the Vitesse pointing a pistol. He fired at the driver, PC **Organ**, who ducked. PC SMITH started to get out of the car to tackle the gunman; he had opened his door and got his feet out when the patrol car slid forward, **Organ**'s foot having slipped on the clutch. The door struck the rear bumper of the Vitesse and was forced back, trapping SMITH's feet. Consequently, **Organ** had to reverse and while he was doing this, the gunman jumped into the Vitesse and drove off. The patrol car resumed the chase.

3.11 After about a quarter of a mile the Vitesse pulled up again on the hard shoulder of the motorway and the patrol car stopped about 40 yards behind. The gunman got out and started to walk along the grass verge on the north side, with the two officers following him at a distance. He turned twice and fired at them; then he climbed over the motorway boundary fence and made off across the fields. SMITH and **Organ** ran after him about 30 yards behind. From time to time he turned to threaten them with shouts and by pointing his gun and warning them not to follow him. He spoke with a foreign accent which SMITH took to be mid-European. Several times he fired at them. PC SMITH saw him shaking the pistol, and thinking that it had jammed or run out of bullets, he decided to close with him. The gunman got out another gun and when SMITH was about 15 feet away shot him in the left arm. PC SMITH held up his blood-covered hand to show that he had been wounded. The gunman shouted at him, 'You let me go and don't say anything about this, and I will give you a thousand pounds. I have got lots of money.' SMITH continued the pursuit.

3.12 The point at which the gunman had left the motorway was some way west of the Westerleigh road which crosses the motorway by an overhead bridge. There is a lane running north and south which joins the Westerleigh road just before this bridge. The gunman's course took him to this lane and when he reached it he ran down it back to the motorway. PC SMITH's patrol car had, of course, been in radio contact with the Operations Room and a number of police officers in Panda control cars were waiting at the point where the lane joins the Westerleigh road. One of the leading ones was a patrol car manned by two officers, PC (now Sergeant) DAVIES and PC BRAGG. They were joined by PC **Organ** and they saw the gunman coming down the lane. When he was about 15 yards away he faced them holding a gun in each hand. He spoke to them, saying in what PC DAVIES described as a Hungarian or possibly a Polish accent, 'You come here'. They thought that he wanted to commandeer a patrol car, so they got back into their car and reversed away. The gunman turned back up the lane.

3.13 Mr Thomas **Taylor**, a farmer, was driving his Rover 2000 across the Westerleigh bridge from the south side of the M4. He took the left hand turn up the lane and saw a man walking towards him whom he thought wanted a lift, so he slowed down. When the man was about 6 feet away, Mr **Taylor** saw a police officer and heard him shout not to stop because the man had a gun. Mr **Taylor** saw the gun and accelerated and drove on. He did not get a really

good view of the man. The gunman was seen going down the embankment to the motorway.

3.14 Mr Douglas **Bullock**, a studio manager in Bristol, was driving a Morris 1100 along the M4 from Bristol. As he approached the Westerleigh bridge, he saw a number of people, including policemen; and a man standing right in the middle of the carriageway waving his arms up and down. Mr **Bullock** thought that there had been an accident and slowed down. The man pointed a gun at him through a side window and told him to open the door, which Mr **Bullock** did. The man jumped very quickly in and told Mr **Bullock** to drive fast up the motorway. PC SMITH, still in pursuit, caught up just too late to interfere as the Morris drove off. He ran across to the west bound carriageway to stop a van that was coming that way. He got into it, got the driver to make a U-turn and started to chase the Morris 1100. But when they eventually found it the gunman was no longer in it. Mr **Bullock** had driven under duress for 2 or 3 miles. When they reached another bridge across the motorway the gunman told him to pull up under the bridge, to let him out and then to drive away.

3.15 Mr Geoffrey **Butcher**, a panel beater, was driving his Austin A40 from Chipping Sodbury to Pucklechurch where he lives. The road crosses the M4 by the bridge at which the gunman had got out. Mr **Butcher** was stopped by a man standing in the middle of the road and waving his hands. Mr **Butcher** opened the door and the man said that he was in desperate trouble and must get to Bath as soon as possible. This was about 9 a.m. Mr **Butcher** told him that he would take him to Pucklechurch. When they got to Pucklechurch the man made no attempt to get out, but pulled a gun out of his pocket, said that he had just shot a policeman and that he wanted the car. When Mr **Butcher** refused to give it to him, the man said that he must take him to Bath and Mr **Butcher** decided that that was the best thing to do. They had a good deal of conversation on the way; sometimes the gunman was threatening and sometimes he was offering money. He talked about his wife and children. Once he pulled two small cylinders out of his pocket and said that there was enough in them to knock a man or a dog out if they gave any trouble. On the journey he smoked a small Tom Thumb cigar. When they got to Bath the man said that he wanted to go to the railway station and Mr **Butcher** took him there.

3.16 Mr Ronald TUCKER is a taxi proprietor who works at Bath station. He saw the Austin A40 arrive and a man leave it and go into the station. A couple of minutes later the same man came out of the station and asked Mr TUCKER to drive him to Chippenham. All this was witnessed by Mr TUCKER's son-in-law, Danny Atkins. The man got into the back of the car. On the journey Mr TUCKER and he had some conversation, the man explaining the mud on his trousers by saying that his car got stuck in a farm gate. Mr TUCKER dropped him outside the Bear Hotel at Chippenham.

3.17 At about 9.50 a.m. a man walked into the Bear Hotel and enquired about getting a taxi. The receptionist, Miss Butt, telephoned for one for him. While he was waiting the man had some conversation with the hotel manager, Mr RANDALL. He asked for a drink which Mr RANDALL had to refuse as he was not a resident; he explained that he had been involved in an accident and felt a bit shaky.

3.18 It was Mr GINGELL's taxi that called for the man about 10.10 a.m. and drove him to Newbury. They had to arrange the fare etc. but they did not talk much on the journey. Mr **Froom**'s taxi, leaving about 11.30 a.m., took a man from Newbury to Reading. The journey lasted an hour and they had some conversation on the way. Mr **Froom** commented on the mud on his shoes and trousers and the man said that he had had an accident and left his car in the ditch. Mr **Froom** dropped the man near the railway station. After this the trail was lost.

V. The Police Inquiry

3.19 The chain of events recorded above was soon put together by police inquiries though it was nearly broken at Chippenham. The tracing of Payen had reached that point by 8 p.m. on the Sunday, the day of the crime. A local CID officer called at the Bear Hotel to ask Mr RANDALL whether anybody had come to the hotel that morning; the incident of the man who wanted a taxi had entirely gone out of Mr RANDALL's mind and he said 'No'. Mr and Mrs Randall worked hard that evening and they did not get out for something to eat until after the bar closed; they got back home at a quarter past midnight. The large and late meal kept Mrs Randall awake. About 3.45 in the morning she woke her husband up and said:— 'Who was that asking for a taxi this morning?' There and then Mr RANDALL rang up the police.

3.20 The three officers who did most of the field work in the inquiry were Detective Sergeants McKay, Taylor and Penny, all of them being attached to the South West Regional Crime Squad at Bristol. It was suspected that from Reading the gunman might have made for London Airport. Sergeant Taylor spent three days, 25–27 February, making inquiries there.

3.21 A brief narrative of events together with the description of the wanted man was circulated. The description read:—

> 35 years, 5 ft 10 ins, very slim build, dark complexion, small mouth, broad cheekbones, small nose. Spoke with a foreign accent, said to be Hungarian, Polish or Italian. Wearing a trilby hat with narrow brim, dark overcoat, single-breasted knee length.

3.22 Reported thefts of Vitesse cars were investigated and it was soon discovered that the abandoned Vitesse belonged to Mr Dannenberg. Such clues as were available from articles found in the abandoned car were followed up. None of these articles belonged to Mr Dannenberg. Since it was thought possible that some of them might have been stolen from other Vitesse cars, all owners of such cars stolen in 1968 and 1969 were traced and interviewed. None of these inquiries produced any result. The abandoned car was taken to the garage at Staple Hill Police Station, Bristol and there examined by the scene of crimes officer, DC Minett, at 2 p.m. on Sunday, 23 February. No fingerprints were found on the car. Among the articles in it taken for further examination there were:

1. A pair of shoes.
2. A torch; this had a fingerprint on it which has never been traced; possibly, if the torch had been stolen, it was the mark of an unknown owner.
3. An electric razor with hair shavings.

4. A pair of socks with two hairs.
5. Eight plastic carrier bags; this was the most significant discovery and will be dealt with in detail in the next two paragraphs.

3.23 The bags were photographed and countrywide inquiries were made in an unsuccessful endeavour to trace their origin. One came from a chemist's shop in Liverpool and bore a handwritten price mark. Apart from the similarity in method, this was the only connection between the Bristol and the Liverpool offences.

3.24 Two of the bags were filled with 34 coin containers from parking meters. A coin container is encased in the meter. The cash collectors, who are employed by the Bristol City Corporation and who visit each meter periodically, open it with a key and remove the full container, replacing it with an empty one. They take the full containers to the council offices where they empty them and record the cash; the containers are then used as replacements in other meters. A thief follows a similar process, except of course that he has to get rid of the empty containers in some other way.

3.25 Fingerprints were found on six of these containers. The fingerprints of all current and past employees of the Collection Department at the Bristol City Corporation were taken, but one of the marks only was identified. Of the other five marks, four were made by the same left thumb and one by a right finger; they were in places where marks would naturally be made by someone removing the container from the meter.

3.26 The five prints were sent to the department at New Scotland Yard which houses the National Fingerprint Collection of 2,500,000 fingerprint forms. Broadly speaking, the time taken in searching the Collection varies in inverse proportion to the number of fingers which it is sought to identify. For example, the identification of a left thumb by itself would require the individual examination of a million forms which would take 5,000 man hours; if clear impressions of all ten digits had been obtained the identification would be comparatively easy. The Department has limited resources of manpower and it will therefore undertake a search only if one of the three following conditions is fulfilled. First, there are the impressions of acceptable quality of at least seven digits. Secondly, there is a mark of a freak pattern. Thirdly, the crime involved is of exceptional gravity or of national importance. This at any rate was the position in 1969, and since in the Bristol case none of these conditions was fulfilled, no general search was undertaken.

3.27 None of the five cars in which the criminal travelled after the shooting was examined for fingerprints or other clues as to his identity. In an investigation that is otherwise to be commended for its thoroughness this is a surprising omission. To be sure, the criminal had left no fingerprints in the Vitesse and it would have been a stroke of luck if he had left any in any of the other cars. But if he had, they might have supplemented those on the containers sufficiently to make a search in the National Collection practicable.

3.28 There were also found in the fields where the shots had been fired several cartridge cases from .22 (LR) bulleted ammunition. Since this was of French origin, the Metropolitan Police Laboratory was asked whether it had a record of

any case in which such ammunition had been used, but it had not. The cartridges were preserved, but nothing more could be made of them at the time.

3.29 Information was drawn in the usual way from cafes, clubs, public houses and regular informants. Several arrests were made, possible criminals were questioned and several identification parades held. But no one was found who came within the description and who could not account for his movements. We shall not detail all the inquiries that were made and all the lines that were followed up. We have seen numerous reports and statements and are satisfied that these inquiries were exhaustive.

3.30 The police were therefore left with only one thing to go upon. This was that the criminal was a foreigner and that, whilst his English was good, his accent was noticeable. No one who had seen and heard him could place his nationality more precisely than to say that it was mid-European. Almost from the start the police thought that he was most likely to be a Hungarian since it was known that some convicted Hungarians were involved in thefts from parking meters. Sergeant Taylor, on his way to report for duty after he had heard the news bulletin on the Sunday morning, saw in Old Market, Bristol a Hungarian criminal who fitted the description of the suspect and who had recently been under suspicion of being in possession of a firearm and was known to be violent when cornered; he arrested him and he was held until his alibi was checked and his home searched. This officer also on 1 March made a search of files on the Hungarian refugees who were billeted near Corsham, Wilts after the Hungarian uprising in 1956. Sergeant McKay concluded as a result of what Mr Dannenberg said in his statement taken on 4 March that the criminal was probably Hungarian. Some time in early March it was decided to examine the Criminal Record Office files of Hungarians at New Scotland Yard and to make up a photographic album of those who came near to the description of the criminal's height and age. By the end of this search 429 files had been examined and 76 photographs selected. The fingerprints of the 76 were all compared with those found on the containers, but none corresponded. Mr Virag must have been one of the earliest on the list for his prints were compared on 5 March.

3.31 The link between Hungary and the criminal was manifestly very slight. But to make an assumption of this sort and test it out seemed now the only alternative to abandoning the inquiry. It might have led to an identification and then to a search which might have produced strong corroborative evidence. Had the assumption been that the criminal was Ukrainian and had Payen's photograph been picked out, a search of his flat would probably, as later happened, have uncovered an abundance of incriminating material, and the case against him would have been clinched by a comparison of finger-prints. The photographic identification of Mr Virag did not lead to the discovery of any corroborative evidence of any substance. But the identification itself, after its confirmation on parade, was apparently so strong and so well supported that it sufficed to convert what had begun as an assumption into a near certainty.

3.32 The album of photographs was completed on 21 March and on the three following days shown to some of the witnesses. Messrs TUCKER, RANDALL and **Froom** picked out Mr Virag, while Mr GINGELL picked out another man K as similar. On 25 March a conference was held at Cheltenham over which the

Chief Constable of Gloucestershire presided. It was decided that the evidence warranted the arrest of Mr Virag so that he could be put on an identification parade. On his way to make the arrest, Sergeant McKay interviewed a London police constable who had heard of the inquiries, and had some information to give. This officer showed him an entry in his pocket book made in February 1968, i.e. a year before, in which he had recorded a conversation with a Hungarian in custody and charged with theft from meters: the Hungarian had told him that a man named Virag was concerned with such thefts and hired out meter keys at £100 a time. No evidence was found to substantiate this, but no doubt at the time Sgt. McKay took it as some slight confirmation of the propriety of the arrest.

3.33 At 11.25 p.m. on 25 March Mr Virag was arrested outside his flat in London. The flat was searched and nothing incriminating was found. He was then taken by car to Staple Hill Police Station at Bristol. On the journey down he was questioned by Detective Sergeants Taylor and Penny. He said that he had seen a parking meter key and he named the Hungarian who had had it. He said that a long time ago he had tried to drive a car but was not very good at it; he had never had a driving licence. He had been to Liverpool, he said, but never to Bristol or Reading. He said that he lived on money from the Labour Exchange; he was also very lucky at cards and always won, sometimes £30 a night.

3.34 On the following day at Staple Hill an identification parade was held. Detailed evidence about the parade was given at the trial of Mr Virag and there has never been any criticism about the way in which it was conducted. There were 12 witnesses present, of whom 6 (those whose names have been printed in capitals) identified Mr Virag.[1] The most significant of those who did not identify Mr Virag was Mr **Cunliffe** (see paragraph 3.9 above), since he was the only witness to the theft from the meters. That evening Sergeant McKay told Mr Virag the result. Mr Virag said that they must be mistaken, since he had been in London at the time of the motorway shooting. In answer to questions he said that he had never possessed a firearm or driven a car and that he smoked Rothman King Size; the last question was doubtless related to the evidence that the gunman smoked Tom Thumb cigars. On 27 March Mr Virag was taken before the magistrates, charged with the attempted murder of PC SMITH and remanded in custody.

3.35 Two more identification parades were held on 14 April. At the first three more witnesses in connection with the Bristol offences attended. None of them identified Mr Virag. The most notable failure among these three was Mr Dannenberg. Thus there was no witness to the theft of the car and in the chronology of events the identification of Mr Virag began with him as the driver of the chased Vitesse. At the second parade PCs CALLON and ROBERTS from Liverpool both identified Mr Virag as the man they had seen. Consequently he was charged with the Liverpool offences.

3.36 The usual inquiries were made to establish the background of the accused. Inquiries at all the houses in the road in which he lived produced nothing.

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[1] The extent to which the various witnesses did or did not pick out Mr Virag from photographs or on the identification parades is set out in Appendix D.

On 1 April inquiries made at the Greater London Council revealed that Mr Virag was not the holder of a licence to drive or to own a car. Subsequently it was ascertained, and put in evidence at the trial, that Mr Virag had held a provisional driving licence in 1966.

3.37 At the time of Mr Virag's arrest, his wife had said that he never went out without her and that they never went out together except to go to the Trojan Club. This Club was not unknown to the police. On 27 March they searched it and found nothing. Sergeant Taylor questioned a number of people there who with one exception were unable to say whether or not Mr Virag was at the club on the night of 22/23 February. The one exception, a croupier, who said that Mr Virag definitely was there in the morning of 24 February, was reminded by the officer as he produced a statement form that he must be accurate and that, if he deliberately made a false statement and it was tendered in evidence, he might be convicted of perjury. The croupier then declined to make such a statement. It is unlikely that the statement, if made, would have been of much service to the defence. The morning of the 24th would not have helped the alibi; moreover, the witness had two previous convictions for receiving stolen property and was then awaiting trial on a similar charge.

3.38 Sergeant Taylor interviewed also Mr Joseph Barna, whom he described as the manager of the Club, and who produced a book which the officer took away with him. The book played some part at the trial without there being any clear explanation of what it was. It was obviously some sort of record of play. Each page had a date on it, e.g. 22 February. But as play began at midnight or after, the date of 22 February might have referred either to the night of 21/22 or to the night of 22/23. The entries on each page were for the most part names followed by figures and it was accepted that they were a record of sums borrowed by players for the purpose of gambling. The fullest explanation given at the trial was that given by Mrs Virag, though it must be doubted how authoritative that could be. According to her, the entries were made by Mr Barna, whom she described both as the doorman and as the manager, and the dates related to the evening before, e.g. 22 February means the night of 22/23. The book, if it had been produced and explained by the person who kept it, would have been evidence of who was at the club on a particular night, though not (since a player did not have to borrow) of who was not there.

VI. The Alibi

3.39 Shortly after the arrest Mrs Virag got in touch with Mr Abraham Stoller. Mr Stoller is a legal executive, at that time aged 75, employed by Mr Bernard Solley, who is a London solicitor. In answer to a question about what part Mr Solley played, Mr Stoller said:— 'As and when I require his services, I call on him'; they were not called for in this case. There is no staff in the office except one secretary. Mr Stoller has had 44 years' experience, the last 12 in crime. At this time he was 'terrifically heavily engaged' in one or two murder cases and other important cases which took up all his time; normally he has a dozen or so defences running at any one time. Mr Stoller gave us what assistance he could in our inquiries. But we were inquiring into what happened 5 years ago, Mr Stoller is now approaching his 80th year and his memory, he says, is not what it was. Moreover, he had not all the papers with which to refresh his memory,

since on Mr Virag's instructions he had sent them to another firm of solicitors who were preparing a claim for compensation.

3.40 When Mr Virag appeared before the magistrates on 27 March he was granted legal aid. Later that day Mr Stoller telephoned to the clerk to the justices and asked for the name of his firm to be put on the defence certificate, which was done. Mrs Virag must have told Mr Stoller of the nature of the alibi, that is, that on the night in question they were both at the Trojan Club, and must have given him the names of witnesses who could say that they were there. On 1 April Mr Stoller wrote a letter to a number of prospective witnesses asking them to telephone for an appointment.

3.41 On 9 April Mr Stoller went to Bristol for a conference with his client. On 10 April Mr Virag was brought before the magistrates for a further remand. Mr Stoller telephoned the police at Staple Hill station, apparently to explain why he would not be in court that day and to say that he would be there on the following Thursday. The officer he spoke to was Detective Inspector Hills. He told the Inspector that in the interests of justice he was quite prepared to give him the names and addresses of all the witnesses with whom Mr Virag was playing cards that night. Mr Hills said that if this was being put forward as an alibi it would have to be checked out and that they could take the matter up on Thursday. Later in the same day Mr Stoller had a telephone conversation with Detective Chief Inspector Wise at Staple Hill. He asked Mr Wise if Mr Hills had told him about the alibi and said that he had got about nine witnesses. He offered to give the names on the telephone, but Mr Wise said there might be some error over the telephone with Hungarian names and that he would prefer the list on paper. On his return to London Mr Stoller wrote reminder letters to the witnesses.

3.42 On 17 April Mr Virag was again before the magistrates when he was represented by junior counsel and Mr Stoller attended. On 5 May he appeared again, evidence was taken (reported to Mr Stoller by a local solicitor whom he had instructed as his agent) and he was committed for trial at Gloucester Assizes beginning on 30 June. He was then transferred from Bristol Prison to Gloucester Prison. On 7 May he wrote to Mr Stoller to ask him to come and see him. Mr Stoller was still without any reply to his letters. The recipients were not the sort of people who were accustomed to answering letters from solicitors or to attending them at their offices. Moreover, Mr Stoller had in his first letter issued his invitation on the basis that the recipient was 'able to establish beyond all reasonable doubt that on the night in question' Mr Virag 'was at a gambling club all night'; and none of the recipients was in fact able to say this. Mr Stoller, who was supposed to put in the Notice of Alibi by 12 May, instructed an inquiry agent, Mr F W Barker, to interview the witnesses.

3.43 Mr Barker made his report on 23 May. The case, he said, had been difficult because all the proposed witnesses were either Hungarian or Cypriot, not speaking very good English, and they all lived or worked at low class gaming casinos. He had made every effort to get written statements, but none were willing to give one, though several were willing to come to court. The most important of these was a Mr Hatei who remembered the incident very well because one of the players had lost £2,000 in the evening. Another witness, Mr Altal, who said that he would come to court if subpoenaed but not as a

volunteer, said that Mr Virag could not drive a car and had never been known to drive one.

3.44 Mr Barker also made inquiries at a hospital, St Mary Abbots, Marloes Road, W8. Mr Virag's reason for remembering the occasion, which he must have communicated to Mr Stoller, and Mr Stoller to Mr Barker, was that there had been a fight that night and that one of those present had been hit on the head and taken to this hospital. Mr Barker reported that he had been told by the hospital that if Mr Stoller wrote to them on headed notepaper the required information would be given.

3.45 On 27 May Mr Stoller paid a visit to Gloucester Prison, perhaps to discuss Mr Barker's report. On 5 June witness summonses were taken out and these were served by Mr Barker on 11 June. On 21 June Mr Stoller delivered a Notice of Alibi in the following terms.

> As you are aware, we were unable to comply with your request as to the alibi witnesses, as the names and addresses of the witnesses given to us by the Defendant could not be contacted.
>
> This necessitated the engagement of an enquiry agent to find these witnesses. Ultimately, the enquiry agent did contact the undermentioned witnesses who refused to give a statement to our agent, but agreed to be subpoenaed in order that they may give their evidence at the trial that the Defendant was in their company the whole of the night until early the next day when the Defendant is alleged to have been in Bristol.
>
> We understand from our enquiry agent that the police have seen all these witnesses and have intimidated them to the effect that if they come and give evidence, the police will charge them with perjury and this is what they fear, particularly as many of them have previous convictions. Hence we were unable to furnish you at the time of the Notice, and we hope you will accept this as the only explanation that we can offer at this stage. All the witnesses have now been served with witness Summonses, viz.,
>
> Mr Lehet Hatei
> 51 Coleville Gardens
> London W11
>
> Mr Barna Lehaci
> 50 Leinster Gardens, W2
>
> Mr B. Bainda
> c/o The Trojan Club
> Cromwell Road, SW5
>
> Miss Tutem
> 99 Camden Hill Towers, W11
>
> Mr Joseph Franczek
> 26 Craven Terrace, W2
>
> Mr Sandor Altal
> 71 Queensborough Terrace
> London W2
>
> Vertergambi (Male)
> 27 Abbey Road
> St John's Wood.

3.46 Sergeant Taylor set out to check the alibi. On 24 June he telephoned to Mr Stoller to inform him that he intended to interview the witnesses and to ask him if he wished to be present, but Mr Stoller declined. Mr Stoller does not recollect the conversation but told us in effect that he would not have been interested anyway. Sergeant Taylor then interviewed all the witnesses on the alibi notice; the effect of that evidence was that they all knew Mr Virag as a regular visitor

to the Trojan Club but none could say whether or not he was there on that particular night.

3.47 During this period Mr Virag in Gloucester Prison had been taking action on his own. Both he and his wife had been trying to think of any Hungarian criminal who might have committed the offence. When his wife visited him in Gloucester Prison on 8 May she told him of a Hungarian called B with a police record; she had heard that he had escaped arrest by using some stuff which knocked a police dog out. Mr Virag tied this up with Mr **Bullock's** evidence, which he had heard at the committal proceedings, that the criminal showed him a cylinder which he had said he could use to knock out a dog or a man; Mr **Bullock**, as Mr Virag noted, had failed to pick him, Virag, out on the identification parade. Mr Virag had also talked with another Hungarian in Gloucester Prison, a man called J. J told him that he knew that B had used a cylinder on a vicious dog in a scrapyard in Birmingham.

3.48 So on 10 May Mr Virag wrote to the Commissioner of the Metropolitan Police saying that he was innocent of the offence with which he was charged and that he had certain information which might help with further inquiries and to clear his name; he did not wish to impart it to the Bristol Police as he had no confidence in them. This letter was passed on to the Chief Constable of Gloucestershire who instructed Detective Superintendent Trull and another officer to make inquiries. On 30 May these officers saw Mr Virag and told him that they had not hitherto been concerned in the inquiries and that this was why they had been instructed to deal with his letter. Mr Virag agreed to make a statement and this contained the information set out above.

3.49 On 5 June Mr Trull interviewed Mrs Virag who confirmed what she had said to her husband. On 6 June he interviewed the prisoner J who did not confirm the story about the dog in Birmingham, but said that he knew B as a very violent man who carried aerosol which he had used in a fight. He gave the officer the names of several other Hungarians who knew B and Mr Trull interviewed them all without getting anything more. B is a much shorter man than Mr Virag and so did not fit the description. So on 13 June Mr Trull made a negative report. In it he drew attention to the fact that both J and another Hungarian criminal interviewed had said that Mr Virag could not drive a car and that he was not the type to resort to shooting.

VII. Prosecution and Trial

(1) *The Brief for the Prosecution*

3.50 The investigation by the Bristol Police was substantially complete by early April and on 10 April the bundle of statements was sent to the Director of Public Prosecutions accompanied by a covering statement summarising the circumstances by Det. Inspector Hills. This summary covered the theft of the Triumph Vitesse and Mr Dannenberg's statement was included in the bundle. This was before 14 April, the date of the parade when Mr Dannenberg, who had not picked out Mr Virag in the album, did not identify him. This left the prosecution with no evidence on which to charge Mr Virag with the theft of the car. He could have been charged with handling the stolen property, but it was

decided not to do so. So the theft was not mentioned at the committal proceedings or the trial and Mr Dannenberg was not called as a witness.

3.51 The other unresolved question concerned the fingerprints. No evidence relating to them (see paragraphs 3.24–25 above) was included in the bundle of statements. Inspector Hills's summary mentions them in paragraph 44.

> Finger impressions found on some of the cash containers in the car, and on a hand lamp, do not match those of Virag and despite search have not been eliminated.

To say that fingerprints have not been eliminated means that the maker of them has not been identified.

3.52 We have endeavoured to ascertain what the police thinking was on this point, but not with much success. As it is necessary constantly to bear in mind, this case is five years old. Decisions were taken at various levels. No incident room was set up and no officer specially detailed to take charge. Detective Chief Inspector Wise, the Senior Divisional Detective Officer, was thus the officer in charge. We have come across his name only once in the papers and that is in relation to the alibi conversation with Mr Stoller; see paragraph 3.41 above. He was absent from duty when Virag was arrested and has since died. Mr Hills's recollection now is that no great importance was attached to the fingerprints for the following reasons:

1. Teams of Hungarians were known to be committing this type of offence so that the presence of an associate, whose fingerprints these were, was quite possible; this hypothesis was supported by the fact that Mr **Cunliffe** had not identified Mr Virag.
2. It was possible that not everyone in the staff who might have had access to the cash containers had had their prints taken and compared.
3. There was the fact that six persons had identified Mr Virag and this seemed to put his involvement beyond doubt.

3.53 The bundle of statements sent to the Director of Public Prosecutions on 10 April was on 15 April allocated to Mr Peter Barnes, a Senior Legal Assistant, now an Assistant Director. On 18 April he held a conference with Inspector Hills and Sergeant McKay. There was no discussion of the fingerprints or of the associate hypothesis. Mr Barnes must have seen paragraph 44 in the Inspector's summary without attaching importance to it, since he had not been told that the prints of all current and past employees of the Collection Department had been taken and that with one exception they did not correspond with the marks on the containers. He thinks it probable that he assumed that the containers would be handled by many meter attendants and other officials responsible for emptying and storing them.

3.54 On 5 May the committal proceedings took place and were conducted for the prosecution by Mr Barnes. He opened the case on the basis that Mr Virag alone was responsible throughout. Had he known that the police considered an associate to be a possibility he would have brought it to light, and he would also have mentioned it in his brief to counsel. The brief was delivered to counsel on 22 May and returned, presumably because counsel was unable to undertake

it, about the end of June; Inspector Hills's summary accompanied it but attention was not drawn to paragraph 44. On 4 July, only three days before the trial began, the brief was sent to Mr Kenneth Mynett QC, and Mr Francis Barnes. On the day before the trial began counsel had a conference with the police officers concerned but fingerprints were not discussed; like Mr Barnes, counsel attached no importance to paragraph 44. It was probably then that Sergeant Taylor produced the Trojan Club book and Mr Mynett directed that it should be shown to the defence.

(2) *The Trial*

3.55 The trial began before Mr Justice Lyell and a jury on 7 July 1969. The accused was represented by Mr Desmond Vowden QC and Mr Machin. He was given in charge on an indictment that contained 10 counts. The first four related to the Liverpool offences, two to theft from a meter and two to the carrying and use of a firearm with intent to resist arrest. The fifth and sixth counts charged him with thefts from meters in Bristol. The seventh count charged him with carrying a firearm at Bristol with intent to resist arrest, the eighth was attempted murder and the ninth and tenth with wounding PC SMITH. The evidence for the prosecution took the trial into the third day.

3.56 The evidence on identification came out as strongly in court as it appeared on paper. PC SMITH in particular was a most impressive witness. His gallantry and devotion to duty would naturally dispose any jury to listen to him with the utmost attention. He described the number of occasions during his pursuit on which the accused had turned to face him. He had been to two earlier parades (see paragraph 3.29 above) and identified no one; but at this parade he recognised the accused as soon as he entered the room. He was clearly himself convinced beyond a shadow of doubt that the accused was the man who had shot him; he said when he was interviewed by Detective Superintendent Allen in September 1973 (see paragraph 3.90 below), 'His face is imprinted on my brain'.

3.57 The cross-examination of the prosecution witnesses was brief since the only issue was identification. It emerged that a number of witnesses had before the identification parade been shown photographs by the police. It may be recalled that Mr Fenwick in Dougherty's case had been at pains to avoid this. Mr Vowden told us that he did not think he would have run the risk of this if it had not been a case where it was necessary to attack the identification evidence strongly. On this and other points which will be mentioned below, Mr Vowden has given us all the help he can; but he has stressed that he has very little recollection of the case and that generally he can only surmise as to why he did this or did not do that.

3.58 The prosecution relied only on the direct evidence of identification and did not offer any corroboration from circumstantial evidence. The articles found in the Vitesse (see paragraph 3.22 above) had been examined in the laboratory, but had produced nothing worthwhile. The shoes had been compared with a pair of Mr Virag's shoes. The two pairs were of about the same size and the feet marks in them showed marked similarities, but the expert was not prepared to say more than that the same feet might have made both. The shavings in the razor were not significantly similar to shavings obtained from Mr Virag. The

expert would not say more about the hairs in the socks than that they could have come from Mr Virag's head.

3.59 Det. Constable Minett was called to prove the presence in the car of the coin containers which Mr Virag was accused of stealing. Mr Vowden cross-examined him, obviously with the intention of showing that no clues pointing to his client had been found at the scene of the crime. After having ascertained that no fingerprints were found on the car, Mr Vowden continued in substance as follows:—

Q. Were there any on anything else?
A. Yes.
Q. Where?
A. On five of the coin boxes.
Q. Were those prints photographed and compared?
A. They were.
Q. I do not want to go into too much more detail, but for the sake of clearness, one would think they were compared with the elimination prints from the people who would be properly taking these coin boxes in and out of the meters?
A. As far as possible.
Q. *Mr Justice Lyell:* They were all, so far as you could, compared with the fingerprints of people who would in the course of duty lawfully handle them?
A. I did not compare them, but they were.
Q. *Mr Vowden:* It is rather like this, is it not, if one is unfortunate to have one's house burgled, and there are prints in the house which are good enough to compare, you have to have the prints of the people in the household so that you can eliminate them?
A. That is correct.

At this distance of time Mr Vowden's recollection does not enable him to say why he embarked on the cross-examination or just why he stopped where he did. He is quite certain that he had no knowledge of any fingerprints and thinks that he was probably 'fishing'. One would have expected him to have brought it out that the prints were not his client's. If he did not want to risk an answer in open court, he could have asked prosecuting counsel privately in the first instance. Mr Vowden thinks that the explanation probably is that he took the witness's answer to mean that the prints did belong to one of the 'lawful handlers'. At any rate the prints were never mentioned again by anybody.

3.60 Although Mr Dannenberg was not called at the trial, the defence knew that he was the owner of the stolen car and that he had not identified Mr Virag as the prospective purchaser and suspected thief. The first part of this information was received by letter from the Director of Public Prosecutions on 10 June in response to a request by Mr Stoller dealing with this and other points. The second part the defence learned when a local solicitor attended on their behalf the identification parade of 14 April; see paragraph 3.35 above. Evidence about this parade, mentioning Mr Dannenberg's name was given by the prosecution at the trial. In the absence of the finger-print evidence, the defence had no reason to attach importance to Mr Dannenberg's failure to identify.

(3) *The Defence*

3.61 Mr Vowden's brief consisted of a short proof from the accused and a copy of Mr Barker's report; there was no proof from Mrs Virag. In the brief Mr Stoller said that the Club witnesses had been summoned to come to court and that he proposed then to take statements from them. They duly came and Mr Stoller took short proofs from them which Mr Vowden saw. The only one who said anything positive was Mr Hatei; he could say nothing one way or the other about the night in question, but he gave the useful information that in March Mr Virag had asked him if he would give him driving lessons.

3.62 The accused was called first and examined, with occasional help from an interpreter. He explained that in 1966 he had obtained a provisional driving licence, taken three lessons and then given it up because he was making no progress. He described his usual day and said that he normally spent week-ends gambling from midnight until 6 a.m. or later. He could not remember positively what he was doing on the night of the Liverpool offences. He remembered, however, the Saturday/Sunday night of 22/23 February. A fight had broken out at about 4 a.m. on the Sunday morning, play had been suspended for about half an hour while the injured man Mr Zauneker was taken to hospital, and then had been resumed. He was shown by Mr Vowden what was believed to be the relevant page in the Club book (see paragraph 3.38 above), and the names of the players he remembered corresponded with the names on that page. The examination in chief finished with the close of the third day of the trial. The jury were interested in the book and at the commencement of the proceedings on the fourth day, 11 July, they asked to see it.

3.63 In cross-examination Mr Mynett did not suggest that there was any possibility that Mr Virag had spent the Saturday/Sunday night gambling and got to Bristol in time to steal 34 coin containers and to be observed at 8 a.m. He attacked the gambling story as 'a wholly false alibi'. He asked the accused to look again at the entries on the page to which he had referred.

Q. So there shall be no mistake, you say that all those people were there on this night as shown in that book?
A. Yes.
Q. That you were there as well?
A. Yes.
Q. And that was the night a fight as you described took place?
A. Yes.
Q. And you say that that page confirms your evidence that you were in that club in the early hours of 23 February do you?
A. Yes, Sir.

This page had at the top of it only the number 23. But the next page immediately opposite bore the full date 'Monday 24/3/69'. From this and from the position of the page in the book counsel was able to demonstrate beyond a doubt that the page on which the accused relied related to Sunday 23 March and not to Sunday 23 February. When the page for 23 February was looked at, Mr Virag's name was not on it; and there was mentioned on it only one of the names which Mr Virag, looking at the page for 23 March, had claimed to confirm his recollec-

tion of events on the night of 22/23 February. Mr Virag could not do better than say that there must be a mistake.

3.64 His attention was then directed to the entries on the page dated 22 February, presumably on the theory, which Mrs Virag later advanced, that it was this page which referred to the Saturday/Sunday night. The list of names on this page contains two out of the five in the similar list on 23 March. Mr Virag's name is not among them, but it is written lower down on the page opposite the figures 40 and 150. At first, Mr Virag said he did not know what the figures meant; then he said that they referred to transactions on the Friday/Saturday night. When Mr Virag was being examined in chief about the day's play on the Friday/Saturday night (21/22 February) he had said that he won £160 or £165, paid back what he had previously borrowed and was left with £35 or £40 cash. He now said that the £150 must represent the money he had won and the £40 the chips he had cashed.

3.65 Mrs Virag gave evidence that she had been present with her husband at the club on the Saturday/Sunday night. She remembered the occasion because it was the first time that she had played there, she did not remember it because of the fight, about which she apparently had no recollection. She knew about the book and indeed had told her husband that the man who kept it had given it to the police to show that Mr Virag was in the club on the night in question. She was referred to the February entries. She pointed out that the fact that Mr Virag's name was not on the page for Sunday, 23 February did not show that he was not there, merely that he had not borrowed money; and anyway, she said, that was not important as it referred to the Sunday/Monday; the relevant page for Saturday/Sunday was 22 February. This was helpful in that Mr Virag's name was entered on that page, but it contradicted his explanation of the figures 40 and 150, since he had explained them by reference to the Friday/Saturday night's play.

3.66 Mr Vowden then had to decide whether he would call any of the other witnesses from the club. He decided not to; with one possible exception, none could say more than that Mr Virag was regularly at the club. The exception was Mr Hatei, who, according to Mr Barker's report, professed to remember the day because one of the players lost £2,000; this would add yet a third memorable incident which neither Mr nor Mrs Virag had mentioned. In his statement given to Mr Stoller at the court, however, Mr Hatei had not said more than that Mr Virag might have been at the club; and in fact, as we know, he had told Sergeant Taylor that he was unable to say whether or not Mr Virag was in the club that night. No doubt some general evidence of this sort from witnesses of good character would have served to give plausibility to Mr Virag's story. Mr Hatei and Mr Altal were of good character and could, moreover, have corroborated to some extent Mr Virag's assertion that he did not drive a car.

3.67 Mr Vowden cannot now recollect what influenced his decision. Such decisions, as he said, often depend on the atmosphere at the time. The picture of Mr Virag that had by now inevitably emerged for the jury's inspection was that of a Hungarian refugee who lived on the social benefits which this country provides and spent his time gambling in a club where a brawl and a broken head were noteworthy as causing half an hour's interruption of play. It was not an attractive picture; and it might be thought that only a piece of clinching evidence

would make it worthwhile offering to prosecuting counsel further opportunities of exploring life at the Trojan Club.

3.68 But the Notice of Alibi had specified seven witnesses and had added, quite unnecessarily, that they would give evidence 'that the Defendant was in their company the whole of the night'. Mr Stoller had no justification for saying this; Mr Barker's report referred only to 'verbal statements which tend to substantiate the claim made by our client'. Mr Mynett knew that the claim in the Notice was unfounded; with Sergeant Taylor's report on the alibi and the statements taken by him, prosecuting counsel was far better equipped than Mr Vowden. When Sergeant Taylor was in the box, Mr Mynett had ascertained from him that a number of those named in the Notice were in the precincts of the court and he had got Mr and Mrs Virag in their evidence to confirm that. Yet the only witness the jury had heard was Mrs Virag, whose name was not in the Notice.

3.69 Mr Vowden wanted to neutralise the silent witnesses and for this purpose put Mr Stoller in the box to say that he had had no opportunity to take proofs from them until after the trial had begun. When Mr Justice Lyell realised that this was to be the sum total of Mr Stoller's evidence and as Mr Mynett was beginning his cross-examination with 'Let us go through the names then, shall we?', the judge intervened to enquire about the relevance of the topic. Mr Vowden said that he anticipated that the prosecution would comment on the fact that witnesses from the club, who had been brought to the court by the defence, had not been called by them; he wished to reply that the first opportunity he had had of considering their evidence was on the day before. The judge ruled the evidence to be inadmissible; and so the cross-examination—perhaps mercifully for the defence if Mr Stoller would otherwise have been given the opportunity to expand upon his efforts—was abandoned.

(4) *Summing up, Verdict and Appeal*

3.70 The closing speeches of counsel occupied the rest of the fourth day and on the fifth day the judge summed up. He dealt first and briefly with the Liverpool offences. As to the Bristol offences, he reminded the jury that in the parades six witnesses had identified the accused, five had identified another and four had made no identification at all. The five and the four might not have been good at remembering faces or the man they saw might not have been Virag; this was speculation; what the jury had to do was to evaluate the evidence of the six, which was positive identification, and say whether they felt sure that they could rely upon it. Mr Vowden had conceded that the parades were as fair a test as possible. He had reminded them of the dangers of identification evidence; the value of such evidence could vary greatly but the jury was entitled to rely on it. The judge then dealt with the evidence of each of the six witnesses, particularly PC SMITH, saying that it was for the jury to decide how impressive that officer was.

3.71 The judge then turned to the defence. He dealt first with the driving licence; the jury might think it a little faint-hearted of Mr Virag to give up after the third lesson, but that was a matter for them. He read to the jury a very full note of Mr Virag's evidence of events at the Club. In his evidence the fight was an important feature of the night, but his wife had not mentioned it and could not

remember anything unusual happening that night; he mentioned also a discrepancy between the two as to whether Mrs Virag was present on the Friday/Saturday night. Mr Virag had been asked a great deal about the entries in the book and had pointed out that it was not his book and that he did not really know what was in it.

> No witness has been called to tell you what that book is except they recognise it as a book kept in the Club. That is the evidence of the Defendant and his wife. There are known to him the people who could have come here, you may think, and tell you in detail about that book. For some reason we do not know, they either are unwilling or are unable to come and explain this. You have heard about a certain number of people who have been named in the Notice of Alibi and have been . . . in the precincts of the court and they have not come. It is for you to say whether that throws light upon the trustworthiness of the Defendant's evidence.

3.72 The jury considered their verdict for 70 minutes. Certain directions had been given to them by the judge about alternative counts. The substance of their verdict was that they found Mr Virag guilty on all the charges except the attempted murder of PC SMITH; on that incident they found him guilty of wounding PC SMITH with intent to resist arrest. The judge sentenced him to terms of imprisonment totalling 10 years. The prisoner said: 'For nothing'. The judge commended PC SMITH for his bravery. Both he and PC **Organ** were subsequently decorated with the British Empire Medal.

3.73 Mr Virag applied for leave to appeal. The application, having been dismissed by the single judge, was considered by the full Court on 17 March 1970. The single judge cannot have considered that Mr Virag had any arguable point to put before the full Court because he did not grant him legal aid. The application was dismissed. In its judgment the Court recited the main facts and said:

> The learned Judge directed the jury with unchallengeable accuracy on the law and facts, he laid proper stress on the question of evidence of identification and on the fact that a number of witnesses called by the prosecution had at identification parades picked out someone other than the applicant. Not surprisingly, the jury convicted him.

The Court then dealt with the grounds put forward by the applicant, which were criticisms of various rulings by the judge, and said that there was nothing in any of them.

VIII. Attempted Murder at Notting Hill

3.74 Before Mr Virag's application was dismissed, a series of events had occurred which, if they could have been evaluated, would have had a material bearing upon it.

3.75 In September 1969 Miss Nicholls, now Mrs Glanville, who then lived at 78 Great North Road, N2, advertised her green Austin 1100 car for sale. A tall man with a foreign accent answered the advertisement, went for a short drive in it, and said that he liked the car and would return. The car was parked outside Miss Nicholls's house and that night it was stolen.

3.76 On 25 November 1969 in the evening, PCs Keane and Clabby of the Metropolitan Police were on plain clothes duty keeping observation on a green Austin 1100 parked outside Pembridge Crescent, W11, and bearing registration plates which they knew to be false, and a licence which had been altered. When they saw a man get into the car and start it, they went over to it. PC Keane opened the front door and showed the man his warrant card. The man got out and said it was his car and that he had papers to prove it. He put his hand in his pocket and then the officers heard a hiss, and a fluid (later identified as aerosol) was shot into their eyes, temporarily blinding them. The man ran off, pursued by PC Clabby and followed by PC Keane whose eyes took longer to clear. Four times in the course of the chase the man turned, pointed a long barrelled pistol at PC Clabby and fired at him at close range, but without hitting him. After the last shot he got ahead, jumped into a parked car headed the way he had come and drove it straight at PC Clabby as he came up. Clabby jumped aside and the car made off at high speed. Subsequent efforts to trace the man were not then successful.

3.77 The green Austin 1100 was identified as the car belonging to Miss Nicholls. Four cartridge cases were found at the scene of the chase, one from a tear gas gun and three .22 (LR) bulleted ammunition of French origin. The enquiry about French ammunition made by the Gloucestershire police nine months before (see paragraph 3.28) had been recorded in the Metropolitan Police Laboratory and was now recollected by Mr McCafferty of that laboratory who asked that the two Gloucestershire cartridge cases should be sent forward. Expert examination showed that all five .22 cartridges had been fired in the same weapon. This of course did not exonerate Mr Virag from the Bristol offences; he might quite likely have passed his gun on to an associate before his arrest. The similarity in the method of stealing the cars must have been noted. But in the Virag case the existence of an associate who stole the car had been allowed for, and it was doubtless concluded that the man who had escaped at Notting Hill was the associate with whom Mr Virag had worked.

3.78 Payen may well have been making a reasonable living out of cash from parking meters, but he must have felt that he could improve upon it. Some time in 1970 or 1971 he started forging £5 bank notes which he did extremely well. He carried on this occupation in his house at 312 Horn Lane, Acton, London, W3. On 27 July 1971 Detective Sergeant Goddard of the Metropolitan Police stationed at Acton decided as a result of information received, to search this house. When they entered the room where Payen was he rushed towards a cabinet which contained his guns; he was restrained and handcuffed; he shouted to the officers (compare paragraph 3.11 above) that he would give them £1,000 each and make them rich men. A search of the house revealed not only the £5 notes and the apparatus of forgery, but also a large number of articles associating him with the Bristol and Notting Hill crimes. These were as follows.

1. A 2.2 Unique long-barrelled pistol. On examination this was found to be the gun that fired the shots in the Bristol and Notting Hill incidents. Payen said that he had bought this gun in April or May 1969; subsequent enquiries established that the gun was stolen from the Hunting Museum of Gienloiret in Paris on 13 October 1966. On that date Payen was living in Paris.

2. Two gas guns.
3. Several sets of number plates including the original plates from the cars of both Mr Dannenberg and Miss Nicholls.
4. Three insurance cover notes relating to the Vitesse HLG 770E in the name of Pollock.
5. A large quantity of coin containers, meter keys and key making equipment.

3.79 These discoveries at once led the police to the conclusion that Payen was the man involved in the Notting Hill incident 20 months before. When Payen was interviewed on the following morning, he denied that offence and refused to go on an identification parade. An hour later PC Keane identified him in his cell. Later on 20 August 1971 after a further refusal to stand on parade, he was identified by PC Clabby.

3.80 On 20 March 1972 Payen was arraigned at the Central Criminal Court on a charge of attempted murder and other charges arising out of the Notting Hill incident. On 29 March he was found guilty of attempted murder by a majority verdict with one dissentient and of the lesser charges by a unanimous verdict. He was sentenced to 18 years' imprisonment for attempted murder and on the other charges to lesser sentences to run concurrently. The judge commended Constables Clabby and Keane for their conspicuous gallantry. Constable Clabby was subsequently decorated with the British Empire Medal. He was also highly commended by the Commissioner of Police.

IX. Effect on the Virag Case

3.81 The relevance to the Virag case of the articles found in Payen's house was of course appreciated and the Bristol police were informed. On 13 August 1971, Payen was interviewed by Detective Inspector Stephens of the Bristol Regional Crime Squad and Detective Sergeant McKay, the officer who had taken part in the investigation two and a half years earlier. Payen accounted for the gun by saying that he had bought it in April or May 1969 from a man who would not give his name and address, and for the number plates by saying that an acquaintance had left them with him to take care of. He said that he did not know Virag by name and he did not recognise his photograph. He denied taking any part in the Bristol incident, the theft from the meters as well as the shooting, but said that he could not tell where he was that day. On 17 August the fingerprints found on the Bristol coin containers were compared with Payen's and found to correspond.

3.82 The evidence summarised above was taken to establish Payen's complicity in the Bristol offences. It proved that he was the man who stole the Vitesse and from the meters. It did not destroy (though in conjunction with other facts which we shall deal with hereafter, it considerably weakened) the theory that Virag was an associate and that it was he who was driving the car and who wounded PC SMITH. Moreover, the police, as has been indicated at paragraph 3.78, had certain sources of information which included information strengthening the conclusion that Payen was the driver.

3.83 On 18 August 1971 Inspector Stephens sent a report to the Chief Constable of Gloucestershire in which he set out all these facts. In his conclusion he

alluded to the hypothesis that Payen and Virag had changed places. He pointed out that Virag had been identified by six witnesses at Bristol and two at Liverpool. He attached pictures of both men, commenting that they were 'in no way similar in appearance and it is therefore difficult to believe that all these witnesses could have been mistaken'. (See page 66.)

3.84 Inspector Stephens' report was forwarded to the Director of Public Prosecutions[1] who sent it on 13 September to the Assistant Under Secretary of State in charge of the Criminal Department at the Home Office as 'raising issues which you may want to consider'. Apart from remarking that the Notice of Alibi was given in respect of six witnesses and that only Mrs Virag was called, he did not add to the material. He introduced the change of driver hypothesis with the comment that it did not necessarily follow from the facts stated that Payen was the man who shot PC SMITH.

X. Procedure in the Home Office

3.85 The Home Secretary can deal with wrong or doubtful convictions either by recommending the grant of a free pardon under the prerogative or by referring the case under the Criminal Appeal Act 1968, section 17, to the Court of Appeal for review. In 1971 the Department in the Home Office which handled these, as well as many other, criminal matters was the Criminal Department. This Department was headed by an Assistant Under Secretary of State who had under him 4 Assistant Secretaries; one of them was in charge of the Division that dealt with petitions and representations relating to convictions. The ranks below Assistant Secretary are those of Senior Principal and Principal, and beneath that come the Executive Officers who are in 3 grades headed by the Senior and followed by the Higher. Ordinarily in the Home Office consideration of a case or matter starts at the lowest rank where simple cases can be disposed of while more difficult ones work their way up. Cases challenging a conviction however begin at one grade higher than usual; they are considered in the first instance by a Higher Executive Officer. Such cases amount to several thousand a year, many of them being hopeless. In 1971 eight Higher Executive Officers were employed full-time in this work.

3.86 There was no pressure from Mr Virag for reconsideration of his case nor from anyone on his behalf. He was serving his sentence without complaint. In his communications with the prison authorities he protested his innocence upon suitable occasions, but he made no fuss about it. It will have been remarked that after he had been sentenced at the trial he made only a brief comment.

3.87 The Director's letter of 11 September 1971 was in accordance with the usual practice considered first by a Higher Executive Officer. The letter was not of an alarming nature; it did not suggest that the Director or the police officers concerned entertained doubts about the conviction. The Higher Executive Officer considered the strength of the identification evidence and the weakness of the alibi and the lack of any representations by Virag himself. He concluded that the new evidence threw no serious doubt on Virag's guilt and that there was not even a case for further enquiry.

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[1] We use the term to denote the office and not necessarily Sir Norman Skelhorn personally.

3.88 It then became his duty to submit the case with his appraisal of it to his Senior Executive Officer. There was a delay of about a year and a half before this was done. The Division was during this period suffering from staff shortages and officers in it were under exceptionally severe pressures. The delay is attributed by the Home Office authorities to a serious misjudgment of the importance of this task in comparison with others rather than to negligence. It was not therefore until March 1973 that the case was sent for consideration by the appropriate Senior Executive Officer. A month later this officer retired from the service without having considered it and the case was passed to another Senior Executive Officer. He made some enquiries about the descriptions of Virag and Payen, but did not differ from the conclusion reached by his subordinate.

3.89 The case then continued on its upward way until in July 1973 it reached a Senior Principal. The Senior Principal did not consider that the new evidence established Mr Virag's innocence but did consider that further enquiries were needed. On 29 August the Assistant Secretary wrote to the Chief Constables of Gloucestershire and Liverpool a long letter which shows that the case had been carefully studied. He asked that a further enquiry should be made and suggested the appointment for this purpose of a senior officer not involved in the case.

3.90 The two Chief Constables jointly and immediately requested the Chief Constable of the Thames Valley police to nominate an independent investigating officer; and he immediately instructed Detective Superintendent Allen of his force to investigate and report. Mr Allen, who was assisted by Detective Sergeant Sheridan, also of the Thames Valley police, began his enquiry on 3 September 1973 and delivered his report on 21 January 1974.

XI. Superintendent Allen's Report

3.91 Mr Allen's enquiry was a difficult one since he was investigating matters five years old. It was nevertheless extremely thorough. In addition to obtaining much new material which would not have been relevant at the trial, e.g. about the nature and extent of the police enquiry before the arrest of Mr Virag, he questioned most of the witnesses in the case and took fresh statements from 30 persons. Particular points are as follows:

1. He satisfied himself that the identification parades were conducted 'in a very rigid and correct manner' by Chief Inspector Witts. Mr Witts observed that, although the others were as near the age, height and description of Mr Virag as was possible, he thought that Mr Virag possibly stood out as the only foreigner on the parade.
2. He satisfied himself that no one had suggested Mr Virag as a likely suspect to Sergeants McKay and Taylor. He recorded in his Report that he 'was impressed with these officers' work in a difficult investigation and also by their frankness during my enquiries in which they gave me every possible assistance'.
3. He made further enquiries into the alibi but did not elicit anything more precise than before, i.e. that Mr Virag was remembered as a regular visitor at the Trojan Club, but that there was no special recollection of the night in question.

4. Extensive enquiries disclosed no evidence of any association between Payen and Virag.
5. Mr Allen questioned the sources referred to in paragraph 3.78 far more thoroughly than had hitherto been done and obtained statements which he considered to be reliable.

3.92 On 25 October 1973 Mr Allen interviewed Mr Virag in Parkhurst Prison. He discussed the case thoroughly with him including the alibi, but obtained no further information, except indirectly. Mr Virag accepted a Tom Thumb cigar but left a third of it unsmoked; he refused a second saying that he did not like them. He expressed his innocence in a quiet and composed manner: Mr Allen felt that he was telling the truth.

3.93 On 6 November Mr Allen interviewed Payen in Albany Prison. He questioned him closely about the incidents of the Bristol shooting and put it to him definitely that he was responsible for it: he put the fingerprints to him for the first time. But he obtained no direct admissions, Payen becoming excited and evasive when the questions got too close. There was no more satisfactory explanation of evidence such as the gun and the number plates than Payen had given before. Payen said that he had last had a hat in 1954 and that he smoked small cigars and tobacco and cigarettes at times.

3.94 Mrs Virag had nothing new to say except that she had been contacted by a man who had been in prison with Payen and who had told her that Payen had said that Virag was not responsible for the Bristol shooting. Payen in his interview with Mr Allen had agreed that he was in prison with a friend of Virag, but would not say what he discussed with him. The man was not traced until 26 November when Mr Allen had an interview with him. He had been in prison with Mr Virag in 1971 and had discussed his case with him, Virag asserting his innocence. Subsequently in 1972 he was in the same prison as Payen. He confirmed that Payen had told him that Virag was innocent, but said that Payen did not admit that he had done the shooting himself.

3.95 Mr Allen's conclusion was that it was Payen and not Virag who committed the Bristol offences. As to the Liverpool offences, Mr Allen found no evidence to incriminate Payen, apart from such inferences as could be drawn from the resemblances between these offences and those at Bristol and Notting Hill, and apart from the slight clue of the shopping bag (see paragraph 3.23 above). He traced the sales assistant whose handwriting was on the bag but she was unable to recognise either Payen or Virag from their photographs.

3.96 Mr Allen's Report reached the Home Office on 29 January 1974 where it was studied for some time. In accordance with custom the views of the Lord Chief Justice were requested. On 5 April 1974 the Home Secretary decided to recommend the grant of a free pardon and on the same day Mr Virag was released from prison. On 28 December 1974 he was paid *ex gratia* £17,500 in compensation for his wrongful conviction and its consequences.

3.97 Mr Allen's report was studied by the Director of Public Prosecutions who decided in March 1974 that the public interest did not require that any further proceedings should be taken against Payen. The jury's verdict in the Virag case meant that they were not satisfied that the person who shot PC SMITH in-

tended to murder him. Consequently, it would not have been appropriate to charge Payen with more than wounding with intent to cause grievous bodily harm; if he were convicted of this, it was felt that a court would have been unlikely to impose any substantial sentence in addition to the term of 18 years which Payen was already serving. There would also be obvious complications in the presentation of the case against him.

XII. Commentary

(1) *Mr Virag's Innocence*

3.98 Our study of the facts leads us to agree entirely with the conclusion of Superintendent Allen and so also with the Home Secretary's decision to pardon Mr Virag. In many cases in which alleged error in identification has been reviewed, it will be found that often the existence of error is left in doubt, the accused being given the benefit of it, and that only in comparatively few is the innocence of the accused definitely established. The case of Virag belongs in our opinion to the few; and so that it may take its rightful place in the case history on this subject we must say why we think so.

3.99 Payen has not admitted guilt in relation to either the Liverpool or the Bristol offences and he has not been tried and found guilty. Nevertheless the articles found in his house establish beyond doubt that he must have been concerned in the Bristol crimes. The insurance cover notes in the name of Pollock and the number plates, coupled with his failure to offer any credible explanation of his possession of them, establish that he must have stolen the Triumph Vitesse. The possession of coin containers and the evidence of the fingerprints likewise establish that he must have been the meter thief in Bristol. The possession of the gun used to wound PC SMITH makes him, again in the absence of any explanation, the most likely person to have fired the shot. So if there were two or more persons concerned in the crime, Payen was most certainly one of them. But why should it be supposed that there was more than one? If Payen had been arrested and his flat searched in February 1969, no one would have produced the hypothesis of an associate with the change of driver complication, Mr Payen would have been charged as the sole perpetrator, Hungarians would not have been thought of and Mr Virag's life would never have been disturbed.

3.100 Nevertheless, it may be said, Mr Virag *was* identified and that so long as the identification stands, his innocence is not proved. Lapse of time is one of several reasons which makes it impracticable for Mr Virag now to be 'dis-identified'. Nor is it necessary for that to be done to establish his innocence. The construction of a defence is not the only, nor even the primary, way of establishing innocence; it can equally well be done by the destruction of the case for the prosecution. There was not a shred of evidence against Mr Virag except the identification so that if the proof of the identification is found to be flawed, the case against him is destroyed. The heart of the proof lies in the identification parades which the subsequent discoveries have shown to be worthless.

3.101 Let us test it in this way. Suppose that before the parades were held the evidence incriminating Payen had been discovered; we have suggested that in that event Mr Virag would never have been thought of. But suppose that there had been discovered also some piece of evidence associating Mr Virag with the

crime, that this imaginary evidence led to the suspicion that Mr Virag might have been the driver of the car and that the police wished to test the matter by an identification parade of the sort that was in fact held. It would manifestly have been absurd and unjust to have staged such a parade for Virag alone. Whatever the strength of the imaginary evidence that Virag was the driver, it would have to compete with the facts that Payen was the thief both of the car and the meters found in it, that he was the owner of the gun, the smoker of Tom Thumb cigars, admittedly a car driver which Virag could not be shown to be, and, as the thief, the person who had already been seen to get into the car 20 minutes before and drive away; he answered equally well to the description of the driver. Parades that did not offer the witnesses a choice between Payen and Virag would have been quite worthless as evidence of identification; and this is what, now that the circumstances are known, they turn out to be. This applies to the parade for the Liverpool offence as well as to those for the Bristol offence.

3.102 Mr Virag should therefore be retrospectively acquitted on the simple ground that, now that all the facts are known, it is apparent that there was no properly tested evidence of identification, and that there never was any evidence of any other sort. There can be added to this two other factors. The first is the unpublicised information which in paragraph 3.82 we have referred to as strengthening the conclusion that Payen was the driver and the man who shot Police Constable SMITH. The second factor consists of the group of impressions that can be formed when the true question can be posed, that question being whether the driver was Payen or Virag. The behaviour of the man in the chase accords much more with the character of Payen than with that of Virag. Mr Virag's demeanour gave the two very experienced police officers who interviewed him, Superintendent Allen and Chief Superintendent Trull, the impression that he was speaking the truth: Payen refused to give any explanation. There is also the similarity in the method of the three incidents at Liverpool, Bristol and Notting Hill, in the last of which Mr Virag could not have been involved.

(2) *Causes of the Miscarriage of Justice*

3.103 The main cause of the wrongful conviction and subsequent punishment of Mr Virag was unquestionably the fact that he was wrongly identified. There were, however, three contributing factors. First, if the evidence of the fingerprints had been made available to the defence, it might have thrown sufficient doubt on the identification to secure an acquittal. Secondly, if the alibi had been less unconvincingly presented, it might have made some contribution to the real doubt whose existence would depend basically on the fingerprints, and would at any rate not have added to the strength of the prosecution's case. The third factor was the misjudgment in the Home Office which delayed the release of Mr Virag for two years. Before trying to ascertain what is to be learnt from the errors in identification, we shall examine these three factors and consider their effect.

(3) *The Fingerprints*

3.104 Inspector Hills gave three reasons for discounting the evidence of the fingerprints; see paragraph 3.52 above. The weakest of them is the second. There is no evidence that at the time the police thought that the elimination of the 'lawful handlers' of the five coin boxes was incomplete, and there is no

reason why it should have been. The police took the prints of all current and past employees in the collector's department. There is nothing to suggest a likelihood of any outsider handling the containers and the prints are not of the sort that would have resulted from casual handling—in four cases the *same* left thumb in a place where it would naturally be put by someone removing the container from the meter. We think that if the prosecution had advanced this hypothesis at the time, it would not have got very far.

3.105 So we think that at the trial the prosecution would have had to have advanced the hypothesis of an associate. Indeed if the full facts of the case had been brought out at the trial, including the theft of the Triumph Vitesse, the hypothesis would probably have been needed anyway, whether or not the 'lawful handlers' were eliminated. The Bristol crimes occurred twenty days after the theft of the car, and it is highly unlikely that the two things were disconnected. So if the prosecution could not establish that Virag stole the car, they would have to presume an associate. Mr Dannenberg's failure to identify Mr Virag made it difficult for the prosecution to assert that he was the thief; the only evidence that he was would have been inference from the alleged fact that he was the driver of the stolen car and if that allegation was true, there would, of course, be no need for the inference. Moreover, the allegation that Virag was alone concerned in the stealing of the car, would have involved his activity on at least two other occasions—the meeting with Mr Dannenberg on 2 February and the theft of the car on the following night—for which he might conceivably have had an alibi. It would also have produced the information that the criminal smoked Tom Thumb cigars; see paragraph 3.7. Evidence that Mr Virag was not known by any of his associates either to drive a car or to smoke Tom Thumb cigars would have made a useful small addition to the defence.

3.106 The hypothesis of an associate would therefore have had to have been made even without the fingerprint evidence. Nevertheless, in the shaping of the hypothesis, the fingerprint evidence was of primary importance. Not only was it the chief ground for the presumption of an associate, but it also narrowed the presumption by requiring that the associate should be on the spot in Bristol and actually handling the meters. Thus it led inevitably to the change of driver hypothesis. This latter hypothesis is open to serious criticism. The defence could have made the following points:—

(i) There was no evidence at all of any association. The notion of the police that Hungarian meter thieves act in pairs or in teams was a good pointer in a search for suspects, but when it came to the witness box, it would be hard to substantiate within the limits of the rules of evidence. Moreover, the police had not found any evidence to show either that the criminal, whoever he was, worked with associates or that Mr Virag had any likely associate. The defence would have argued that the associate was simply a person who had to be invented to explain the fingerprints.

(ii) There was at best only a minimal time within which to effect a change of driver. Timings cannot be stated with perfect accuracy. Mr **Cunliffe** first saw the thief in Small Street near to the Assize Court; he walked to his car which was parked in Corn Street near to the Grand Hotel. He put his first sight of the thief at 8 a.m. and the police officers say it was 8.20 when they first saw the Vitesse and gave chase. On this evidence

there would be something less than 20 minutes between the time the thief drove off and the time the car was next seen. The distance between the two spots is 10.2 miles and a check made under similar conditions, i.e. early Sunday morning, showed that the journey at maximum speed would take 17 minutes. The opinion of Superintendent Allen, who made the test, is that, if the thief drove with the utmost recklessness, two minutes could have been knocked off; as against that, it cannot be assumed that the driver had sufficient knowledge of Bristol to find the route without hesitation.

(iii) What would be the object of the change of driver? It is difficult to think of any reason that makes sense. If the car had not been identified, both men could make a quick getaway; if it had been identified by **Cunliffe**, the fact that it had a different driver would not help much when there were coin boxes in the boot and guns in the front. It seems much more likely that the thief panicked; his action in threatening **Cunliffe** with a gun is evidence of that. The action of a panic-stricken man would be to drive straight off, leaving his associate to look after himself.

(iv) 34 coin boxes were found in the car and only 34 meters had been tampered with. So the associate and Mr Virag were not working separate beats. The only role that could be found for Mr Virag was that of keeping watch in the vicinity. When **Cunliffe** ran off he ran up Lord Street and turned left at Wine Street. He could hear the car behind him and ducked down behind some benches. He then saw the car being driven down Wine Street towards Union Street and down Newgate, and then lost it to sight. This does not suggest that the driver was trying to pick up a man in the vicinity. The associate could no doubt have returned to the vicinity, if time permitted, but it is hardly likely that he could have expected to find Mr Virag still hanging about.

We conclude that if the full story had been before the Court a submission by the defence to the jury that there was reasonable doubt about Mr Virag's guilt could certainly not have been dismissed as a light one; and we think that, in spite of the strength of the identification evidence, there would have been a reasonable possibility of an acquittal.

3.107 We have not overlooked the fact that if a search had been made in the National Fingerprint Collection, the result, as we now know, would have been to incriminate Payen and produce at once the situation that was not produced until $2\frac{1}{2}$ years later in August, 1971. But it is obvious that limited resources have to be used sparingly and the restriction to very serious crimes can be criticised only by someone who is prepared to provide more money and more men. It may be said that if what is at stake is a sentence of 10 years upon a possibly innocent man, that is very serious. But whether it is called very serious or not, the fact is that an extension of the rule to include all crimes that might be severely punished would certainly require a considerable increase in the existing resources and it is quite outside our province to consider that. We hope that research currently being done into the matching of fingerprints by computer may soon change the position entirely.

3.108 The defence had no knowledge of the fingerprints except what they obtained casually as recorded in paragraph 3.59. What is there recorded shows

that there was no suppression. But if there was a duty on the prosecution to disclose the fingerprint evidence, it was not in our opinion fulfilled. Whether or not Mr Vowden misunderstood Constable Minnett, the defence was not to blame for overlooking the potentiality of the fingerprint evidence. It is the sort of evidence that requires consideration before it can be effectively used. If it is something that ought to have been considered by the Court—we think that it was—the prosecution should either have brought it out and adapted their case to it or given it to the defence in good time for them to study. A duty of disclosure is not discharged by frankness in cross-examination if the point happens to be raised. We shall consider in chapter 5 what the duty of the prosecution is in these matters. At this stage we concern ourselves only with seeking for the explanation, whether justified or not, of the non-disclosure.

3.109 When seeking for the explanation it is imperative to escape from the influence of the facts now known, that is, the facts whose emergence force us to conclude that all the identifications of Mr Virag must have been mistaken. At the time it seemed almost absurd to suppose that they could be. Among the classic cases of wrong identification, there are few in which the evidence was as strong as in Virag's case. This was not a case of fleeting glimpses or of a single witness on a single occasion. Eight witnesses on six separate occasions identified Mr Virag as the man. The witnesses were varied in type as also were the occasions. Five of the witnesses were police officers trained to identify and all looking at the man with the knowledge that they might well be asked to identify him later. Four of them (paragraphs 3.5 and 3.12) had seen him briefly, but PC SMITH had chased him for half an hour and had been shot by him at close range. The other three were civilians who had seen him and talked to him under ordinary conditions.

3.110 It was true that, compared with the eight witnesses who had identified Mr Virag on parade, there had been nine who had not. Mr Vowden made this point of course but he wisely refrained from inviting any of the non-identifiers to expand upon their doubts. When Superintendent Allen interviewed them in September 1973, most of them were in fact confident that he was the man. Mr **Cunliffe** (paragraph 3.9) said that he would have identified him in the dock without any hesitation: he was then 98% certain, while he was very nervous on the parade and felt that he had not paid enough attention to faces. Mr **Bullock** (paragraph 3.14) identified Mr Virag without any trouble in the magistrates' court and again at the Assize Court. He was very nervous indeed on the parade, he said, and having carried away a memory of a very rosy complexion, was looking for a man that was flushed rather than studying features and was in too much of a hurry. PC **Organ** (paragraph 3.10) also was very nervous on parade; when he saw Mr Virag sitting in the dock he was quite satisfied that he was the man who had fired a gun at him. Mr **Froom** (paragraph 3.18) thought he was the man on the parade but did not make an identification because he was not 100% certain: when he saw Mr Virag in the dock he was 'fairly sure in my own mind' that he was the man. These opinions were all given in response to a neutral inquiry: PC **Organ** probably knew that another man, Payen, was under suspicion, but the other witnesses did not.

3.111 Proof as strong as this appeared to establish the fact that Mr Virag was the driver of the car just as clearly as proof of the fingerprints established that he

was not the only meter thief. These two facts had to be reconciled and since the only way of reconciliation, it seemed, was to presume the existence of an associate, the existence of an associate became a fact as strong as any other. Given this status of fact, the presumption was not tested as it should have been.

3.112 Thus the first of the subsidiary factors which we mentioned in paragraph 3.103 as contributing to the result was not truly independent of the main cause. The neglect of the fingerprint evidence was itself a product of the wrong identification. The same can be said of the third factor. The associate and change of driver hypothesis were so strongly grounded on the impossibility of error in the identification evidence that they survived the discovery of the Payen material and lived on to bedevil the Home Office enquiry. We must say, however, that we do not see how they could have survived more than a cursory inspection. The inspection by the Gloucestershire Constabulary and the Director of Public Prosecutions was no more than that and there was no reason why it should have been. The Director's task was only to decide whether the case raised an issue for the Home Secretary to consider and he decided (see paragraph 3.84) correctly that it did. The initial decision within the Home Office recorded in paragraph 3.87 is a different matter.

(4) *The Misjudgment in the Home Office*

3.113 We have in paragraphs 3.98–102 given our reasons for concluding that Mr Virag was innocent. In reaching this conclusion we have considered nothing that was not open to the Higher Executive Officer who first dealt with the case. So theoretically he ought, in our opinion, to have reached the same conclusion. There is however a great practical difference between an officer studying a case which is one among many and a committee studying it after a pardon has been granted. Making every allowance for that, what we cannot understand is how the officer could have reached the conclusion that there was no need for any further enquiry and so obviously no need for one that the case could be put on the shelf. It is not our business to look for a culprit and we are therefore quite content to accept the view of his superiors that there was no incompetence or neglect. On the other hand we cannot accept the view that the explanation lies simply in an individual error of judgment. The decision was substantially confirmed by the Senior Executive Officer. The decision and the confirmation of it are in themselves so astounding as to suggest the possibility of an error in the principles which are generally applied in the Home Office in such cases; we shall consider this possibility in chapter 6.

(5) *The Alibi*

3.114 There are two ways in which an ill-prepared alibi can cause or contribute to a miscarriage of justice. The first is of course when it would, as in Dougherty's case, if properly presented, have proved innocence. The second is when a true but insufficient case is through lack of preparation made to appear false. An explanation of some sort, even if it is only a failure of memory, is virtually a compulsory answer to identification evidence of any substance. When thereafter a conviction results, it is impossible to say whether it was the strength of the identification evidence or the weakness of the alibi evidence that was the deciding factor. Experienced advocates think that there must be many cases in which a

jury resolves its doubts about identity by its disbelief of the alibi: if he was not the man, why does he lie about where he was?

3.115 If Mr Virag's alibi was in essence true—and there is no reason to suppose otherwise—it seems improbable that conclusive proof of it would have been obtainable. There does not seem to have been any way of clinching the date. We made enquiries at St Mary Abbots Hospital about Mr Zauneker (see paragraph 3.62); while he was known to the hospital as a patient admitted on 26 June 1969, there is no record of any earlier treatment. So there would have been no confirmation from that source of Mr Virag's story. It is conceivable that if the Club Book had been properly explained, it would have yielded some confirmation. But it is noteworthy (see paragraph 3.38) that Mr Barna, who produced the book and who was said to keep it, was one of those who told Sergeant Taylor that he could not say whether or not Mr Virag was at the club on the night in question.

3.116 If the alibi had appeared simply as insufficient, its effect would have been neutral. Inadequate preparation made it appear as false. That is the appearance it shows on the written record and the impression which the trial judge received. In his view it harmed rather than helped Mr Virag's case. The inadequacy in preparation was made up of the failure to obtain proper statements from the witnesses and the failure to study the Club Book. We shall devote a paragraph to each of these.

3.117 There was available to the defence, if the evidence had been sorted out in the office in the ordinary way, a couple of witnesses of good character who could testify that Mr Virag was regularly in the Club at weekends, that he had never been known to drive a car and had in fact recently asked one of them to give him driving lessons. This was probably the best that the defence could have done. To bring half a dozen witnesses to court without knowing what they were going to say or whether or not that they would be called proved to be in this case, as it would in most, injurious. (It proved also to be a serious waste of public money.) In such circumstances any witness whom the defence does not put in the box is inevitably assumed to be adverse to it. It is a course which may have to be taken occasionally with an individual witness who is recalcitrant, but it is obviously one to be avoided. It is hard to understand why the defence could not obtain statements. The prospective witnesses were friends and not enemies; Mrs Virag knew them all. The police experienced no difficulty. Mr Stoller told us, however, that he found Mrs Virag unhelpful and it is fair to say that Superintendent Trull (see paragraph 3.49) found her elusive.

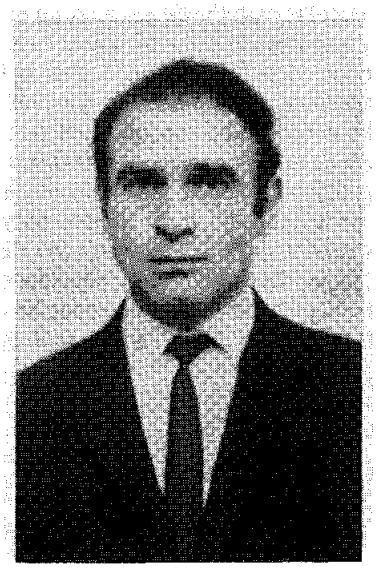
3.118 In the Notice of Alibi (paragraph 3.45) it is alleged that the police intimidated the prospective witnesses. Mr Stoller told us that he got this information from Mr Barker: Mr Barker denied that flatly. The only evidence of anything approaching intimidation that we have comes from the police themselves and consists of the incident recorded in paragraph 3.37, when Sergeant Taylor warned a prospective witness against perjury. If that witness was thereby deterred, it would have done the defence, as we have already remarked, no harm. But what Sergeant Taylor said to one may have been passed on to others and distorted on the way; it is possible that it resulted in making club members unwilling to give statements in writing to the defence. We shall consider this further when we consider the role of the police in relation to alibi evidence.

3.119 We shall consider at the same time whether it is desirable for the police without informing the defence to take possession of documents such as the Club Book, which might assist the alibi. In this particular case the defence could easily have learned of the book's existence—Mrs Virag in fact knew of it and that the police had got it—and could have asked to see it before the trial. But it is a practice that is capable of impairing the presentation of an alibi notwithstanding that, as in this case, the book is shown to the defence at the trial. Such records often need to be studied and it is not fair to an accused or to any witness that he should not have the opportunity of studying them before he goes into the box. Even a fundamentally honest witness, when he is fighting for his liberty, may be tempted to allow his imagination to run freer than it should; and when Mr Virag was unfortunately presented with the wrong page, that is probably what he did. It left the trial judge, and doubtless the jury too, with the impression that he was 'clutching at straws'. This would not have happened if the book had been properly studied.

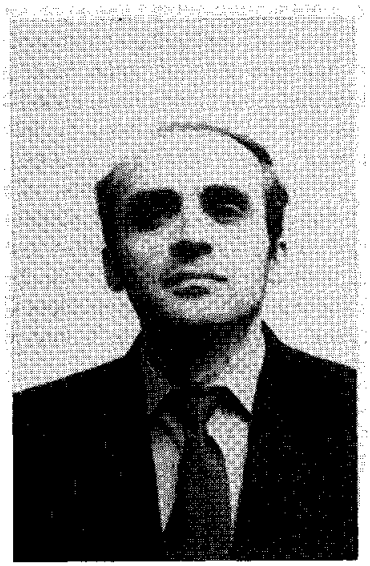
(6) *Conclusion*

3.120 We have to conclude therefore that Virag is not quite a copybook case in which nothing went wrong except the identification. But it comes near to it and, as we have shown, the misidentification was itself a cause of some contributory errors. Moreover, on specific problems, such as the giving of descriptions, the use of photographs, dock identifications and so on, there is much useful material to be obtained which we shall deal with in its appropriate place. In order to give a comprehensive picture of the similarities and differences between the witnesses on these points, we have prepared tables which we print in Appendices D and F.

PHOTOGRAPHS OF VIRAG AND PAYEN



LASZLO VIRAG



GEORGES PAYEN

Note

When making a comparison between the two photographs, it must be remembered that the criminal in the Liverpool and Bristol cases always wore a hat; Mr Virag and all the other participants wore hats on the identity parades. If each photograph is given a notional hat, there seems to us to be a distinct similarity. It would not be enough to confuse a witness who had seen and carefully noted the features of both men (see on this paragraph 3.83 above), but it would in our opinion be enough to account for the fact that, where one alone was present as on a parade, he was easily picked out. In this respect the Virag case is not untypical.

Among the other cases we have studied the nearest we have come to it on the facts is the case of B.[1] B, a man of good character, was charged in January 1959 with having defrauded 3 taxi drivers on separate occasions but by the same method. Each of the drivers identified him without hesitation on a parade. He was unable to produce any independent evidence of alibi, was convicted and fined £5. About a fortnight later he was again charged with a similar offence and again identified on parade without hesitation. In court he produced a convincing alibi and was discharged. In November 1960 another similar offence occurred and the taxi driver identified B in a large number of police photographs; when interviewed by the police, B produced a convincing alibi. A similar incident occurred in February 1961, when B's photograph was again identified and where police enquiries established that he could not have been responsible. In September 1961, the police arrested M who confessed to all the offences. Although M was 10 years older than B, the police considered that there was a remarkable likeness between them. Each of the taxi drivers who had identified B agreed, when they saw M in court, that they had been mistaken.

[1] The details of this case and some of those mentioned elsewhere in the Report and at Appendix G are drawn from Home Office records. In accordance with Home Office rules, such cases are kept anonymous.

CHAPTER 4

EVIDENCE AND PROCEDURE AT THE TRIAL

I. Identification: Meaning and Nature

(1) *Types of Identification*

4.1 The methods by which the law permits the identity of a person to be proved are to be found in any textbook on the law of evidence. For our purpose we distinguish between three categories.

The first is by recognition; its weight depends upon the human ability to memorise a face, even when it cannot be described with any accuracy. If the memory is clear enough, it will enable a positive identification to be made. If it is not so clear, it will permit a witness to do no more than give evidence of resemblance; this we put into a second category. The third category is identification by means of some distinctive feature, such as a tattoo mark or a scar or a limp or exceptional height. We stress the word 'distinctive' because evidence about usual features often forms part of evidence of recognition—colour of eyes, shape of nose, baldness, a beard and so forth. A witness who has observed a distinctive feature in another man can give evidence which will help to identify him, even though he has never seen his face and does not claim to recognise him. Or a witness who has seen the face and does claim to recognise it, may say that in addition to facial recognition he observed a particular mark on the arm. What we mean by 'evidence of feature identification' is evidence that is presented independently of evidence of facial recognition.

There are, of course, other means of identification, for example, by fingerprints, by handwriting, or by voice, by habits or by propensities, as they are called. Two of them arose incidentally in the course of the cases we have been investigating and we say a word about each of them in the following paragraphs.

4.2 The voice is certainly a means of identification, and in one or two unreported cases studied by the Committee the voice was the principal factor. In one the charge, which was one of assault, arose out of an incident when the chief witness was subject to physically humiliating treatment for the purpose of blackmail at the hands of a group of men. The question whether the defendant (who habitually wore dark glasses) was one of the group turned on whether the victim had correctly identified his voice.[1] In the second case, following an armed attack on the cash register of a petrol filling station, one of the raiders, who had worn a mask at the time of the attack, was identified by his voice by one of the station employees 11 days later.[2] In a Scottish case in 1969, which did not depend

[1] *R* v. *Lewis* (CA, 14 March 1972, unreported).
[2] *R* v. *Knight* (CA, 14 March 1969, unreported).

wholly on evidence of identification, the only witness at the scene of the crime could make no visual identification; he had heard the criminals speak but had never seen them clearly. There were other occasions connected with the crime as to which a visual identification was possible, and a parade of persons who resembled the suspect was assembled for this purpose, including a man suspected of being one of the criminals. As well as the usual arrangements for visual identification by other witnesses, it was arranged that each of those on the parade should speak in the hearing of the witness at the scene of the crime words he had heard spoken during the crime. The suspect was the first to be asked to speak, and, when he did so, his voice was identified by the witness as that of the criminal. No one else on the parade was invited to speak.[1] A distinctive way of speaking also played a part in the case of James Hanratty (1962).[2]

4.3 In Virag's case most if not all of the identifying witnesses had as good opportunities for hearing the criminal speak as for seeing his face. On the parade, Mr Virag was not allowed to speak (see Appendix C, paragraph 12), not unreasonably, since the current practice is normally to require all participants to speak if one is allowed to do so, and Mr Virag was the only foreigner on the parade. So we do not know whether his voice might have been mistaken for that of Payen or not.

4.4 It seems likely that positive identification could, in fact, be made only by someone very familiar with the voice heard, or by an expert. It is perhaps significant that in the second example quoted above the witness who had identified the robber by voice at an identification parade held 11 days after the offence (when only a few words had been spoken) said at the trial several months later, after hearing the defendant give evidence for some time, 'I cannot say I recognise the voice now as it is so many months ago when I heard it'. It has also to be remembered that a voice can greatly alter under stress. It is doubtful, therefore, whether the recognition of the voice by a stranger (unless the voice was distinctive, in which case it would rank as feature identification) could ever amount to more than evidence of resemblance; to make it worth anything much more there would have to be a separate voice identification parade, with voices chosen for their resemblance. We understand that in Sweden a procedure of this kind is employed with the aid of recorded tapes (see Appendix L, paragraph 36).

4.5 There is at present no adequate procedure at all for testing the capacity to recognise the voice, and so far as we can ascertain there has been no scientific research into this question. Questions of voice identification arise rarely, but there is no saying when one will, and we recommend that research should proceed as rapidly as possible into the practicability of voice identification parades, with the use of tape recorders or any other appropriate method, which among other things would have to take account of the dangers of disguising the voice and the extent of changes induced by stress.

4.6 The other method of identification that was made use of in a limited way in the Virag case (paragraph 3.6) is by means of the identikit or photofit systems. These do not appear to us at present to amount to much more than a convenient

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[1] *R* v. *Meehan*. See *A Presumption of Innocence* by Ludovic Kennedy (1976).
[2] Report of Mr C Lewis Hawser QC (Cmnd 6021), 1975, paragraph 134 (b).

way of recording a description. But a programme of research has recently been undertaken at the Psychology Department of Aberdeen University under the auspices of the Social Science Research Council and with the approval of the Home Office. Although concerned principally with the efficiency of the photofit system, it may produce some useful information about the factors which influence a person's ability to reconstruct a face which he has seen.[1]

4.7 Returning to paragraph 4.1, there is a sharp distinction to be drawn between evidence in the first category and evidence in the other two. Evidence of recognition, if accepted, *proves* identity; it can be attacked as false or mistaken, but, if the attack fails, it is enough by itself to constitute proof. Evidence in the other two categories, if accepted, does no more than *tend* to prove identity; granted that it is true and reliable, it is rarely, if ever, sufficient by itself. Evidence of resemblance is obviously insufficient. Evidence of a distinctive feature leads at once into an assessment of the possibility of another man with a similar feature being present at the place and time in question; if the feature is not uncommon, the evidence may be worth little; if rare, it may be worth much; if unique, it would be conclusive.

4.8 Evidence of features has not given rise to any problems for us to consider, but a special word must be said about evidence of resemblance. It could be worth little or nothing. Or it could denote the state of mind of a witness who is just not quite sure of recognition. As such it might be a valuable addition to other evidence connecting the accused to the crime. In practice, however, we believe that the question would not be asked in chief of a prosecution witness who could not positively identify. Although we have found no authoritative statement on the point in English law, we think that many judges would disallow such a question if it were put. If they did, it would be in the exercise of their general discretion in favour of the accused. It would certainly be open to the defence to suggest to a witness that the man he saw did not resemble the accused or that he did resemble someone other than the accused. It is not, therefore, that evidence of resemblance is of its nature deemed to be irrelevant or valueless. If a witness, who in chief had positively identified, conceded under cross-examination that he could not say more than that there was a strong resemblance, the modified answer would presumably be admitted for what it was worth.

4.9 We think that the origin of the practice of not asking the witness about resemblance may be found in the desire, since evidence of identification by itself may be conclusive, to protect the accused from the danger that the jury might mistake evidence of resemblance for positive identification; some of our witnesses thought there was a real danger of this. It might be that if juries are warned against treating even positive identification as conclusive, the need for protection would be diminished. We think that there are cases in which the evidence would be clearly relevant and also quite fair. For example, in a case which depended mainly on circumstantial evidence, but in which there were also witnesses to the crime who could not positively identify the man they saw, the jury might

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[1] See the initial study by H Ellis, J Shepherd & G Davies, *An Investigation into the Use of Photo-fit Techniques for Recalling Faces* (British Journal of Psychology, 1975, 66, 29–37).

naturally wish to be told by them whether he resembled in any way the accused.[1] But this little pocket in the law of evidence is not well defined and we think that it is much better that it should be further developed in the practice of the courts than that an attempt should be made at this stage to regulate it by statute. We shall not, therefore, propose any alteration in the law.

4.10 So it is the first category only that is the real subject matter of this Report. It is usually distinguished from other methods of identification by referring to it as 'visual identification'—not perhaps a very accurate description but one that indicates the nature of the evidence tendered, which is evidence of observation. Since the question we have to answer in the Report is whether for the protection of an accused this type of evidence should be specially treated by the law or in practice, our concern with it is limited to the evidence of a witness for the prosecution who deposes that he recognises the accused—or that he did upon some previous occasion, such as an identification parade, recognise the accused—as a person whom he had previously seen at the scene of the crime or in circumstances connecting him with the crime. We think that the expression 'visual identification' is capable of being defined in these terms and hereafter we use it in this restricted sense, and for the sake of brevity we use the phrase 'in the circumstances of the crime' to cover the scene and all connecting circumstances.

4.11 The strength of evidence of visual identification depends upon the power of recognition, that is, of observation and memory combined. It is obvious that the power of recognition will be greater if the witness is already familiar with the person he sees. Familiarity does not, however, do away with the problem entirely. It may mean that the witness's power to memorise a face can hardly be challenged, but his power of observation may be. A man is unlikely to be mistaken about a very familiar face at which he has had a good look, but he might be mistaken about it on a fleeting glimpse. We have considered whether we should endeavour to exclude this type of case from the definition. We have decided against it, partly because, as we have just said, the problem is not entirely removed, and partly because of the difficulty of distinguishing familiarity from the case of the person who claims to know another because he has seen him before. We have found a number of cases in which a witness who had seen the accused before was mistaken about him. In at least one case it is doubtful whether the police officer who claimed to know the accused by sight had in fact seen him before.

> A witness to a smash and grab raid identified one of the offenders as a man known to him by his nickname for about five years, and claimed to have confirmed this recognition when he got a half view of the man's face in the course

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[1] We do not think that it would be difficult to find cases in which evidence of resemblance has been left to a jury without judicial disapproval. In the case of *R* v. *Todd* (CA, 20 May 1974, unreported) in which the prosecution relied mainly on circumstantial evidence, the judgment in the Court of Appeal said that 'there was only one not very positive identification by one witness, Mrs Howard'. In an earlier passage in the judgment the Court referred to 'the tentative evidence of Mrs Howard that he resembled one of the men very much, modified by her saying that she could not be sure that it was not a different man'.
In *R* v. *Lake* (CA, 15 November 1974, unreported) the Court of Appeal referred to a witness who had attended an identification parade 'and picked out the appellant as being a man of similar build to the man he had chased, but he could not say positively that it was the man'.

of the chase that followed. The accused was acquitted at a re-trial when further alibi evidence was called. (Case of W, 1964.)[1]

A garage attendant who was the victim of an assault said that just before the attack, he thought he saw X whom he knew well by sight, standing at a nearby bus shelter. He subsequently positively identified X as his assailant, saying 'When he came towards me I recognised him as X himself . . . whilst I was being attacked I saw the face of the person attacking me. I recognised that face. It was Mr X.' X was granted a Free Pardon when another was found reliably to have confessed to the offence. (Case of X, 1969.)

A police witness to a daylight burglary claimed to recognise one of the participants two days later as a man known to him for some years by name and sight. It subsequently transpired that the witness had known the accused only by sight. He was granted a Free Pardon when another was found reliably to have confessed to the offence. (Case of Y, 1962.)

One of the officers who stopped a lorry which contained stolen butter said that as the lorry approached he had recognised the accused as the driver, but subsequent inquiries revealed that he had not seen the man he identified before the time of the offence. The conviction was quashed when further evidence substantiated the accused's alibi. (Case of Z, 1949.)

(2) *Modern Research*

4.12 One of our earliest tasks was to enquire whether recent studies in forensic and general psychology and sociology threw any light on the power of recognition which would help us to determine whether in the law of evidence it should be given some special treatment. Psychological studies of the processes of memory and recall underline the need to approach evidence of eye-witness identification with great caution. A person's observation of any episode is itself an interpretative process involving the interaction of the sensory data presented by the episode in question and the observer's own bodies of knowledge, attitude and expectations about the world, including those preoccupations which are uppermost in his mind at the moment. The process of subsequent recall involves a similar interaction between the observer's knowledge of the episode and the demands of his present circumstances. A number of experiments during the last 75 years have demonstrated the extent to which these factors combine to distort a witness's ability to recall the details and significance of an incident to which he has been exposed, and the general inadequacy of the average man's powers of memory. Two such sets of experiments have recently been given some publicity—one in the *Sunday Times* on 19 May 1974 and another in a television programme 'The Evidence of Your Eyes', prepared under the direction of Professor Laurie Taylor of York University, and broadcast originally on 19 February 1974.[2] The

[1] See the note on page 66. The letter symbols in this paragraph continue the series used in Appendix G, Table II.

[2] The earlier experiments in Germany and the U.S.A. are surveyed in D S Greer's article, *Anything but the Truth? The Reliability of Testimony in Criminal Trials* (British Journal of Criminology, 1971, 11, 131). The *Sunday Times* article summarised an experiment carried out in the United States which was fully reported by J Marshall, *Law & Psychology in Conflict* (1966). Similar experiments in Sweden are reported in A Trankell, *Reliability of Evidence: Methods for Analysing and Assessing Witness Statements* (1972).

message of all of these experiments is that the power of the average witness to recall accurately is very limited.

4.13 Most of this research has been directed to the question of a witness's powers of observation of events and incidents. Some experiments on the ability to recall faces suggest that it is at least as limited as the ability to recall incidents.[1] Special factors, such as the likeness of the observed offender to someone known to the witness or the emotional significance of a certain cast of features for the observer may constitute an additional difficulty in the recall of faces. Thus both Dr Broadbent and Professor Hunter have expressed the view that the perceptual process is so ordered that there is a distinct bias towards identifying an unknown person as someone we know. The television programme referred to above was mainly concerned with an incident watched by 35 witnesses and with testing their ability to recall its details. But later in the programme the audience was treated as the witnesses in an identification parade in which one of the four men who had taken part in the incident was put up for identification; 15 out of 35 witnesses failed to identify him. In another television programme which has come to the Committee's notice, the Hampshire police staged a test on the Isle of Wight ferry in which passengers boarding the ferry were shown photographs of a man, said to be on board and wanted by the police, and asked to look out for him. Not one of those questioned at disembarkation had spotted the man, although he was on board and several film shots showed him during the crossing in close proximity to those questioned.[2]

The opposite risk, of witnesses making a 'false positive' claim to identify, was suggested by an experiment reproduced on Granada Television's programme 'World in Action', broadcast on 24 November 1975, in which 31% of the volunteers wrongly identified a man in a mock identification parade as someone they had casually seen three days previously in a waiting room.[3] The reality of the risk cannot be disputed, but we doubt whether any precise conclusion can be drawn from these data without a fuller analysis of the differences between the experimental situation and the circumstances of an actual offence.

4.14 Some researchers have sought to test the credibility of different types of witness. Marshall, for example, used law students, police trainees and a low income group from a settlement house, most of whom were on poor relief.[4] But not much of this research has been directed specially to identification,[5] and no research into the capacity of witnesses to recall details of an incident or into the general ability of individuals to memorise and recall faces has so far yielded conclusions which could be used to assess the credibility of witnesses who appear

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[1] E.g. K R Laughery, J F Alexander and A B Lane, *Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position and Type of Photograph* (Journal of Applied Psychology, 1971, 55, 477–483).

[2] The programme, 'Take it From Us', was made by Southern Independent Television in conjunction with the Hampshire Constabulary and first shown on 8 August 1967. We are indebted to Mr M Zander for making a copy of this film available to us.

[3] The full analysis of this experiment, which was conducted by the Tavistock Institute of Human Relations was not available in time for consideration by the Committee. The data in Appendices B, D and G (Table II) drawn from actual parades, as well as the cases mentioned at paragraph 4.30, illustrate the same risk.

[4] *Op. cit.*, p. 42.

[5] Reference may be made to T H Howells, *A Study of Ability to Recognise Faces* (Journal of Abnormal and Social Psychology, 1938, 33, 124–127).

before the courts. On the other hand in some particulars research seems to have provided valuable support for what is widely accepted on the basis of common intuition. Thus experiments have shown that people of one racial group have more difficulty in recognising members of another group than members of their own.[1] This is something which has been judicially noted; see the cases of *R* v. *Lewis*[2] and *R* v. *John*.[3] It is something that is easily conveyed to a jury in the thought that all Chinamen look alike.

It has also been suggested that witnesses may recall the features of a suspect more accurately under hypnosis. Dr Haward told us of an instance in which he had been able to elicit a 1,000 word description from a key witness who had consented to be hypnotised, which would otherwise have been inaccessible. But while we understand that hypnosis has been occasionally used in different parts of the world to assist witnesses to recall details of incidents, we do not know of any systematic investigation into its use to improve a person's ability to describe someone he has seen at the scene of a crime.

4.15 A number of proposals have been made for further research to explore the psychological aspects of our subject. In particular it has been represented to us that a gap exists between academic research into the powers of the human mind and the practical requirements of courts of law, and the stage seems not yet to have been reached at which the conclusions of psychological research are sufficiently widely accepted or tailored to the needs of the judicial process to become the basis for procedural change. In view of this we recommend that the possibility should be explored of undertaking research directed to establishing ways in which the insights of psychology could be brought to bear on the conduct of identification parades and the practice of the courts in all matters relating to evidence of identification. We envisage that such research would require the participation not only of qualified psychologists, but of the Home Office, the legal profession and the police.

(3) *Methods of Visual Identification*

4.16 When the witness is unable to name the offender one of the following methods is commonly employed to find or identify a suspect.

(i) The witness sees the offender by chance in the street, or elsewhere. This may happen a day or two after the offence or, on occasion, many months later.

(ii) The witness tours the area immediately after the offence on his own or in the company of the police, to look for the offender. Where there are two witnesses, they may be taken in separate police cars. This is a frequent method in cases of assault or robbery in a public place.

(iii) Where an offender is caught in the act by the police, but escapes, they pursue him and make an immediate arrest. We discuss at paragraph 4.69 below the relationship of such cases of 'hot pursuit' to identification cases proper.

(iv) The witness, accompanied by the police, keeps watch on a public place

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[1] R S Malpass and J Kravitz, *Recognition for Faces of Own and Other Race* (Journal of Personality and Social Psychology, 1969, 13, 330–334).

[2] Note (1), page 67.

[3] *The Times*, 17 May 1975.

where the offender is expected to appear, for example, a crowd leaving a factory gate, or outside a labour exchange. This method is usually employed when the police have no lead to a suspect, but on occasion may be used (for example, where the suspect has refused to attend a parade) to confirm police suspicions of a particular man.

(v) The witness is shown a selection of photographs, including photographs of men who it is thought might have committed the offence, and picks out the photograph of the offender.

(vi) A confrontation is arranged between the witness and the suspect at a police station or elsewhere.

(vii) A witness picks out the suspect at a formal identification parade.

(viii) When a suspect held by the police has refused to attend an identification parade, witnesses may be introduced by the police into a place where the suspect is present with a number of other people.

4.17 It is obvious that in all except the second and third of the situations mentioned above, there is no guarantee that the witness will make an identification soon after the offence has occurred. We have considered whether in a substantial number of cases a witness's memory may be impaired by the lapse of time between the observation of the offence and the subsequent identification of the offender, however it was made. While this must be true in certain instances,[1] such evidence as is available suggests that it is not a significant factor in the great majority of cases. In 36 of the cases furnished by the Home Office (Appendix G), sufficient information is available to determine the interval between the date of the offence and the date on which the first identification was made. The average time lapse for the 36 cases is found to have been 30 days, but if 3 cases in which the time lapse was over 100 days are excluded from the calculation, the average interval for the remaining 33 cases was 9½ days, and in 22 cases a witness identified the offender 7 days or less after the commission of the offence.

(4) *The Need for Safeguards*

4.18 The preceding section refers to police procedure. There are as yet no special procedures in the law which treat evidence of visual identification any differently from any other kind of evidence. It is, however, argued that it is evidence of a special character and liable, unless subject to safeguards, to create a special danger of wrongful conviction. What is the evidence for this view?

4.19 It is not possible to obtain any clear statistical evidence. A survey of cases that went to appeal in 1973–74 (Appendix H, Table IV), shows that the issue of identification played a major part in 29 out of 361 in 1973 and 38 out of 224 in 1974. But it must be noted that these are only two years and that in them the percentages differ so widely as to make the mean of them (11.4%) a somewhat unreliable indicator. Moreover, there are no comparable issues by reference to which a figure of 11.4% can be said to be high or low.

4.20 The opinion of experienced persons that evidence of visual identification has a special weakness is, however, now becoming pronounced. In paragraphs 4.12–14 above we have noted the work of the psychologists. It can be summed

[1] In one case two boys, who had been indecently assaulted, claimed to recognise as the man responsible a man whom they saw 8 months later driving a corporation dustcart in the area. The boys were proved mistaken when another man confessed. (Case of AA, 1972.)

up in the conclusion of Dr D. E. Broadbent, FRS, that certainty in the field of identification is unattainable since the acts of perception and recall have to deal with disconnected rationalisation by the perceiving subject. This conclusion is reinforced by the opinions of experienced lawyers who have studied the subject from the time of the Beck case onwards.[1] The report in that case said, 'evidence as to identity based on personal impressions, however *bona fide*, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe insufficient basis for the verdict of a jury.'[2]

4.21 The CLRC in its Eleventh Report, paragraph 196, said:—'We regard mistaken identification as by far the greatest cause of actual or possible wrong convictions.' There has been a number of judicial dicta to the like effect. Many English judges, although they have not gone so far as the Supreme Court of the Republic of Ireland, which has laid it down that in all cases where the verdict depends substantially on the correctness of an identification the jury must be specially warned, have noted that identification cases are always difficult and a cause for anxiety. In October 1974 Lord Justice Scarman in the Court of Appeal spoke of 'the vexed question of how the court should deal with identification evidence', and added later:—'We all know there is no branch of human perception more fallible than identifying a person'.[3] The Lord Chief Justice in an address to the Magistrates' Association in October 1974 referred to it as 'perhaps the most serious chink in our armour'.[4] Sir Norman Skelhorn, the Director of Public Prosecutions, in his evidence to us called it 'the Achilles heel of British justice'. We have at paragraph 1.24 above quoted Lord Gardiner.

4.22 Another argument for special treatment is that there is a particular class of the community, namely persons with police records, which is especially vulnerable to the peril of misidentification. When there is brought to the police a complaint against an unknown person, inevitably they initiate an enquiry, as they did in the Dougherty and Virag cases, by looking in their records for the sort of person who is associated with the type of crime committed. This may lead to identification by photograph which, for the reasons noted in Dougherty's case (paragraphs 2.25–26) puts the accused at a further disadvantage. On the other hand, as far as the person of good character is concerned, not only is his photograph not to be found in police records, but if tried, he can freely put his character in evidence and it is highly improbable that uncorroborated evidence of identification would upon any serious charge prevail against him, if he could offer any plausible, albeit uncorroborated, account of some other activity at the time.

4.23 It is to be noted also that the public is peculiarly disturbed by cases of mistaken identity which usually receive exceptional publicity. The reason we think may well be because in such cases the miscarriage of justice is clear-cut. In other types of wrongful conviction it often happens that the accused, though found eventually to be innocent, has behaved rashly or recklessly, played with

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[1] *Adolf Beck* was twice (in 1896 and 1904) convicted of frauds perpetrated on a number of women, being wrongly identified as the confidence trickster concerned by 11 of the women on the first occasion and 4 on the second. He was granted a Free Pardon when the true culprit was discovered shortly after Beck's second trial.

[2] Cd 2315, page vii.

[3] In *R* v. *Dunne* (CA, 4 October 1974, unreported).

[4] *The Times*, 11 October 1974.

fire or in other ways contributed to his predicament. In cases of misidentification a man who is blameless in every way has suffered an injustice.

4.24 There may be some who think that evidence of identification calls for no special treatment, that there is ineluctably in every type of case a small danger of a miscarriage of justice and that it is no greater in identification cases than in others. This view does not appear in the evidence submitted to us. That evidence is directed to particular reforms advocated or opposed as the case may be. Those who advocate reform naturally consider that special safeguards are necessary; those who oppose reform do so on particular grounds and we have not received any general expression of opinion to the effect that identification evidence is not in any need of special treatment.

4.25 Our own view is that identification ought to be specially regarded by the law simply because it is evidence of a special character in that its reliability is exceptionally difficult to assess. It is impervious to the usual tests. The two ways of testing a witness are by the nature of his story—is it probable and coherent? —and by his demeanour—does he appear to be honest and reliable? It is well-known to legal practitioners as well as to forensic psychologists that eye-witnesses of an event can differ widely about the details of it. But normally when the court has to reach a conclusion about an incident or event, it does not have to make a finding on each detail; it is enough if out of the evidence as a whole there can be extracted as much of the story as it is necessary to know in order to determine the point at issue. But in identification evidence there is no story; the issue rests upon a single piece of observation. The state of the light, the point of observation and the distance from the object are useful if they can show that the witness must be using his imagination; but otherwise where there is a credible and confident assertion, they are of little use in evaluating it. Demeanour in general is quite useless. The capacity to memorise a face differs enormously from one man to another, but there is no way of finding out in the witness box how much of it the witness has got; no-one keeps a record of his successes and failures to submit to scrutiny. If a man thinks he is a good memoriser and in fact is not, that fact will not show itself in his demeanour. Witnesses who are themselves convinced of the truth of their identification and who are able to impart to a jury their own sense of conviction, have not infrequently been found to have been mistaken. A single mistake may be fatal, since in identification cases where there is no corroboration the verdict has to rest on a single point: the risk of error in observation or in comprehension is not spread as it is when a conclusion rests upon a number of observations.

4.26 In these circumstances we have received three proposals for the reform of the law of evidence, each designed as a safeguard against too ready an acceptance of evidence of visual identification. They are

That a jury should be directed as a matter of law not to convict without corroboration.

That a jury should be specially warned of the danger of convicting without corroboration.

That the identification of an accused while he is in the dock should be inadmissible unless by a witness who has previously identified him under controlled conditions, such as an identification parade.

Before dealing with these proposals individually we wish to make some observations about corroboration generally.

II. Corroboration: History and Argument

4.27 The latest and most authoritative treatment of the subject of corroboration in the criminal law is to be found in the Eleventh Report of the CLRC, paragraphs 174 to 208; paragraphs 196 to 203 deal specifically with the corroboration of evidence of identification. The Report accepts the classic definition of corroboration as 'independent testimony which affects the accused by connecting or tending to connect him with the crime'. It points out that in the criminal law the requirement of corroboration arises in two different ways. It is imposed by statute in certain named categories of case and then it is absolute. But it has also been imposed indirectly by the judiciary; it then takes the form of a warning to the jury that it is in general dangerous to convict without corroboration coupled with a direction to the jury that they may nevertheless convict if they are satisfied that they can safely do so in the particular case.

4.28 The usefulness of this type of direction has been criticised. The Report says[1]: 'Looked at from the point of view of the defence, it is said that the direction is absurd in that the judge having warned the jury that it is dangerous to convict, may go on to say that they may nevertheless convict. It is true that the direction, looked at carefully, implies that it is in general dangerous to convict on evidence of the kind in question but that in the particular case there may be no danger; but the distinction is a subtle one'. This type of direction has also been affected by a change in the law. The direction is based on the principle that the jury is the final judge of whether or not the general danger applies in the particular case. Since 1966 the jury has no longer been the final judge. The Criminal Appeal Act 1968, section 2, now requires the Court of Appeal to allow an appeal if they think that under all the circumstances of the case the verdict was 'unsafe or unsatisfactory'.

4.29 The requirement of 'independent testimony' necessitates the calling of a second independent witness, but his evidence may afford either direct or indirect corroboration. If direct, he will testify to his observation of the same facts as the first witness has observed; if indirect, he will testify to some evidential fact, from which the guilt of the accused may be inferred, i.e. circumstantial evidence. In Scotland the requirement of corroboration in all criminal cases has always been a matter of course. The basic requirement is that the offence be brought home to the accused by evidence from at least two sources. Crucial facts must always be proved by corroborative evidence, that is, by the direct evidence of two witnesses, or two or more evidential facts spoken to by separate witnesses from which the crucial fact may be inferred, or a combination of the direct evidence of one witness and one or more evidential facts spoken to by other witnesses which support it.

4.30 In a number of the leading cases of mis-identification there has been corroboration in the shape of direct testimony from a second witness. In Beck's case 15 women, whom it was alleged that he had defrauded, independently

[1] Cmnd 4991, paragraph 181.

identified him. In Slater's case there were over a dozen (but there was no proper identification parade) and in Warner's case there were 17.[1]

4.31 This suggests that the testimony of a second eye-witness does not offer much additional protection. Such a suggestion is strongly reinforced by the two cases of Dougherty and Virag. Even where police officers work in pairs or more, they make independent identifications on the parade. But there seems to be a tendency for them, when there is a mistake, to make the same mistake. The tendency is not confined to policemen; it exists whenever two witnesses are involved in the same incident, as in the case of Dougherty. An entirely separate identification by a second eye-witness on a different occasion would obviously be much stronger.

4.32 The early presentations of the argument for corroboration appear to contemplate a second eye-witness as acceptable. In the submissions presented to us the distinction is drawn by some but not by others. The 4 bodies who advocate the introduction of the requirement are *Justice*, the Law Society, the British Legal Association and the National Council for Civil Liberties. The last 3 put no restrictions on the type of evidence. *Justice* recommends that the corroborative evidence should be 'of a different kind'; 'the evidence of one witness to identity should not corroborate that of another'.

4.33 We have endeavoured to obtain some notion of the likely effect of an introduction of a requirement of corroboration. Of course, in a very substantial number of identification cases there is, in fact, corroboration. It is impossible to ascertain how many or to do more than make an intelligent guess as to what percentage of cases in which the prosecution has succeeded in the past would in future, under a requirement of corroboration, fail. We invited experienced witnesses to make an estimate, but naturally enough few responded; the estimates of those who did varied from infinitesimal to 25%. The available statistical evidence is slender, but some impression may be gained from the analysis of cases heard in the Court of Appeal during 1973–74, the results of which are given in Appendix H. Table VI of that Appendix covers 67 appeals in which identification was the principal issue. In 17 of these, i.e. 25%, the prosecution depended on one witness only. In a further 11 there was corroboration by a second eye-witness but not by other evidence. Thus in 28 (42% of the whole) there was no corroboration in the *Justice* sense, i.e. 'of another kind'. In the 28 cases the appeal was allowed in 17 and dismissed in 11. Thus, if there had been in force a requirement of corroboration 'of another kind', 17 appellants would have been relieved of the necessity to take their case to the Court of Appeal, since they would have escaped conviction in the first place, and 11 appellants whom, under the present law, the Court of Appeal deemed guilty would have

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[1] *Oscar Slater* was in 1909 wrongly convicted of murder largely on the evidence of a maid-servant and a messenger girl who identified him as the man whom they had seen emerging from the house after the murder. Twelve others identified him as the man who had earlier been seen keeping watch on the premises. His conviction was quashed only after he had served 19 years in prison.

Charles Warner, accused of murder in 1912, had been identified by no less than 17 witnesses as the mysterious stranger who had been seen in the murdered woman's company or loitering near her house. Before his trial he was able to establish an irrefutable alibi which caused the charges to be dropped.

(For *Beck*, see note on page 75 above.)

had no case to answer at the trial. The latter group form 31% of those identification cases in which at present a conviction is upheld in the Court of Appeal. So far as figures for two years are of value, these give some idea of the measure of the change. The table attached to Appendix B deals *inter alia* with prosecutions consequential upon identification parades in 1973. It will be seen that there were 347 prosecutions in which there was no corroboration in the *Justice* sense. These form 36% of all the prosecutions reported in Table I (951) and this figure is broadly comparable with the proportion of cases for which no evidence of another kind was found in the Court of Appeal cases (Table VI). The cases in Table I would include, of course, summary cases and also cases which may have ended with a plea of guilty, whereas the figures in Table VI relate only to indictable offences in which the issue of identification was obviously fought hard and taken to appeal. The convictions reported in Table I where the prosecution rested on evidence of visual identification alone (258) form 33% of all the convictions reported in that Table (783).

4.34 The argument for imposing a requirement of corroboration is brief but cogent. Such a requirement, absolute or conditional, is the obvious remedy when the prosecution is relying upon a class of evidence that may have inherent defects. It is the well-tried remedy which both Parliament and the judiciary have regularly applied in the past. So once the need or desirability for some sort of a safeguard is granted, corroboration is the natural one to employ and the onus passes to its critics to make out a case against it.

4.35 It may be useful here to state briefly the purposes for which the requirement has been used in the past. In so doing we are indebted to a valuable note prepared for us by Mr R. N. Gooderson. The 3 most common cases in which corroboration is required are the evidence of accomplices, the evidence of complainants in cases of sexual offences and the evidence of children. None of these cases would exclude a second eye-witness to the crime as corroborative, but in these types of crime the presence of another eye-witness is sufficiently unusual to mean that the corroboration tendered is likely to consist of some circumstantial evidence. The rule relating to accomplices originated from the judges and was firmly settled by 1788. It is noteworthy that it was never more than a warning and that there is in 1788 a reported case[1] in which the jury convicted even though the accomplice was not corroborated. The reason for the rule was given by Chief Baron Abinger as being that the evidence of the accomplice might be coloured by some promise of immunity. In the other 2 cases the rule is comparatively modern, being created in the early days of the Court of Criminal Appeal. In both categories the rule was a more general application of specific requirements of corroboration laid down by statute. Thus a statute of 1834[2] required corroboration in affiliation cases, i.e. of an allegation by a woman that a particular man was the father of her child; and a statute of 1885[3] had provided for corroboration in a number of sexual offences, such as procuring for prostitution. It is difficult to disentangle the rule relating to children from that relating to sexual offences, since, as the CLRC Report observes, 'very young children are seldom required to give evidence except in sexual cases'.[4] At com-

[1] *R v. Atwood & Robbins* (1788), 1 Leach 464.
[2] 4 and 5 W.IV c. 76 s. 72.
[3] Criminal Law Amendment Act 1885 (48 and 49 Vict. c. 69).
[4] Cmnd 4991, paragraph 208.

mon law unsworn statements were not admissible so that children could not give evidence at all unless they were old enough to understand the nature of an oath. The same statute of 1885 permitted children to give unsworn evidence in certain sexual cases, but required corroboration of it. It was natural, therefore, for juries thereafter to be told to look for corroboration even when the evidence was sworn.

4.36 The first argument against the requirement—the first, that is, to follow naturally from what we have just said—is that the belief in its value has been declining. Some of the great text book writers have always criticised it on the ground of its rigidity. The CLRC in its Eleventh Report recommended the abolition of the rule in the case of evidence by accomplices and by children. They recommended its retention in sexual cases primarily on the ground of the hidden danger, the danger being 'that the complainant may have made a false accusation owing to sexual neurosis, jealousy, fantasy, spite or a refusal to admit that she consented to an act of which she is now ashamed'.[1] This reason might be thought applicable to identification evidence where there is also hidden danger in that a mistaken witness can speak with such certainty as to carry conviction. The CLRC, however, was not in favour of imposing the requirement in such cases. Opinion on the Committee was divided on both points and both views expressed majority opinion only; there is of course a difference between retaining a rule which has been expounded and developed and imposing a similar rule in a new field.

4.37 The CLRC noted the difficulties that have occurred in deciding what does and what does not amount to corroboration and that such difficulties have led to technical distinctions.[2] There have been decisions about what kinds of evidence may be corroboration as well as about whether particular pieces of evidence are sufficiently weighty to be corroborative in a particular case. The judge has to direct the jury whether a piece of evidence is capable of being corroboration; this is a question of law and the Court of Appeal may disagree with him. 'These difficulties' the Committee observed, 'have caused many mistaken rulings at trials and consequent quashings of convictions.'

4.38 Apart from doubt about the value in any type of case of the corroboration requirement there are three principal arguments against its application to identification cases. The first argument concentrates upon the type of case in which the opportunity for observation is prolonged, e.g. of a kidnapper who operates without a mask, or is based on a number of occasions, for example, several interviews with a confidence trickster. There are also more usual cases in which, for example, the perpetrator of a rape may spend some time with the victim. This is a more controversial area since in some circumstances there have been some notable mis-identifications, e.g. the Barn murder case, where the murderer was in the witness's presence for about half an hour.[3] But even in

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[1] Cmnd 4991, paragraph 186.

[2] Ibid, paragraph 180.

[3] The case concerned the murder of Mrs Patience, wife of the owner of the Barn Restaurant, in 1972. Beverley Patience, daughter of the murdered woman, had spent half an hour with her father and mother in the presence of the gunman as he sought to force the handover of keys to a safe in the Patiences' living room. Miss Patience (who was herself severely wounded in the shooting) subsequently identified George Ince as the man. At Ince's first trial the jury could not

such cases and admitting the danger, it is argued that it would be wrong to absolutely exclude uncorroborated evidence. It seems reasonable to infer from such statistics as there are, supplemented by experienced opinion, that the effect of the blanket exclusion would be that acquittals of the guilty would considerably outnumber convictions of the innocent. Our principles of justice aim to avoid even a single wrong conviction but there is, it is argued, a limit to the price which can be paid for the ideal; the possibility of the occasional mistake cannot be eliminated. Some of the most detestable crimes are committed in circumstances which permit of identification evidence only and some of our witnesses feel strongly that the public would not tolerate a situation in which a jury was not allowed in such cases even to consider apparently clear and strong evidence of identification. It would indeed be difficult to justify a rule which excluded prolonged or repeated observation and admitted a fleeting glimpse plus a trifle from a forensic laboratory. No form of words has been suggested to us, nor have we ourselves been able to think of one, which could admit frequent or prolonged observation on the one hand or exclude circumstantial trifles on the other.

4.39 The argument we have just considered is concerned with grave crimes. Another argument is addressed to the effect of a corroboration requirement in petty crimes. An enormous number of petty convictions depend upon uncorroborated identification by a single police officer. At present the identification is rarely challenged. But here again, a balance has to be struck and a requirement of corroboration would be a charter of immunity to a huge number of petty offenders who could not be prosecuted at all since, if they were, they would simply submit that there was no case to answer. An example commonly taken is that of the motoring offence. *Justice*, in its evidence to us, submitted that the motor car in question and its owner could be identified, and that through him the identity of the driver at the time could be ascertained. However, the recent introduction of owner liability for certain fixed penalty offences is an indication of the practical difficulties that stand in the way of tracing offending drivers. And there are many other road traffic offences to which the owner liability provisions do not apply. Apart from road traffic offences, there are many cases of street offences, or of disorderly behaviour in public places where a requirement for corroboration would give rise to the difficulty we have mentioned.

4.40 If there were a corroboration requirement in this type of case, the police, in order to secure corroboration, would in many cases be driven to making arrests and to taking the offender to a police station where his photograph and fingerprints could be taken. A suggestion was made to the Thomson Committee (but not made the subject of a recommendation by them) that the police should be equipped with cameras or fingerprinting kit so as to verify the identity of offenders at the time of the incident.[1] We think that measures of this sort would impose an unreasonable burden on the police and would be deeply resented by members of the public willing to admit their identity.

4.41 The third argument applies to every sort of crime, whether grave or petty. Assuming that an apparently reliable identification is not by itself enough for a conviction, should it not be enough to require the accused, if he denies that

agree, and at a second trial he was acquitted. Subsequently, another man was convicted of the murder.

[1] Cmnd 6218, paragraph 46.06.

he was the person involved, to account for his movements? If it is, this would put an end to a submission of no case at the end of the prosecution's evidence. The right to make such a submission is of the essence of the corroboration requirement. In this respect the requirement differs from a warning that corroboration is to be looked for.

4.42 The effect of these arguments is to cause the majority of those who gave us their views on this point to conclude that it would not be possible to frame a fair and workable rule which imposed the requirement of corroboration. This is the view of the Home Office, the Senate of the Inns of Court and the Bar (Criminal Bar Association), of both bodies who speak for the magistrates and of the four bodies who speak for the police. The Lord Chief Justice has publicly expressed the view that a rule whereby the conviction is totally barred in the absence of corroborative evidence would not be acceptable.[1] The difficulties are also sufficient to cause two out of the four bodies supporting the rule (see paragraph 4.32 above) to qualify their support. The National Council for Civil Liberties, while contending for a general rule that 'corroboration of identification evidence by independent evidence should be compulsory', accept that there are cases, which they do not exemplify, 'where it is impossible for such evidence to be provided'; in such cases they say that there should be a duty on the judge to issue a strong warning to the jury coupled with the discretion to withdraw a case which he feels unsafe. *Justice* proposes that if the strict rule is unacceptable, 'it could be modified to allow the prosecution to make a submission to the judge in the absence of the jury that the evidence of identification was of such a reliable nature that it should be allowed to go to the jury with a direction that it did not require corroboration'.

III. Warning in Identification Cases: History and Argument

4.43 There were in the early part of this century several spectacular cases of miscarriage of justice due to wrong identification, the most important relevant literature for which is cited in Appendix K. They did not, however, lead to the conclusion that there was any inherent weakness in identification evidence as such. Consequently this class of evidence has not been considered for inclusion among those which required a warning (paragraph 4.35 above). Evidence of identification was not considered as different from evidence of any other kind of observation; as in all cases the jury must be satisfied of the honesty and reliability of the witness and when there was no doubt about that, the evidence of an eye-witness of the actual crime was thought to be the best obtainable. The first record we have of any suggestion being made to an English court that there should be a general warning is in the case of *R* v. *Williams*.[2]

4.44 The courts in the Republic of Ireland reacted differently. The leading case is the decision of the Supreme Court in *The People* v. *Casey* given in December 1962.[3] The accused was charged with indecent assault on two 5 year old boys; he denied that he was the man involved. The assault was committed in a field at a time when it was beginning to get dark. Apart from the unsworn evidence

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[1] In his address to the Magistrates' Association referred to at paragraph 4.21 above.
[2] [1956] Crim LR 833.
[3] *The People (at the Suit of the Attorney General)* v. *Dominic Casey (No. 2)*, [1963] IR 33.

of the children, the identification evidence consisted of that of a boy aged 11 who saw the accused in the field at some distance away and of a man who gave chase to him and had a momentary view of his face in the light of the headlamps of his motor car. The accused was convicted and the Court of Criminal Appeal refused leave to appeal. The summing-up was not criticised except in the one respect that it contained no warning. In rejecting this as a ground of appeal, the court was apparently following one of its previous decisions in which it was said: 'There is no authority for the proposition advanced, which, if correct, would amount to pronouncing that every instance of identification of an accused person by sight must be accompanied by warnings of danger'. They certified, however, that their decision involved a point of law of exceptional public importance and as such it was reviewed in the Supreme Court.

4.45 The Supreme Court expressed the opinion that juries as a whole might not be fully aware of the dangers involved in visual identification and continued:

> We consider juries in cases where the correctness of an identification is challenged should be directed on the following lines, namely, that if their verdict as to the guilt of the prisoner is to depend wholly or substantially on the correctness of such identification, they should bear in mind that there have been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications on a parade or otherwise, which identifications were subsequently proved to be erroneous; and accordingly that they should be specially cautious before accepting such evidence of identification as correct; but that if after careful examination of such evidence in the light of all the circumstances, and with due regard to all the other evidence of the case, they feel satisfied beyond reasonable doubt of the correctness of the identification they are at liberty to act upon it.

4.46 The Court said that the direction was not meant to be a stereotyped formula, that it might require to be explained or amplified in a particular case and that it contained only a minimum warning. On the ground that no general warning had been given the court ordered a new trial. At this trial, the trial judge gave a free rendering of the warning formulated by the Supreme Court. The accused was again convicted and did not appeal.

4.47 The decision in *The People* v. *Casey* was considered by the House of Lords in 1970 in the case of *Arthurs* v. *Attorney-General for Northern Ireland.*[1] There was a state of riot in Dungannon caused by a clash between opposing factions and the accused was charged with causing malicious damage. He was identified by a police constable, who he admitted knew him very well, and was convicted. The Court of Criminal Appeal for Northern Ireland dismissed the appeal but certified the following point of law as one of general public importance: 'When, in the course of a trial on indictment, a conviction appears to depend wholly or substantially on the visual identification of the accused by one or more than one witness, is it in law the duty of the presiding judge to give a general warning to the jury of the dangers of acting on such evidence?' On this point the case

[1] (1970), 55 Cr App R 161.
Legal developments which followed on the judgment in *Casey*'s case in Ireland, Australia and Canada are summarised in Appendix L, paragraphs 11–15.

went to the House of Lords, whose judgment is contained in the speech of Lord Morris of Borth-y-Gest with which the other members present concurred.

4.48 The argument in favour of the 'new rule', as it was called, was based on *The People* v. *Casey* which Lord Morris noted though he did not otherwise comment on the judgment. The appeal was dismissed on the ground that the police constable knew the accused well. Lord Morris referred to cases 'where the situation is very different' and said that he 'would leave for future consideration the question whether there is need to lay down any rule for the guidance of courts in such cases'. He indicated that in his view there was not, saying that 'It would be undesirable to seek to lay down the rule of law that a warning in some specific form or in some partly defined terms must be given' and that he preferred 'the discerning guidance which the features of a particular case may require'.

4.49 An allusion was made to this situation by Lord Chancellor Hailsham in the House of Lords in a case in 1973. The subject matter of this case was the corroboration of children's evidence. In the course of his speech Lord Hailsham referred to other classes of case in which a warning was given and continued: 'I do not regard these categories as closed . . . the Supreme Court of the Republic of Ireland has apparently decided that at least in some cases of disputed identity a similar warning is necessary. The question may still be open here'.[1]

4.50 The question was in fact raised later in the year in the Court of Appeal in the case of *R* v. *Long*[2] where the accused disputed that he was one of a band of robbers. The evidence against him was not solely identification; there were some other items which we shall consider later (see paragraph 4.68 below), but which were insufficient to amount to corroboration in law. The trial judge in his summing up reminded the jury of counsel's argument that in a matter of identification it was easy to make mistakes, but did not himself give any warning. The Court of Appeal said that 'the law does not require a judge in this kind of case to give a specific warning about the dangers of convicting on visual identification still less does it require him to use any particular forms of words'. The appeal was dismissed, but the court certified the following point of law as being of general public importance: 'When a conviction depends wholly or substantially upon the visual identification of the accused by one or more witnesses to whom he had previously been unknown and who only had an opportunity limited in time to identify the alleged criminal at or about the time of the commission of the crime, is it in law the duty of the judge to warn the jury in terms of the dangers of convicting upon such evidence?' The House of Lords refused leave to appeal which means that it considered that the question could only be answered in the negative.

4.51 It is to be noted that the Court of Appeal said nothing to indicate that such a warning would be generally undesirable; on the contrary it said that a warning on the lines given in *The People* v. *Casey* might often be appropriate. But it said that it must be left to the judge to decide 'what kind of direction is best suited for the case which he is trying'. So it must now be regarded as settled law that there is not in England any rule which requires the judge to give

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[1] *Director of Public Prosecutions* v. *Kilbourne*, [1973] AC 729, at 740.
[2] (1973), 57 Cr App R 871.

any warning to the jury about identification evidence or indeed to deal with it in any particular way. We have not found any case in which the Court of Appeal has quashed a conviction solely on the ground that a warning would have been appropriate and was not given. In one case, *R.* v. *Long and Shepherd*[1] the Court, in quashing the conviction, said that there should have been a warning but that in any event the conviction was unsafe and unsatisfactory.

4.52 In its Eleventh Report presented in June 1972 the CLRC, as we have already stated, recommend that there should be a statutory requirement for a warning to the jury. The terms proposed were as follows:

> Without prejudice to the general duty of the court at a trial on indictment to direct the jury on any matter on which it appears to the court appropriate to do so, where at such a trial the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the court shall warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications, but in doing so shall not be required to use any particular form of words.

The committee had at one time considered making an exception in cases where the person identified was well known to the witness, but in the end decided against it, feeling that even when the two persons were known to each other there might still be a danger of mistaken identification.
No action has been taken upon the committee's recommendation.

IV. Corroboration and Warning: Conclusions

(1) *The Rule Proposed*

4.53 We accept the arguments given in paragraphs 4.36–42 above against the imposition of a statutory requirement of corroboration. On the other hand we accept in principle the need for some form of warning or special direction. The introduction of this could take one of two simple forms. It could be done by adding another category to those (such as the warning about accomplices) in which corroboration is presented to the jury as to be desired for the sake of safety. Or we could simply endorse the recommendation of the CLRC in the preceding paragraph. On three grounds we are not fully content with either of these courses. The first two grounds relate to the common law warning and the third to the CLRC recommendation.

The first ground is that, for the reasons given in paragraph 4.28 above, a warning in the traditional form is now apt to cause confusion. It may be only a matter of words, but it seems the right occasion, if there is going to be reform, to get rid of any possibility of confusion.

The second ground is that the law about corroboration has become overloaded with technicalities. The House of Lords has now made it plain[2] that corroboration is not a term of legal art. But we think that there is still force in the considerations mentioned in paragraph 4.37 above, and that they apply as strongly to cases in which corroboration is to be looked for as to those in which it is an absolute requirement. It is significant that the CLRC framed its recommendation so as to avoid any reference to corroboration.

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[1] CA, 23 July 1973, unreported.
[2] *Director of Public Prosecutions* v. *Hester*, [1973] AC 296.

Our third ground comes from a wish to sponsor a more elaborate warning than that contemplated by the CLRC. We have reached the conclusion which we shall develop in the following paragraphs that a bare warning is not enough. The Dougherty case is a striking illustration of this. The late Mr Bryan Anns QC, who represented Mr Dougherty in the second appeal and who gave us his views on the case, wrote: 'The lesson to be learnt seems to me that the form of words used by the Judge was *in fact* valueless in making the jury understand the difficulties and problems connected with identification.'[1] We agree.

4.54 Our study of the two cases we have investigated and of the other relevant cases, and of the mass of material that is now available on this subject has led us to the conclusion that the possibility of mistake in visual identification is sufficiently high to mean that as a rule evidence of visual identification standing by itself should not be allowed to raise the level of probability of guilt up to the standard of reasonable certainty that is required by the criminal law. We consider that a jury should be so directed.

4.55 We think that the most effective way of diminishing the danger of a wrong conviction in identification cases is by means of a careful and detailed summing-up containing at the heart of it such a direction. We have read a great number of charges to the jury in identification cases. Though they do very frequently caution a jury about identification, they usually do so rather cursorily. We think that a cause of miscarriage of justice may well be that a jury, although cautioned, is not told just what they are being cautioned against or what they should do to avoid the perils they are being warned about. We think that in charging a jury at the end of a case in which the prosecution has relied wholly or mainly on evidence of visual identification, the judge should, after reviewing the evidence of visual identification:

(a) state the general rule and instruct the jury as to the reason for it;
(b) direct the jury's attention to any exceptional circumstances which might make the rule inapplicable in the particular case, and
(c) point to such other evidence, if any, as might be sufficient to put the case for the prosecution beyond reasonable doubt.

If the judge finds himself unable to point to any exceptional circumstance or to any substantial additional evidence, he would have to direct the jury that it would be unsafe and unsatisfactory for them to convict. The use of the word 'substantial' in this connexion is well known to the law. It is intended to exclude the trivial or minimal.[2] Paragraph 3.58 of this Report provides an example. If the prosecution in the Virag case had tendered the laboratory evidence it might have been additional but it would not have been substantial. The inclusion of the word ensures that the judge is not obliged to leave any sort of additional evidence to the jury. Beyond that, what is substantial must be a question for the jury. But since they would be directed on the footing that visual identification by itself leaves of necessity a reasonable doubt, it would be natural that they should ask themselves whether the additional evidence is sufficiently weighty to dispel the doubt.

In the next four sections, we deal in greater detail with the general review of the evidence and with the three specific points we have mentioned above.

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[1] This is not meant as criticism of the judge but of the law.
[2] See for example *R.* v. *Lloyd*, [1967] 1 QB 175.

(2) *Review of the Evidence*

4.56 It is of course platitudinous to say that the trial judge should review the evidence. But we have found in some of the earlier summings-up in identification cases that the judge does not do much more than recite the evidence of the identifying witnesses, saying that it is for the jury to determine whether they are to be believed or not, without any discussion of the factors for or against their reliability. In the Virag case the judge spoke rather dismissively of the fact that 9 out of 15 witnesses had failed to identify Mr Virag.

4.57 We have, however, observed an increasing tendency to review the evidence more elaborately. In 1973 in *R.* v. *Long*,[1] Lawton LJ said:

> It is likely that the summing-up would not be fair if it failed to point out the circumstances in which such identification was made and the weaknesses in it. Reference to the circumstances will usually require the judge to deal with such important matters as the length of time the witness had for seeing who was doing what is alleged, the position he was in, his distance from the accused and the quality of the light. If the witnesses made mistakes on the identification parade or at any other relevant time, fairness probably requires that the jury should be reminded of them.

4.58 The Lord Chief Justice in his address to the Magistrates' Association, mentioned at paragraph 4.21 above, pointed out that, while a judge would naturally draw the attention of the jury to any 'laboratory evidence' that is corroborative, such as hairs or the like left by the criminal or smears of paint or the like found on the criminal, he does not so naturally draw the attention of the jury to the absence of such evidence where some might be expected to be found. The Lord Chief Justice spoke with approval of a compilation by Mr Keith Devlin of the points to which magistrates should pay attention in identification cases, which was repeated in the evidence of the Magistrates' Association to us.

4.59 We think it might be serviceable if we summarised what would appear from our studies to be the chief points which in a usual case a summing-up might be expected to cover. They are taken with some adaptations from Mr Devlin's list.

(i) *The witness himself.* Whether he appeared in examination and cross-examination as careful and conscientious or as obstinate or as irresponsible. Whether the experience, e.g. in the case of violent crime, might have affected his identification.

(ii) *Conditions at the scene.* Lighting and points of view. How much of the criminal seen. Period or periods of observation.

(iii) *Lapse of time*, when it occurs (see paragraph 4.17), between the observation and the subsequent identification.

(iv) *Description.* What does a comparison show? The judge and jury should bear in mind that the ability to identify correctly and the ability to describe correctly are distinct; see paragraph 5.8.

(v) *Identification parade.* Any criticisms of the conditions. Did any witnesses make no identification or pick out someone other than the suspect?

(vi) *Identified person.* Easy to recognise or nondescript?

(vii) *No circumstantial evidence.* What might have been expected?

[1] (1973), 57 Cr App R 871, at 877–8.

(3) *Reason for the Rule*

4.60 We think it essential (on grounds which we elaborate in paragraph 4.81 below) that the judge should not merely lay down the rule but should also tell the jury the reasons for it. These have been explored in paragraph 4.25 above. The chief reason, put briefly, is that experience has shown that the chance of an eye-witness making a mistake is high enough to induce a reasonable doubt, bearing in mind that a witness who is mistaken can give evidence as apparently convincing as one who is not. This language is modelled on that of the Irish warning (paragraph 4.45 above). It also draws attention to one additional factor which we think to be very important, namely, the latent danger lying behind the 'apparently convincing' nature of the evidence; the jury is to be warned against doing that which it is normally told to do, that is, to judge of the witness by his demeanour and to consider simply whether the impression he makes on them is one of honesty, accuracy and reliability.

(4) *Exceptional Circumstances*

4.61 When dealing with exceptional circumstances it must be made clear to the jury that they do not, just because they are found to exist, justify a conviction; there still remains a danger of mistake, but the danger is not necessarily so great as to preclude a reasonable certainty. In some circumstances the danger will be considerable and in others almost negligible. It is impossible to compile a complete catalogue of exceptional situations. A judge must be left free, subject of course to appeal, to add to the list as he thinks fit so long as he states clearly what the circumstances are that may warrant a departure from the norm. We set out below by way of illustration some sets of circumstances that might be regarded as exceptional.

4.62 We have considered in paragraph 4.11 above the situation in which the witness is already familiar with the person he claims to have seen. If the witness was a neighbour convincingly recognising under good conditions for observation a man whom for months past he had seen every day, the danger of mistake would be almost negligible. Dispute is likely to arise only in the more doubtful cases of familiarity mentioned in paragraph 4.11. Nevertheless, any credible evidence of familiarity creates an exceptional circumstance.

4.63 Another example of an exceptional situation arises when the accused does not deny his presence as one of a group at the scene of the crime, but denies that it was he who performed the criminal act, e.g. struck the blow. In such a case visual identification is mixed up with ordinary observation of action in proportions that will vary according to the circumstances. Did the witness correctly observe the movement constituting the blow; and, if he did, did he attach it to the right body? If the group is small, its members dissimilar in appearance and the action distinctive, a capacity for memorising a face may play little or no part. If the group is large and its members similar, e.g. a dozen boys of about the same size, visual identification as distinct from ordinary observation may be very important. But, whatever the circumstances, the case will not conform with the usual identification type. There will, for instance, be no alibi evidence to strengthen or weaken the defence.

4.64 When credible evidence of identification has been called by the prosecution, an accused is not compelled to counter it with his own story, but it is highly

unusual for him not to do so. We think that a failure to do so could create an exceptional situation.

4.65 Opportunities for repeated or prolonged observation, such as we considered in paragraph 4.38 above, create another set of exceptional circumstances. But it would certainly be necessary to tell the jury that even under such circumstances mistakes have been made. The judge in Virag's case might have told the jury that an identification by 8 different witnesses on 6 different occasions was out of the ordinary, but it may be also that if the jury had been told they were doing something exceptional in convicting, they might not have done so. The rule cannot be made to mean more than that in the normal case a jury will not convict without additional evidence; and that in an abnormal case the warning will be much strengthened by their knowledge that in convicting they would be doing something unusual.

(5) *Additional Evidence*

4.66 In paragraphs 4.29–32 above, we considered whether or not a second eye-witness should be regarded as corroboration. The danger to be guarded against, however, is not the untruthfulness or unreliability of a single individual (in which case evidence to the same effect from another individual would be strengthening), but the unreliability of eye-witness evidence in general. Therefore, we accept the argument of *Justice* that the additional supporting evidence should be evidence of a different kind, i.e. evidence other than of visual identification.

4.67 What is the difference, it may be asked, between additional evidence and corroboration? In words as ordinarily understood—that is, ignoring the legal definition of corroboration[1]—there is no difference: corroboration is additional evidence and vice versa. The practical difference is created by a change of attitude resulting from the Criminal Appeal Act 1966 (re-enacted in 1968). We have already in paragraph 4.28 above drawn attention to the way in which this Act has affected the judicial warning as to the desirability of corroboration. It affects also the statutory requirement of corroboration. Before 1966 a conviction was rarely upset on appeal unless the judge had misdirected the jury. The verdict of a properly directed jury was virtually conclusive. It was not pertinent for the appellate judges to enquire whether they themselves had any doubt about the rightness of the verdict. Now since the 1966 Act the first question which the Court had to ask itself is whether they think the verdict of the jury to be safe and satisfactory; if they do not, they must allow the appeal. These words have had a revolutionary impact. They mean that an appellate judge and as an inevitable consequence a trial judge also—has to ask himself whether *he* thinks that a verdict of guilty is or would be safe and satisfactory. Under the old law, when the verdict was virtually conclusive, it was much more important than it is now to control the material that was left for the jury's consideration. The old rules about corroboration illustrate this. If the jury was told no more than that they should look for additional evidence, they might treat a trifle as enough and the court would have to accept their conclusion. Therefore, corroboration had to be defined with some exactitude, the definition being a matter of law, and before a piece of evidence was left to the jury, the judge had to be satisfied both that it came within the definition and that it was sufficiently weighty to be at least

[1] Which may not have survived, *Director of Public Prosecutions* v. *Hester*, [1973] AC 296.

capable of being corroborative. Hence the criticisms noted in paragraph 4.37 above. Since 1966 it has no longer been disastrous if the jury makes too much of a small piece of additional evidence. If the Court of Appeal think that the jury have done that, the Court will set aside the verdict as unsafe. Before that stage is reached if the trial judge thinks that there is nothing sufficiently substantial to be capable of raising the level of proof to that of reasonable certainty, he will have withdrawn the case from the jury on the ground that a conviction would be unsafe and unsatisfactory. Thus, if the change in the law has not rendered the old rules of corroboration obsolete, it has certainly made it unnecessary and undesirable that their field of operation should be enlarged. While therefore we are rejecting the suggestion that there should be a requirement of corroboration in the old technical sense, we are at the same time seeking a way of ensuring as far as possible that in a normal case there will not be a conviction unless there is corroboration in a wider sense.

4.68 A useful illustration of the difference between corroboration in the old technical sense and additional evidence can be found in *R* v. *Long* to which we referred in paragraph 4.50 above. In that case the issue was whether the accused had been rightly identified as a man who took part in a robbery. There were three items of additional evidence which the Court of Appeal said expressly[1] did not amount in law to corroboration.

The first was that he left home the morning after the robbery and the police, who apparently suspected him, were unable to find him. This of course might mean little or nothing. Its weight would depend on his reason for leaving home, which he said was to take him family on holiday. Doubtless he was cross-examined on this.

The second item covers his conduct when he heard in some unexplained way of the robbery while he was on holiday and went to the police station with his solicitor. He claimed in conversation with the police to know who had done the robbery and offered to help in finding them. It would be curious if a man who was picked out by mistake on a parade, happened also to be a man who knew a good deal about the robbery.

The third item mentioned in the judgment of the Court of Appeal was that he 'had sought to prove his defence of alibi by calling witnesses whose evidence was not accepted'.[2] This raises a large and important question about the relevance of an alibi to the burden of proof in an identification case: we consider it in the next section.

4.69 It may be noted that the second of the three items above which were treated as some supporting evidence was the accused's conduct: *a fortiori*, a statement made by him can be additional evidence. Indeed the latter has always been regarded as corroboration, being testimony independent of that of the witness to be corroborated. But since in these identification cases it is not usually the honesty of the witness that is suspect, it is not necessary that the additional evidence should come from an independent source. The witness himself can depose to some circumstance which adds to the strength of his identification.

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[1] At page 879.
[2] Ibid.

It is at this sort of point that the cases of exceptional circumstances are likely to merge with those of additional evidence. Take the case of a witness who chases an offender, catches him and taken him to the police station. He might make no claim to recognise the offender, e.g. if the offence had been done in the dark—and then it would not be a case of visual identification at all. Even if he did make the claim, it would not be of great significance beside his evidence that he had never lost sight of the offender. But suppose he did lose sight of him briefly and then picked him up again. And suppose also that he claimed to recognise him from a brief sight of his face at the time of the offence. The question whether the facial recognition or the evidence of pursuit was the more cogent evidence of identification would then depend principally on the length of time that the offender was out of sight. But at the least the latter would give cogent support to evidence of visual identification. It does not matter for this purpose whether the fact of the pursuit is regarded as evidence of an exceptional circumstance or as evidence of an additional supporting factor.

4.70 Another situation in which additional evidence may emanate from the witness himself is when he gives evidence of a distinctive feature in addition to evidence of visual identification. As we said when discussing this type of evidence in paragraph 4.7 above, it may be worth very little, too little to rank by itself as substantial additional evidence. On the other hand, if a witness could say, for example, that in addition to recognising the accused's face he had observed a tattoo mark of an unusual character, it would be cogent confirmation of a visual identification.

4.71 Since neither the judge nor the jury will have to consider the question of evidence additional to the visual identification until the whole of the evidence has been completed, it is possible that additional evidence may be supplied by the defence itself. Evidence for the defence is usually evidence of an alibi. Just as a convincing alibi can destroy the evidence of identification, so the presentation of a fabricated alibi can confirm it. This leads us to consider the whole question of alibi and its relationship to the problems of identification.

(6) *The Alibi*

4.72 It must quite frequently happen that a man who has been identified can offer no alibi except his own statement that he was in fact somewhere else at the time of the offence, backed up perhaps by the testimony of a wife or close relative, or, as it would have been in Virag's case if evidence had been called, by witnesses whose evidence after cross-examination comes down to not much more than that the accused might well have been where he says he was. We may call this a "neutral alibi".

4.73 On the other hand, there is what is sometimes referred to as a fabricated alibi. It is not an ideal word since, if it is taken literally, all alibis that are not true are fabricated. What we mean by it is an alibi which, looked at by itself, a jury rejects as incredible. That is to say, the jury are satisfied that, whatever the accused was doing at the time and whether or not he was doing what the prosecution says he was, he was certainly *not* doing what *he* says he was. It sometimes happens—increasingly so since the defence was required in 1967 to give particulars in advance—that the prosecution is able to demonstrate that, disregarding

altogether the weight of the identification evidence, the alibi is simply a concoction. There are also cases in which an accused's evidence is to the effect that he was not at the scene of the crime, but that he does not remember where he was. This will be tested in cross-examination. If the story appears to be genuine, the alibi will be at best convincing and at worst neutral. But if the prosecution can show that the absence of memory is faked, it would count as fabricated.

4.74 We think that a fabricated alibi should be treated as an additional factor supporting visual identification. A neutral alibi on the other hand should not be treated as an additional factor. Looked at by itself, all that a jury can say about it is that it may or may not be true. The only way of proving it to be false is by accepting the truth of the identification evidence and it is the truth of that evidence which is being tested. Neither disproves the other with the result that the alibi remains doubtful. Consequently, in the case of a neutral alibi, where evidence of visual identification stands by itself and there are no exceptional circumstances, a jury should be told to acquit.

4.75 We referred in paragraph 3.114 above to the importance of the presentation of the alibi. It may be too easily assumed that, because circumstances do not permit the presentation of a convincing alibi supported by independent evidence, it is not worth bothering with. But alibi evidence is the counterpart of identification evidence: the two cannot be handled separately; it is vital for the defence to present an alibi as convincingly as possible even though it is clear that it cannot be better than neutral. It is quite possible that wrong convictions due to mis-identification have been caused not by the jury being over-impressed by the identification evidence, but by their being unfavourably impressed by the alibi.

4.76 As in the case of exceptional circumstances (see paragraph 4.61 above) it will always be necessary to warn a jury that proof of a fabricated alibi does not automatically justify conviction. It justifies a jury in concluding that the accused is a liar, but that conclusion is not the same as a conclusion of guilt. There may be reasons other than guilt that might account for untruthfulness. It is improbable, but not impossible, that there might be other reasons besides guilt of the particular crime alleged to account for a concocted alibi. It is more likely that as in Virag's case (paragraphs 3.115–119) an alibi, which is true in essence, will contain minor inaccuracies or even be decorated by incidental lies. There are characters who, when in fear or under stress, find it difficult to stick to the unvarnished truth. Even a spotless character putting forward an unsupported alibi may be tempted to invent corroborative detail. The accused who are wrongly identified are hardly ever spotless characters; and the tendency to lie themselves out of a tight corner will be given just as free a rein when they are innocent as when they are guilty. The trial judge should warn the jury that a conclusion that the accused has told one or more lies does not lead inevitably to the conclusion that the alibi is fabricated; and that they must satisfy themselves not only that the alibi is fabricated but also that the inference to be drawn from it is that the accused was the man identified.

V. Corroboration and Warning: Reform

4.77 In the preceding section we have set out the change of approach which we have concluded should be made to the problem of identification in the criminal law. It is not so easy to translate it into the formal language of a recommendation.

If the English criminal law was wholly statutory and if it were simply a matter of drafting the appropriate amendments, it would not be too difficult. But criminal law is still basically the common law; in particular, the nature and content of the direction to the jury in relation to the burden of proof and such matters have hitherto been settled by the judges themselves and thus embodied into the common law.

4.78 The judicial introduction of a new principle into the common law is, as we have made clear in paragraphs 4.47–51 above, not now to be looked for. Some may regret that the Appellate Committee of the House of Lords in *R* v. *Long* put a summary end to the possibility of a judge-made change in the law. The Supreme Court of the Irish Republic had made a change, the House itself had twice left the question open and the CLRC had recommended a change. It may be that the Appellate Committee did not rate the question as worth further debate or it may be that they thought that a change in the law, if there was to be one, should be made by Parliament. Whichever the reason, it is clear now that either the law must be left as it is or it must be changed by statute.

4.79 We do not think that the law should be left as it is. The law as it is leaves it to the discretion of the individual judge to give such directions as he thinks appropriate to the circumstances of the case—a warning if he thinks proper and none if he does not. Some judges are disposed to put a higher value than others on visual identification with the result that a man's prospects of acquittal vary unnecessarily according to the views of the presiding judge. This is the first reason for having a rule. The common law, being of the opinion perhaps that, as has been said, the discretion of the judge is the first instrument of tyranny, traditionally extends to the accused the protection of a rule of law.

4.80 The second reason is that which was forcefully expounded by Mr Justice Kingsmill Moore in *The People* v. *Casey*; we set out the passage in paragraph 4.87 below. What he says in effect is that there are three classes of judicial direction:

1. those which are common to all cases, e.g. on the burden of proof and the reasonable doubt;
2. those which are common to a class of case; here he gives the familiar examples and declares that identification cases should be included among them;
3. those which are peculiar to the facts of a particular case.

We adopt this analysis. In the third class the trial judge must have a discretion because no general rule is possible. In the first two classes a general rule is possible, and, because possible, desirable: if this proposition was not true, there would be nothing to be said for having any law at all.

4.81 The next question is whether we should follow the course taken by the CLRC and recommend only a duty to warn without specifying the terms of the warning. We have decided that an imprecise warning would not be good enough. Nor do we think that it would be satisfactory merely to tell the jury the rule; they cannot be expected to apply it full-heartedly unless they are given the reason for it. This is especially necessary in that the danger in identification evidence is hidden. The extent to which a man may deceive himself is well known to psychologists and to experienced criminal lawyers, but it is not yet universally

realised. It may come to be. In this respect it is comparable with the situation which prevailed before it became the practice to warn juries about the danger in sexual offences of accepting the uncorroborated evidence of complainants. Today when sexual matters are frankly discussed and everyone has some general knowledge of the mental processes involved, such a warning may appear unnecessary. But when the practice was started in cases of alleged rape, the ordinary juryman would have been shocked at the idea that a decent woman, looking like his wife or his sister, could make up a story of sexual adventure. Such a thing would be quite outside his experience at a time when judges generally were aware that it was something that could and did happen. We think that this sort of situation now exists in relation to evidence of visual identification. Jurors who have thought a little about the point know of course that an identification *may* be mistaken but do not appreciate the extent to which an apparently convincing witness may be mistaken. Judges from their knowledge of the cases they have handled or read about and perhaps some study of the views of psychologists know that there is a real danger.

4.82 In such a situation merely to say Take Care is not enough. It is like a road sign that tells motorists to drive carefully without mentioning the hazards that lie ahead. It begins, as every summing up in every sort of case does, with the direction to the jury that before they convict they must be sure of guilt; then it tells the jury that on an issue of identification they must take extra care or special care: does this mean, the jury may ask themselves, that they have to be more sure than sure. Then it ends up, as did Judge Gill (see paragraph 2.34 above)—and it is difficult to see how under the present practice it could have ended differently—by saying that the question for the jury is 'whether that identification does convince you to such an extent that you can say, we are sure that this is the man who was in the shop stealing'. Thus, the circle completed, the jury is brought back to the beginning.

4.83 Our recommendation, put into formal language which we hope can be translated into a statute, would run as follows:

(1) What follows applies to any case in which the evidence for the prosecution consists wholly or mainly of evidence of visual identification. Such evidence means the evidence of a witness for the prosecution who deposes that he recognises the accused (or that he did upon some previous occasion, such as an identification parade, recognise the accused) as a person whom he had previously seen in the circumstances of the crime or in circumstances connecting him with the crime.

(2) (a) A judge shall direct the jury that experience has shown that as a general rule the chance of an eye-witness, even when he himself is quite certain, making a mistake about identification is high enough to induce a reasonable doubt, that a witness who is mistaken can give evidence as apparently convincing as one who is not and accordingly that it is not safe to convict upon such evidence unless the circumstances of the identification are exceptional or the identification is supported by substantial evidence of another sort.

(b) A judge who gives such a direction shall indicate to the jury the circumstances, if any, which they might regard as exceptional and the evidence, if any, which they might regard as supporting the identification:

if he is unable to indicate either such circumstances or such evidence, he shall direct the jury to return a verdict of not guilty.

(3) A conviction shall be deemed to be unsafe

(a) if the judge at the trial has omitted to give a direction in the words set out in sub-paragraph (a) above or in words to the like effect, or

(b) if in the opinion of the Court of Appeal the circumstances of the identification were not exceptional and the identification was not sufficiently supported by evidence of another sort.

4.84 The form set out above, while it does not define exceptional circumstances, gives a triple protection against their being framed too easily. The jury, after being warned, must be satisfied that they exist; the trial judge must be satisfied; and finally the Court of Appeal. Inevitably precedents will be created and this is to be welcomed because of their flexibility; precedents do not have to be parsed and analysed; they are indicative rather than definitive. The warning also has some flexibility. It is the effect rather than the words that is to count. If the effect is not secured, the verdict will be invalidated unless in the circumstances of the case the omission is irrelevant when the Court can act under the proviso (Criminal Appeal Act 1968, s 2) which permits them to dismiss an appeal "if they consider that no miscarriage of justice has actually occurred". Otherwise, it is not intended that an error in a direction by a trial judge on what might amount to an exceptional circumstance or to additional evidence should be fatal; its consequences should be judged by the general test of safety.

4.85 Our object in making these proposals has not been the formulation of a complete code designed to protect an accused against all peril of misidentification. This would need an inflexible rule, subject to a definitive list of exceptions and requiring a prescribed minimum of additional evidence. If such a rule was practicable at all, it would, we believe, result in too great a preponderance of guilty men escaping conviction. What we have devised will certainly result in a number of acquittals, some doubtless by the direction of the judge, in cases where the identification is thin, e.g. the fleeting glimpse. But our prime object is to ensure, if we can, that in future no jury convicts in a case of disputed identity without being more fully informed than it has been in the past of the nature of the problem and giving it a deeper consideration. For this purpose we think that a general rule, albeit a flexible one, is much better than a mere warning; it will bring home to the jury that to convict on visual identification alone is to do something exceptional.[1]

4.86 Essentially what we are relying upon is the detailed and careful summing-up with the general rules as its core. In paragraphs 4.56–71 above, we indicated the aspects of the problem which we think a summing up might explore. We shall not, however, make any attempt to translate the contents of those paragraphs into any form of statutory requirement. No doubt there are precedents for telling judges by statute exactly what they are to do and how they are to do it, but they have not so far penetrated into the criminal law. We think that the development of a change in the law such as we are recommending will in the end

[1] Our survey of cases which went to appeal in 1973–74 suggests, for what it is worth, that at present a considerable number of convictions are secured on identification evidence alone. See paragraph 4.33.

be better shaped if it is worked out as case law. The judiciary is—for understandable reasons that lie outside the scope of our Report—more reluctant than it used to be to formulate general rules and more disposed to leave the introduction of new principles to Parliament. But this does not mean that if Parliament sets a new policy and proclaims it in a statute, the judiciary will have any difficulty in working out the logical consequences of the change. An example of this is to be found within the small compass of our subject in the change of judicial attitude following on the introduction of the 'unsafe and unsatisfactory' provision; a few words set the process in motion. A new approach to the problem of identification is within its smaller field just as significant and will, we believe, lead to as fruitful a development. On such related subjects as the alibi we hope that our observations may be useful as a starting point for judicial consideration; see paragraphs 4.74–76 above.

4.87 One of the best recent statements of the functions of the judge in relation to matters pertinent to our enquiry was made by Mr Justice Kingsmill Moore[1] in the Irish case to which we have referred (paragraph 4.44 above).

> It is the function of a judge in his charge to give to the jury such direction and warnings as may in his opinion be necessary to avoid the danger of an innocent man being convicted, and the nature of such directions and warnings must depend on the facts of the particular case. But, apart from the directions and warnings suggested by the facts of an individual case, judicial experience has shown that certain general directions and warnings are necessary in every case and that particular types of warnings are necessary in particular types of case.
>
> Such accumulated judicial experience eventually tends to crystallise into established rule of judicial practice, accepted rules of law and statutory provisions. But the general directions which must be given in every case as to the onus of proof and the necessity of establishing guilt beyond reasonable doubt have arisen from experience of the fallibility of human testimony in general, whether due to mendacity, imperfect observation, auto-suggestion or other causes.

The judge then referred to the types of cases we have considered in paragraph 4.35 above and continued:

> The category of circumstances and special types of case which call for special directions and warnings from the trial judge cannot be considered as closed. Increased judicial experience, and indeed further psychological research, may extend it.[2]

4.88 The proper use of the 'accumulated judicial experience' to which Mr Justice Moore referred seems to us to be a vital factor in trial by jury. Without it and unless it is placed at the disposal of the jury, the jury cannot function effectively. The juryman brings into the jury box his experience of everyday affairs, but the judge must, where it is necessary, reinforce that with the judicial

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[1] While, as we have noted in paragraph 4.48 above, Lord Morris of Borth-y-Gest in *Arthurs* v. *Attorney-General for Northern Ireland* did not see the need for a general rule in identification cases, it is clear from what he said in *Director of Public Prosecutions* v. *Hester*, [1973] AC 296, at 309, that he would not have disapproved this statement of principle.

[2] Lord Morris in *Hester*, at 309, said:—'It has, however, been recognised that the risk or danger of a wrong decision is greater in certain cases than in others'.

experience derived from close contact with the administration of justice. Moreover, as Mr Justice Moore pointed out, judicial experience is not static. It is to be obtained today not merely from work in court but also from sociological and psychological studies which a judge may be expected to read and a juryman would not. We have referred in paragraphs 4.12–14 above to the work that is going on in these fields. We do not suppose that we have said the last word on this subject; ways may be discovered of improving the accuracy of visual identification and which will call for the review of the 'established rules of judicial practice, accepted rules of law and statutory provisions', to which Mr Justice Moore referred. It will be for the judiciary to decide in the first instance by which of these three methods any further reform is to be effected.

VI. Dock Identification

(1) *Argument*

4.89 The identification of the accused as the man who was seen to perform the criminal act to which the witness is deposing is an inescapable part of the trial process. The person who will be convicted if his act was criminal is not a person with a given name but the *corpus* actually in the dock, that is, the prisoner. So the prisoner as he stands in the dock must be identified as the man who did the act. This is generally referred to as 'dock identification'. Where the identity is not in dispute, the identification, though a necessary step in the procedure, is purely formal and no one objects to it as a matter of form. When however identity is in dispute dock identification is by common consent objectionable for the reasons discussed in Dougherty's case, paragraph 2.24. The objectors who say that when identity is disputed dock identification ought to be banned are not really going quite as far as that because, as we have said, it is an essential procedural step; what they are saying is that it should be permitted only subject to the fulfilment of a condition precedent, which is that the witness should have picked out the accused on an identification parade or in some other unobjectionable way (see paragraph 4.16 (i), (ii), (iv) above); in such cases the identification becomes in effect a formal one, for the witness is simply saying that the man in the dock is the man he picked out on the parade, a fact which could if necessary be proved by other means. Likewise, those who say that dock identification in cases of disputed identity ought not to be banned, conditionally or otherwise, are not saying that it is the most satisfactory form of identification. In general they would agree that an identification parade is much to be preferred, but they claim it to be impossible to frame a rule excluding dock identification in all except specified cases and say therefore that the matter must be left to the discretion of the trial judge. We set out in the next following paragraphs several of the cases in which it is contended that, when there is no parade, dock identification should nevertheless be permitted.

4.90 The first and most obvious case is when the accused refuses to attend the parade. We have noted that in parts of the United States there has been a move in recent years to employ a court order to compel a suspect who is not already in custody to attend an identification parade. (See Appendix L, page 194, note (1).) But such has never been the practice in this country and none of our witnesses had advocated its introduction; apart from the objection in principle to the exercise of compulsion, everyone is agreed that a fair parade requires the accused's co-

operation. It does not of course necessarily follow that the accused's refusal to attend a parade means that he cannot be identified in an unobjectionable way. If he is on bail and at large, an opportunity may be found for picking him out from others; see paragraph 4.16 above. Even if he is in prison, there may be opportunities such as in an exercise yard. Where such opportunities are not available, it is customary to resort to 'confrontation' between the witness and the prisoner. This of course gives no opportunity for picking out and is no better than a dock identification. None of our witnesses suggests, however, that an accused who refuses a parade should have the right to insist upon protection from some form of confrontation, whether it be when he is in the dock or elsewhere.

4.91 Another and more controversial type of case occurs when a witness who has failed to pick out anyone on the parade feels convinced when he comes into court that the accused is the man after all. The witness often explains the change by saying that he was nervous on the parade. Three witnesses, who had failed to identify Mr Virag on parade, but who would have been willing to identify him in the dock, gave this explanation.

4.92 Some hold the opinion that a witness ought not to be prevented, when he gets into court, from saying whatever he then feels to be the truth, though the trial judge would of course be expected to draw the jury's attention to the weakness in the evidence. Others wonder whether a witness who is too nervous to say what he thinks at a parade would make a very reliable identification anyway and asks why he should be any less nervous in court than on a parade. A man who has too little confidence in his own opinion to take the initiative in identifying the man on a parade may feel differently when he finds that all he is required to do in court is to back the choice the police have already made; it may be argued that such evidence is inevitably below par.

4.93 A third type of case is sometimes referred to as 'spontaneous identification', that is, when a witness sees a man in the dock whom he has not seen since the time of the offence and then recognises him; after that it is too late to hold an identification parade. Such a situation might arise when there are two men in the dock and a witness, called to give evidence against one of them whom he has identified on a parade, recognises the other when he sees him in the dock as a man who had played a minor part in the crime.

4.94 A situation such as that just considered would be rare. But there may well be occasions when between the commission of a crime and the proceedings in court a witness has seen and identified an accused in suggestive circumstances. Suppose that a police officer visits the address given to him by a driver whom he has stopped for a motoring offence and identifies the man he finds there as the driver. This is common enough and in ninety-nine cases out of a hundred no question arises. But suppose that the man interviewed contends that he was not the driver and maintains that the driver must have given a false name and address. The police officer's identification must be suspect since he is identifying the man whom he expected to meet; it would be futile thereafter to hold a parade. If in such circumstances a dock identification is forbidden, the case against the accused would collapse. It is easy to think of other situations in which a witness may see an accused in suggestive circumstances before a parade has been held. In spite of the precautions taken at a parade a witness may before

the parade begins accidentally see the accused in circumstances which reveal that he is the man whom the police suspect.

4.95 It was doubtless a consideration of cases of this sort that restrained the CLRC from making any recommendation. The report says (paragraph 201): 'The majority of the committee, while agreeing strongly that in general it is right that a witness who is to identify the accused in court as the offender should be asked first to attend an identification parade, do not think that there should be a statutory requirement. They think that this would be too strict, as the matter must depend on the circumstances'. As has been shown in Dougherty's case (paragraphs 2.27 and 2.55) the courts have followed the same line: the law is that the admissibility of a dock identification must depend upon the discretion of the trial judge.

4.96 Then there are conditions in which it might be futile to hold an identification parade but which ought not to preclude dock identification for what it was worth. The appearance of a suspect might be so distinctive as to make it impracticable to collect an identification parade in which he would not stand out. He might have a feature, such as a facial scar, which it would be impossible to conceal, or to disguise. We should expect that in such cases, if the suspect wanted a parade, the police would always hold one for what it was worth, but there might well be cases in which both sides agree that it would be pointless. In such cases the case for the prosecution would rest upon the contention that the distinctive appearance eliminated or reduced the danger of a mistake: or in so far as it relied upon a scar, it would be a features identification. In neither case do we think that the witness should be precluded from asserting, if he can, that the man he saw was the man in the dock. There would also be cases in which the witness says that he was familiar with the appearance of the man he saw at the scene of the crime. In cases where the degree of familiarity is slight, it would be necessary to hold a parade, but in cases of close relatives it would obviously be pointless. A witness who claims to have had a fleeting glimpse of a close relative may, of course, be mistaken, but it is not a claim that could be tested by a parade.

4.97 Then there is the type of case in which the dispute about identity is confined to two or three persons. An example of this is when a police officer observes two men in the front seats of a passing car and later identifies one of them as being the driver at the time of his observation. If there is no dispute that one or the other was the driver, there could be no point in an identification parade. The choice can be made only by comparison between the two when he is confronted with them and this can be done as well in court as anywhere else.

4.98 One way round the difficulty is to follow the course that was taken in Dougherty's case (paragraph 2.27) that is, to allow the accused to leave the dock so that the identifying witness has to pick him out from among others. Some of those who gave evidence to us recommend this alternative, but most do not. As we know, it went wrong in Dougherty's case. The chief argument against it is that any identification which it produces would not be reliable. The elaborate precautions which are thought necessary to secure a fair parade (and which we consider in detail later in this Report) would be made to look rather silly if an identification in court is regarded as an adequate substitute. If the accused is on bail and both he and the witnesses are waiting for some time in the court

precincts, it would be impossible to ensure that he has not been pointed out to them. If the accused is in custody, it might well be unsafe to relax the security precautions which, if they are taken, would single him out. In the courtroom itself, it would be difficult, if not impossible, to observe all the rules that are thought necessary for the proper conduct of a parade and the breaches of which frequently lead to criticism by the defence. On the other hand, relaxation of the rules might give the accused undesirable advantages; for example, he might manoeuvre himself into an inconspicuous position.

(2) *Conclusion and Reform*

4.99 The root of all objections to dock identification is that it comes as an answer to what is in effect, if not in form, a leading question, that is, a question put in a way which suggests the answer that is expected. It is a general rule of evidence that leading questions may not be put in examination in chief. There have always been exceptions to the rule, based on the principle that, like all rules of evidence, it is designed to serve the ends of justice and must not therefore be applied so strictly as to defeat them. From the earliest times identification has been treated as an exception to the rule since otherwise the evidence could not be given at all. Identification requires evidence that the person or object to be identified is the *same*—not just similar to—the person or object seen on an earlier occasion and the only way of doing that is for the person or object to be exhibited and pointed out in court. So in *R* v. *Watson*[1] it was ruled that a witness could be asked whether the prisoner in the dock was the person he had referred to. As time went on, it came to be accepted that in cases of disputed identity the answer to such a question was of little evidential value and it was said that the proper question should be: 'Do you see the person referred to in Court?' This is the form now in use. There have been instances of unsophisticated witnesses pointing to someone not in the dock. But it is now generally accepted that the reformed question is just as leading as the one which it replaced.

4.100 There appear to us to be two ways of dealing with this situation. The first is by the method considered in paragraph 4.98 above. The placing of the accused outside the dock removes the element of 'leading' from the question: 'Do you see the person referred to in court?' The second is by making the real identification part of the pre-trial procedure; thus when the question is put in court, it is a formal question and as such unobjectionable. The first method is on the face of it attractive, but we are impressed by the weight of the disadvantages already mentioned. The second has the merit of being already in use; in the great majority of cases there has been a pre-trial identification. It has, however, the disadvantage that, because there will always be some cases in which pre-trial identification is impracticable, it cannot be converted into an unqualified rule. Our conclusion is that, since too much may go wrong with a court identification for us to recommend it, it is the second method that should be adopted.

4.101 Although we cannot formulate an unqualified rule, we do not consider that the question of admissibility should be left entirely to the discretion of the trial judge, as is the law at present. The Dougherty case illustrates the weakness of such a solution. There is nothing to guide the judge in the exercise of his discretion with the result that it is likely in the end to depend upon his personal

[1] (1817), 2 Stark NP 116, at 128.

estimate of the general dangers of dock identification, a matter upon which judges differ. In Dougherty's case the judge allowed it, but a judge who rated its value low would have disallowed it. Thus a decision which ought so far as is practicable to be the subject of a general rule, is made to depend upon the school of thought to which the trial judge happens to belong. The need for flexibility in the rule does not require an unbounded discretion of this sort.

4.102 Identification on parade or in some other similar way in which the witness takes the initiative in picking out the accused, should be regarded in law, as in the normal case it is already regarded in practice, as a condition precedent to identification in court, the fulfilment of the condition to be dispensed with only in exceptional circumstances. The discretion of the judge should be limited to determining whether in the particular circumstances of the case he is trying, the holding of a parade would have been impracticable or unnecessary. We think that these words are wide enough to embrace the situations we considered in paragraphs 4.93–96 above, and others of a like sort. They would not embrace a case (paragraph 4.91 above) of a witness who after the parade changes his mind, but in our opinion a dock identification by such a witness should not be permitted.

4.103 If an accused refuses to attend a parade, the holding of it would be impracticable and a dock identification permitted on that ground. We have, however, considered whether the refusal of the accused does not create a situation which ought to be specially provided for. Where the accused deliberately and without giving any reason refuses to attend a parade, as happened in the case of Payen (paragraph 3.79), there is no difficulty: he is rejecting the alternative to the leading question. At the other extreme, where the accused fails to attend the parade, as in Dougherty's case, because of a muddle, or maybe because he himself does not bother, likewise there is no difficulty. It is the duty of the police to take all reasonable steps to see that a parade is held (a duty which in Dougherty's case they did not discharge), and if they do not, they cannot claim that the holding of a parade was impracticable. But there is an intermediate case in which the accused refuses to attend the parade but gives a reason for it which may be good or bad. Take Virag's case as affording an example of what might occur: he might have refused to go on a parade in which he was the only foreigner.

4.104 We have considered whether this situation ought not to be specially provided for. The refusal to attend a parade could be taken out of the general provision which makes impracticability the test and covered by a special clause which makes the test the *unreasonable* refusal to attend a parade. We have come to the conclusion that such a provision would allow too great a room for manoeuvre to a guilty man. It would be quite possible for such a man to take numerous objections to the details of a parade, one or more of which a judge might find to be reasonable in the sense that, had he been deciding the matter before the parade took place, he would have ordered the police to alter the arrangements. But when the objection is upheld at the trial, it would probably be too late for that, and then the result would be that, dock identification having been disallowed, the case for the prosecution might collapse. With such a prospect, a guilty man, who expected to be identified on parade, might think it better to take as many objections as he could in the hope that one of them would be upheld.

4.105 In paragraphs 5.35–44 below we consider in a general way the difficulties that may be created when there is a genuine difference of opinion between prosecution and defence upon interlocutory issues, such as the conditions of an identification parade. The conclusion we reach for reasons which are there set out is that the responsibility for the decision should be left with the police. This means that an accused, whose objections have been overruled by the police, will have to attend at the parade, albeit under protest. But the weight of his objections will be judged at the trial. If they are so grave as to affect the fairness of the parade, the judge will (we deal with this point in paragraph 5.89 below) exclude evidence of the parade altogether with the inevitable result that he will disallow dock identification. If they are less grave, they can be put to the jury as affecting the weight of the identification.

4.106 We do not therefore recommend any special provision in the case of a refusal to attend a parade. We do not, however, propose any interference with the overriding discretion which a judge now has to exclude a dock identification, like any other evidence for the prosecution, when he thinks that its prejudicial effect would exclude its probative value or that its admission would on any other ground be unfair. We have been dealing above with the circumstances in which the trial judge would be bound to disallow dock identification; if there are other circumstances in which he considers that to allow it would be oppressive to the defence, he can, if he thinks necessary, exercise his general discretion.

4.107 In any case in which a dock identification is permitted we think that there should be a judicial warning about the weakness of such evidence in a situation in which there has to be a confrontation and not a picking out. We do not think that it is necessary to prescribe or to suggest any form of words since the jury is bound to see the point and all that is necessary is that the point should be made by the judge. Here it is not a question of altering the law, since in Dougherty's case the Court of Appeal made it clear that there must be 'explicit warnings of the dangers of that type of evidence'. Nevertheless, in a statute which will be dealing with identification evidence generally, we think it desirable that the law on this point should be declared to be what it is, since the omission might give rise to doubts.

We have considered whether an exception should be made when the need for dock identification is created by the refusal of the accused to attend a parade. We think that there should be no exception: the warning simply draws attention to the weakness inherent in an answer to a leading question and the fact that it was the accused's own attitude which made the leading question necessary does not remove the weakness. But we think that the jury should be told of the accused's refusal and also that they can have regard to it. If they were unable to conceive any reason for it except the fear of identification, they could treat it as strengthening the dock identification up to the point where it would justify a conviction. If, however, they thought that there were genuine, even though mistaken, reasons for the refusal, they might decline to act on the dock identification.

4.108 Obviously it will not be possible to achieve the results we have indicated without a statutory provision which we think should be on the following lines.

1. Save by consent or by leave of the trial judge, a witness for the prosecution shall not be asked to identify in court an accused person as a person whom

he saw in the circumstances of the crime unless he has previously given evidence that he took the initiative in pointing out the accused either at an identification parade or upon some other comparable occasion.[1]

2. Consent shall be assumed unless by a notice of alibi or otherwise the prosecution is made aware that the identity of the accused as the person who committed the crime is in dispute.
3. A judge shall not grant leave unless he is satisfied that the holding of an identification parade was impractical or unnecessary.
4. In any case in which the question is asked by leave of the judge, the judge shall warn the jury of the weakness of an identification made in court.

4.109 There is, as has been pointed out to us, always the danger that a witness, though he has not been asked to identify the accused, may in the course of his evidence say that he recognises the man in the dock. This sort of situation—one in which a witness volunteers inadmissible evidence—is one with which a judge is familiar and knows how to handle. We see no difficulty in his telling the jury that a dock identification made by a witness who has failed on an earlier occasion to point the accused out, is obviously unreliable. We ourselves would see no objection to his also telling the jury that they could take it as evidence, for what it was worth, that the accused must have resembled to a greater or less degree the person whom the witness saw. But as we have said (paragraph 4.9 above) the practice on this point is not clear and we are not recommending any special provision.

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[1] The first, second and fourth situations mentioned in paragraph 4.16 above are examples of comparable occasions.

CHAPTER 5

PRE-TRIAL PROCEDURE

I. Disclosure by the Prosecution

5.1 Some of the points which we shall be considering in this chapter raise the question of how far it is the duty of the prosecution to disclose to the defence material which the police have discovered in the course of their enquiries but which the prosecution does not intend to make part of its case. Until 30 years ago no authority existed for the proposition that there was any duty at all. In 1946 it was laid down by the Court of Criminal Appeal[1] that where the prosecution have taken a statement from a person whom they know can give material evidence but whom they decide not to call as a witness, they must make that person available as a witness for the defence. 'Making available' is taken to mean supplying the defence with the name and address; it does not extend to supplying a copy of the statement. There is not any general rule requiring the prosecution to supply the defence with copies of statements they have taken or documents they have discovered. Some exceptional cases where there is a duty to do that are given in Archbold, paragraph 443.[2]

5.2 It is, however, usual for the prosecuting solicitor to supply prosecuting counsel with the material statements and documents (such as the Trojan Club Book in Virag's case; see paragraph 3.54) and to leave the question of what should be disclosed to counsel's discretion. In practice we believe that counsel frequently goes beyond the legal requirements in supplying copies of statements. But this does not usually happen until at, or shortly before, the time of the trial.

5.3 We have not invited comment on this situation. We believe, however, that it does not give universal satisfaction. In 1966 *Justice* published a report on this topic by its Committee on the Laws of Evidence together with its legislative proposals. Those who think that there is a need for reform will certainly find in Virag's case material to support their view. That case shows in the first place that the prosecution and the defence may very easily take a different view of what may be 'material evidence'. Secondly, it highlights the absence of any machinery for ensuring that the question of materiality is considered at an appropriate level. Thirdly, it raises the question whether the disclosure should not be in sufficient time, as well as in sufficient width, to afford to the defence the opportunity of giving to the material full consideration and maybe of making further enquiries. On the other hand, it is questionable whether everything which the police discover and which might conceivably be material should be made available to the defence. It might not be merely a matter of withholding confidential information.

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[1] *R* v. *Bryant and Dickson* (1946), 31 Cr App R 146.

[2] Archbold: *Pleading, Evidence and Practice in Criminal Cases*, 38th Edition by T. R. Fitzwalter Butler and S. Mitchell (1973).

In practice the defence is accorded a wide latitude in the material it puts before a jury and there would be a reasonable fear on the part of the police that statements of little relevance might be used to distract the jury and prolong the trial.

5.4 In the House of Commons on 3 April 1973[1] the Solicitor General, speaking on an amendment to the Administration of Justice Bill, gave an undertaking that he would reconsider the general rule that the prosecution is not required to supply the defence with copies of statements. We understand that in consequence some aspects of pre-trial disclosure are under consideration in the Home Office. We have no doubt that the points that we have made in the preceding paragraph will be taken into account. Even if a full enquiry into them fell within our terms of reference, we think it would be far too large for us to undertake. It would have to cover, of course, all material evidence which might be of use to the defence on any issue and not merely on the issue of identification.

5.5 We have, however, had several suggestions made to us advocating the pre-trial disclosure of specific pieces of identification evidence, such as descriptions of the criminal, and we have had to decide how to handle these. We think that our right course is to take the law as it is, to assume, rightly or wrongly, that in general the existing duty to disclose is sufficient and to consider whether a case had been made out for regarding any particular piece of identification evidence as exceptional. If it is not exceptional, then the question of disclosure must await a general enquiry.

II. Descriptions of the Criminal

5.6 Where a complaint is made to the police of an offence committed by an unidentified person, the first step is naturally to obtain from the witness a description of the person. If there is more than one witness, the description can vary a great deal. Virag's case, in which there was an exceptionally large number of descriptions, is an illustration of this. The witnesses were, of course, describing Payen. His official description is set out in paragraph 3.4. The descriptions of him by the witnesses are summarised in Appendix F, and it will be seen that they vary enormously. Nevertheless, a description is a starting-point and may enable the police to form some idea of the man they are looking for.

5.7 It has been proposed to us that there should be a legal obligation on the police at the first interview with a witness to obtain from him or her on a suitable form a description signed by the witness; and that copies of all the descriptions so obtained should be supplied to the defence. This proposal—or at any rate a good deal of what is in it—is supported by many of our advisers. Much of it was approved by the CLRC.[2] It is already the practice in some police forces to supply such descriptions if asked.

5.8 We shall consider the proposal first in relation to identifying witnesses, i.e. those who are called at the trial to identify the accused. The defence naturally wants to know of any recorded description given by the witness; if it is an inaccurate description of the person in the dock, it can be suggested to the jury, as in Dougherty's case (see paragraph 2.23), that the identification is thereby

[1] Official Report, Vol 854, col 384.
[2] Eleventh Report, paragraph 200.

weakened. We think that caution must be exercised about this. 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.

5.9 It is, of course, open to the defence when cross-examining an identifying witness to call for any description which the witness has given earlier and to compare it with his evidence. Defending counsel are unlikely to do this when they do not know what the description is. We think that it is right that the defence should know in advance, but not that they should have the option of putting the description in evidence if it suits them and keeping it out if it does not. If the description is consistent with the identification—still more, if it strongly supports it—it is something that the jury should know about. We recommend, therefore, that the description given by an identifying witness should be admissible in evidence. This could be done—as it is already quite frequently done—by including it in the statement of his evidence put in at the committal proceedings.

5.10 There must be some restriction on admissibility. First, we think the rule should apply only to an identifying witness. There may be witnesses who give a good description, but fail to identify the accused on parade or on some other comparable occasion; they may be called to prove some relevant fact other than recognition; we do not think that the rule should apply to them. Secondly, we think that the rule should be restricted to a description given to the police at the first convenient opportunity, and in particular before the witness has seen the accused again (as might happen, for example, if the witness and the police immediately visit a place where the accused is to be found), or any photograph of him, or received any description of him from another source.

5.11 In the two preceding paragraphs we have been considering only a segment of the proposal made to us, and what is probably an uncontroversial part of it, i.e. its application to witnesses who are actually called to identify. But the police will frequently obtain descriptions from many more witnesses than they call to identify. Some of the uncalled witnesses will have attended a parade and failed to identify, which is why they are not called. Should the prosecution supply the defence with the descriptions furnished by such witnesses? Unless the existing rule of disclosure, which we summarised in paragraph 5.1 above, is given a narrow interpretation, there will be a duty on the prosecution to give the defence the names and addresses of such witnesses. A witness who has seen the criminal and says that he was not the accused is of course as material as one who says that he was. A witness who is not positive either way, may be material; and the question whether he is or not can only be decided in the context of the case that the defence is putting up. In Virag's case Mr Dannenberg in slightly different circumstances might have been a witness helpful to the defence. We doubt whether the precise extent of the existing rule has ever been determined. Since the names and addresses of witnesses who attend a parade will be known to the defence anyway, the rule could apply only in the odd case where the police,

perhaps because the witness has said that he would not recognise the criminal again, have not summoned him to a parade.

5.12 We think that the practice should be the same whether the witness comes to a parade or not, and we do not think it is much of an extension of the existing practice to ordain that descriptions furnished by known witnesses should be supplied to the defence. We think that identification witnesses, because they normally attend a parade and are by that means made known to the defence before the trial, constitute a special category of the sort we contemplated in paragraph 5.5 above. Our conclusion is, therefore, that the prosecution should supply the defence on request with the names and addresses of any witness, whether or not he attends a parade, who is known to them as having seen the criminal in the circumstances of the crime and with a copy of the description of the criminal given by such person.

5.13 This brings us back to the first part of the proposal, which is that there should be a legal obligation on the police at the first interview with a witness to obtain on a suitable form a description of the criminal signed by the witness. The police are against introducing legal obligations into this field. 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 any questions which he thinks may help in finding the criminal and must not be inhibited by rules against prompting. The prime object at this stage is to find the criminal and not to provide relevant material for his trial. This is not to say that material produced will necessarily be defective. Getting an accurate description is just as important for finding the supposed criminal as it is for assessing his innocence or guilt at the trial; if prompting taints the witness's recollection so that the description is erroneous, the investigation will be the first thing to suffer. Evidence of prompting could, of course, be used to disallow the use of the description by the prosecution.[1]

5.14 We do not think that a form should be prescribed. To be of value it would have to be far too elaborate for the ordinary witness to cope with unaided. Many police officers carry a small card issued by the Police Review. It is headed 'Description of persons or bodies' and is designed for use as a 'reminder to assist witnesses to give as much detail as possible'. It covers 20 physical features with up to a dozen alternative descriptions for each. We think that the skilful use by a police officer of a card like this is the best way of obtaining a description.

5.15 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. The second would be on the following lines:

[1] On a similar point see Archbold, paragraph 523a–b.

When a witness for the prosecution has identified in court an accused person as a person whom he saw in the circumstances of the crime, any written description of that person signed by that witness and given when first interviewed by a police officer may be admissible as evidence to show that the witness's identification is consistent with the description so given.

This is intended to make the description admissible on the same terms and for the same purpose as a complaint made by a woman who has been sexually assaulted. A statute in these terms would provide that the evidence *may* be admissible and thus preserve the general discretion of the judge to exclude it in any case where he thinks its admission would be unfair. No doubt he would exercise his discretion on similar principles to those which have already been laid down in the case of complaints, that is to say, he would not admit a description which had been suggested to the witness either directly by prompting or indirectly by the showing of a photograph or the like. Under the law in sexual cases the complaint is evidence of consistency only and cannot be regarded as corroboration. We think that a description which tallies with the identification may give some additional weight to it and we do not therefore propose a special provision excluding it for that purpose. We do not think, however, that it would normally be sufficient by itself to raise the identification from the level of probability to that of reasonable certainty.

III The Use of Photographs

(1) *The Problems Created*[1]

5.16 The use of photographs when the police are searching for a criminal may create according to the circumstances a major or a minor problem, depending mainly on whether the police have or have not got a suspect.

When they have not got a suspect, they will do as they did in both the Dougherty and Virag cases, make use of an album of police photographs of the sorts of criminals who they think from their records might be the man they want. This practice creates a major problem.

When they have got a suspect but do not know where he is to be found, they will probably be able to provide themselves with a photograph of him and may want either to publish the photograph in the press and the media or show it to individuals with whom they think he has been in contact. This creates a minor problem, minor because it is less likely than in the first case that the photograph will be seen by a person who will be required to be an identifying witness at the trial.

5.17 It was the major problem that arose in the Dougherty and Virag cases and we shall consider it first. The situation gives rise to two difficulties which we have already mentioned (paragraphs 2.25–26). The first is that a witness who has been shown the photograph is, when he comes to an identification parade, more likely to have the photograph in mind than the image he had previously formed of the criminal. The second is that the inclusion of the accused's photograph in a police album may suggest to the jury that he has a criminal record.

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[1] These have been considered by the Court of Appeal in a number of cases, the most recent of which are *R* v. *Capaldi* (CA, 23 November 1973, unreported) and *R* v. *Brett and Others* (CA, 28 July 1975, unreported).

5.18 The existence of both of these difficulties is generally agreed, but we shall add something in amplification of each. On the first, it is difficult to estimate the extent to which the showing of a photograph may affect the witness's previous image of the criminal. Virag's case provides some illustrative data. Of the eight witnesses who picked out Mr Virag on parade, three had been shown photographs. A fourth man who was shown the photographs did not pick out Mr Virag on the parade. It is also significant that one of three who picked out Mr Virag on the parade had in fact picked someone else in the album of photographs, thus showing that the selection of the photograph does not automatically lead to the same selection on the parade. But undoubtedly there is a likelihood of it. We agree with the way in which it is put in the Use of Photographs Rules, where it is said (paragraph 18) that the fact that a witness has been shown a photograph before the parade 'will considerably detract from the value of his evidence'. It is at this point that the first difficulty runs into the second. The danger of a miscarriage of justice resulting would be much less if the jury could be warned of the diminished value of the evidence. But this cannot be done without the risk of alerting the jury to the fact that the accused has previously been in trouble with the police.

5.19 On the second difficulty there is a school of thought which holds that it would be best to be candid with the jury, reveal the existence of police photographs and the extent to which they have been used and thus equip the jury with the knowledge which will enable them to give the identification evidence its true weight. In support of this it is urged that there is likely to be on every jury at least one person who knows that, if the accused is not given a good character, it means that he has a bad one; the existence of the photographs will not tell the jury more than that. Opinions are now somewhat divided about the extent to which a jury ought anyway to know of an accused's previous convictions: this is outside our province. We conclude, as did the CLRC, that so long as there are in the interests of the defence restrictions on the disclosure of the accused's bad character, it must be for the defence to say when, if at all, they should be relaxed.

5.20 Arising out of this it has been suggested to us that when the defence decides to refer to the photographs—as, for example, in Virag's case (paragraph 3.57)—there should be an obligation on the judge to tell the jury to ignore the implications. But if the judge does that, it will, first, make it quite plain (which it may not be; it is conceivable that in Virag's case the jury might have known that the police have photographs of aliens) that the photograph carries an adverse implication; and, secondly, it would be a reminder of something to which they might not have paid much attention. Much must depend on the degree of prominence given to the photographs in the trial and it is not in our view a case for a general rule. Many judges will prefer to see what reference, if any, defence counsel makes to the photographs in his address to the jury and then, if it is appropriate, endorse it.

5.21 Is it possible to get round the difficulty by making the photographic identification more formal and treating it as a substitute for the live identification parade? This idea will not survive more than a cursory examination. The object of the parade is to surround the accused with a number of people bearing a sufficient resemblance to him. At the time when the photographs are shown

there is no definite suspect or accused and so it is impossible to collect photographs resembling him; indeed the object at this stage is not to collect resemblances but to collect possible suspects so as to see if one can be picked out. Then the photographic album does not afford the full inspection that is given on parade. Whatever regulations were made for its conduct, there being no suspect, neither he nor his solicitor can be there to see that they are observed. Finally, the production of the album would be bound to arouse the suspicions of the jury as to how it came into existence and about the sort of men who found their way into it.

5.22 There are thus left only three alternatives. The first is that no prospective witness should be shown a photograph of the accused. The second is that no witness who has been shown a photograph of the accused should be permitted to identify him at the trial. The third is that the showing of photographs to prospective witnesses should be limited as far as practicable.

5.23 No one advocates either the first or the second; not the first, because it would impose an unacceptable handicap on the search for the criminal; not the second, because it would give to a man of bad character an advantage not open to a man of good. There is really no course open except the third, which is a compromise between the first and the second. Under it the search for the criminal is given priority, but the showing of photographs is to be limited to what is reasonably necessary to make the search effective.

(2) *The Existing Rules and Reform*

5.24 The existing Use of Photographs Rules have three objects. The first and most important is the one we have just discussed. It is covered by paragraphs 18 and 20 which provide in effect that photographs should not be shown if the circumstances allow of a personal identification; and that once a witness has made a positive identification from photographs, no more should be shown. We have evidence to suggest that this rule is not observed as strictly as it should be. It was broken in both the Dougherty and Virag cases; see paragraphs 2.25 and 3.32 respectively. It was also broken in the Ince case.[1] In each of these three cases there was a mistaken identification. We think that the rule should be firmly and clearly restated in one paragraph instead of two. The essence of it is that the police shall not show photographs to prospective witnesses unless the showing is strictly necessary for the purposes of their search; and after they have got a satisfactory identification from one prospective witness it would normally be unnecessary to show it to any other. With one satisfactory identification they have got a suspect and the usual and proper way of confirming or eliminating the suspicion is by means of a parade.

5.25 The second object is to fix the conditions under which photographs are to be shown. In the existing rules these are to be found in paragraphs 19, 23 and 24. Paragraphs 19 and 23 are ancillary; they prescribe that the photographs used are to be available for production in court and that the defence is to be

[1] See note on paragraph 4.38. George Ince was brought under suspicion for the murder of Mrs Patience in the first place by an anonymous telephone call to the police. Before Beverley Patience was invited to attend the identification parade at which she identified Ince, she was shown first a card containing Ince's photograph among 11 others (from which she made a partial identification), and on two later occasions, a total of 6 individual photographs of Ince.

told that photographs have been used. The main rule is contained in the last part of paragraph 24 and is that 'the witness should be left to make a selection without help and without opportunity of consulting other witnesses'. Unfortunately the first part of paragraph 24 restricts its operation in cases in which a suspect has already been singled out. Thus the paragraph does not cover what we described in paragraph 5.16 above as the major problem, the one that arose in both the Dougherty and Virag cases where the police are searching for a suspect. In this situation it is not possible to make a rule prescribing how the album is to be made up. The police have only a class of suspect, e.g. Hungarians or shoplifters, and they must make up an album out of that class. They are not getting together a collection of resemblances because they do not know as yet what the suspect looks like.

5.26 What is needed is simply a rule which lays down the condition under which a photographic album, for whatever purpose it is being used, is to be shown to a witness. We think that the conditions should be as nearly as possible those which apply to an identification parade. They should include the following:

1. The procedure should be superintended by an officer of not less rank than sergeant.
2. The album should not be shown to the witness until he is alone in a room with the superintending officer, only one witness being present at a time. If more than one witness has come to make a selection, care should be taken to see that they do not communicate with each other.
3. The witness should be left to make his selection without help. The photographs in the album, not less than twelve, should be numbered or marked in some other way so that the selected photograph can be clearly identified thereafter.

The execution of this procedure will be recorded in a written report by the superintending officer and a copy of this report should be supplied to the defence. The report should state the date and hour of the photographic inspection. It will be important for the defence to know the length of time that elapses between the photographic inspection and the identification parade, for the shorter it is, the less will be the value of the identification.

5.27 The third object of the existing rules, one which is covered by paragraphs 21 and 22, is to prescribe when a witness who has made a photographic identification should attend a subsequent parade and when he should not. We think that it is always desirable that he should. We think that the defence is always entitled to know whether or not a photographic identification is confirmed on parade. It by no means follows that it will be confirmed; in Virag's case, as we have pointed out, one out of three did not confirm.

The conditions for which paragraphs 21 and 22 were framed will be changed if the scheme which we propose for the regulation of dock identification (paragraphs 4.102 and 4.108 above) is found acceptable. Under that scheme, if there were no subsequent parade, it would be necessary to permit a witness to identify in the dock a person whom since the crime he had not seen and picked out in the flesh. We do not regard this as a satisfactory basis for a dock identification. Moreover, it is a basis which could not be referred to in court, since his qualifications, so to speak, for making the dock identification would be that he had picked out from a police album the photograph of the accused. The jury would thus be left with the false impression that the witness had had no occasion to

reflect upon his recollection of the accused between seeing him at the crime and in the dock.

We recommend that rules 21 and 22 should be dropped.

5.28 We turn now to what we described in paragraph 5.16 as creating the minor problem, i.e. the situation that exists when the police have got a specific suspect whom they want to interview, but do not know where he is to be found. If they have got a photograph of him, they will want to show it to individuals who they think may have seen him and may even want to publish it in the press and the other media. If they show it to individuals, they should avoid as far as possible showing it to persons whom they may want subsequently to pick out the suspect on a parade. As to publication in the press, it is only in exceptional circumstances that this method is used and the decision to use it is never left to junior officers. The showing or publication of a photograph in these circumstances does not necessarily indicate a criminal record, if indeed the accused has one. Consequently the need for protection is not nearly so great. The defence can make the point that the identification evidence has been weakened and the police, being well aware of this, can be relied upon to put their own restrictions on the use of photographs.

IV. The Identification Parade

(1) *Origin and Present Position*

5.29 We have stated briefly in paragraph 1.10 the origin of the identification parade. It was evolved by the Metropolitan Police, possibly at the instigation of the judiciary; certainly the judges played a significant part in its evolution. The first record of it that has been traced is in a Police Order of 24 March 1860 which followed upon 'some remarks of the Assistant Judge of the Middlesex Session'. Following upon the Beck case of 1904, the Metropolitan Police revised their regulations and in 1905 the Home Secretary commended these regulations to all Chief Constables. The regulations were from the first designed as orders or instructions to the police and they have never departed from that form. But they have become of considerable importance to all practitioners in the criminal law. In 1969 they were for the first time printed in a supplement to Archbold, the practitioners' textbook. We print them in Appendix A.

5.30 The parade is now extensively used. At Appendix B we set out in tabular form the statistics for 1973. Of particular interest is the extent to which the suspect put up by the police is picked out by the witnesses, and conversely, the extent to which the parade may be said to yield 'negative evidence', that is to say, when a witness picks out someone other than the suspect or makes no identification. We have already noted this phenomenon in Virag's case (paragraphs 3.34–35 and Appendix D). The figures in Appendix B show that in 1973 the suspect was picked out in less than half of the parades held (944 out of 2116), while on 984 occasions no one was picked out. But it has been possible to make a more detailed analysis of this point in the limited number of cases for which information was supplied by the Home Office. The results are shown at Table II in Appendix G. Identification parades were mounted in 18 of these cases for a total of 21 suspects. For 15 of these suspects there was more than one witness, but on only three such occasions did the witnesses agree in selecting the suspect. The bare figures can provide only a rough and ready indication of the problem.

Witnesses, for example, may be called to the same parade who had very different opportunities for observing the criminal: but it is not possible from the papers alone to assess this variable. Moreover, police practice may vary. In a serious case, every witness who might have had some opportunity to see the offender may be invited to view the parade, whereas in less serious cases only a selection of possible witnesses may be called. The available information is, however, sufficient we think to underline the importance of a judge drawing a jury's attention not only to any positive evidence, but equally to any negative evidence arising from an identification parade (see paragraphs 4.57 and 4.59).

5.31 The parade has now taken its place in the criminal process as a quasi-judicial pre-trial proceeding controlled by rules, like the police interrogation. This development will be solidified if it is made, as we recommend, normally indispensable to identification at the trial. Conscious of this, we have given careful consideration to the proposals we have received for its improvement. We have viewed them, however, in the light of five governing considerations.

The first is that we are dealing with an institution which on the whole is working well. We have had some complaints but very few have been substantiated. The improvements suggested are mainly in matters of detail and framed as amendments to, or amplifications of, the existing rules. They are conducted, as paragraph 3 provides, under the supervision of an independent officer. We have heard little criticism of the good faith and impartiality with which they are administered; and we have received favourable testimony on these points from solicitors from all parts of the country.

Secondly, the organisation of a parade imposes a considerable burden upon the police. It is not a light task to go out into the highways and byeways and enrol 8 or more members of the public 'who are as far as possible of the same age, height, general appearance (including standard of dress and grooming) and position in life' as the suspect.[1] Fortunately, enough people regard it as a public duty of the same sort as they regard service on a jury. If they did not, the task would be impossible; nonetheless people are apt to make excuses and there is no method of compulsion. In addition to this, the police station has to be arranged to accommodate the parade; the witnesses must also be accommodated so that there is no danger of their seeing the suspect separately from the parade or of their communicating between themselves. Evidence from the Metropolitan area in particular is that it is becoming increasingly difficult to collect the requisite number.

Thirdly, whatever may have been the position in the past, an identification made on parade will, if our recommendations are accepted, no longer be presented in the normal case as by itself an identification beyond reasonable doubt. If that result is not being looked for, there is nothing to be gained by making a parade appear a more accurate instrument than in fact it is; it is better the jury should be warned that the parade, though the best method that can be devised, is by no means infallible. The more refinements there are, the more their fulfilment or non-fulfilment will be argued about at the trial, giving the jury the impression that the parade is the only thing that really matters.

Fourthly, the parade originated as the best practicable method of achieving an

[1] These difficulties were also noted by the Royal Commission on Police Powers and Procedures in 1929 (Cmd 3297, paragraph 129).

identification without confrontation. It is not a scientific test and cannot safely be treated as one.
Fifthly, we have received no alternative suggestions, and the great bulk of our psychological evidence has been directed to eye-witness evidence in general rather than to visual identification. Consequently, we are bound to regard the identification parade as still the fairest and most practical test available of a person's ability to recognise a face previously seen.

(2) *Rights and Duties*

5.32 Under this head we propose to consider whether the suspect has the right to demand a parade and under what circumstances there is a duty on the police to mount a parade; and conversely, whether the police can compel the suspect to attend a parade, or, if not, what should be the consequences of his refusal to do so.

5.33 As to the first part, there is no dispute about the general proposition that the accused is entitled to have a parade if he wants one; we have not come across any case in which he has asked and been unreasonably refused. On the other hand, there have been cases in which the police have been criticised for not taking the initiative in mounting a parade. We have in effect covered the general situation by our proposal (paragraphs 4.99–108) that there should be no court identification without a previous parade unless to hold one would be unnecessary or impracticable. What we have here to concern ourselves with is not the general right of the suspect to a parade, but the right to have one on particular conditions, such as in the presence of a solicitor. We examine this aspect of the question in paragraphs 5.35–44 below.

5.34 Likewise, we have already touched in paragraphs 4.90 and 4.103–105 upon the situation created when the accused refuses to attend a parade, and we shall elaborate on this in paragraph 5.45 below. But the situation is not invariably one of unconditional refusal. Here again it can be a question of the conditions under which the parade is to be held.

5.35 There may well be a genuine dispute about conditions with something to be said on both sides. Take Virag's case, for example. The defence might have said that to put Mr Virag on a parade where there were no other foreigners was unfair: the police might have answered that it was impossible in Bristol to get the required number of foreigners: the defence might have rejoined that the parade should be held in London: and so on. Or the suspect may make less reasonable demands. We have been informed of a case in the Metropolitan Police District in October 1974 in which the accused, acting on legal advice, refused to stand on the parade unless his lawyer was first allowed to question the witness in order to see whether the description given by the witness fitted the accused; if it did not fit, the accused said that he would not stand on the parade.

5.36 Finally, it is possible that an accused, who fears to be identified, will make a number of stipulations in the hope of avoiding both the parade and a blank refusal of it, which latter would prejudice his chances at the trial. We are informed by the Metropolitan Police that there have been occasions of this sort. Then, while there may be no dispute about the conditions, there may be a difficulty in their fulfilment as rapidly as the police want. It is not perhaps sufficiently appreciated that there is an inherent conflict of interest between the

police and the defence in that for each of them the parade has a different object. The object of the police is to ascertain whether they have got the right man; for this they want to hold a parade immediately after arrest, usually before a formal charge is made; if there is no identification, they want to release the suspect and get on with their search for the criminal. From the point of view of the accused, however, the object of the parade is to safeguard him against misidentification; he is, especially if he is on bail, more concerned with safeguards than with speed.

5.37 A typical case in which difficulties of this sort may be raised arises when an accused asks for the presence of a solicitor at the parade. In principle this is settled. Paragraph 10 of the Parade Rules requires that the suspect should be informed 'that if he so desires he may have his solicitor or a friend present at the identification parade'. When a suspect has his own solicitor readily available, there is no difficulty; but when he has not there may be. The police are usually prepared to take reasonable steps to find a solicitor for the suspect, but not to hold up the parade indefinitely if one cannot be found.

5.38 For the overwhelming majority of suspects who go on an identification parade, a solicitor means one that is provided by legal aid. To what extent is this available for an identification parade? If the parade is not held until after the accused has been brought before the magistrates and obtained a certificate of legal aid, the availability is pretty high. If the accused or his relatives have not, as in Virag's case (see paragraphs 3.39–40), already contacted a solicitor, the clerk of the court or the police may be able to find one. In some parts of the country there is a duty solicitor in attendance at magistrates' courts and the Law Society is doing its best to encourage such schemes.

5.39 However, as in both the Dougherty and the Virag cases, many parades are arranged before a suspect is brought before the magistrates. Legal aid at that stage may be available under the Advice and Assistance Scheme, but by comparison with the general scheme, this is restricted. There are other problems about the application of the Advice and Assistance Scheme which we have not space to detail. It is sufficient to say that to ensure that a solicitor, to be paid out of the Legal Aid Fund, is available whenever the police might reasonably want to hold a parade, would mean an expensive, and maybe impracticable, extension of the scheme. We consider it desirable that a suspect should always have a solicitor representing him at a parade, but the evidence we have had about the fair way in which parades are conducted by the police and the lack of complaint about them does not lead us to conclude that it is an absolute necessity.

5.40 Disputes about the conditions for holding a parade are rare. The system works well enough at present by a combination of reasonableness on the part of the police and fear on the part of the suspect that lack of co-operation will prejudice his changes at the trial. This fear may be diminished by the restraints placed on dock identification: it may also tend to grow less with the spread of legal advice. The time may come when the suspect will appreciate—and act upon the appreciation—that he is no more obliged to go on a parade without a solicitor, or indeed under any other conditions which he dislikes, than he is to make a statement without a solicitor.

5.41 It is obvious that one side or the other must have the right to prescribe in the first instance the details of the parade leaving it to the opponent to object. It is equally obvious to us that the side that prescribes must be the side which is responsible for the organisation of the parade, i.e. the police. The problem is how best to resolve objections taken by the defence. There appear to be only two ways, neither of them ideal. The first is to treat a dispute as an interlocutory matter and to set up some new judicial machinery for deciding it. The second is to require the defence, unless it is prepared to take the extreme course of abstaining, to submit to the police rulings but with the right to challenge them at the trial.

5.42 Any interlocutory machinery would mean recourse to a magistrate or to a circuit judge in chambers. The majority of our professional advisers consider that this would be impracticable. At best it would be an incomplete solution. It would be bound to impose a delay of up to 24 hours and that might not be acceptable to the police. When they are engaged in the search for a dangerous criminal they may, as in Virag's case (see paragraphs 3.29–30), bring in for identification a number of innocent suspects who must be confirmed or eliminated at once if the search is to proceed rapidly. Another limitation would be caused by the fact that objections may not arise until the parade is viewed and then any application to the court, whether it was well-founded or not, might achieve its objective of the abandonment of the parade.

5.43 The alternative is what is called a trial within a trial. Objection is taken by the defence to the admissibility of the evidence on the ground that the parade was unfairly conducted; the judge breaks off to hear evidence on this issue, usually in the absence of the jury; on the basis of his findings he sustains or overrules the objection, and the trial then proceeds. The disadvantage, especially from the point of view of the defence, is that the judge is being presented with an accomplished fact. Objections which might have been compromised or dissolved before the parade took place must now be decided starkly: once a parade has been held under faulty conditions, it becomes impossible to hold another one under improved conditions. The judge does not like to apply the drastic remedy of excluding altogether vital evidence upon which the prosecution may depend and so he tends to override objections which, considered in advance, he might have thought quite reasonable. This is said to be the present experience of defence advocates. It is under the existing procedure open to the defence to invite the judge to exclude evidence emerging in an unfair parade under his general discretion to exclude evidence prejudicial to the defence. But it is said that, while the judge may be led to make an adverse comment, he will only very rarely exclude the evidence.

5.44 As we have said, the existing system is working reasonably well, and on the whole we do not think that the time has yet come for the introduction into it of judicial machinery. We think, therefore, that the police should continue to decide any dispute about the conditions of a parade as fairly as they can. If deadlock is reached, the defence should submit under protest which should be formally recorded. If there is to be challenge at the trial, it will stand a much better chance of success if it is based on a point taken at the time than upon one that may be said to have been thought up after an identification has been made.

5.45 We turn now to the refusal to attend the parade. The consequence will be that a dock identification will be permitted. The same consequence should follow upon a repeated failure of an accused on bail to attend a parade. If there has been only one failure we think that the police should seek to find out the cause of it and take such action, possibly by making an arrest, as may seem appropriate. Whether in custody or not the accused should after a refusal or a single failure be served with a notice on the following lines:

> You are formally invited for the last time to attend an identification parade to be held at ..... on ..... If you wish, you may attend under protest. Your protest and the grounds you give for it will be recorded in writing by the officer in charge of the parade and may be used by you if there be a trial in support of an application that any identification made on the parade should be disallowed.
> If you refuse or fail to attend a parade, that fact may be given in evidence. Furthermore, if there is a trial witnesses may be called to identify you in the dock as a person whom they saw in circumstances connected with the crime with which you are charged.

(3) *Photographing the Parade*

5.46 Most of the proposals we have relating to the conduct of the parade have been for amendments of the existing rules. We have received a few which would involve the introduction of a new feature and one of the more important of these is a proposal that parades should be photographed. This proposal has received considerable support, notably from the Lord Chief Justice and Mr Justice Cusack, but it has been received coolly, that is, with a lack of enthusiasm rather than with active opposition, by the police and some other bodies. They feel that the usefulness of a photograph, which they do not think would amount to much, is outweighed by the trouble it would cause.

5.47 After weighing these arguments, we have come down in favour in principle of one black and white photograph being taken of the parade as lined up. We consider that the jury will be able to judge from this whether or not the suspect stands out. If he does not, the parade is fulfilling its object: it cannot be expected to bring together persons so similar that differences between them can be detected only by close scrutiny. We are not, therefore, in favour of anything more elaborate. We do not think that a colour photograph would be particularly valuable, and, taken under the conditions in which a parade is usually held, the colours might well be deceptive. For the purpose we have in mind, we do not think that a ciné film would be as valuable as a still photograph. What is wanted is a photograph that the jury can inspect in the jury box and have with them in the jury room and look at as often as they want, not a film that they would have to adjourn to sit through.

5.48 We have no evidence of what the effect would be if a parade was photographed. Police witnesses apprehend that it would discourage volunteers from participating. At present it is quite usual for participants (we use that word in the limited sense to describe the members of the public who are brought in to assist) to leave their names and addresses, but the police consider that many people who are willing to do that would be unwilling to have taken what they would call 'a police photograph' and which they would think might be used for a

dossier; there would be the same objection as there is to the police having fingerprints. The only way of ascertaining whether these objections are sound or not is by experiment. We recommend, therefore, that experiments should be made in a number of representative areas and that, unless they prove unsuccessful, the practice should be made universal. It should, however, be subject to the following conditions:

1. Provision must be made for the security and ultimate destruction of any prints.
2. The photograph should be simply of the parade as lined up; there should be no individual photographs.
3. The officer in charge of the parade should ascertain whether the suspect wishes the parade to be photographed. Some may object to a police photograph, and, since the photograph is being made for the suspect's benefit, there is no point in overriding his objection. The objection should be recorded and the taking of the photograph abandoned.
4. The officer in charge of the parade should tell it that it is about to be photographed, should explain the reasons for the photograph and the precautions to be taken against its misuse. If any participant objects, it will be for the officer to decide whether to dispense with the photograph or with the objector.

(4) *Participants*

5.49 It has been mentioned incidentally above that it is quite usual for participants to leave their names and addresses. A proposal has been made to us that this practice should be universal. The advantage suggested is that if any complaint is made of unfairness on the parade, it would be useful to be able to contact independent witnesses; the suspect himself would obviously not be independent and even his solicitor, if he were present, might not be thought by a jury to be wholly independent. The proposal is opposed, though not by the police, on the ground that the procedure would be regarded as oppressive and might give rise to a risk of intimidation.

5.50 We conclude that as a matter of principle it is desirable to have a record of those who took part in the parade. Since the practice is already quite widespread[1] and there has been no evidence to support the fears expressed, we think that it should be made general and a rule made to that effect. It should, however, if a participant objects to giving his name and address, be left to the discretion of the officer in charge of the parade as to what to do. We think that normally he would be wise to dispense with the objector. The refusal would be odd and it is not inconceivable that persons who did not wish to be identified might have some improper reason for wanting to get on a parade.

5.51 We do not recommend that the names and addresses should be included in that part of the record of the parade (referred to in paragraph 5.75 below) which is given to the accused as a matter of course. They should be specially applied for.

5.52 The Metropolitan Police put it to us that the task of collecting participants would be made easier if they were paid a fixed sum for attendance. We under-

[1] It is in fact customary in 40 forces.

stand that this matter was considered by the Council of the Association of Chief Police Officers in June 1975 who recommended that there should be a uniform national fee of £1 for each volunteer member of an identification parade, and that in addition a reasonable payment should be made to cover expenses where these were incurred. We agree with this recommendation.

(5) *Witnesses*

5.53 One of the subjects which we have discussed in some detail with those who have given evidence to us is the susceptibility of witnesses at a parade to unintended pressures. As we have noted, some tend to be very nervous and allow this to affect their identification. We have also been impressed with evidence from psychologists which suggests that witnesses may tend to make an identification on parade because they feel that that is what is expected of them. This is not reflected in the statistics, for what they are worth. The Table in Appendix B does not reveal an alarmingly high percentage of identifications; on the contrary nearly half the witnesses failed to pick out anyone at all. The police are naturally anxious that nothing should be said or done to discourage a witness from making a positive identification when he is reasonably sure of the person.

5.54 The Parade Rules make some provision in paragraph 13 for the witness who is nervous at the prospect of having to touch the person he is identifying as the criminal; such a person can identify by pointing out. We think that in general it is desirable that the witness should identify by touching, since this is the only way which precludes any possibility of a mistake. Where the supervising officer has reason to think that a witness might not wish to touch, it would, we think, be better that the suspect or participant should be referred to by number. Most participants are in fact referred to in the report on the parade by their number in the line. It would not be difficult for a police station to be provided with numbers that could be laid on the floor in front of the participants.

5.55 We have read with great interest the observations on this point of the Thomson Committee.[1] This Committee is convinced that there are certain witnesses who are frightened to identify suspects in their presence and propose the introduction into all police stations of a one-way screen arrangement whereby the witness can identify the suspect without being seen by him. There are, apart from the expense and inconvenience of the erection of a one-way screen, two objections to this. The first is that it means that the identification will not be made within the sight of the accused; this objection can be mitigated if the suspect's solicitor, who the Thomson Committee recommends should always be present at this type of parade, is also behind the screen. The second objection is that, if the witness identifies the accused, he will have to repeat the identification openly in court. It seems to us that it would be necessary to warn the witness that this would be the case—a warning which might deter him from making the identification—since otherwise he might be misled into thinking that he would be protected from sight throughout. The evidence before us does not lead us to the conclusion that the problem of the nervous witness is grave enough to require this solution.

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[1] Cmnd 6218, paragraph 12.07.

5.56 Some witnesses, it is suggested, who dislike staring at people, may find it embarrassing to examine closely the person on the parade. An experiment with colour slides projected to life size, reported in the magazine 'New Behaviour'[1] found that mistaken identifications were higher in the conventional parade than with the colour slides. The use of colour slides would make it much easier to mount a parade, but a great deal of further experimentation would have to be done, we think, before the conventional parade was abandoned. It would need strong evidence to overcome the general belief that an identification in the flesh is better than one on paper. The ultimate identification, the one which counts for the purposes of the law, must be in the flesh at the trial; and the possibility cannot be risked that a witness, who had identified the slide, might say it was different now that he saw the man himself.

5.57 The 'blank parade' has been suggested as a device which might help to reduce the psychological pressure on a witness to pick out someone, even when he was not sure.[2] The scheme is that the witness would be told that he would be required to view two parades in only one of which a suspect would be standing. This would double the work of the police in mounting parades and we do not feel that the problem of psychological pressure is sufficiently acute to demand such a solution. Moreover, the double parade would carry with it some disadvantages of its own. If for instance the suspect were in the first parade and the witness identified him, the only apparent point in holding the second parade would be that the witness might become confused and identify someone on both parades; if, however, the second parade were not held at all, the participants would naturally feel that their time had been wasted and the difficulty of getting volunteers would soon be increased. If the suspect were not on the first parade but on the second and the witness had failed to identify anyone on the first parade, he might feel, as the psychologists agree, under even more pressure to identify someone in the second parade than may now be the case with just one parade.

5.58 We have considered whether psychological pressure might be reduced if more than one question was put to the witness. We examined the idea of putting three questions as follows:

1. Can you positively identify anyone on the parade as the person you saw?
2. If not, does anyone on the parade closely resemble the person you saw?
3. If not, can you say that the person you saw is not on the parade?

5.59 Many witnesses, we think, may feel that a man closely resembles someone they have seen before without being able to say positively that he is the man. The second question gives the witness an opportunity to escape the pressure to identify; he can then answer the first negatively without feeling that his attitude is totally negative and unhelpful. It might result in fewer positive identifications, but they would be the more valuable in that they would clearly signify something more than close resemblance.

5.60 These questions or something like them were in fact suggested to us for a

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[1] H. Dent and F. Gray, *Identification on Parade*, New Behaviour, 1975, 366–369.

[2] The suggestion goes back at least to the Report of the Royal Commission on Police Powers and Procedures of 1929 (Cmd 3297, paragraph 129), which deemed it to be 'of interest' but made no recommendation on the matter.

rather different purpose by some of the police representatives. When a witness fails to positively identify the suspect, the answers to the second and third questions will be valuable to the police in their investigation in helping them to decide whether they have got to start off on a new trail or not. They are questions which the investigating officer can ask afterwards in the course of his further enquiries, but there is certainly something to be said for their being asked openly and as a part of the parade procedure. On the other hand, some of the bodies who gave evidence to us were opposed to the asking of the questions for any purpose. Some feared the introduction of any notion of resemblance (see paragraph 4.9) while others thought that more than one question would confuse the witness.

5.61 On the whole we have come to the conclusion that it would be best not to alter the existing practice. Our chief reason for this is the danger of confusing the witness. Experienced persons agree that there is a real danger of this. For many witnesses the identification parade is their first contact with legal procedure in any form. They do not, as most witnesses in court do, see the procedure at work before they are called upon; they are brought straight onto the parade, addressed shortly and required to perform. If they were not given advance notice of the questions, if the second was not put until the first had been answered and so on, it would be simpler for them. But this would destroy the purpose we had in mind in paragraph 5.58. That purpose requires that the witness should have the alternatives presented to him so that before he is called upon to answer any questions he knows that a middle course is open to him. This might certainly confuse some witnesses.

5.62 There are other disadvantages. All the participants in the parade are supposed to resemble the suspect, and therefore each other to a certain extent. It may not, therefore, be clear to the witness just what is meant by close resemblance. It really means someone whom you think may be the man but about whom you are not quite sure, but it cannot be put that way. Again, it is not very desirable to invite witnesses to pick out persons who closely resemble the criminal. It is embarrassing for volunteers on the parade to be picked out in that way; incidentally, one of two of them who were picked out in the first of two of the Virag parades, did not attend the second (see Appendix C, paragraph 15). It must happen sometimes, of course, but it should not be made to happen more frequently than need be. Finally, there is the uncertain status of evidence of resemblance.

5.63 We think, nevertheless, that something should be done to relieve the witness of any sense of failing in his duty if he does not pick out someone on the parade. We have concluded that this may best be achieved by requiring the officer in charge of the parade to explain informally to each witness before he attempts to make an identification that the person whom he saw at the scene of the crime is not necessarily among those paraded. While we would not consider a rigid form of words appropriate, something along the following lines would, we think, achieve the object we have in mind:

> Mr Smith
>
> You have been asked here today to see if you can pick out the person whom you saw on .... doing .....

I should first explain that not only is there a suspect on this parade, but also (8) people who cannot have been involved. I am going to ask you in a moment to walk along the line and to touch any person whom you saw on .... if he should be here. Before doing so, however, I should point out that the person you saw may not be here, and you should touch someone only if you are quite sure that he is the person you saw.

5.64 The witness should then be asked whether the person he has come to identify is on the parade, and told that if he cannot make a positive identification he should say so. If in response to the single question, the witness volunteers any observation, it should be recorded. This is what seems to be contemplated by paragraph 14 of the Parade Rules; examples of the sort of thing a witness might say will be found in Appendix C, paragraph 18. We are dealing here with spontaneous observations. We do not think any questioning of the witness should be allowed as part of the parade.

5.65 It occasionally happens that a witness before he makes an identification asks to hear one or more members of the parade speak or see them move. This creates a difficult situation. The parade is a fair test of appearance only; the participants are not selected for similarity in speech or gait. Obviously it would be wrong to have all the members speaking or walking before any selection was made at all, since it would then be the singularity of speech or of movement which would determine the result. There is a case for saying that if a witness was hesitating between two or more persons, he should be allowed to hear them speak or see them walk before making up his mind. But it is easy to see how this could produce an unfair result. Suppose that a witness on a Virag parade had hesitated between Mr Virag and another; as soon as he knew that Mr Virag had a foreign accent and that the other had not, he would have chosen Mr Virag. He would then be said to have picked out Virag on the parade, whereas in truth, so far as appearance went, he would have been unable to say which of the two it was.

On the other hand, there is no reason why a witness should not check his recollection of appearance by reference to voice or movement. Maybe the further test would show him that his recollection was wrong and, if so, the sooner that is known the better. We think that if a witness asks for speech or movement, he should be told that it can be permitted only by one person. He should be asked whether there is any one person whom he can pick out because of his appearance and whom he is prepared to identify subject to confirmation. If he is, then what is in effect a voice or movement confrontation can be held and the identification either confirmed or withdrawn.

We recommend that a regulation to the above effect should be introduced into the Parade Rules, thereby modifying the existing Rule 15. The procedure, if it takes place, should be recorded in the superintending officer's report.

5.66 In the Virag case (Appendix C, paragraph 7) it was ensured that the witnesses were accommodated in a room where they could not catch a glimpse of the suspect or the participants awaiting the parade. Our attention has been drawn to the fact that, whereas paragraph 7 of the Parade Rules provides that the witnesses should be prevented from seeing the suspect before he is paraded, it says nothing about the other participants. It is, in fact, almost as important that the witnesses should not see the participants in circumstances which suggest that they are members of the public as that they should not see the suspect in

circumstances which suggest that he is the suspect. If when the witness enters the parade room he immediately recognises a number of non-suspects, the effective number on the parade is to that extent diminished.

Though we believe it is the general practice to ensure that the witnesses do not see the participants, we think that the omission to mention this in the rule should be remedied.

5.67 Finally, with regard to witnesses, some of the police representatives have pointed out to us in connection with the difficulty of mustering parades, the unhappy situation that is created when a parade is mustered for a witness who does not turn up. We do not think that this often happens, but neither do we think that the police should be powerless when it does. We recommend the introduction of a summons similar to a witness summons which can be used to require attendance at a parade at a given time and place. The summons should be available also for use in the rare cases when a witness refuses altogether to attend. In a recent case[1] a perceptive girl, aged 11, an important supporting witness, was not permitted by her parents to attend an identification parade. In consequence she made a dock identification which led to a conviction. We think that a refusal to attend an identification parade, whether made by the witness or by someone in authority over the witness, should be covered by the same principle as a refusal to attend a court of law.

(6) *The Suspect*

5.68 It has been suggested to us that the suspect's position should be improved by ensuring that he is formally told, not only as required by Parade Rule 10, of his right to have a solicitor or friend present, but also of all his rights in relation to the parade. In practice this is generally done, but we agree that it ought to be made a rule. We think, however, that the objective would best be achieved in two stages. Once a suspect has made it clear that identity is in dispute, and the circumstances are such that an identification parade would be called for, he should be given at the earliest convenient moment a leaflet describing the object and nature of the parade, as it will be set out in the code, and explaining in general terms his right to have a solicitor or friend present, his right to attend under protest if he objects to any of the conditions, and the possible consequences of his failure to attend (compare paragraphs 5.44–45).

5.69 In addition, a brief statement as to his rights regarding the actual conduct of the parade, covering such matters as the right to object to a participant, the right to change his position and so on, should be given him shortly before the parade itself. In the Virag case an hour before the parade was due to start, the supervising officer saw Mr Virag in his cell, ascertained that he could understand English and that he was willing to attend the parade, and made sure that he understood the procedure. While it will rarely be necessary to enquire whether the suspect understands English, we think that in general this is an excellent procedure and should always be followed, whether the accused is in custody or on bail, and whether or not represented by a solicitor. At this interview the accused may be given the brief statement mentioned above, and a specimen form suitable for this purpose is printed as Form D in Appendix E.

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[1] *R* v. *Smith* (CA, 17 June 1975, unreported).

(7) *Constitution of the Parade*

5.70 Paragraph 4 of the existing Parade Rules prescribes that wherever possible the officer arranging the parade should be of not less rank than inspector. We recommend that the qualification 'wherever possible' should be omitted.

5.71 The Parade Rules (see paragraph 8) provide for a norm of 8 participants. Dr Bytheway and Mr Clarke suggest that this figure should be 19, thus making a parade of 20 which would conform with 'a well established practice of statisticians to employ a 5 per cent level for establishing significance'.[1] Our advice from the Home Office Statistical Department is that, while this is a commonly used rule of thumb, it is of an arbitrary nature, and different levels may be applied according to the circumstances of the enquiry. The purpose of the parade is not to produce material for a random selection, but to test whether the witness has a sufficiently sharp recollection of the person he saw to pick him out from among a number of similar persons—in short, to avoid a confrontation. For this purpose the number on parade must be large enough to give a reasonable range and not too large to make the assembling of it difficult. Eight appears to us to be a reasonable number and, except as above, it has not been criticised.

5.72 It is natural that in recruiting participants for a parade the police should sometimes have recourse to institutions where groups are available. Several of our advisers have pointed out the danger that such groups may be of a recognisable type, e.g. an army type, in which the suspect might stand out, not perhaps so much in features as in bearing. We think that this danger should be recognised and that the rule (now in paragraph 8) should specify that several members of a homogeneous group such as the police or the army should not be used to parade, unless, of course, the suspect himself is a member of the group. There already exists a rule in the Metropolitan Police and in some other forces that policemen should not stand on a parade unless the suspect is a policeman.

5.73 Paragraph 3 provides that the investigating officer, if present, should take no part in conducting the parade. No one disputes the prohibition, but several have asked why the officer should be present at all; it is suggested that he might, consciously or unconsciously, make helpful signs to a witness. On the other hand, it is urged that it may be useful to the officer in his further investigations to see exactly what happens on the parade, especially when there is no identification or an identification of someone other than the suspect. We have no evidence of any misbehaviour by an investigating officer, but we think it important that, so far as possible, any occasion for suspicion should be avoided. If the suspect's solicitor is present, we can see no ground for excluding the investigating officer; but otherwise we think that he should not be present.

(8) *The Report of the Parade*

5.74 It is axiomatic, of course, that a proper record should be kept of the procedure followed at the parade. At present there is no requirement on police to keep such a record but, nevertheless, all forces do have either a form or a register for this purpose. We have examined and analysed these forms, which show a wide variety of style, format and information required. Only two forces use exactly the same form.

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[1] *On the Conduct and Uses of Identification Parades*, by Bill Bytheway and Malcolm Clarke, published by the Centre for Social Science Research, Keele University, page 5.

5.75 It is particularly important that there should be maintained a consistent and detailed record of all that the witness does at the parade. Indeed, it is already the practice in police reports on identification parades not merely to state the result, but also to state exactly what the witness did, for example, whether he went straight to a particular person and identified him, or whether he first walked up and down the line. This is done, principally, for the information of the prosecution in assessing the strength of the case, but it is, of course, also useful for the defence in presenting their case. We recommend this should continue, in a form prepared for the purpose and we reproduce at Appendix E drafts of the forms which we consider should be used by all police forces. Forms A and C contain all the information which we believe the defence should have as a matter of course, and in such a form that they could be copied easily and made available to them. We recommend that when a parade has been held before the suspect is charged, copies of Forms A and C should be given to the accused or his solicitor if and when the charge is made or a summons served upon him: when the parade has been held at a later stage, the copies should be served as soon as the forms are completed. This recommendation is intended to apply to all cases in which the suspect is charged and not merely to those parades from which evidence for the prosecution emerges. A copy of each Form C completed irrespective of whether the witness picked out the suspect or not, should be supplied.

5.76 We recommend that the details of participants should be recorded on a separate form, a specimen of which is at Form B of Appendix E. While this form may be attached to the police record of the identification parade, it should be made available to the defence only on special application (see paragraph 5.51) and it is for this reason that we have kept it separate from the general record of the parade (Form A).

(9) *Alternatives to the Parade*

5.77 The identification parade is not the only method which the police have developed for the purpose of avoiding a confrontation between the witness and the suspect (see paragraph 4.16). There are other conditions besides the parade in which the witness can be found in a group; we can categorise them as conditions in which the witness has taken the initiative in picking out the offender. We have considered whether these methods ought to be regarded as alternative to a parade or merely as a preliminary. It can be argued that when the police have found a suspect by one or more of these methods, they ought to put him on a parade to make sure. But our advisers generally took the view that this would be a farce, and we agreed. The suspect would be entitled to an immediate parade to determine whether he should be charged and maybe held in custody or not; and the parade would follow so soon after he had already been picked out as to be worthless. In this respect we think that the situation differs from that created by identification by photograph. There is a great difference between a picking out on paper and a picking out in the flesh; and moreover there is frequently quite a long interval between a photographic identification and a parade.

5.78 These alternative methods are often used when there is no specific suspect in view and when the police think that the offender may be one of a group that resorts to a particular place. For this purpose we consider them to be unimpeachable. They are, however, capable of being used also when there is a specific

suspect in view. For example, the suspect, perhaps previously identified by photograph, might be known to work at a particular factory or to go to a place such as a labour exchange at a particular time. There have been cases where the witness has been taken to such a place so that he can view the suspect in a crowd and pick him out if he can.

5.79 We do not regard such a procedure as unfair. We have not, therefore, proposed any special term to exclude it as a satisfactory prerequisite to dock identification. Some police officers regard it as a more satisfactory, because a more natural, method than the parade, and they may be right. But it has the disadvantage that it is less controlled than the parade. It takes place in an atmosphere in which hints, conscious or unconscious, may be given and mistakes made about the person pointed out, and where neither a solicitor nor the accused is able to check what is being done. We recommend therefore that as a matter of general practice it should not be used in cases in which a parade can be mounted. Where there is some good reason for not holding a parade we regard it as acceptable. One case in which it might certainly be used with advantage is where the suspect has refused to go on parade.

(10) *Parades in Prison*

5.80 The present rules say that a suspect in prison who is willing to take part in an identification parade should be produced at the nearest convenient police station for this purpose, unless special security considerations make it unwise to hold the parade outside or the suspect refuses to take part in a parade unless it is held in prison. There are, however, grave objections to holding identification parades in prison, and all those whom we have consulted agree that they should be eliminated if possible. While the suspect may choose those from among the prison inmates whom he wishes to stand with him on the parade, there is no guarantee that sufficient persons similar to himself will be available to make the parade a fair one, even if all concerned co-operate fully. It may well be difficult to ensure that the last condition is fulfilled by prison inmates and it has been put to us that not infrequently it is possible for the suspect and his fellow prisoners to reduce the proceedings to something approaching a farce.

5.81 Even if these disadvantages did not exist we would not accept that a prisoner should be accorded the right not available to ordinary suspects of exercising some (if limited) choice over where the parade should be held. We recommend, therefore, that while it may be necessary to make special arrangements in a small number of cases where there is a serious problem of security, identification parades should not be held in prison. If it is required to put up a prisoner for identification he should be given the opportunity to attend a police station (under the normal procedure for the production of prisoners) to take part in a parade which should be conducted according to the ordinary rules. If he refuses, he would (like any other suspect) lay himself open to the risk of being identified for the first time either by confrontation or in the dock.

5.82 In cases involving a high security risk, it may, at the discretion of the authorities, be necessary to arrange for the parade to be held in a place where security can be safeguarded more easily than in a police station. We think, nevertheless, that in such a case the ordinary rules for the conduct of parades

should be observed, and other participants in the parade should be volunteer members of the public, not fellow prisoners.

V Status of the Rules

5.83 This gives rise to two questions. The Parade Rules and the Use of Photographs Rules are, as we have said, cast in the form of instructions to the police and the document in which they are contained is described as a 'memorandum' attached to a circular (see Appendix A). Any breach of the rules is a matter for police discipline. Beyond that, the only sanction for non-observance is contained in the following sentence in the circular letter:

> The memorandum has been prepared in consultation with the Lord Chief Justice and the Secretary of State understands that failure to observe its provisions may well result in the judge, in his summing-up to the jury, commenting on the reliability of the evidence obtained.

5.84 The first question is whether the rules should be raised in status. The highest status attainable would be that of a statutory regulation. Short of that they could be given the status of a code, such as the Highway Code or the industrial codes of practice which may be issued under the Health and Safety at Work etc Act 1974. In neither of these codes is the breach of an article itself an offence, but in neither is it irrelevant. In the case of the Highway Code it may be relied upon 'as tending to establish or to negative liability'. The Health and Safety at Work etc Act 1974 prescribes a general duty to maintain conditions of safety and the like; failure to comply with an article of an industrial code amounts to proof of neglect of that duty unless it is proved that the duty has been fulfilled in some other way.

5.85 Obviously one of the main reasons for raising the status of the Parade Rules or the Use of Photographs Rules would be to secure that a breach of them would result in some stronger sanction than that of judicial comment. So the second question is what should the stronger sanction be. On this our advisers are divided. No one recommends that a breach of the rule should be an offence with legal penalties attached, so there would seem to be no point in turning the rules into statutory regulations. But several bodies argued for an 'exclusionary' rule, that is that, where there was a breach, evidence of identification should be excluded, at any rate unless the prosecution could establish that the breach was immaterial. On the other side it was argued that the matter should be left entirely to the discretion of the trial judge who in the exercise of it would doubtless have regard to any breach of the rules.

5.86 We think that it should prove practicable to steer a course between these two. By concentrating upon the object of the rules as a whole rather than on the wording of any single one of them we think that there can be avoided on the one hand too severe a rigidity and on the other too wide a discretion. The result would be to give the rules a status similar to that of the Highway Code.

5.87 On the first question we think that in any event the rules should be revised in form. We have recommended a number of amendments so that for that reason alone they will require to be substantially re-written. The Parade Rules as they stand are not designed to present a comprehensive drill but are directed to particular points upon which police officers might be thought to require guidance. We think that the Parade Rules should now take the form of a statement,

based on a parade conducted as in Appendix C of the drill which is usually to be observed. Their object will be primarily to constitute a code by reference to which the fairness of the parade, if it is challenged at the trial, can be tested; and secondarily to give to the suspect the information he needs about what is going to happen to him on the parade, about his rights and about the rights and duties of the police. Points which are intended solely for the instruction of the police can be given to them in the form of a commentary upon the rules and in a purely administrative document.

We think that the Use of Photographs Rules should be revised in the same way. The conduct of a parade and the use of photographs for identification purposes are two distinct processes and we think that the rules relating to them should form two separate codes.

5.88 On the second question we shall deal first with the Parade Rules. We have already provided that the admissibility of identification evidence will be normally dependent on the result of an identification parade, and 'parade' in this provision must naturally be taken to mean at the least a parade held fairly and in a manner calculated to achieve its object. At the most it could be taken to mean a parade held strictly in accordance with the Rules. We do not advocate this latter meaning, since the result would be that a trivial breach might defeat a substantially unobjectionable identification. We think that the best course is that, either in the statute or in the Rules themselves, there should be stated plainly the object of the identification parade and that if in the opinion of the judge at the trial the conduct of any part of the parade is such as to substantially impair the achievement of that object, the parade or the part of it affected shall be treated as a nullity; and that in considering whether the object is impaired, the judge shall have regard to the Rules but shall not be confined to them.

5.89 The object of the existing Parade Rules is stated in their first paragraph. We agree with the criticism that Dr Bytheway and Mr Clarke have made on the wording of this rule that it may be read as assuming that the criminal is on the parade and as implying that what is in question is simply the witness's ability to recognise the suspect as the criminal.[1] We think that it should be restated on the following lines: 'The object of an identification parade is to test the ability of a witness to pick out from a group the person, if he is present, whom the witness has said that he has seen previously on a specified occasion'. All the Parade Rules are designed to achieve this object and so, if one is broken, the breach must immediately give rise to a consideration of how the object is affected. But in the end the question for the trial judge is whether a breach of the rules or any other piece of misconduct or misfortune (as for example a signal given wittingly or unwittingly by a participant) has made the test unsatisfactory. If the test is unsatisfactory, then the parade is unsatisfactory and any evidence that emerges out of it should be held inadmissible. If it has been admitted and has resulted in a conviction resting wholly or mainly upon it, then the conviction is unsatisfactory and should be quashed.

5.90 The revised Use of Photographs Rules will, first, specify the conditions under which photographs should be shown to witnesses and, secondly, ensure that they shall not be unnecessarily shown.

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[1] *op cit* (note, page 124), page 6.

5.91 As to the first, the conditions for inspection are similar to those on a parade and the object can be stated in the way we have just indicated as being 'to test the ability of a witness to pick out from an album of photographs the picture, if it is there, of the person whom the witness has said that he has seen previously on a specified occasion'. The question for the judge is simply whether, having regard to the code, the test is satisfactory. If it is not, any identification which the witness may make at a subsequent parade must also be held to be unsatisfactory and so inadmissible.

5.92 As to the second, the consequences of a breach of a rule designed to protect an accused against the unnecessary showing of his photograph are not so simple to handle. We talk of a 'breach', but we do not see non-compliance as creating any sort of an offence. The police are engaged primarily in a search for the criminal and it is for them to decide how best to use the opportunities they have got. If they can find the man who did it and if, as in the case of Payen, they find at the same time a mass of incriminating material, the case is not going to turn wholly or mainly on the reliability of the identifying witnesses. We do not see the rules about showing photographs as rules in the sense that a breach of them amounts to misconduct; they constitute a code for holding the balance as fairly as may be between the needs of the investigation and the protection of an accused. The police may therefore act in accordance with what they see as the necessities of the case, so long as they appreciate that, if, through carelessness or in excessive zeal or simply because they see no other way forward, it matters not which, they use photographs too freely, they are thereby impairing the value of the identification evidence. We think it should be left to the trial judge to determine whether they have done so and, if they have, to apply the remedy. The remedy should in our opinion be the exclusion as an identifying witness of the person, or persons, to whom the photographs need not have been shown. This can be done by adding to the statutory regulation of dock identification (see paragraph 4.108) a provision on the following lines:

> A witness for the prosecution shall not be asked to identify in court an accused person as a person whom he saw in the circumstances of the crime if he has previously been shown by or at the instance of a police officer investigating the crime a photograph of the accused, unless the judge, having regard to the Use of Photographs Rules, is satisfied that the showing was reasonably necessary for the purposes of the investigation.

5.93 By framing the matter in this way we follow our general principle of giving the trial judge a limited and defined discretion. At present he has a general discretion, the exercise of which will inevitably be influenced by his personal views on the effect of photographs on the fairness of an identification. We propose to limit this discretion to the evaluation of a factor which cannot be made the subject of a general rule, namely, the needs of the investigation in a particular case. In deciding this question the judge, though not absolutely bound by the rules, should be guided by them. They should be drafted so as to make the norm quite clear. The norm is that the showing stops as soon as a single witness has made an identification. Any departure from that should call for special justification. But it would not be right to make the rule absolute. On the one hand it might be too wide: when a suspect can be viewed on parade or on some comparable occasion, it would not be right to show a photograph at all.

On the other hand, there may be cases when it seems to an investigating officer unsafe to take action on a single identification, which is perhaps not absolutely clear and positive. It has to be remembered that the next step after a photographic identification may very well be an arrest which the police will have to justify as being made upon reasonable suspicion.

5.94 We have expressed in paragraph 5.28 our views on those cases in which photographs of a wanted man are published or shown to individuals. For the reasons there given we do not think that in these cases the accused stands in the same need of protection; accordingly, if any rules are made to cover them, we think that they should be administrative only. We have also expressed in paragraphs 5.80–81 above our views on the holding of parades in prison; any rules on this point should likewise be administrative only.

5.95 The general result, if our recommendations are accepted, is that there will be two codes similar to their nature and effect to the Highway Code. We think that the codes should be reviewed from time to time by the Home Secretary and that he should be given power to amend them. The Highway Code is promulgated by virtue of a section in the Road Traffic Acts but is not scheduled to them. In the case of these codes, since they will be specifically referred to in the statute, we think that they should be scheduled to it.

VI. Alibis: Preparation and Investigation

(1) *The Duty of the Prosecution*

5.96 It might be said that logically we should consider first the duty of the defence since the duty of initiating an alibi falls upon it. But in practice the police often hear about an alibi before the accused's advisers do. A suspect on arrest or when first interviewed may, as in Virag's case, deny the charge and say that he was not the man and that he was in fact elsewhere. What then is the duty of the police?

5.97 Whatever it is, an addition has been made to it at a later stage as a result of the Criminal Justice Act 1967. That Act, as we noted in paragraph 1.15, requires the defence within 7 days after the end of the committal proceedings to give a notice of alibi with particulars and names of witnesses. The Act says nothing about any duties of the police in connection with the notice. But the Ninth Report of the CLRC, on which the Act was based, said expressly that the police should be able to interview the alibi witnesses.[1] In order to lessen the difficulties that might arise if allegations were made that the police acted improperly when interviewing a witness, the Committee recommended that, before interviewing a proposed alibi witness, the police should, whenever possible, give the solicitor for the defence reasonable notice of their intention to do so and a reasonable opportunity to be present at the interview. When the Bill was before Parliament the Home Secretary gave an undertaking that this would be done.[2] What then is the duty of the police at this later stage? Does it differ from their duty at an earlier stage? In our opinion it does.

5.98 In paragraph 1.22 we explained how it had come about that the police in

[1] Evidence (Written statements, formal admissions and notices of alibi) (Cmnd 3145), 1966, paragraph 40.

[2] Official Report, Standing Committee A 1 February 1967, col 219.

practice, before launching a prosecution, considered not only whether there was a *prima facie* case, such as would satisfy an examining magistrate in committal proceedings, but also whether in all the circumstances the case was likely to succeed. For this purpose the police have a duty to make enquiries in a quasi-judicial spirit. By quasi-judicial in this context we mean that the enquiry is to be conducted as much with the object of ascertaining facts which will exonerate as of ascertaining those which will convict; and that the facts when ascertained are to be assessed impartially. It is because this quasi-judicial duty exists that it is not unreasonable to expect a suspect to make a voluntary statement to the police; no such expectation could reasonably be entertained if he were simply giving advance information to the enemy. If a voluntary statement made at the outset includes particulars of an alibi, it is therefore the duty of the police to enquire into these particulars and in the light of the results of the enquiry to re-examine their own evidence of identification and to consider whether it remains strong enough to justify a prosecution.

5.99 But once proceedings have been initiated the position is radically altered. The process is then under judicial control and there is no longer any place for quasi-judicial decisions. Indeed, the police are not normally required to reach any decision at all. Their duty, insofar as it is indicated by the CLRC, is to 'investigate' the alibi, and in particular to make enquiries about the credit of the witnesses to be called in support of it. What is meant by 'investigation' is clear enough when one considers the mischief that the new procedure was designed to remedy. The mischief of the 'sprung alibi' was that further enquiries, which might disprove the truth of it, could often not be made by the prosecution without an adjournment. Advance notice means that such enquiries can be made in advance. For that purpose the prosecution have to know more than would appear from brief particulars. They must know enough of what the witness is going to say to lead them maybe to other sources, contradictory documents perhaps or to other witnesses whom they will then have time to bring to court. Hence the need, in the view of the CLRC, for the police interview. But the object is not for the police on the one hand to cross-examine the witnesses with a view to breaking them down nor on the other hand to do the work of the defence or turn stones that the defence has left unturned. They have not got to make up their minds whether or not the witnesses are telling the truth or to decide whether the defence is likely to succeed. It would be absurd to evaluate the defence without interviewing its principal witness who is naturally the accused himself.

5.100 Of course, even in a limited investigation something may emerge that throws grave doubt on the prosecution's case. It is not, however, at this stage for the police to assess the weight of the doubt and assume the responsibility for acting on it. Open justice requires that after proceedings have been initiated everything should be done in public; the defendant has the right to public exoneration and the public (and in particular those members of it upon whose evidence the charge was brought) a right to know why the proceedings are not taking their normal course. The police are not to be expected to withdraw a prosecution unless it is perfectly clear that it is quite hopeless. It is only by rigid adherence to this principle, notwithstanding that it may involve time and money and perhaps some distress to an accused, that there can be avoided any suspicion of a hole and corner affair. All this is well illustrated by Dougherty's case. There were witnesses who were quite convinced that he was the man. He had in fact

been a shoplifter and some of his friends and neighbours who were prepared to support his alibi had minor convictions. An announcement that the police had investigated the alibi and accepted the truth of it might well have given rise to dissatisfaction at the British Home Stores and even possibly led to suggestions that the police had been fixed.

5.101 We shall come back later on to the nature of the investigation of a notice of alibi. It is convenient now to return to the investigation at the earlier stage and to consider certain suggestions that have been made to us about this. It has been suggested to us that if the police at this stage take statements from potential witnesses to an alibi, they should provide the defence with copies of them. We do not agree with this. Alibis are sometimes concocted; and if the criminal before he commits himself to any particular line, is given advance information about what the police know of his movements, he will know what ingredients have to go into the concoction. We think that, whatever view may be taken about the nature of the prosecution's duty to disclose statements generally (see paragraph 5.4 above), they ought not to be required to disclose statements relating to an alibi, at least until after the notice of alibi has been served. They should, however, in our opinion be required to notify the defence forthwith of any documents or articles relating to the alibi which they have removed. An example is the Club Book in the Virag case; see paragraphs 3.38 and 3.119.

5.102 Another small point arises out of the Virag case. When, as recorded in paragraph 3.37 above, Sergeant Taylor was interviewing witnesses at the Trojan Club, the statement form which he tendered contained a sentence at the foot of it to the effect that any knowingly false statement in it rendered the signatory liable to prosecution for perjury. This is necessary if the statement is to be used as that of a prosecution witness in committal proceedings.[1] We think that the statement form should only be used when it is reasonably clear that the statement is going to be tendered as part of the prosecution's case. This is never likely to happen in the case of an alibi witness; if exceptionally the prosecution wanted to make use of his evidence, they would put him in the box. So the sentence does not reflect the true legal position and may deter a potential witness for the defence from giving information.

(2) *The Duty of the Defence*

5.103 A solicitor who is instructed that his client has an alibi should at once take a full statement from him and follow it up with statements from corroborative witnesses. This will put him in a position to give the notice of alibi at the time of the committal proceedings or within seven days thereafter as required by the statute. When he is notified by the police that they wish to interview the alibi witnesses, the good solicitor should arrange, if he can, for the interviews to take place in his office. The handling of the alibis in the Dougherty and Virag cases fell far below this standard. While we do not think that in this respect they were altogether typical, our enquiries suggest that they were not quite horrifying exceptions, and that, except in the case of the biggest and best solicitors, the preparation of an alibi is often a good deal more perfunctory than it should be. It must be appreciated that the ordinary criminal defence is often a matter simply of meeting and answering the case for the prosecution; it may sometimes

[1] Criminal Justice Act 1967, s 2.

involve no more than interviewing one witness other than the accused himself. The work involved in this type of case is not comparable with that of the prosecution. But an alibi involves the defence in building up a case from its foundations and may place a considerable strain upon the small office which is handling 20 or 30 criminal cases a week; see paragraph 2.8. The legal aid scheme itself does not make any provision for distribution of cases to solicitors who are best able to handle them; in effect, the accused picks out his own solicitor, as in Dougherty (see paragraph 2.8) and Virag (paragraph 3.39).

5.104 There has been no suggestion that restrictions imposed by the legal aid scheme hamper the activities of the defence solicitor. What is said is that the fees paid, which for many firms in criminal practice are by far their largest source of income, are too low to finance the employment of enough solicitors and clerks of the right calibre. Many firms, it is said, have not the staff to prepare alibis as well as they should do. In reply it might be asked whether enough use is being made of enquiry agents; there are firms employing ex-policemen who would seem to be well fitted for the job. Or it may be asked whether it would be practicable to allot alibi defences only to firms who are large enough and experienced enough to cope with them. We have not the time to pursue enquiries of this sort. But we attach, as we have already made clear, the greatest importance to the proper preparation of alibi defences; we have been left with the impression that inadequate preparation of the alibi is a contributory cause of many of the miscarriages of justice in identification cases. We recommend that the appropriate authorities should be invited to consider, in the light of the Dougherty and Virag cases, whether they are satisfied with the existing arrangements for the conduct of alibi defences, including the scale of remuneration provided, and, if not, what alterations are necessary.

(3) *The Scottish System*

5.105 When the CLRC decided to recommend the introduction into the English system of the notice of alibi, they were taking a novel step, though one which has commanded general approval and was at no point criticised before us. There was then no precedent for requiring an English accused to condescend to any detail in his general plea of not guilty. When the Committee decided to introduce the notice of alibi, they had to decide also upon the sort of machinery which would be necessary to implement it. They could have taken any one of at least three courses. First, they could have put upon the defence the same burden as is laid upon the prosecution, i.e. the provision to the other side of the statements of all their witnesses with the requirement that they should be brought before the examining magistrate for questioning if desired. Secondly, they could have adapted the machinery in the English civil procedure for obtaining further and better particulars. Thirdly, they could have looked to the Scottish procedure which unlike the English provides for special pleas including the special defence of alibi.

5.106 The Report does not show to what extent the CLRC explored the first two; there are obvious arguments against each of them. But it is clear that the CLRC chose the third and adopted the police interview as a means of getting particulars of the plea because that was already established as the Scottish method. In assessing its value, it is, we think, desirable to elaborate a little on the Scottish procedure and on the differences between it and the English.

5.107 There is in Scotland no committal procedure (the nearest thing to it is the first or pleading diet) and no duty upon the prosecution to disclose the statements of their witnesses. But the prosecution is required to attach to the indictment the names of all the witnesses whom they intend to call and it is then open to the defence to 'precognosce' or question these witnesses. The precognition which emerges is in effect the questioner's note of what the witness is likely to say. It differs from a statement in that it is not seen and signed by the witness and it cannot be used to discredit him at the trial. It is, in the words of the Thomson Report, 'very highly confidential'.[1]

5.108 By this means the defence can get to know, though more informally, as much of the prosecution's case as it does in England. But the prosecution is given a similar advantage. If the defence intends to call any witness, other than the defendant himself, whose name is not on the prosecution list, they must give notice of the name to the prosecution at least three days before the trial. The prosecution may then precognosce the witness as above; it is usually done by the police on behalf of the procurator fiscal. This is the rule whether or not a special defence is being raised. Notice of a special defence such as alibi must be given at the pleading diet, and it is the normal, indeed almost the invariable, practice for the notice to contain the names and designations of the supporting witnesses. Neither the prosecution nor the defence are entitled to have a representative present while their witnesses are being precognosced by the other side, nor is it usual that there should be such a representative. In providing that the defence solicitor should, if he wished, be present during the police interview, the CLRC made a concession to English fears that the police might misuse their opportunities. Each side must supply the other with a list of 'productions', i.e. documents and other articles which they intend to exhibit at the trial.

(4) *Criticisms*

5.109 Some of the criticisms which the Committee has received in the Dougherty case blame the police for the inadequate presentation of the alibi evidence. We think that it should be made clear both to the police and to defending solicitors that it is not a police duty to see that the alibi is properly investigated and effectively put before the court. Their duty is to see that material which may contradict the alibi is before the court. Of course if their investigations lead to something in favour of the defence that the defence itself has missed, they do not suppress it. It may be likewise that their investigations will so thoroughly destroy the alibi that the defence do not persist with it; or alternatively, that they prove the alibi to be true. But it is not the object of their investigations that they should either destroy or confirm the alibi. It is always open to the defence to place all the material in the hands of the police at the outset and invite them to confirm it. When they give a notice of alibi, they are signifying thereby that they want the points to be determined by the court and not by the police.

5.110 The existing notion that the police are ultimately responsible may tend to make the defence solicitor less thorough than he should be since the police are going to look into the matter anyway. The police interview also leads to allegations, such as were made in the Virag case, that defence witnesses are put off from giving evidence. We have had no evidence of any impropriety com-

[1] Cmnd 6218, paragraph 17.04.

mitted by the police, but this is the sort of allegation that is likely to be made and possibly to be believed whenever one side has an interview with persons already selected as witnesses by the other. Bearing in mind that the accused in an identification case frequently has a criminal record and criminal associates, there is always the possibility that the alibi witnesses are persons who, when interviewed by the police, are over-anxious to say what they think the police would like them to say.

5.111 It has not been found easy to arrange an interview with the witness at which both the police officer and the solicitor can be present. It is often a great inconvenience for witnesses to have to come to solicitors' offices. The police are used to interviewing witnesses at home after working hours, but solicitors do not like that. Apart from the hours and the inconvenience, the double interview imposes a burden on solicitors who have little manpower to spare. It may also be unpopular with the witnesses. They do not quite understand what the police are doing. Where they have already made a statement to the defence, they may, as happened in Dougherty's case, be disinclined to make another statement to the police. Alternatively, they may be inclined to think that it is the police who are in charge. In Dougherty's case witnesses who did not want to come to court thought it enough to tell the police so.

5.112 In Scotland a potential alibi witness can be compelled to attend before the procurator fiscal for the purpose of giving a precognition.[1] It has, moreover, been laid down by the court that it is the duty of such a witness to give such information to the Crown as he may be asked, just as it is the duty of a prosecution witness to give similar information to the prisoner's legal advisers. In England there is no rule of practice to inhibit the defence from advising alibi witnesses not to give information to the police. In *R* v. *Evans*[2], 5 out of 6 alibi witnesses refused information. The Court of Appeal accepted the defence solicitor's statement that he had not so advised, but did not lay down any rule of practice. A possible cause of the reluctance of English witnesses may be the practice of the English police, contrary to the Scottish system, of asking for a signed statement. Such statements are commonly used for the cross-examination of the witness at the trial and sometimes too much is made of minor discrepancies. On the other hand, under the Scottish system there is no way in which major discrepancies between the precognition and the evidence actually given can be exposed at the trial. This is generally recognised as creating a problem. The Thomson Committee proposed to solve it, first, by encouraging the procurator fiscal to precognosce on oath before the sheriff a suspect witness, i.e. one who was thought to be open to persuasion to change his evidence, and then by providing that a sworn precognition should be admissible at the trial to test credibility.[3]

(5) *Conclusions*

5.113 We have already expressed our view on the proper function of the police in the investigation of a notice of alibi. There is, however, another view which has been strongly and authoritatively expressed to us. This is that the police have

[1] Renton and Brown, *Criminal Procedure according to the Law of Scotland* (4th Ed.), paragraphs 5–68.

[2] CA, 29 January 1974, unreported.

[3] Cmnd 6218, paragraphs 17.09 and 44.07.

the same duty to investigate a notice of alibi as they have initially to investigate the circumstances of the crime—in short, that the distinction we have drawn in paragraphs 5.98–100 above between the two stages is a false one. On this view the police should interview and question all the alibi witnesses and at the end of it re-assess the prosecution's case. If in their judgment the alibi is confirmed, they should discontinue the prosecution. They cannot, of course, once there has been a committal to the Crown Court, withdraw the prosecution without the leave of the court; but it is only in rare cases that the court would feel itself in a position to override a decision of the prosecution not to proceed.

5.114 This raises a large question. The police have already taken over or had thrust upon them many of the responsibilities which under other systems are discharged by an examining magistrate. To extend this responsibility beyond committal into an area which is the province of the defence would be a further erosion of the adversary system. The adversary system is being criticised, but we do not think we ought to take for granted a radical departure from it in theory, the more so since we think that in relation to the particular circumstances of the alibi the departure would in practice prove unfortunate. An extension of police responsibility into the area of the alibi defence will lead in practice to a diminution of defence responsibility. Solicitors, who are either hard pressed or insufficiently conscientious, will be tempted to avoid the hard work involved in the thorough preparation of an alibi. They may even content themselves, as they did in both the Dougherty and the Virag cases, with getting a list of names and addresses from their client and leaving the rest to the police. This would be a very unsatisfactory result. Our recommendations will, therefore, be based upon the narrower view of the police function. It is, however, of the first importance that it should be made authoritatively clear to prosecuting solicitors and to the police exactly how far police responsibility goes.

5.115 In paragraph 5.103 above we said that it was the duty of a solicitor who is instructed that his client has an alibi to take at once a full statement from him and from corroborative witnesses. This is an obligation which we are quite sure would be accepted generally by the profession. Where this has been done, is there any reason why the statements should not be supplied to the prosecution in the same way as the prosecution supplies to the defence statements of additional evidence? And if that is done, is there any reason why the police should interview the witness? The defence solicitor has no right to have a witness, who after committal furnishes additional evidence for the prosecution, brought before the committing magistrates for questioning. Of course, if the object of the process is the testing by the police of the witness's veracity a written statement will be insufficient. But if the object is to ensure that the prosecution is not taken by surprise, a reasonably full statement by the witness is all that is necessary.

5.116 We do not think, however, that we can recommend making the furnishing of such statements compulsory with the consequent abolition of the police interview. There would then be no satisfactory way of ensuring that the statements were sufficiently full. In the case of a prosecution witness a judge can exclude evidence which is not in his statement. It is much more difficult to exclude evidence that could establish innocence. What therefore we recommend is that solicitors should be encouraged to supply statements to the police (at present they do so only very rarely); and that the encouragement should take the

form of the police refraining from exercising their right to interview unless the statement was defective and supplementary information refused. This would mean that in cases in which statements are promptly and sufficiently supplied, the solicitor—and the witness also—would escape the burden of an interview.

5.117 We have considered whether we should recommend that the police, when they do interview, should adhere to the Scottish system and abandon the practice of obtaining from the witness a signed statement for use in cross-examination at the trial. There is much to be said for this, but we do not make the recommendation. We should much prefer to see the preparation of adequate statements by the defence solicitor and the furnishing of them to the prosecution become the general practice. In that event interviews would be rare and, when they did take place, it would be because the defence was not being co-operative. In such circumstances we do not wish to place any restriction on the conduct of the interview.

5.118 The statement from the witness which the defence solicitor should take and supply should contain the same amount of detail relevant to the alibi as is required in a statement of additional evidence taken by the prosecution. It should be made clear that there is no advantage to be gained for the defence by holding anything back. The best way of doing that is by the exercise of the power of adjournment if anything emerges at the trial which takes the prosecution by surprise. An adjournment in such circumstances is highly inconvenient, but it is not disastrous. The knowledge that the power is there and that it will be exercised if necessary will serve as a discipline effective enough to make the actual exercise exceedingly rare.

5.119 The witness's statement should contain his or her date of birth. The relevance of this (which has puzzled the Court of Appeal[1]), is that, if the witness has a criminal record, it enables it to be discovered. As we have mentioned, the CLRC had in mind as a particular object of the investigation, enquiries about the credit of the witnesses to the alibi.

5.120 In paragraph 5.108 above, we noted that under the Scottish system the defence as well as the prosecution must supply a list of exhibits. There may be cases in which an alibi witness will be referring to a document and, where he does, the document should be identified in this statement and the prosecution given inspection and a copy if desired. We think that when an opportunity occurs to amend the Criminal Justice Act 1967, the requirement to identify documents should be made compulsory in the same way as the requirement for particulars and the names of witnesses.

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[1] *R* v. *Sullivan* (1970), 54 Cr App R 389.

CHAPTER 6

POST-TRIAL PROCEDURE

I. APPEAL AND PREROGATIVE

6.1 The problem of how to treat fresh evidence arising after a conviction is one which arises in both the Dougherty and Virag cases and which is especially likely to arise in cases of disputed identity. If a person is innocent or believed by his friends and relations to be innocent, it is inevitable that they will speculate about who it was who could have done it, will look for undiscovered clues and will examine the ways in which the accused's alibi might even after the twelfth hour be strengthened. If these lines of enquiry are productive, what they will produce will be fresh evidence. Inevitably then appeals will be made to the Court of Appeal or to the Home Office or to both to look at the fresh evidence. In this chapter of our Report we intend to consider whether the stories in the Dougherty and Virag cases show the machinery in both of these institutions to be working satisfactorily and, if not, what lessons are to be learnt.

6.2 Some of the reasons which we gave in paragraphs 4.18–26 in justification of the creation of special safeguards at the trial for identification cases may be used to suggest that identification cases should be given special treatment at the appellate stage and thereafter. It can be suggested too that problems relating to the admission of fresh evidence are especially likely to arise in identification cases. In framing this chapter of our Report we have had in mind only identification cases because they alone are within our terms of reference. We can see that it may be argued that the recommendations we make are as applicable to all cases as to identification cases, but an enquiry into the force of that argument would take us out of our province.

6.3 As mentioned in chapter 1, our administration of justice is based on the adversary system and the trial retains many of the characteristics of the battle. In a battle it is the responsibility of each side to get all its troops on the field on time. Napoleon could not appeal against the verdict of Waterloo on the ground that Marshal Grouchy and his army were still on their way when Blucher and the Prussians arrived in the nick of time. Under the adversary system relief is granted if the lack of evidence at the time of the trial was due to misfortune, but not if it was due to lack of diligence or to a deliberate decision to do without the evidence. The law on this point is fundamentally the same in criminal as in civil cases; see paragraph 2.37. In civil cases, this operation of the principle of finality, as it is called, is accepted as perfectly just. In criminal cases it operates upon the prosecution (which has no right of appeal against the verdict anyway[1])

[1] S 36 of the Criminal Justice Act 1972 allows a reference to the Court of Appeal on a point of law only, following an acquittal. But the verdict remains unchanged whatever the outcome of the reference.

without any relief for misfortune: that also is accepted as perfectly just. But its operation upon an accused attracts criticism which illuminates one of the points at which the adversary system does not quite suit modern ideas. There may have been a time when it was acceptable to public opinion that a man, *ex hypothesi* innocent of the crime of which he had been convicted, should on the principle of 'woe to the conquered' serve out his time in prison because the carelessness of his lawyers—even his own carelessness—had lost him his case: but that time is not now.

6.4 In fact the consequences of negligence and folly have always been mitigated for the accused—though now perhaps more freely than they were—by the use of the Prerogative of Mercy. We are not here concerned with the grant of mercy in the strict sense of that word, but with the use of the Prerogative to correct a situation in which, as it is bound sometimes to occur, judgment according to law does not equate with justice in a particular case. When this occurs, in the civil law, the afflicted party is left to draw such consolation as he can from the maxim that 'hard cases make bad law'. For the defendant in a criminal case one of the uses of the Prerogative is as a means of avoiding the application of the maxim. Cases in which fresh evidence is tendered often fall into this class. The exclusion of the evidence may well be justified by a legal rule which is absolutely necessary to the regular administration of justice and yet which works an injustice in a particular case.

6.5 When a petition against conviction is presented to the Home Secretary accompanied by a submission of fresh evidence which he thinks deserves examination, he may act in one of two ways. He may decide to deal with the petition himself and, if he considers it to be well-founded, may as he did in the Virag case act under the Prerogative by recommending the grant of a Free Pardon. Or he may, as he did in Dougherty's case (paragraph 2.60) act under the Statutory Power (first granted to him when the Court of Criminal Appeal was created in 1907) and refer the case to the Court of Appeal for determination as if it were an appeal by the convicted person. It has long been established that when the Home Secretary does this, the Court will consider whatever fresh evidence is referred to it, notwithstanding that, had the appeal been initiated by the convicted person, leave to call the fresh evidence would not or might not under the ordinary rules have been granted.[1]

6.6 At first sight this seems an odd state of affairs. One asks oneself why, if the Court of Appeal is going to admit the evidence eventually at the behest of the Home Secretary, it does not do so at once and of its own motion. The answer is that they preside over separate jurisdictions which are governed by different principles. The Court of Appeal administers the law. However unmeritorious an appellant's case, he is entitled to the benefit of the law; because of this the Court from time to time allows appeals on purely technical points and where, as it sometimes says, the appellant has no merits at all. When the case gets to the Home Secretary the appellant has lost the protection of the law and is in mercy. The Prerogative will not help him unless the Home Secretary is satisfied that his individual case is one in which an actual injustice is or may be being done.

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[1] *R* v. *McGrath*, [1949] 2 All ER 495, *per* Lord Goddard CJ at 497; see also *R* v. *Swabey*, [1972] 2 All ER 1094, *per* Lord Widgery CJ at 1103.

6.7 Thus, the two institutions—the Court of Appeal and the Prerogative in the aspect of it which we are considering—complement each other, the Prerogative being, as it is sometimes called, the 'long stop' or 'safety net'. The combination produces a severe discouragement to an appellant from slackness in the preparation of his case but without imposing upon him as a penalty a term of imprisonment for a crime which *ex hypothesi* he did not commit. The discouragement is caused not merely by the fact that the appellant puts himself in mercy. Inevitably time must elapse while his case is being considered in the Home Office and it is time which the appellant will be spending in custody.

II. Appellate Procedure

6.8 The above analysis of the relation between the law and the Prerogative was necessary as a preliminary to considering the suggestions made to us for alterations in the law and procedure governing the admissibility of fresh evidence. The wider suggestion, made by Mr Alec Samuels,[1] is that all fresh evidence going to identification should be admissible as a matter of course. On the narrower ground (paragraph 2.58) *Justice* has criticised the insistence of the Court that the appellant has to bear the consequences of any negligence or inefficiency on the part of his defence lawyers.

6.9 It is highly desirable that the admission of fresh evidence by the Court of Appeal should be as large as is consistent with the regular administration of justice. It is not desirable that the appellant should be left to the Prerogative in any case in which he can properly be given the benefit of the law. Nevertheless, there must be some limit and we do not agree that the appellant should be given an option—for this is what it would amount to—to present his case either at the trial or on appeal or partly in one place and partly in the other, as suits him best. We do not think that in this respect an issue of identification should constitute an exception to the general rule.

6.10 On the point raised by *Justice* the Court of Appeal has not formulated any general rule as to what should be done when the omission to adduce evidence at the trial is attributable to the appellant's legal representatives and advisers. The omission may occur in a wide variety of circumstances ranging from a lack of due diligence to a decision made at the trial which has turned out disadvantageously. It would be impracticable to cover the range by a statutory provision.

6.11 Dougherty's case illustrates the variety of circumstances and is particularly relevant to the decision that turns out disadvantageously. At the trial Mr Fenwick, if we may return to the field of Waterloo, decided not to adjourn for Grouchy (whom he did not think much of anyway) and to risk Blucher. Had the situation been as Mr Fenwick had then supposed, his client would have been acquitted, whereas, if after an adjournment the alibi had been shown then to be fabricated, he might well have been convicted. This is the sort of advantage which the adversary system allows and which under any other system would have been denied by a decision by the judge that he wanted to hear the driver of the excursion bus (see paragraphs 2.32–33), whether or not his evidence favoured the defence. We do not think that this sort of situation can be resolved simply by increasing the latitude given to the defence.

[1] *Fresh Evidence in the Court of Appeal Criminal Division*, [1975] Crim LR 23.

6.12 The Act of 1968 requires the Court of Appeal to admit fresh evidence when it is satisfied that there is a reasonable explanation for the failure to adduce it at the trial. We cannot recommend an amendment to the statute which would require the court to admit fresh evidence notwithstanding that there is no reasonable explanation for the failure to adduce it at the trial. Nor can we recommend a statutory provision telling the court what it should or should not accept as a reasonable explanation; this must be left to the judiciary. The Court of Appeal has not laid down any general rule about what should happen when the cause of the failure is negligence or inefficiency on the part of the defence lawyers. It has however said recently that where a deliberate decision has been taken by counsel at the trial not to call a witness, it will not, 'save perhaps only in the most exceptional circumstances' allow that witness to be called on appeal.[1] This makes it clear that the court will not regard the deliberate decision as being *per se* a reasonable explanation under sub-section (2) of section 23 of the 1968 Act and that in such a case it will rarely exercise its discretion under sub-section (1) (see paragraphs 2.38–39). This sounds severe. But it must be remembered that it is not a final condemnation of the appellant to what may be unmerited imprisonment. It is a ruling that normally he must seek relief by other means. A decision not to make use of evidence available at the trial is something that would have to be fully accounted for. The accounting may be a delicate process involving the competence of counsel and solicitors and perhaps the complicity of the appellant. If the judiciary considers that such a process is better performed informally in the Home Office than in open court, we think that their view must be accepted. We should, however, expect that the court, when they are assessing what amounts to exceptional circumstances, would have regard not merely to the circumstances on which the evidence was excluded, but also to the weight of the excluded evidence. In Dougherty's case (which was certainly exceptional) the evidence excluded could, if it had been marshalled by a solicitor for the purpose of the application, have been shown to be irresistible. In such a case the acts and decisions of counsel and solicitors at the trial, whether defensible or not, cease to matter. Once it is plain that sooner or later and in some way or another the prisoner has got to be released, there is no point in delay.

6.13 This leads to the second question which arises out of the Dougherty case and which concerns the grant of legal aid for applications to call fresh evidence. We must confine our observations on this point to situations similar to that in the Dougherty case, i.e. where the question of tendering further evidence arises at the conclusion of the trial. Such a situation is covered by the 'post-operation' service noted in paragraph 2.40. If counsel is then able to advise that further enquiries from prospective witnesses might reasonably be expected to produce statements 'likely to be credible' and 'admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal' (we quote from sub-section (2)(a) of the Criminal Appeal Act 1968, section 23; see paragraph 2.38), we recommend that legal aid should normally be extended to cover the services of a solicitor. What we are saying is that the matter of whether there is 'a reasonable explanation' under sub-section (2)(b) of section 23 ought not to come into the question—as it did decisively in the Dougherty case—of whether or not legal aid should be extended to cover the solicitor. Even if there is no reasonable explanation under sub-section (2) there is still the matter of the discretion under

[1] *R* v. *Brett and Others* (CA, 28 July 1975, unreported).

sub-section (1), and we do not think that the discretion can be properly exercised when the weight of the further evidence is unknown.

6.14 While at the time Dougherty's case was being dealt with the position regarding legal aid in appeal cases was by no means clear, an unofficial group inaugurated under the chairmanship of the late Mr Justice Bean had been for some time examining procedures for preparing appeal cases. The group's deliberations seem to have been given final impetus by the difficulties which arose in Dougherty's case, and its labours resulted in June 1974 in the publication of a pamphlet entitled *Preparation for Proceedings in the Court of Appeal Criminal Division*. This pamphlet was commended to solicitors and counsel by the Lord Chief Justice in a Practice Note issued at the same time.[1] The Note included a reminder that solicitors should explore any reasonable possibility of calling fresh evidence at the earliest possible moment, and that for this purpose a legal aid order under section 30(7) of the Legal Aid Act 1974 would apply in the way set out in the pamphlet. Furthermore, in granting legal aid for the oral hearing of an appeal the Court would order 'full legal aid' whenever there was good reason to appoint a solicitor, for example, if it appeared that reports, witness statements, or other new material, where important, might be required. It is, in our view, of the first importance that legal aid for an appellant should include the services of a solicitor whenever these services are reasonably required for the preparation of further evidence. We think that the Practice Note, if liberally interpreted, should achieve this object.

6.15 The remaining question under this head relates to the practice of retaining in the Court of Appeal the services of the counsel and solicitor who handled the case in the Crown Court. In the ordinary appeal this is obviously in the client's interests and it ensures that the court will have the assistance of counsel and solicitors familiar with the course of the trial. This will be true also in a case in which the possibility of further relevant evidence has emerged only in the course of or after the trial. But when an application is presented for the admission of evidence which was known to be available and which for some reason was not used, we think that the reverse is more likely to be true. At the hearing of such an application it is almost inevitable that the acts or omissions of counsel or solicitor or both will be under scrutiny and accordingly that the court as well as the client will benefit from an independent presentation.

We recommend that in such cases the general practice should be that a new counsel and solicitor are assigned. There may of course be exceptional features and, if there are, they are likely to appear in counsel's advice. But we think that the professions would welcome a general rule that is fully in accordance with their traditions. There will of course be many cases in which the conduct of counsel and solicitor has been beyond criticism. Where there is a general rule, the change will imply no criticism. Where there is no general rule, the Registrar will have to decide in each case whether or not there is room for criticism and a change then made may be taken as a slur which there has been no opportunity of rebutting.

III. Home Office Procedure

6.16 We have described the procedure in paragraphs 3.85–90. The Virag case was initiated by the letter of 11 September 1971. Nearly two years later on 29

[1] [1974] 1 WLR 774.

August 1973 the Assistant Secretary requested that an enquiry should be made into the case. In his statement to the House of Commons on 8 April 1974[1] the Home Secretary said that clearly there was unacceptable delay within the Home Office.

6.17 The major part of the delay was due to a serious misjudgment of the importance of the case by the officer who first dealt with it, coupled with the fact that officers in the Division were under exceptional pressures due to staff shortages; see paragraph 3.88. In his statement to the House the Home Secretary said that he was reviewing the procedure for dealing with cases of this type. As a result of this review, and of a subsequent management study of the Criminal Department of the Home Office, certain changes have been introduced which we are authorised to publish. The higher staff (i.e. Higher Executive Officer and upwards) in C3 Division dealing with matters relating to the exercise of the Royal Prerogative of Mercy—which in 1973 had already been increased from 12 to 14 by the addition of a Senior Principal and a Higher Executive Officer—was further increased by another Principal and two more Higher Executive Officers. The object of this re-inforcement was to relieve overloading and to increase the speed and accuracy of the examination of cases and of decision taking, and also to improve the standard of 'on the job' training for this type of work. Two of the Principals (one of whom has considerable experience in the Organisation and Methods field) were given special responsibility respectively, for the development and improvement of training procedures and the application of appropriate management methods within the Division. Subsequently responsibility for this work, and all the staff dealing with it, were, in the course of a redistribution of work within the Office, transferred to a newly-created C5 Division (which deals with life sentences as well as the Prerogative and associated work). The effect has been to enable the head of the Division to exercise closer control with less distraction from other urgent work arising from other fields of responsibility.

6.18 The serious misjudgment and the exceptional pressures mentioned in the preceding paragraph account for most of the period between 11 September 1971 and March 1973 (when the case reached a Senior Executive Officer on the second stage of its progress) and perhaps for some of the period between March 1973 and the request for the inquiry on 29 August 1973. Had the case proceeded with the customary speed there would nevertheless have been a substantial delay of some months, perhaps as long as six months, between the receipt of the letter from the Director of Public Prosecutions and the request for the enquiry. In our opinion it ought not to have taken longer than was necessary to read and digest that letter and the report which accompanied it to perceive that there was a need for a further enquiry. We were led by this to ask about the test that was employed. We wondered also whether the officer's serious misjudgment of the importance of the case was due solely to his individual underestimate or whether it might be attributable at least in part to the sort of test which he was expected to apply. We made therefore a full enquiry into this aspect of the matter, receiving the utmost assistance from the officials concerned.

6.19 In our opinion, whenever fresh evidence is tendered that appears to be credible, the first question that arises is whether it changes the complexion of the case. If it does, there is an immediate need for a further enquiry (whether it takes

[1] Official Report, Vol 872, col 46.

the form of a new investigation or of a complete re-examination) in order to answer the second question. That question is whether, when the case is looked at again after the further enquiry, doubt is cast on the rightness of the conviction. In the Virag case the new evidence showed at once that at the time of the trial the full facts were not known and that the supposition upon which the jury had convicted Mr Virag, namely that he was the only criminal involved, was probably false. This did not necessarily clear Mr. Virag of complicity but it altered the complexion of the case. This is why we have said that it needed only the perusal of the letter to see that an enquiry was called for. The officer concerned must, we think, have been asking himself the wrong question, i.e. not whether the evidence changed the complexion of the case but whether it was enough to upset the conviction. We think that in all cases of fresh evidence the two questions, involving the two stages, should be kept distinct.

6.20 What then is the right test for the answering of the second question, that is, after the re-assessment of all the evidence, taking the old and new together? Essentially the test which the Home Secretary applies is a reversal of the burden of proof. This does not mean that the petitioner must provide indisputable proof of innocence, but he must establish very convincing grounds for thinking that he did not commit the offence of which he has been found guilty by due process of law. This is a lot stiffer than the test that is applied in the Court of Appeal. There, since the appeal is based on fresh evidence, there is an initial burden on the appellant to show that the evidence he is tendering is credible and material in the sense that it might have made a difference to the verdict. But, once the hurdle is jumped, the appeal follows the ordinary course with the burden of proof, as always, on the prosecution to show that after a re-examination of all the relevant material the conviction is one which is 'safe and satisfactory', that is, as it has been put, that the Court is not left with a 'lurking doubt'.

6.21 We think that the Home Secretary should apply the same test as the Court of Appeal. It is anomalous that he should not. For when he has decided that there is a *prima facie* case for reconsideration, i.e. when he has found that the fresh evidence submitted is credible and material, he has then to make up his mind whether he will send the case to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 or will deal with it himself. He cannot refer a summary conviction to the Court of Appeal because it does not fall within section 17. Nor can he refer a case in which he is being asked to consider legally inadmissible evidence, for the Court of Appeal will not do that. There may also be cases, such as the Virag case, when it is undesirable that the new evidence, or a part of it, should be given in public. Doubtless there are other factors, but, whatever they may be, we cannot conceive of any which would justify the imposition of a different burden of proof if the case proceeds in one mode than if it proceeds in the other.

6.22 In discussion with representatives of the Home Office we were reminded that the two processes, i.e. the reference to the Court of Appeal and the internal inquiry within the Home Office, were intrinsically different. The handling of cases under the latter process is subject to serious limitations; evidence cannot be fully tested and witnesses cannot be heard. It was suggested that in such a situation it was right that a stiffer test should be applied. We appreciate the difficulty but nevertheless think that the solution lies in assimilating the processes as far as

possible rather than in differentiating the tests. The discussion went on to contemplate an independent review tribunal with rules of evidence and procedure different from those of the ordinary courts, to which cases unsuited to the section 17 procedure could be referred. We recommend that the feasibility of creating such a tribunal should be studied within the Home Office. It could be manned by persons with criminal appellate experience and its powers might be either determinative or advisory.

CHAPTER 7

PROCEDURE IN MAGISTRATES' COURTS

7.1 In the previous chapters of this Report we have had in mind trials on indictment, before judge and jury. It is in the Crown Court that the more serious crimes are tried, carrying the heavier penalties. Instances of actual or probable miscarriages of justice arising from misidentification which have been drawn to our attention, have come, with few exceptions, from such trials. We think there are good reasons for this. Cases of disputed identity arise much less frequently in courts of summary jurisdiction. In the great bulk of summary offences, the defendant is either arrested, or questioned at the scene of the offence. Where process is by way of summons, as in nearly all traffic or street offences, some evidence of identification is obtained at the scene, and disputes as to identity are rare. Disputes which involve the calling of alibi evidence, we are told, are even rarer.

7.2 In those cases where identity is seriously disputed, there are, already, a number of basic differences in summary court procedure from that followed in the Crown Court.

First, an appeal from the magistrates, unlike an appeal from the verdict of a jury, takes the form of a complete rehearing before a Crown Court judge sitting with other magistrates. The evidence called on appeal can differ materially from that called below, and omissions and mistakes made at the first hearing can be rectified by either side. Thus if a person is wrongly convicted, the error will have to be repeated twice for an ultimate miscarriage of justice to occur.

Secondly, adjournments of a case can be made with far greater ease in magistrates' courts; for in the Crown Court the convenience of jurors makes such adjournments largely impracticable. Thus either party, or the court itself, can seek an adjournment for further inquiries to be made, if such a course appears desirable.

Thirdly, the provisions of s. 11 of the Criminal Justice Act 1967, whereby advance notice of particulars of alibi is made a prerequisite to the calling of any evidence in support of an alibi, are applicable only to trials on indictment.

7.3 In the light of the above, we have given much thought to a consideration of the extent to which our recommendations should apply to trials in courts of summary jurisdiction. It has been forcibly pointed out to us that any overcomplication of procedure in these courts could result in unacceptable delay and complexity in a whole range of cases which are at present satisfactorily disposed of with reasonable despatch. These could include all those cases which at present involve a more or less 'formal' identification of the defendant by a single witness, which are not true identity cases at all. We appreciate this danger, and mainly because of it, we have rejected a number of suggestions

made to us: for example a statutory requirement for some form of corroboration: an obligation on the defendant to serve a notice of disputed identity: a duty upon the clerk to draw the attention of the bench, formally, to the dangers of identification evidence. We do not consider it appropriate that the more formal procedures applicable to the higher courts should be followed in courts of summary jurisdiction.

7.4 Our main recommendations so far have covered three areas:

(1) The basic principle or rule, which is of general application (paragraphs 4.53–71)

(2) Dock identification (paragraphs 4.89–109)

(3) The alibi (paragraphs 4.72–76)

The argument in chapter 4 is directed to trials on indictment, and much of it would obviously not be applicable to summary trials. At present it appears to us that summary trial procedures in this sphere are working reasonably well. Before changing these procedures we feel that a period of time should elapse to see how those of our recommendations which are implemented, work out in practice in the Crown Courts. This would also afford an opportunity to take into account any redistribution of business between magistrates' courts and the Crown Court which may result from the recommendations of the James Committee.[1]

7.5 We have decided therefore to limit our specific recommendations, for the time being, to trials on indictment: we make no proposals for any procedural changes in magistrates' courts. This does not mean that we believe that different legal principles should be applied in magistrates' courts. On the contrary, in those cases in which identity is a real issue, we recommend that magistrates should have regard[2] to the principles we have enunciated in paragraphs 4.53–71 above, and should direct themselves accordingly. We must emphasise again that true identity cases of the kind we have in mind do not include the mass of cases where an identification is made in court and is really no more than a formality. Nor, where a name and address has been taken at the scene, or some other evidence of identification provided, will magistrates have any difficulty in finding exceptional circumstances or additional evidence as spelt out in paragraph 4.55 above. We are confident that magistrates will be well able to distinguish the true disputed identity case when it occurs, and will then apply the general rule.

7.6 Again, in the true identity case, regard should be had to the unsatisfactory nature of dock identification. Magistrates should feel encouraged to reject evidence of identification of this kind, when they are satisfied that an identification parade has been omitted without good reason. In these circumstances they should feel free to refuse to act on a dock identification alone.

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[1] Report of the Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts (Cmnd 6323), 1975.

[2] Compare clause 28 of the draft Bill contained in the CLRC's Eleventh Report, which reads: 'At the summary trial of a person for an offence the court shall have regard to all such enactments as would or might in comparable circumstances at a trial on indictment require the court to warn the jury of a special need for caution before convicting the accused.'

7.7 In the infrequent case where an alibi defence is put forward, magistrates should apply the principles set out in paragraphs 4.72–76. Every encouragement should be given to solicitors to notify the court and the prosecution, at the earliest opportunity, of an intention by the defendant to dispute identity. Equally there should be a ready grant of an adjournment where the prosecution has been taken by surprise.

7.8 As the proportion of cases of true disputed identity in summary courts is very small, we do not think that our recommendations will noticeably increase the number of defendants electing to go for trial in the Crown Court, where such election is open to them. Such cases would usually, in our view, justify the grant of legal aid, where the financial conditions are satisfied. By their very nature, they would be cases where an election would be likely to be made, in any event.

CHAPTER 8

SUMMARY AND RECOMMENDATIONS

(Recommendations on detail are in small print)

I. Introductory

8.1 We are satisfied that in cases which depend wholly or mainly on eye-witness
4.18–25 1.24 evidence of identification there is a special risk of wrong conviction. It arises because the value of such evidence is exceptionally difficult to assess; the witness who has sincerely convinced himself and whose sincerity carries conviction is
1.25 4.12–15 not infrequently mistaken. We have found no forensically practicable way of detecting this sort of mistake. We recommend that further research should be encouraged.

4.15 Research should be directed to establishing ways in which the insights of psychology can be brought to bear on the conduct of identification parades and the practice of the courts. In particular, research should proceed as rapidly as possible into the
4.5 practicability of voice identification parades with the use of tape recorders or any other appropriate aids.

8.2 Although our examination of the processes peculiar to identification cases, such as the identification parade, shows the need for some improvements (which we consider below), it does not uncover any clear defect in the machinery which substantially increases the risk of error. The only way of diminishing the risk is by increasing the burden of proof. This inevitably will make it more difficult to convict the guilty as well as the innocent, and so is a course to be followed with restraint.

8.3 The traditional way of increasing the burden is by imposing a requirement
4.53 4.36–42 of corroboration. We do not recommend this for two reasons. The first is that there are types of cases which it would be difficult or impossible to bring within a statutory definition (they would include, for example, cases in which there has been frequent or prolonged observation) where the requirement would impose an excessive burden. The second is that the traditional requirement is in our
4.67 opinion on the way out. Before 1966, when the verdict of a properly directed jury was virtually conclusive, the requirement of corroboration, even though it gave rise to undesirable technicalities, was a necessary safeguard. Since 1966 the Court of Appeal has been required by statute to reverse a verdict which they do not regard as safe and satisfactory; this makes it unnecessary to control as strictly as before the material that is left for the consideration of the jury.

II. Trial Procedure

8.4 We do however wish to ensure that in ordinary cases prosecutions are not brought on eye-witness evidence only and that, if brought, they will fail. We

think that they ought to fail, since in our opinion it is only in exceptional cases that identification evidence is by itself sufficiently reliable to exclude a reasonable
4.54 doubt about guilt. We recommend that the trial judge should be required by statute

4.83 a. to direct the jury that it is not safe to convict upon eye-witness evidence unless the circumstances of the identification are exceptional or the eye-witness evidence is supported by substantial evidence of another sort; and

b. to indicate to the jury the circumstances, if any, which they might regard as exceptional and the evidence, if any, which they might regard as supporting the identification; and

c. if he is unable to indicate either such circumstances or such evidence, to direct the jury to return a verdict of not guilty.

4.62–65 We give examples of exceptional circumstances, but we leave the law on this point to be developed by judicial precedent. We do not think that it is practicable
4.61 or desirable to provide by statute a definitive list of exceptions or a prescribed
4.84–85 minimum of additional evidence.

8.5 We have three other proposals to make on trial procedure which we summarise in the next three paragraphs. The first relates to the summing-up generally. The other two call for a tightening of procedure in two respects, first, in the matter of the dock identification, and, secondly, in relation to breaches of the rules governing identification parades and the showing to prospective witnesses of a photograph of the suspect.

4.56–59 **8.6** In the last few years judges in their summings-up have tended to deal more elaborately than in the past with the issue of identification. We think that this
81–82, 86 tendency is to be encouraged. In particular we think that the judge should deal
4.72–76 carefully with the alibi put forward; identification evidence and alibi evidence
1.2 are opposite sides of the same coin.

8.7 It is generally agreed that dock identification is undesirable and unsatisfactory. It is however legally admissible and the courts have left it to the discretion of the trial judge to say whether or not it should in particular cases be reject-
4.108 ed as prejudicial. We recommend that this discretion should be limited and regulated by statute. Identification on parade or in some other similar way in which the witness takes the initiative in picking out the accused should be made a condition precedent to identification in court, the fulfilment of the condition to be dispensed with only when the holding of a parade would have been impracticable or unnecessary. An example of its being im-
4.103 practicable is when the accused refuses to attend. An example of its being
5.45 unnecessary is when the accused is already well-known to the witness. In all cases in which a dock identification is permitted the judge should be required by statute to warn the jury about the weakness of such evidence in a situation in which there has to be a confrontation and not a picking out.

1.9 **8.8** There has been in operation for some time a Home Office Circular instructing the police on the manner of holding parades and of showing to potential
5.95 witnesses photographs of a suspect. We recommend that these should be reconstituted into separate codes—a parade code and a showing of photographs

code—and scheduled to a statute. We recommend various amendments which we summarise below under the heading of pre-trial procedure. The question that arises at the trial itself is about the consequence of a breach of the rules. At present this is left to the discretion of the trial judge. Here again we recommend that the discretion of the judge should be limited and regulated by statute.

We recommend that the object of the Parade Rules should be restated as being 'to test the ability of a witness to pick out from a group the person, if he is present, whom the witness has said that he has seen previously on a specified
5.88–89 occasion'. If the trial judge considers that a breach of the rules (or any other piece of misconduct or misfortune) has made the test unsatisfactory the parade or the part of it affected should by statute be treated as a nullity and any evidence that emerges out of it should be excluded.

We recommend that a breach of the Showing of Photographs Rules should be treated in the same way, the object of the rules being stated as being 'to test the
5.91 ability of a witness to pick out from an album of photographs the picture, if it is there, of the person whom the witness has said that he has seen previously on a specified occasion'. These Rules will also make provision against the unnecessary showing of photographs. Once the police have got a suspect whom they can put on parade, further steps towards identification should be taken by means of the parade and not by the showing of photographs. We do not propose that this should be an absolute rule since the needs of the investigation must be paramount, but we consider that any departure from it should call for
5.90–93 justification. We recommend a statutory provision that a witness who has been shown a photograph of the accused shall not be permitted to identify him in court unless the judge, having regard to the Rules, is satisfied that the showing was reasonably necessary for the purposes of the investigation.

III. Pre-trial Procedure

8.9 The chief aspects of this which we have investigated are

(1) The obtaining and furnishing of descriptions of the criminal (paragraph 8.10)
(2) The showing of photographs (paragraph 8.11)
(3) The identification parade (paragraphs 8.12–17)
(4) The preparation and investigation of the alibi (paragraphs 8.18–20).

We deal with each of these separately in the paragraphs noted above.

8.10 The police usually, but not invariably, obtain and put into writing a description of an unidentified person against whom a complaint is made. It has been suggested to us that such descriptions should be made more fully available than they are at present to the defence before the trial and that they should be admissible in evidence. We recommend that

5.15 (1) There should be an administrative rule that the police should, wherever practicable, obtain and put into writing descriptions of an alleged criminal.

5.12, 15 (2) The prosecution should be required by statute to supply the defence on request with the name and address of any witness, whether or not he attends a parade, who is known to them as having seen the criminal in the circumstances of the crime, together with a copy of the description, if any, of the criminal given by such a person.

5.15 (3) When a witness for the prosecution has identified in court the accused as a person whom he saw in the circumstances of the crime, any written description of that person, signed by that witness and given when first interviewed by a police officer, should by statute be made admissible in evidence to show that the witness's identification is consistent with the description as given.

8.11 The showing of a photograph of a suspect to a potential witness is an indispensable step in the search for the criminal. At the same time it necessarily affects the reliability of any identification which that witness may make. We have indicated in paragraph 8.8 what we regard as the best solution of this problem. In general, we recommend that the rules should be revised to ensure that the conditions under which photographs are shown conform as closely as possible with those which apply to an identification parade.

5.26 The procedure should be superintended by an officer of not less rank than sergeant.

5.26 The album of photographs should not be shown to the witness until he is alone in a room with the superintending officer, only one witness being present at a time. If more than one witness has come to make a selection, care should be taken to see that they do not communicate with each other.

5.26 The witness should be left to make his selection, without help, from the album which should contain not less than 12 photographs.

5.26 A written report of the procedure, including the date and hour of the photographic inspection, should be made by the superintending officer and a copy supplied to the defence.

8.12 An identification parade is not primarily a scientific test of a witness's memory for faces. It is a device for avoiding a confrontation. The result of it is that an identification on parade is usually worth something whereas an identification after confrontation is frequently worth nothing. Within its limits the parade
5.30–31 has proved a most useful device. Statistics for the year 1973 show that less than half the witnesses brought to parades picked out the suspect on them and most of the others did not pick out anyone. We can hardly doubt that, if there had been a confrontation, the 'success rate' would have been much higher than that. The device of the parade eliminates the uncertain witness. It does no more than that.

We have received proposals calculated to make it do more than that. An identification on parade is at present enough by itself to secure a conviction and this is naturally a cause for concern. We doubt, however, whether there is any practicable method of adapting the parade so as to increase materially the value of any identification emerging from it. So we have preferred to meet the point by reducing the value attached at the trial to the identification on the parade. Our recommendations summarised in paragraph 8.4 are designed to ensure that only in exceptional circumstances will the parade identification constitute the whole case against the accused.

8.13 We do not therefore propose any radical amendment to parade procedure. We have received little complaint about the conduct of parades by the police. So the bulk of our recommendations under this head is concerned with small points and in many cases they are only making formal provision for what is already being done in many police forces. The parade rules were not framed to

encompass a comprehensive drill but were directed to particular points upon which police officers might be thought to require guidance. We recommend
5.87 that they should be revised to take the form of a statement of the drill which is
5.74–76 usually to be observed. We recommend also a standard form of Parade Report.

5.68 Once a suspect has made it clear that identity is in dispute and the situation is likely to call for an identification parade, he should be given at the earliest convenient moment a leaflet describing the object and nature of the parade, his rights in respect of it and the possible consequences of his failure to attend.

5.70 The parade should always be supervised by an officer of no lower rank than inspector.

5.66 Witnesses should be prevented from seeing members of the parade before they are introduced for the purpose of making an identification. They should also, so far as is
5.31 practicable having regard to the circumstances of the case, be prevented from talking with each other.

5.72 Members of a homogeneous group, such as the police or the army, should not normally be used as participants in an identification parade.

5.39 While it is desirable that a suspect should always have a solicitor representing him at a parade, this is not an indispensable requirement. If, however, the accused's
5.73 solicitor is not present the officer investigating the case should be excluded from the parade.

5.54 For the purpose of making an identification, witnesses should normally touch the person picked out. The problem of the nervous witness may best be dealt with by numbering the members of the parade, and asking the witness to indicate the number he selects.

5.64 Any observation volunteered by the witness should be recorded.

5.65 A request by any witness to hear a member of the parade speak or see him walk should only be granted if that witness has first picked out a member of the parade and desires to hear that person's voice or see him walk for the purpose of confirming his identification. In such a case only the member of the parade concerning whom the request is made should be allowed to speak or walk.

5.69 The officer in charge of the parade should interview the suspect in advance, explaining to him the procedures and giving him a printed statement of his rights of the kind set out in Form D of Appendix E.

5.50–51 Names and addresses of participants in the parade should be recorded, but not automatically given to the accused. They may be given to the defence on request.

5.80–82 Parades should not be held in prison. Where a prison inmate is required for identification he should normally be invited to go to a police station for an identification parade. If he refuses he should be deemed to have refused to attend a parade. Where there is a serious security problem, a parade may be held elsewhere than in a police station, but, subject to the security requirements, should be conducted by a police officer under normal parade rules with members of the public (not prisoners) as participants in the parade.

5.75 Standard forms of the kind set out in Appendix E should be used by all police forces for recording identification parades. Copies of Forms A and C should be given to the defendant as soon as he has been charged or a summons served on him.

5.67 Provision should be made for requiring the attendance of a potential witness at an identification parade.

8.14 There are, however, three points which call for special remark and which we summarise in the next three paragraphs. They are

1. Photographing the parade.
2. The tendency to identify.
3. The accused's right to a parade.

Under the first two heads we recommend changes of procedure; under the third we have considered changes, but do not recommend them.

5.46–48 **8.15** It has been proposed to us that the parade should be photographed so that the jury may have an opportunity of judging for itself whether or not the suspect stands out. Objections of some weight have been made to the taking of a photograph and, accordingly, we recommend that experiments should first be made in a number of representative areas and that, unless they prove unsuccessful, the practice of taking a photograph should be made universal.

8.16 We have been impressed with evidence from psychologists which suggests
5.53–62 that witnesses may tend (though the tendency is not apparently reflected in the statistics) to make an identification on parade because they feel that that is what is expected of them. We have considered various ways of relieving the pressure on witnesses of this type and conclude that the best way is for the officer in
5.63 charge of the parade to tell the witness expressly that the person he saw may not be on the parade. We recommend that this should be done when the officer addresses the witness just before he inspects the parade.

8.17 We have not come across any case in which a suspect has asked for a parade and been unreasonably refused, but it is represented to us that his right to a parade ought to be expressly provided for. In effect we have done this, unless the holding of a parade is unnecessary or impracticable, by our recommendation that there should be no identification in court without a previous parade.
5.35–44 There may, however, be cases (we have come across only a few) in which there is a genuine dispute between the police and the defence about the conditions under which the parade should be held. We have explored ways in which such a dispute could be resolved at the time by judicial decision. But we have concluded that the position is best left as it is. That is that the police should continue to decide any dispute about the conditions of a parade as fairly as they can. If
4.105 deadlock is reached, the defence should submit under protest and take their objection at the trial. The result would be that if the conditions were such as to defeat the object of the parade, it would be treated as a nullity; see paragraph 8.8 above.

5.96–102 **8.18** The circumstances of the Dougherty and Virag cases have given rise to questions about the police investigation of an alibi at two stages. The first is when, as frequently happens, the accused discloses an alibi at the time of arrest or shortly thereafter. The second is when the alibi is disclosed by notice pursuant to the Criminal Justice Act 1967, section 11. We recommend that the duty of the
5.109, 114 police at both stages be clarified by administrative directions.

8.19 At the first stage it has been suggested to us that the police should provide the defence forthwith with any statements they take from alibi witnesses. This might assist a guilty man in the composition of a false alibi. We do not
5.101 recommend it, but we do recommend that, if the police in the course of their

enquiries take charge of any document or article, they should inform the defence and offer inspection.

8.20 At the second stage we consider that the responsibility for the proper
5.109–112 presentation of the alibi rests upon the defence solicitor. The duty of the police is to check the alibi and to see that any material which may contradict it is before the court; they are not responsible for seeing that the alibi as a whole is properly presented to the court.

The existing practice permits the police to interview defence witnesses to the alibi, normally in the presence of the defence solicitor if he so desires. The Dougherty and Virag cases illustrate the difficulties that may arise about this.
5.116 We think it would be preferable for the defence to supply to the prosecution statements of the evidence to be given by their witnesses, as is done in the case of prosecution witnesses. We recommend that the police should interview defence witnesses only in cases in which adequate statements are not supplied.

5.120 A defendant should be required to add to a notice of alibi provided under section 11 of the Criminal Justice Act 1967 particulars of any document on which he proposes to rely for the purpose of his alibi.

5.102 Forms used by the police for taking statements from alibi witnesses should not contain any reference to the possibility of prosecution for perjury, unless it is reasonably clear that the evidence of the witness is going to be tendered as part of the prosecution's case.

5.103 When a solicitor is notified by the police that they wish to interview an alibi witness, he should, if possible, arrange for the interview to take place in his office.

5.104 The appropriate authorities should be invited to consider in the light of the cases of Dougherty and Virag, whether they are satisfied with the existing arrangements for the conduct of alibi defences, including the scale of remuneration provided, and, if not, what alterations are necessary.

IV. Post-Trial Procedure

8.21 The case of Dougherty illustrates the difficulties in the way of getting
6.9–12 fresh evidence before the Court of Appeal. These difficulties, we consider, arise out of restrictions which the Court is bound as a general rule to place on the introduction of fresh evidence, if the defendant is not to be given an option to present his case either at the trial or on appeal as suits him best. While we consider that the admission of fresh evidence should be as large as is consistent with the regular administration of justice, we are not able to recommend any alteration to the law at present applied by the Court of Appeal. If the law creates
6.4 a hardship in a particular case, we think that it is best dealt with as at present by a reference back by the Home Secretary.

6.14 **8.22** As a general rule in legal aid the services of a solicitor should normally be granted for an appellant who wishes to call fresh evidence on appeal, if counsel is able to advise that there is a reasonable chance of its being admitted. The Practice Note of June 1974 (issued after the Dougherty case) should, if liberally interpreted, achieve this object.

6.15 If the evidence was available at the trial and not used, a new solicitor and counsel should as a rule be assigned.

8.23 In the Home Office the interval which elapsed in the Virag case between the receipt of the letter introducing fresh evidence and the setting up of a police
6.19 investigation was too long. We recommend that in cases in which the fresh evidence appears to be credible, two questions should initially be distinguished. The first is not whether the new evidence upsets the conviction but simply whether it changes the complexion of the case. If it does there is an immediate need for a full enquiry, whether it takes the form of a new police investigation or simply of a complete re-examination. The second question is whether the result of the enquiry is to cast doubt on the rightness of the conviction.

8.24 On the second question we think that the test at present applied in the
6.20–21 Home Office is too stiff. It does not fall far short of a reversal of the burden of proof. We recommend that the test should be the one applied in the Court of Appeal, namely, whether after a re-examination of all the relevant material the conviction is seen to be safe and satisfactory. We recognise that, when the review takes the form of an internal enquiry rather than of a reference to the Court of Appeal, it is difficult to ensure that fresh evidence is fully tested. We
6.22 recommend that the Home Office should study the feasibility of setting up an independent review tribunal in which cases unsuitable for reference to the Court of Appeal could be handled.

V. Magistrates' Courts

Chap. 7 **8.25** For a number of reasons we have decided to limit the application of our proposals to trial on indictment, but we recommend that in deciding disputes as to identity magistrates should have regard to the principles which, if our main recommendations are accepted, will be applied in the Crown Court.

7.7 Solicitors should be expected as a matter of good practice to notify the court and the prosecution at the earliest opportunity of an intention by the defendant to dispute identity. Where this is not done, an adjournment should be readily granted for the purpose of investigating an alibi.

7.6 Where identity is disputed, magistrates should not feel bound to act on dock identification alone, particularly when they consider that an identification parade has been omitted without good reason.

VI. General

8.26 To carry out our recommendations a new statute or part of a statute will be necessary. But we have kept statutory change to a minimum believing that what is chiefly needed is a change of attitude by all those who are concerned in the handling of cases of disputed identity, whether as police, solicitors, barristers, judges, magistrates or jurors, in regard to the problems inherent in such cases and a greater awareness of the risks involved in them. This change is best
4.56–88 brought about by judicial development of the law and practice. We have pointed to the directions which this might take. Those passages cannot be put into summary form, but we venture to hope that they may be useful to judges.

8.27 Identification cases are tricky to handle, all the more so because they occur very rarely. We think that it would be a great help to all professionals—especially solicitors, barristers, magistrates and judges, who might quite suddenly find themselves confronted with such a case—if they had conveniently collected

for them in one place a statement of the applicable law and procedure and of the relevant factors to be taken into account. If our recommendations are accepted, there will be a statute and two new codes, and, as we have said, they will not contain everything which judges and advocates will need to know. There has already been judicial advice on the points to be covered in a summing-up. Our
4.57–59 observations on what might constitute exceptional cases and additional evidence
4.61–76 may be used as a starting point for what will eventually be settled by judicial determination. We recommend that the Home Office should publish a booklet containing all this material together with some guidance on the matters which should be borne in mind. This will be almost essential for magistrates, whom we have invited to apply in a general way the relevant principles, and may very well be useful to others, with judicial duties to discharge. It should also be of value in the training of police officers whose grasp of the problems will be of crucial importance.

In conclusion we wish to express our high gratitude to our Secretary, Mr J. C. Hindley. Our work has involved the study of a great quantity of material. Each of the two cases which we have specially investigated has accumulated its own bundles of documentary evidence. Then on the general questions whose consideration forms the bulk of our Report, we have received many submissions and have had many enquiries to make and to get answered. Mr Hindley's powerful grasp of all this and his mastery of detail has been indispensable to us.

DEVLIN
CATHERINE FREEMAN
JEREMY HUTCHINSON
PHILIP KNIGHTS

J. CLIFFORD HINDLEY (Secretary)

APPENDIX A

THE HOME OFFICE CIRCULAR ON IDENTIFICATION PARADES

The circular printed below is the latest in a series of circulars from the Home Office which began with the commendation in 1905 of the rules for identification parades then prevailing in the Metropolitan Police District to all Chief Constables. The rules were expanded in 1925 and further amended in 1926. They were considered by the Royal Commission on Police Powers and Procedures in 1929, which published them in an appendix to its Report (Cmd 3297), but were not further revised until 1969 when they assumed their present form.

The present circular was issued in 1969, and incorporated as Appendix 6 in the Home Office Consolidated Circular to the Police on Crime and Kindred Matters, 1969 Edition. It was published by Her Majesty's Stationery Office as a separate pamphlet and has now been reprinted at paragraphs 1351–1353 of Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 38th Edition (1973). It has been referred to for convenience in this Report as HO Circular 9/1969.

Home Office,
Horseferry House,
Dean Ryle Street,
London S.W.1.

January, 1969.

Sir,

HOME OFFICE CIRCULAR NO. 9/1969
IDENTIFICATION PARADES

I am directed by the Secretary of State to say that he has reviewed the advice on the conduct of identification parades given in the Consolidated Circular to the Police on Crime and Kindred Matters, and that the attached memorandum should be substituted for it. The memorandum has been prepared in consultation with the Lord Chief Justice and the Secretary of State understands that failure to observe its provisions may well result in the judge, in his summing up to the jury, commenting on the reliability of the evidence obtained.

I am, Sir,
Your obedient Servant,
PHILIP ALLEN

The Chief Officer of Police.

IDENTIFICATION PARADES

1. The object of an identification parade is to make sure that the ability of the witness to recognise the suspect has been fairly and adequately tested.

2. Identification parades should be fair, and should be seen to be fair. Every precaution should be taken to see that they are so, and, in particular, to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed specially to the suspected person instead of equally to all the persons paraded.

Conduct of Identification Parades

3. If an officer concerned with the case against the suspect is present, he should take no part in conducting the parade.

4. Wherever possible the officer arranging the parade should be of not less rank than inspector.

5. Once the identification parade has been formed, everything thereafter in respect of it should take place in the presence and hearing of the suspect, including any instructions to the witnesses attending it as to the procedure that they are to adopt.

6. All unauthorised persons should be strictly excluded from the place where the identification parade is held.

7. The witnesses should be prevented from seeing the suspect before he is paraded with other persons, and witnesses who have previously seen a photograph or description of the suspect should not be led into identifying the suspect by reason of their recollection of the photograph or description, as for instance by being shown the photograph or description shortly before the parade.

8. The suspect should be placed among persons (if practicable eight or more) who are as far as possible of the same age, height, general appearance (including standard of dress and grooming) and position in life. If there are two suspects and they are of roughly similar appearance they may be paraded together with at least twelve other persons. Where, however, the two suspects are not similar in appearance, or where there are more than two suspects, separate parades should be held using different persons on each parade.

9. Occasionally all members of a group are possible suspects. This may happen where police officers are involved (e.g. an allegation concerning a police officer which can be narrowed down to a number of officers who were on duty at the place and time in question). In such circumstances an identification parade should not include more than two of the possible suspects. For example, if there were twelve police officers on duty at the time and place in question, there should be at least six parades, each including ten officers who were not implicated and not more than two who might have been: the twelve possible suspects should not be paraded together. Two suspects of obviously dissimilar appearance should not be included on the same parade. Where police officers in uniform form an identification parade, numerals should be concealed.

10. The suspect should be allowed to select his own position in the line and should be expressly asked if he has any objection to the persons present with him or the arrangements made. He should be informed that if he so desires he may have his solicitor or a friend present at the identification parade.

11. The witnesses should be introduced one by one and, on leaving, should not be allowed to communicate with witnesses still waiting to see the persons paraded; and the suspect should be informed that he may change his position after each witness has left.

12. The witness should be asked whether the person he has come to identify is on the parade. He should be told that if he cannot make a positive identification he should say so.

13. It is generally desirable that a witness should be asked to touch any person whom he purports to identify; but when the witness is nervous at the prospect of having to do

this (as may occur when, for example, the witness is a woman or child who has been the victim of a sexual or violent assault or other frightening experience) and prefers not to touch the person, identification by pointing out may be permitted.

14. If a witness indicates someone but is unable to identify him positively, this fact should be carefully noted by the officer conducting the parade, as should every other circumstance connected with it, whether the suspect or any other person is identified or not.

15. It may sometimes happen that a witness desires to see the suspect with his hat on or his hat off, and there is no objection to all persons paraded being thereupon asked to wear or remove their hats. Sometimes again there may be something peculiar in the suspect's gait or tone of voice, and if the witness desires to see the person walk or to hear the person speak, there is no objection to the person paraded being asked to walk or to speak. When any such request is made by a witness, the incident should be recorded.

Identification Parades in Prison

16. If the suspect is in prison and is willing to take part in an identification parade, arrangements should be made with the governor for his production at the nearest convenient police station where the parade may take place. A parade should be held in prison only if special security considerations make it unwise to hold it outside or the suspect refuses to take part in a parade unless it is held in prison.

17. Where a parade has to be held in prison, the governor will be responsible for the assembly of the parade and a prison officer will be present throughout in charge of the discipline of the prisoners taking part. A police officer, unconnected with the case, will otherwise be responsible for the parade (including the introduction of witnesses to the parade and the noting of all that takes place). He must ensure that the parade is conducted in the same way as a parade outside prison.

Use of Photographs in Identifying Criminals

18. Photographs of suspects should never be shown to witnesses for the purpose of identification if circumstances allow of a personal identification. Even where a mistaken identification does not result, the fact that a witness has been shown a photograph of the suspect before his ability to identify him has been properly tested at an identification parade will considerably detract from the value of his evidence.

19. Any photographs used should be available for production in court if called for.

20. If a witness makes a positive identification from photographs, other witnesses should not be shown photographs but should be asked to attend an identification parade.

21. Where there is other evidence identifying the accused with sufficient certainty to prefer a charge, a witness who has made a firm identification by photograph should not normally be taken to an identification parade. There may however be circumstances when it is desirable to ask the witness to identify the suspect from a parade. For example, identification may have been made from a poor or out-of-date photograph; the photographic identification may have been made so long previously that the present ability to identify is uncertain; the suspect's appearance may have materially altered since the photograph was taken; or the witness may think his identification is likely to be assisted by having an opportunity of hearing a suspect speaking or observing his gait. The decision whether a witness should, in such circumstances be taken to an identification parade should, wherever possible, be made by an officer of not less rank than inspector.

22. Where there is no evidence implicating the suspect save identification by photograph, the witnesses as to identification should be taken to an identification parade notwithstanding that they may already have made an identification by photograph.

23. The police should inform the defence of any case where an identification is first made from photographs since it cannot normally be said in court that an identification was made from photographs without revealing the existence of a criminal record.

24. Where it is necessary to show a photograph of the suspect, it should be shown among a number of other (unmarked) photographs having as close a resemblance to it as possible, and the witness should be left to make a selection without help and without opportunity of consulting other witnesses.

APPENDIX B

IDENTIFICATION PARADES HELD IN ENGLAND AND WALES, 1973

Table I is based on inquiries undertaken for the Committee by the Association of Chief Police Officers and the Metropolitan Police.

The Table deals with cases in which identification parades were held. The first section shows the number of parades held. The second section shows the number of occasions on which prosecution of the suspect followed the holding of a parade, including the cases (shown separately) where the police had sufficient evidence to prosecute although the suspect was not picked out at the parade. The third section shows the number of occasions on which the only evidence against the accused was that of one or more eye witnesses. This section is restricted to cases in which an identification parade was held, and does not include, for example, the large number of cases prosecuted on the evidence of a single eye witness in which identity was not disputed, or cases in which identity was disputed, but for various reasons no identification parade was held.

Note

On occasion several witnesses may be invited to view the same parade, one may pick out the suspect while another may pick out someone else. For the purpose of this Table a parade is recorded under (ii) if at least one witness picked out the suspect. A parade is recorded under (iv) only in cases where no-one picked out the suspect, but at least one witness picked out someone other than the suspect.

TABLE I

Identification Parades held in England and Wales and Consequent Prosecutions, 1973

		Metro-politan Police	Other Forces	Total
(a) *Parades*	(i) All parades	767	1349	2116
	(ii) Parades in which the suspect was picked out	296	648	944
	(iii) Parades in which no one was picked out	387	597	984
	(iv) Parades in which the suspect was not picked out but some other person was picked out	84	104	188
(b) *Prosecutions*	(v) Suspects prosecuted following their Identification at a parade	248*	602	850
	(vi) Prosecutions under (v) which resulted in conviction	193†	503	696
	(vii) Suspects for whom a parade was held at which they were not picked out, who were prosecuted on other evidence	30	71	101
	(viii) Prosecutions under (vii) which resulted in conviction	22	65	87
(c) *Evidence*	(ix) Prosecutions where the only evidence against the accused was identification by a single witness	69	100	169
	(x) Prosecutions where the accused was identified by more than one witness but there was no other evidence	71	107	178
	(xi) Prosecutions under (ix) & (x) which resulted in conviction	93	165	258

* A further 4 cases outstanding.
† A further 5 cases outstanding.

APPENDIX C

THE CONDUCT OF IDENTIFICATION PARADES

Introduction

The procedures for conducting identification parades naturally vary in detail from one area to another. Much depends on the accommodation available. In a small rural police station, for example, it may not always be possible, without causing considerable inconvenience to defendants and witnesses to ensure that no witness catches a glimpse of any member of the parade in advance of the proceedings, as is ideally desirable.

2. The principles laid down in Home Office Circular 9/1969 are, however, followed by all police forces, and the following account of the parades arranged for Mr Virag serves to illustrate the way in which a parade may be conducted. Attention is drawn in the footnotes to points on which the practice of other police forces may diverge from that followed in Gloucestershire.

Identification Parades conducted for Mr Virag

3. Arrangements were made for 17 witnesses to the gunman's activities in London, Liverpool and Bristol to attend identification parades at Staple Hill Police Station. Staple Hill is a suburb of Bristol, to the north east of the city, and not far from the M4 motorway where the shooting and car hold-ups took place on 23 February 1969. The first parade was held on 26 March for 12 witnesses to the incidents in and around Bristol and the subsequent car journeys on 23 February The other two were held on 14 April, when the owner of the stolen vehicle used in the offences and two witnesses to the events on 23 February attended the first parade, and two witnesses to the Liverpool incident on 19 January attended the second.

The Parade on 26 March

4. The parade was due to be held at 3.30 p.m. and during the morning the police made a number of enquiries to obtain the services of 8 volunteers to stand on the parade. In the course of these enquiries, a number of unsuitable people were rejected until 8 men were found who were as far as possible of the same age, height and general appearance as the suspect. As was to be expected, all the volunteers lived in the suburbs of Bristol, or just outside, near Staple Hill, and for the most part were employed at nearby offices or factories. At the subsequent trial it was suggested to one of the witnesses (who had remarked on the gunman's foreign accent) that he had picked out Mr Virag because of his foreign appearance, but this was denied. The witness said,'I do not know your interpretation of the word foreign. He looked like everybody else on the parade'.

5. An hour before the parade was due to start the officer in charge went to the cells to explain the procedure to Mr Virag. He ascertained that he could understand and speak English well. He repeated the charge on which he had been arrested, namely suspicion of the attempted murder of a police constable in Gloucestershire on 23 February 1969, and went on to explain the purpose and procedure of an identification

parade. Mr Virag said that he understood and was given a copy of a form P.50 to read. The relevant part of the form is as follows:

> Identification parades. (1) A person in custody may, if he so desires, have his solicitor or a friend present at identification parades. (2) He can change his position in the parade after each identification witness has left. (3) Whenever practicable eight or more persons similar to the accused will be paraded with him. (4) A witness is required to touch the person he purports to identify.

The officer in charge then explained the information contained in the form and asked Mr Virag if he was willing to attend an identification parade to be held at about 3.30 p.m. that day. Mr Virag said he was willing. The officer asked him whether he wished a solicitor or friend to be present. Mr Virag replied, 'My wife is in London. I don't want anyone'.

6. At about 3.35 p.m. the 8 volunteers were brought into the court room where the parade was to be held, and their names and addresses were checked. Since nearly all the witnesses reported seeing the gunman in a hat, the officer in charge arranged for a supply of identical trilby hats and each member of the parade was instructed to wear one. The officer then went to the police cells and escorted Mr Virag to the court room. Mr Virag also was instructed to wear a trilby hat, and the line of volunteers was formed up. The officer in charge then stood Mr Virag in front of the parade and said to him: 'I want you to look carefully at all these men on the parade, eight of them, and if you consider that you want to object to any of these eight men standing on the parade with you because they are not similar in appearance to yourself, then please tell me so.' Mr Virag looked at the parade for about a minute, and then said that he did not wish to make any objection. The officer in charge then checked that all the hats were worn at the same angle with the full face showing, and also ensured that there was no-one standing at the rear of the parade. He then said to the prisoner, 'You may now take whatever position you wish to stand on the parade, and after each witness has left the room I shall ask you if you wish to change your position before the next one is introduced. From now on and during the parade, everything I say will be said in your presence and hearing.'
The prisoner took up a position between the men standing as Nos. 6 and 7.

7. Meanwhile, the 12 witnesses had been accommodated in a room on the first floor which did not overlook the cells or the court room, where the identification parade was to be held, to ensure that they caught no glimpse of the suspect or the parade volunteers before entering the parade room.[1]

8. The physical arrangement for the parade can be seen from the plan on page 169. The parade lined up in the court room itself. Each witness was escorted in turn from the first floor room to the court room by a police officer. This officer was the only person allowed to leave the court room during the proceedings, and he had strict instructions not to converse with any of the witnesses.[2] Each witness was introduced through the door marked 'A', and when he had completed his inspection of the parade he left through door 'B', before another witness was admitted. Police officers were posted at the entrance and exit doors of the court room to ensure that no unauthorised person should enter. All the witnesses, having completed their inspection were accommodated in room 'C' until the parade was at an end.

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[1] In some forces, where more accommodation is available, the witnesses are segregated individually and not allowed to communicate with each other while on police premises.

[2] The method of calling witnesses into the parade room varies. In some forces, the officer in charge telephones from the parade room asking for the next witness to be introduced: this is done within the hearing of the suspect so that there can be no suggestion that a message has been passed as to where the suspect is standing in the line.

9. The first witness, Mr Cunliffe, was introduced at 3.51 p.m. The remaining 11 witnesses were then introduced in succession, ending with Mr Randall, and the whole parade was over at 4.35 p.m. As each witness entered the parade room, the officer in charge read to him a summary of part of his evidence. For example, Mr Tucker was addressed as follows:

> At about 9.30 a.m. on Sunday 23rd February, 1969, you were outside Bath Railway Station with your taxi. You saw a man alight from the passenger seat of an A40 motor car, go into the station and then come out again. This man approached you and asked the fare to Chippenham. He entered your taxi and you drove him to Chippenham where you dropped him on the forecourt of a public house or hotel. Can you identify that man as being on this parade to-day? If you do identify him, I want you to touch him and say 'That's the man'. If you cannot make a positive identification, please tell me so.

The last three lines were said to each witness.[1]

10. After this introduction each witness, starting from the left-hand end, walked down the line, returning behind the line of volunteers.[2] He made his inspection unaccompanied since, in accordance with regular practice, the officer in charge would not allow anyone not connected with the parade either to stand or sit behind the parade, to avoid any risk that a signal might be given to the witness behind the back of the suspect.

11. Mr Virag changed his position 4 times in the course of the parade, between the departure of one witness and the entry of the next. Having started between Nos. 6 and 7, he moved after the third witness to a position between Nos. 3 and 4, after the fifth witness to a position between Nos. 1 and 2, after the 8th witness to a position between Nos. 2 and 3, and after the 9th witness resumed his original position between Nos. 6 and 7, for the remaining 3 witnesses.

12. Of the witnesses, P. C. Smith, Sgt. Davies, P.C. Bragg, Mr Tucker, Mr Gingell, and Mr Randall, all touched Mr Virag and said 'That's the man'. P.C. Organ, Mr Butcher and Mr Atkins all touched No. 6, while Mr Cunliffe and Miss Butt touched No. 5. Mr Bullock said that he was not able to make a positive identification. Two of the police officers who reported hearing the offender speak with a foreign accent, P.C. Organ and P.C. Bragg, asked the officer in charge to allow each person on the parade to speak, but this request was refused. The reason for this refusal, no doubt, was the fact that Mr Virag, while not obviously foreign in appearance, was known to the officer to be the only foreigner on the parade.

13. When the 12th witness had left the parade room, the officer in charge asked Mr Virag, 'Are you satisfied that the identification parade was conducted in a proper and satisfactory manner, and was fair?' He replied, 'Yes I am'. On being further asked whether he had any complaint to make regarding the parade, he said, 'I have seen none of them'. The officer replied, 'Who do you mean?' He said, 'The witnesses'. Mr Virag was then invited to sign the statement to the effect that he was satisfied with the conduct of the parade, but declined to do so.

Parades on 14 April

14. For various reasons it proved somewhat more difficult to organise the parades on this second occasion. Since the court room was in use it was necessary to find

[1] In some forces, the witness is not asked to say anything, but merely to touch the person he purports to identify. Where the witness is a child, or the female victim of a sexual assault he or she is commonly told that they may merely point to the person they purport to identify.

[2] In some forces, no provision is made for the witness to go behind the parade unless he specifically asks to do so in the presence and hearing of the prisoner.

another room wholly secluded from the cells and the waiting room for the witnesses. The only available space was, in fact, the police station's skittle alley. It was completely enclosed, without windows, but well lit. The skittle alley is shown on the sketch plan. The parade was conducted in the central area, the officer in charge standing at the point marked X. Witnesses were introduced through the main entrance (marked D) and left by way of the fire exit (marked E) at the opposite end of the alley, some 25 yards distant from the main door.

15. Only seven volunteers could be found for the purpose of the parades on 14 April, six of whom had taken part in the parade on 26 March. It is not known whether the other two members of the earlier parade, one of whom happened to have been mistakenly picked out by two witnesses, were also requested to attend on 14 April. At any rate they were not there.

16. The preliminaries regarding the explanation about identification parades and similar matters were repeated on 14 April, in the same form as had been used on 26 March. However, on the 14 April, a solicitor representing the prisoner was present. When, therefore, the officer in charge asked Mr Virag whether he was prepared to stand on an identification parade at 11.30 a.m. that morning, he consulted his solicitor before agreeing. The officer then said to him, 'It is in your own interests that your solicitor be present. Do you wish that he attend?' Mr Virag replied that he did so wish, and at 11.30 a.m., the officer in charge went with the prisoner's solicitor to the room where the parade was to be held, and to the room on the first floor where the witnesses were accommodated. The solicitor was thus able to check the arrangements and to see that the witnesses were not able to see either the cells or the room where the parade was to be held.

17. Mr Virag was then taken from the cells to the parade room, where the parade was formed up standing in line. On being asked whether he objected to any of the seven men, Mr Virag pointed to four of them, who were taken from the parade and left the room. One of those rejected was, in fact, a man who was mistakenly picked out by three witnesses on 26 March. After a few minutes the services of two further men were obtained to make the parade up to a total of five. Since this is less than the number of eight recommended by the Home Office Circular, the officer in charge having first ascertained that Mr Virag had no objection to the five men now lined up, said to him, 'It is not possible at the present time to obtain the services of eight men to form the parade. Are you prepared to stand with these five men?' After consultation with his solicitor, Mr Virag said 'Yes'. He was once again told that he might take up any position he wished and change his position after each witness had left the room. He then took up the position between Nos. 1 and 2, where he remained throughout the parade.[1]

18. There were three witnesses, Mr Dannenberg, Mr Froom and Mr Taylor; none of whom picked out anybody. Mr Dannenberg said, 'No, I cannot make an identification'. Mr Froom said, 'I don't think I can see anybody of the same likeness'. Mr Taylor said, 'I am not definite'.

19. The officer in charge asked each witness whether he wished to see each man on the parade walk. Mr Dannenberg and Mr Froom declined this suggestion, but Mr Taylor, who had been driving his car at the time of the motorway shooting, and had only seen the gunman walking along the road towards him, asked to see the members of the parade walk. The officer accordingly instructed each man on the parade, one at a time, to walk along the room giving the witness a front and back view.

[1] To start with seven volunteers and then go ahead with only five must be extremely rare. In some forces, it might have been decided in such a case to adjourn the proceedings until more volunteers could be found. The alternative (adopted at Staple Hill) would be to obtain the suspect's agreement to conduct the parade with the smaller number.

20. The last witness left the room at 11.56 a.m. Whereupon, in the presence of the solicitor, the officer in charge asked Mr Virag whether he was satisfied that the parade was conducted in a satisfactory manner and was fair, and whether he had any complaint to make regarding the parade. He said that he was satisfied and had no complaint, and this time signed the appropriate form to this effect.

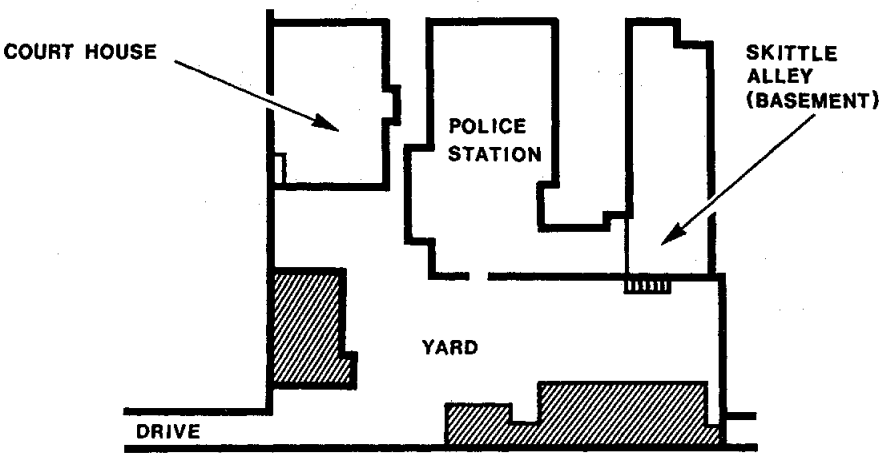
21. After an interval of ten minutes or so, doing which none of the parade volunteers was permitted to leave the room, a second parade with the same procedure was mounted for the benefit of the two police constables who had travelled from Liverpool for the purpose of determining whether they could identify the man who had pulled a gun on them in the small hours of 19 January. Still in the presence of Mr Virag's solicitor, the officer read the charge relating to the Liverpool offence, and then asked if Mr Virag was still willing to stand in the parade with the five assembled men. After consultation with his solicitor Mr Virag agreed, and was then told that two witnesses were to be introduced and that he might take up whatever position he chose in the line-up for each of them. The two police constables, Callon and Roberts (who had been segregated, since their arrival an hour or so beforehand, in a first floor room) were then brought in, in turn. Each identified Mr Virag as the man concerned in the Liverpool incident.

22. The proceedings concluded with the following exchanges between the officer in charge and Mr Virag:

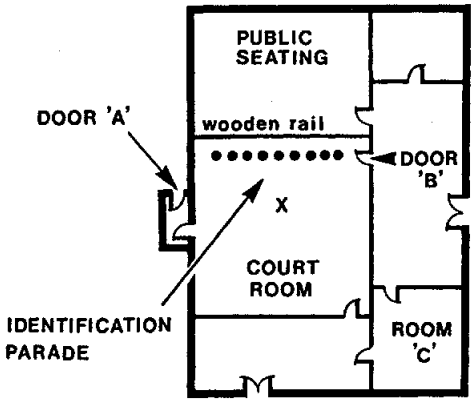
Officer: Are you satisfied that the parade was conducted in a satisfactory manner and was fair?
Virag: I never was in Liverpool this year.
Officer: Do you understand my question regarding the fairness of the parade?
Virag: Yes.
Officer: Are you satisfied that the parade was fair?.
Virag: Yes.
Officer: Have you any complaint to make regarding the parade?
Virag: No.

Mr Virag then signed the appropriate form containing these questions and answers.

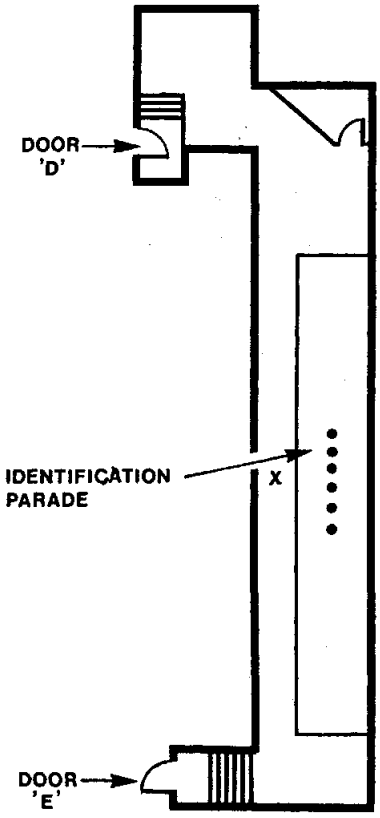
Staple Hill Police Station Bristol and associated buildings



SKETCH PLAN OF MAIN LAYOUT



COURT HOUSE



SKITTLE ALLEY

Note: Illustrations are not to scale

APPENDIX D

IDENTIFICATIONS OF MR VIRAG

The Table shows the various identifications made of Mr Virag whether by photograph, at an identification parade, or at the trial. Witnesses who gave evidence are listed in the order in which they were involved in the incident at Liverpool on 19.1.69 and in and around Bristol on 23.2.69. Mr Dannenberg (who did not give evidence) attended the parade on 14.4.69 to see if he could identify the man named 'Pollock' with whom he had negotiated for the sale of his Triumph Vitesse, the car which was subsequently stolen and used in the Bristol offence.

1. Liverpool Offence

Name of witness and part played	Whether shown album of photographs including Virag, and result	Result on parade	Whether photographs shown revealed at trial	Whether result of I.D. parade stated at trial	Whether identified Virag publicly at trial
1.	2.	3.	4.	5.	6.
P.C. DEREK A. CALLON Driver of police land-rover who accosted suspect in Hood Street.	No	Picked out Virag	—	Yes	Yes
P.C. TERENCE M. ROBERTS Passenger in landrover who joined P.C. Callon in confronting the suspect.	No	Picked out Virag	—	Yes	Yes

2. Bristol Offences

1.	2.	3.	4.	5.	6.
COLIN J. CUNLIFFE Disturbed man in Bristol stealing money from parking meter.	No (a)	Picked out someone else	—	Yes	Yes (un-asked) (b)

1.	2.	3.	4.	5.	6.
P.C. ALBIN B. SMITH Gloucester P.C. who pursued the gunman and who was shot in the arm.	No	Picked out Virag	—	Yes	Yes
P.SGT. LAWRENCE DAVIES Bristol P. Sgt. who joined the chase at Westerleigh.	No	Picked out Virag	—	Yes	Yes
P.C. JOHN D. BRAGG Bristol P.C. who was in car with Sgt. Davies.	No	Picked out Virag	—	Yes	Yes
P.C. BRIAN J. K. ORGAN Gloucester P.C. who was in car with P.C. Smith	No	Picked out someone else	—	Yes	No
THOMAS B. TAYLOR Driver of the Rover car who did not stop for the gunman	No	No identification	—	Yes	No
DOUGLAS G. BULLOCK Driver of Morris 1100 who was held up on M4 near Almondsbury	No	No identification	—	Yes	No
GEOFFREY H. BUTCHER Driver of A40 who took gunman from Westerleigh to Bath Station	No	Picked out someone else	—	Yes	No
RONALD G. TUCKER Taxi driver who took gunman from Bath to Chippenham	Yes. Picked out Virag.	Picked out Virag	Yes	Yes	Yes
ROYSTON G. RANDALL Manager of Bear Hotel, Chippenham.	Yes. Picked out Virag.	Picked out Virag.	Yes	Yes	Yes
KENNETH A. GINGELL Taxi driver who took gunman from Chippenham to Newbury.	Yes. Picked out someone else (c)	Picked out Virag.	Yes	Yes	Yes
JOHN L. FROOM Taxi driver who took gunman from Queen's Hotel, Newbury to Reading.	Yes. Picked out Virag.	No identification	No	Yes	No

Notes

(a) It emerged at the trial that Mr Cunliffe had also attended an identification parade at Bristol on 26 February. He had been shown photographs before this parade, and had picked out someone who had no part to play in the case. Mr. Virag was not a suspect at this stage, and his photograph would not have been among those shown.

(b) At the trial, Mr Cunliffe was not asked whether he could identify anyone in court, but in the course of explaining his hesitation at the identification parade between the man he picked and another, said, 'The other person I would have had the intention to pick out then, to put it this way, would have been the person, which, if I may say so, would have been the person in Court today . . .
Q. Did anybody tell you? A. No. Nobody told me I was going to see the same person being in Court.'

(c) The entry follows Inspector Hills's report of 10 April 1969, although in 1973 Mr Gingell told Superintendent Allen that he recalled having picked out Mr Virag's photograph.

The following (associated with the Bristol offences) did not give evidence at the trial

	Whether shown album of photographs including Virag, and result	Result on parade
DANNY A. ATKINS With Mr Tucker (his father-in-law) outside Bath Station.	No	Picked out someone else
VIVIEN E. BINGHAM (neé BUTT) Receptionist at Bear Hotel, Chippenham.	Yes. Identified no-one.	Picked out someone else
FRANKLIN N. M. DANNENBERG Owner of the Triumph Vitesse car used in the Bristol offence, from whom it was stolen on 3/4 February 1969.	Yes. Picked out someone else as similar to 'Pollock'.	No identification

APPENDIX E

FORMS FOR USE IN CONNEXION WITH IDENTIFICATION PARADES

Form A: Report of Identification Parade (General)
Form B: Record of Persons forming the Parade
Form C: Record of Events (to be completed separately in respect of each witness)
Form D: Notice to suspect

POLICE FORCE

Form A

REPORT OF IDENTIFICATION PARADE

DIVISION: CRIME NO.:

PLACE OF PARADE:

DATE:

NAME OF SUSPECT:

Offence(s) with which charged or suspected:

Brief description of dress and peculiarities, if any:

I confirm that the Chief Constable's Notice to Suspect on Identification Parades (Form D) was handed to the accused, and explained at (time) on (date) by:_____
(officer in charge of parade)

QUESTION TO SUSPECT:

'Do you wish to have present at this identification parade your solicitor or any friend?'

ANSWER:

Steps taken to comply with suspect's request (to include the name and address of solicitor/friend and the time he/she attended):

The arrangements for the identification parade will be made by an officer, not below the rank of inspector, other than the officer in charge of the case.

This report will be signed by the officer making the entries therein, and also by the officer in charge of the parade.

N.B. If the space is insufficient for the reply to any question, attach a continuation sheet.

Form B will be completed as a record of persons forming the parade.
Form C will be completed for each witness inspecting the parade.
All copies of these forms will then be attached to this report.

Time Parade commenced:

QUESTION TO SUSPECT:

'Do you object to any of the persons paraded?'

ANSWER:

State any arrangements made in consequence of the suspect's objection, and if any substitution is made a new Form B will be completed. All copies of Form B will be attached to the final report and will not be destroyed.

State names of all police officers and other persons present during the parade, showing in the case of police officers, whether under instruction or connected with the investigation of the above offence:

QUESTION TO SUSPECT:

'Do you object to any of these persons being present?'

ANSWER:

Steps taken to comply with suspect's objection:

ADDRESS TO PARADE BY OFFICER IN CHARGE:		
NAME, ADDRESS AND OCCUPATION OF WITNESSES:		
1	Name Address	Occupation
2	Name Address	Occupation
3	Name Address	Occupation
4	Name Address	Occupation
5	Name Address	Occupation
6	Name Address	Occupation
7	Name Address	Occupation
8	Name Address	Occupation
9	Name Address	Occupation
10	Name Address	Occupation

Witnesses will be kept in a place where they cannot see the parade or the suspect, or hear any of the proceedings, and will be introduced one at a time.

On leaving they will not be allowed to communicate with witnesses still waiting to see the persons paraded.

State how this instruction is carried out, indicating in particular where witnesses were kept before, and taken after, the parade:

FOR CONDUCT OF EACH WITNESS'S INSPECTION OF THE PARADE—SEE FORM C

After the last witness has left the parade

QUESTION TO SUSPECT:

'Are you satisfied with the manner in which this identification parade has been carried out?'

ANSWER:

Time parade finished:

Remarks on any point not already covered:

I hereby certify that I carried out the above parade in accordance with [Force Orders] and that I am not in charge of the case:

Signature and rank of officer making the above entries: _____

Signature and rank of officer in charge of the parade: _____

Attach completed Forms B and C.

POLICE FORCE

Form B

RECORD OF IDENTIFICATION PARADE HELD ON

CRIME NO.:

NAME AND DESCRIPTION OF SUSPECT:		
Name Description		
NAME, ADDRESS, OCCUPATION AND DESCRIPTION OF PERSONS FORMING THE PARADE:		
A	Name Address Description	Occupation
B	Name Address Description	Occupation
C	Name Address Description	Occupation
D	Name Address Description	Occupation
E	Name Address Description	Occupation
F	Name Address Description	Occupation
G	Name Address Description	Occupation
H	Name Address Description	Occupation

Attach to Form A on completion.

N.B. If any substitution is made a new Form B will be completed. This form will be attached to the final Form B and will not *be destroyed.*

POLICE FORCE

Form C

RECORD OF IDENTIFICATION PARADE HELD ON

TO BE COMPLETED FOR EACH WITNESS

CRIME NO.:

NAME OF SUSPECT:
Explain to suspect before the witness appears:— **'You may select any place you like among the persons paraded'**
Show below the position taken by the suspect, who will be marked X, and the members of the parade. ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐
Number witness enters. NAME OF WITNESS:
ADDRESS OF WITNESS:
State in detail everything that takes place while the above witness is present, in the order in which the events occur, naming the person, if any, whom the witness picks out:
Signature and rank of officer making the above entries: _____

Attach to Form A on completion.

POLICE FORCE

Form D

IDENTIFICATION PARADES

NOTICE TO SUSPECT

After agreeing to stand on an identification parade, all persons whom it is proposed to put up with others for identification will be informed:—

1. It is proposed to put you up for identification and you may have a friend or solicitor present if you wish, but it must be clearly understood that such person may not in any way interfere by action or words with the proceedings.
2. You will be placed in a line comprising a number of other persons of similar age, height and general appearance as yourself. You will be allowed to stand in any position in the line you choose. [Unless you object, a photograph will be taken of the parade.]
3. You will be allowed to change your position in the line after each witness has left.
4. You may object to any of the members of the parade or to the arrangements made. Such objection must be made to the officer in charge of the parade.
5. No intimation as to your identity will be given to the witnesses.
6. At the conclusion of the parade you will be asked if you are satisfied with the arrangements made.

Note. In paragraph 2, the words in square brackets are for use in any area where an experiment is being made as recommended in paragraph 5.48 of the Report.

APPENDIX F

WITNESS DESCRIPTIONS OF THE GUNMAN IN LIVERPOOL AND BRISTOL

The following details are drawn from written descriptions of the gunman, with whom Mr Virag was wrongly identified, made shortly after the relevant incidents. Descriptions of the clothing are limited to those which relate to 23 February 1969. Descriptions by witnesses to both the Liverpool and Bristol incidents are drawn upon for physical features.

PHYSICAL FEATURES

Age	Descriptions range from 28–30 years to 36–40 or fortyish
Height	Descriptions vary between 5′ 9″ (or 5′ 8″–10″) and 6′ 1″.
Build	Small Slim Thin Medium Heavy
Features	Prominent cheek-bones Broad face, but with small features Pointed features, long pointed nose Strong features Facial features and expression were very hard, oval face Roundish face About the face, gipsy appearance.
Eyes	Dark rings under both eyes Eyes were dark, but red around the rims Eyes deep-set
Complexion	Fresh Very fresh Red, outdoor Sallow Pale brown Brownish Dark, swarthy.
Beard, etc.	Either a full moustache or in need of a shave Clean-shaven and not noticeable sideboards A day or so's growth of stubble and the sort of man who has to shave twice a day A growth of beard as if he had not shaved today.

CLOTHING

Hat (colour)
Dark colour, navy
Dark blue/grey
Dark green
Brown
Medium grey (fine check)

One witness said the gunman was hatless.

Top coat (colour)
Dark coloured
Dark blue
Dark brown
Sort of green/brown tweed
Blue
Light blue
Light grey

Top coat (style)
Raglan style
Not raglan style
Short coat—possibly car coat
Three-quarter length, not shortie
Knee length
Normal length
Long

Trousers
Dark
Dark grey
Dark blue or black
Grey check pattern
Light grey check.

Mr Dannenberg gave a full description of the man 'Pollock', which included the following features: Height, 6′–6′ 2″; slightly sunken eyes; normal sideburns; age 40–45.

APPENDIX G

MATERIAL RECEIVED FROM THE HOME OFFICE

The Home Office has supplied details of 38 cases of disputed identity which have occurred since the war. These include 16 cases which resulted in the grant of a Free Pardon and 5 cases in which a reference by the Home Secretary to the Court of Appeal[1] resulted in either the quashing of the conviction or acquittal upon re-trial. The remaining 17 cases were drawn from those which have come to the notice of the Home Office because of a request for compensation, either where the conviction had been quashed on appeal or reversed on re-trial (15 cases), or where the true offender was discovered before trial proceedings were completed (2 cases).

Identification Parades

Identification parades were mounted in 18 of these cases for a total of 21 suspects. Table II shows, for each suspect, the number of witnesses who respectively picked out the suspect, picked out no-one and picked out someone other than the suspect. Each case fell into one of the categories mentioned above in which the suspect was ultimately declared to be innocent.

Disputed Identity in Trials on Indictment

In addition to the supply of case material (which included cases tried summarily and on indictment), all Free Pardons following trial on indictment and all cases referred by the Home Secretary to the Court of Appeal were examined for the period January 1963 to December 1974 in order to set in context cases of disputed identity. The results are shown in Table III.

It should be noted that the number of cases included in this Appendix and in Appendix H is small, and that conclusions may therefore be drawn only with caution.

[1] The relevant authority is now found in s 17 of the Criminal Appeal Act 1968.

TABLE II

Purported Identifications made at Identification Parades Mounted for 21 Suspects in Cases for which Information is Available

Year	Suspect	Number of witnesses who picked out:			Total No. of witnesses at ID parade
		(a) The suspect	(b) No-one	(c) Another	
1949	A	2	1	–	3
1953	B	1	–	–	1
1954	C	2	–	–	2
1956	D	1	1	–	2
1956	E	1	1	–	2
1962	F	3	–	–	3
1965	G	1	–	–	1
1965	H	1	–	–	1
1965	J	1	–	–	1
1967	K	2	–	2	4
1967	L	2	3	–	5
1967	M	1	–	–	1
1968	N	2	4	–	6
1968	O	1	1	–	2
1968	P	2	–	–	2
1968	Q	1	2	–	3
1969	R	1	1	–	2
1970	S*	–	1	–	1
1971	T	3	–	1	4
1971	U†	1 + ?1	7	2	11
1972	V	1	2	2	5

* The suspect, accused of robbery, was identified in the street by one police officer and in a police cell by another: but the victim of the attack was unable to identify him at an identification parade.

† One witness positively identified the suspect who was accused of murder. A second witness did not identify him on the parade, but said later that she was sure that the suspect (whom she referred to by his place in the line) was the man.

TABLE III

Cases Following Trial on Indictment in which a Free Pardon was Granted or which were Referred by the Home Secretary to the Court of Appeal, 1.1.63 to 31.12.74

	Free Pardons	References under s. 17 on issue of conviction		
		Appeal allowed or acquittal at re-trial	Appeal dismissed or conviction at re-trial	Total s. 17 references
All cases	8	17	13	30
Cases in which identification was the principal issue	5	5	6	11

APPENDIX H

MATERIAL RECEIVED FROM THE CRIMINAL APPEAL OFFICE

The Criminal Appeal Office has supplied a sample of 61 cases of disputed identity heard in the Court of Appeal between the end of the war and December 1972. These included 6 cases which were also covered in the Home Office sample.

In addition, all cases heard in the Court of Appeal during 1973–74 have been examined and the identification cases for those years have been analysed. The criterion for an identification case was a case in which identification of the accused was the sole or a principal issue at the trial. The study did not include appeals abandoned or applications for leave to appeal which were rejected or were still awaiting a hearing. The results are summarised in Tables IV–VI.

Table IV shows the total of identification cases as a proportion of all appeals heard. Table V analyses the identification cases with reference to the main issue on which the appeal was decided. Table VI gives a broad indication of the nature of the evidence which was available at the court of trial.

TABLE IV

Appeals heard Against Conviction in which Identification was the Principal Issue as a Proportion of all Appeals Heard Against Conviction, England and Wales, 1973 and 1974

	1973			1974		
	Allowed*	Dismissed†	Total	Allowed*	Dismissed†	Total
1. All appeals against conviction	153	208	361	105	119	224
2. 'Identification cases'	11	18	29	21	17	38
3. (2) as a % of (1)	7	9	8	20	14	17

* Conviction quashed or retrial ordered.
† Conviction affirmed or alternative substituted.

Note: The difference in the totals for appeals heard in the two years corresponds to a difference in the number of applications for leave to appeal. The number of applications for leave to appeal against conviction or conviction and sentence was 1,857 in 1973 and 1,200 in 1974.

TABLE V

Appeals Heard Against Conviction in which Identification was the Principal Issue, England and Wales, 1973 and 1974, Classified by Main Grounds on which the Appeal was Decided.

Main grounds on which appeal was decided	1973			1974		
	Allowed	Dismissed	Total	Allowed	Dismissed	Total
Misdirection by the trial judge	2	10	12	8	3	11
Further evidence brought in the Court of Appeal	2	1	3	6*	3	9
Alleged fault in use of photographs or conduct of parade	—	2	2	—	—	—
Weakness of prosecution evidence	5	2	7	2	1	3
Multiple grounds	2	3	5	5	10	15
Totals	11	18	29	21	17	38

* In 4 of these cases where further evidence was heard by the Court of Appeal, a retrial was ordered.

Notes: In most cases there is more than one ground of appeal and it is frequently a matter of judgment whether a case should be included in one category rather than another. Where no single ground of appeal could be selected as predominant, the case is included under the heading 'Multiple grounds'.

Lack of a warning to the jury on the dangers of identification evidence or the inadequacy of the warning given was the ground or one of the grounds of appeal in 16 cases. All these cases fall within the categories 'Misdirection' or 'Multiple Grounds' in the Table above, and comprise 1 appeal allowed and 6 appeals dismissed in 1973 and 5 appeals allowed and 4 appeals dismissed in 1974. In only one case does the absence of a warning appear to have contributed significantly to the Court's decision to allow an appeal.

TABLE VI

Appeals Heard Against Conviction in which Identification was the Principal Issue, England and Wales, 1973 and 1974. Analysis of Evidence Available at the Trial.

	(1) Identification by 1 witness only	(2) Identification by 2 or more witnesses only	(3) Statement	(4) Additional evidence other than statement	Total
Appeals allowed	12	5	5	10	32
Appeal dismissed	5	6	2	22	35
Total	17	11	7	32	67

Notes: Columns (1) and (2) cover all cases in which the case against the accused rested wholly on identification by eye witnesses. In the remaining cases identification evidence was supplemented by words used by the accused and nothing more (column (3)) or by additional evidence of some other kind, which might include a statement made by the accused with other material (column (4)).

In column (3) 'statement' means something allegedly said by the accused which tends to incriminate him, whether a brief and allusive remark or a formal confession.

In column (4) 'additional evidence' means evidence other than that of eye-witness identification, tending to incriminate the accused, which was available at the court of trial.

In columns (3) and (4) account has been taken of every item of evidence, however slight, which might tend to incriminate the accused. No judgment is implied as to the weight or authenticity of such evidence.

The analysis is based in the first instance on the judgments of the Court of Appeal supplemented by a study of the short transcripts of proceedings at the court of trial.

APPENDIX J

MATERIAL RECEIVED FROM *JUSTICE* AND OTHERS

The Committee has received information about a number of cases from *Justice*, the National Council for Civil Liberties, and a number of other bodies and individuals, in which it has been alleged that a miscarriage of justice resulted or might have resulted from mistaken identification. While unable to assess the merits of such allegations, the Committee has looked at these cases as illustrations of the problems which may arise over identification in criminal proceedings.

In addition the Committee has been able to commission some research into records kept by *Justice* in order to test whether there might be a volume of complaint on this matter which did not find expression through official channels. In 1974 *Justice* received 17 complaints alleging wrongful conviction on the ground of mistaken identification. Except for one case which had not been brought to trial at the time of the study, they were all the subject of applications for leave to appeal. Leave to appeal was refused in 12 cases and in 3 others an appeal was dismissed. In the remaining case leave to appeal was refused by the single judge, but at the time of the study a renewed application had yet to be heard by the Full Court. One of the dismissed appeals was against sentence only and, in this case, *Justice* advised against appealing against conviction. In 4 cases where leave to appeal was refused, *Justice* advised against proceeding further. No case was found in which following conviction the regular appeal procedures had not been used.

APPENDIX K

SELECT BIBLIOGRAPHY

1. Other Relevant Cases

In taking account of the other relevant cases to which it is directed in its terms of reference, the Committee has for the most part drawn upon the wealth of material supplied by the Home Office and the Criminal Appeal Office. But it has not been unmindful of the notable cases which have occurred over the last 100 years. Details of such cases may be found in a number of publications of which the following is a select list.

R. Brandon and C. Davies, *Wrongful Imprisonment*, 1973, chapter 2.

P. Cole and P. Pringe, *Can You Positively Identify This Man?*, 1974.

P. Hunt, *Oscar Slater, The Great Suspect*, 1951.

Report of the Committee of Inquiry into the case of Mr. Adolf Beck (Cd 2315), 1904.

Report of the Tribunal of Inquiry on the Arrest of Major R. O. Sheppard, DSO, RAOC (Cmd 2497), 1925.

C. H. Rolph, *Personal Identity*, 1957.

W. Roughead (ed), *The Trial of Oscar Slater*, 4th ed., 1950.

W. N. Roughead (ed), *Tales of the Criminous: a selection from the works of William Roughead*, 1956 (pages 53–81 on Warner's case).

E. R. Watson (ed), *The Trial of Adolf Beck*, 1924.

2. Other Matters

The Committee has also, on a variety of matters, referred to:

F. C. Bartlett, *Remembering*, 1932 (repr. 1972).

Committee on Criminal Procedure in Scotland (Second Report) (Cmnd 6218), 1975.

Criminal Law Revision Committee, *Eleventh Report, Evidence (General)* (Cmnd 4991), 1972.

M. Knight, *Criminal Appeals*, 1970.

J. Marshall, *Law and Psychology in Conflict*, 1966.

R. H. Renton and H. H. Brown, *Criminal Procedure according to the law of Scotland* (4th ed., G. H. Gordon), 1972.

D. R. Thompson and H. W. Wollaston, *Court of Appeal Criminal Division*, 1969.

A. Trankell, *Reliability of Evidence: Methods for Analysing and Assessing Witness Statements*, 1972.

P. M. Wall, *Eye-Witness Identification in Criminal Cases*, 1965.

APPENDIX L

LAW AND PRACTICE IN OTHER COUNTRIES

The Committee has received evidence about law and practice from Australia, Canada, the Republic of Ireland, France, Holland and Sweden. Part I of this Appendix summarises the information received about the three countries within the common law tradition, and Part II with information from the three countries outside it.

I. Australia, Canada and Ireland

It is common ground in these countries that the identification parade is the best available method of testing a witness's ability to identify a suspect, and should wherever possible be used in preference to other methods. The procedure for parades in Ireland and the various States of the Commonwealth of Australia is broadly similar to that followed in England and Wales. In Canada there is greater variety of practice, but the principles governing the conduct of a parade are the same. The three countries follow broadly the same rules as prevail in England and Wales for the use of photographs by the police for identification purposes. They also agree in the main as to the role of the judge at the trial, but there is some divergence as to the way in which his discretion in regard to the handling of identification evidence may be restricted. The more noteworthy points of difference from the law and practice in England and Wales are set out below.

Methods of Identification

2. The police in the three countries use the same variety of methods as is found in England and Wales. However, in the remoter country districts of Western Australia, it is not always easy to assemble a parade of persons who are reasonably similar to the suspect and at the same time unknown to the local witness. There is accordingly much more frequent resort to informal identification in the street or elsewhere. Similarly, in the rural areas or smaller urban communities of Canada the requirement for identification parades does not arise as frequently as it might in metropolitan centres since people in the area are generally well known to one another.

3. The Australian High Court has ruled[1] that identification through individual confrontation, in which the accused has been shown alone as a suspect to the witness is so liable to error, that it is unsafe to convict the accused unless his identity is further proved by other evidence, direct or circumstantial. In the State of Queensland, however, the police are required to offer the suspect a choice between this method and an identification parade.

Identification Parades

4. In Ireland, Canada and all but one of the State police forces in Australia, the conduct of Identification Parades is governed by codes of practice which are to a greater or less degree similar to that contained in the Home Office Circular 9/1969. In Western Australia there are no formal rules, but the same principles are followed as elsewhere. The minimum number of volunteers normally required for a parade, however, varies: in New South Wales, for example, it is 5; in Canada and Ireland it is 6; while in Victoria it is 8 or more.

[1] *Davies and Cody* v. *R.* (1937), 57 CLR 170.

5. In Canada the procedure is interpreted very broadly to take account of the variety of local circumstances. The intention is generally to make it as difficult as possible for a witness to make a positive identification of a suspect in a line-up. For example, a common technique is to have the witness view the line-up from the front: then, after removing him from the room, to arrange for the participants to change position for subsequent viewings from the back, and for profiles. Clothing also may be switched about in these manoeuvrings, while at each stage the suspect may choose his own position. Several Australian police forces on the other hand have rules which prohibit or severely restrict the exchange of clothing.

6. It is generally allowed for the suspect to raise objections to the arrangements made or specifically to object to any of the volunteers assembled for the parade. In addition, the Commonwealth Police Force of Australia uniquely requires a question to be put to each witness to ascertain whether any of the paraders is personally known to him.

7. The method by which a witness should make known his purported identification varies. In some forces he may touch the person or point him out in some other way; in others he is required to touch; whereas in the State of Victoria he is required merely to point the man out. In Canada any of these practices may be followed, or the parade may be numbered, and the witness required to write down the appropriate number.

8. While all forces take precautions to prevent a witness who has made an identification from communicating with other witnesses, in some, this is done by segregating those witnesses who have viewed the parade after they have left the room: in other forces, no witness who has made, or attempted to make, an identification is permitted to leave the room until all the witnesses have been brought in.

9. As for records of the parade, the names and addresses of paraders are taken by several Australian forces, while in one it is forbidden to make any such record. In Canada, it is the practice to photograph the parade, and photographs may be taken at random throughout, as possible evidence of the fairness of the proceedings.

Use of Photographs

10. There is general acceptance of the principle that photographs should not be used to enable a witness to make an identification when other methods are available, and photographs of persons who are under arrest should never be shown. It is also agreed that when photographic identification is appropriate, a single photograph should not be shown, but the witness should be invited to pick out one from an array of several photographs. Some forces specify the minimum number of photographs (10 or 12) to be shown. In contrast, however, to the provisions of the Home Office Circular about the conditions under which a witness who has made an identification from photographs may properly be invited to identify the suspect on a parade, it is stated by the Australian Commonwealth Police Force that there is no objection to inviting a witness who has made a photographic identification to attempt to identify the suspect at an identification parade.

Points of Law

11. The extent to which a judge should be obliged to warn the jury of the general risks attaching to all evidence of identification was the subject of a judgment by Mr Justice Kingsmill Moore in the case of *Dominic Casey* in the Supreme Court of Ireland in 1963.[1] This important case is summarised in paragraph 4.44 of this Report. It was there laid down that, wherever the verdict depends substantially on the correctness of an identification, even where there is more than one witness to such an identification, it is the judge's duty to warn the jury in general terms of the necessity for caution since mistakes can be made even by the best witnesses in the best conditions. The subsequent

[1] *The People (at the Suit of the Attorney General)* v. *Dominic Casey (No. 2)*, [1963] IR 33.

and unreported case of *Michael & Thomas O'Driscoll*, heard by the Irish Court of Criminal Appeal in 1972, made it clear that a warning along the lines given in *Casey's* case was still required not only when the witness had prior acquaintance with the suspect, but also whether his identification was corroborated or not. The Court said that corroboration had nothing to do with the matter and that the warning appropriate to an issue of disputed identification was to be distinguished from that required concerning the uncorroborated evidence of an accomplice or of a complainant in cases of sexual assualt.

12. The response to the *Casey* judgment in England and Wales is discussed in the body of the Report at paragraphs 4.47–48. In Canada, the case has been referred to in a series of cases in the Ontario Court of Appeal. While the judgment of Kingsmill Moore J was adopted as a model in the case of *R.* v. *Sutton*[1] (1970) the Ontario Court of Appeal has declined to say that a warning of this kind is mandatory in all identification cases. In *R* v. *Spatola*[2] (1970), while no view was expressed on this point, it was held that a warning of the kind enunciated in *The People* v. *Casey* was mandatory, 'where the identification evidence was offset either by evidence of a contrary nature or by evidence of another witness's inability to make an identification even though he had been equally in a position to observe the alleged offenders'. In *R* v. *Howarth*[3] (1970), it was held that such a warning was not necessary where no-one else had had the same opportunity as the identifying witness or took advantage of the same opportunity of identifying the persons involved in the crime.

13. The position of the Ontario Court of Appeal was stated more generally in *R* v. *Olbey*[4] (1971) where the following ruling was given:

> In a case where the verdict depends substantially on the correctness of an identification, it is not essential that the jury be charged in general terms along the lines set out in *The People* v. *Casey* (No. 2), [1963] I.R. 33 at 39. In the present case the trial Judge pointed out in detail all matters of evidence which tended to weaken the identification evidence. At trial no objection was taken to the charge. The charge was adequate in the circumstances. Without derogating in any way from the principle that in identification cases the trial Judge should carefully charge the jury on those matters which, in the circumstances of the particular case, should receive their anxious consideration in deciding whether they will accept the identification evidence, the weight of authority is against the necessity of a particular form of words general or specific, failure to use which form must result in a new trial.

A similar judgment was given by the British Columbia Court of Appeal in *R.* v. *McCullum*[5] (1971).

14. In Australia, several judgments in the Courts of Criminal Appeal in New South Wales and Victoria have emphasised the need for a warning or caution to be given to the jury, where the Crown case depends largely on identification. They have not, however, held such a rule to be mandatory. In the case of *Maarroui*[6] in 1970, the New South Wales Court endorsed the rule laid down in the Victorian case of *Preston*[7] a decade earlier, to the effect that there was no rule of law that in every case of disputed identity a warning must be given, although, where the circumstances of the case required it, the jury should be warned in appropriate terms about the need to exercise considerable care before coming to a conclusion on the evidence as to identification. Where there

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1 [1970] 3 CCC 152.
2 [1970] 4 CCC 241.
3 [1970] 1 CCC (2d) 546.
4 13 CRNS 316.
5 [1971] 4 WWR 391.
6 (1970), 92 WN 757.
7 [1961] VR 761.

was only one witness to identification, for example, the jury should be satisfied that he was not only honest but accurate. While referring to the Irish case of *Dominic Casey*, the Court appears not to have accepted the doctrine that a general warning should be mandatory.

15. In the more recent case of *Kelleher*[1] (where a man convicted of rape disputed identity), the High Court of Australia upheld the ruling of the New South Wales Court of Criminal Appeal that a specific warning on the danger of convicting in sexual cases on the uncorroborated evidence of the victim was not essential when evidence capable of being corroborative was available. Mr Justice Gibbs, one of the judges of the High Court also endorsed the judgments in the English cases of *Arthurs*[2] and *Long*,[3] that in cases of disputed identity while the judge should set out clearly all the circumstances affecting the identification, a summing-up should not be considered defective if it did not contain a general warning of the dangers of acting on evidence of visual identification. Gibbs J, however, added that it is in practice generally desirable that, where the case for the prosecution includes evidence of visual identification by a person previously unfamiliar with the accused, an appropriate warning should be given to the jury.

16. Two judgments of interest, one from Canada and one from Australia, concerning the prejudicial effect of disclosure at the trial that an identification had been made from police photographs, may be noted. In the case of *Watson*[4] in 1944, the Ontario Court of Appeal held that such disclosure did not occasion a mistrial, since the police have in their possession photographs of persons other than convicted persons; where such a fact is disclosed, however, it is advisable for the trial judge to warn the jury against allowing their minds to be influenced by that knowledge to the prejudice of the accused. In the Australian case of *Doyle*[5] in 1963, where the charge was murder, the Supreme Court of Victoria held that while an inference prejudicial to the accused might have been drawn by the jury from the disclosure of the use of photographs, this danger was outweighed in this case by its probative value; the trial judge had correctly exercised his discretion in admitting the evidence; his omission of a warning to the jury to disregard any adverse inference arising from the evidence did not amount to a miscarriage of justice, and the decision to give such a warning (which may emphasise the matter in an undesirable way) lies entirely within the discretion of the trial judge.

17. In one reported case, that of *R.* v. *Marcoux and Solomon*[6] in the Ontario Court of Appeal in 1973, consideration was given to the question whether it was proper for the prosecution to give evidence that an accused had refused to take part in an identification parade. In his summing up the trial judge said that there was no statutory authority to force an accused person, or a suspect, or a person at a police station, into a line up, and that it was for the jury to decide, on the totality of the evidence, what significance should be attached to Mr Marcoux's refusal to participate in a suggested line up.

18. On appeal two judges of appeal held that this direction did not conflict with the principle that no man should be compelled to incriminate himself. They held:

> That privilege relates to the obtaining of oral confessions or statements from a prisoner. Here the evidence adduced relates to the conduct of the accused, not to something that he stated or did not state as to the charge against him. Thus it is not an invasion of his rights under the maxim (namely, the privilege against self-incrimination). It is but a circumstance which together with all the other circumstances the jury are entitled to take into consideration.

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1 (1974), 48 ALJR 502.
2 (1970), 55 Cr App R 161.
3 (1973), 57 Cr App R 871.
4 (1944), 81 CCC 212.
5 [1967] VR 698.
6 (1973), 23 CRNS 51.

In a dissenting judgment, Brooke JA said that the privilege against self-incrimination vested in the appellant the right to refuse to participate in the line-up, and that to allow a negative inference to be drawn from the exercise of that right would amount to a partial denial of the right itself.[1]

II. Other Countries

France[2]

19. A distinction is drawn between 'material means' (such as fingerprints, traces or materials found at the scene of the crime which point to the suspect) and processes which employ human testimony.

20. Human testimony is concerned with the photograph of a suspect or the suspect himself. The witness is asked to state whether or not he recognises the photograph or the suspect presented to him. But this operation presupposes, at the very least, that the witness knows the person by sight, having seen or noticed him, and, in certain cases, having actually observed him committing the crime or offence.

21. On a legal level, identification by technical means is subject to rules of expertise laid down by the Code of Penal Proceedings. Identification by presentation of photographs or persons is connected in law with the questioning of witnesses, for which the Penal Proceedings Code has not provided any particular regulations in this instance. The only provision laid down by the Code is that the witnesses be questioned 'separately'. Nevertheless prudence has inspired a practical rule which requires that several photographs or several persons be shown to the witness at the same time as the suspect or photograph of the suspect, for recognition. The rule forbids this procedure (where it is employed) to be carried out simultaneously for several witnesses. There is obviously a concern that no particular reply should be suggested by presenting the witness with only one person or one photograph, and that one witness should not be influenced by knowledge of the evidence given by others.

22. These two classic means of proof do not carry the same credibility. That of material proof is naturally the greater. Human testimony is essentially subjective, uncertain and fragile. French law has not adopted a system of legal proof, but one of inward conviction, the benefit of the doubt being given to the accused.

23. The legal procedure of a double hearing, with the provision for debating all the charges verbally and publicly in open court, makes allowance for the witnesses and experts to be contradicted, and, up to a point, to gauge their sincerity and the truth of their statements.

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[1] This is in striking contrast to some recent decisions in the U.S.A. where it has been held to be not unconstitutional in certain circumstances for a court to order a suspect to stand for identification. In the case of *Wise* (1971) a rape victim who had tentatively identified a suspect from a group of photographs, asked to see him in person. A court order was obtained, requiring the suspect to appear for the requested line up. While the District of Columbia Court of Appeals ruled that the police had to re-submit a more detailed application for the order in this case, it specifically supported the view that the court could order a suspect who was not already in custody to appear for identification procedures. We understand that the American Law Institute has proposed that the courts generally should be empowered to issue on grounds of reasonable suspicion an order to appear for identification procedures, such procedures to include fingerprints, blood or urine samples, identification material that may be on the surface of the body or under finger-nails, and procedures to obtain witness identification through line ups, photographs, voice samples or handwriting exemplars.

[2] This section is translated from a note supplied by the Direction Générale de la Police Nationale of the French Ministry of the Interior.

Holland

24. There are no specific rules or procedures for the identification of accused persons.

Sweden

The Code of Judicial Procedure

25. Swedish law contains no special provisions on identification in criminal cases and there are no instructions or rules given by administrative authorities. A form of identification parade is, however, a part of the pre-trial investigation and this and related procedures are therefore covered by a general provision on such investigation in the Swedish Code of Judicial Procedure. Under this provision the police are required to give consideration not only to those circumstances which point towards a suspect's guilt, but also to those which are favourable to him and they must collect favourable as well as unfavourable items of evidence. This provision must be observed when arranging identification procedures.

26. The Swedish Code of Judicial Procedure gives the court a right to freely examine and assess any evidence presented during the trial. Thus the court is not bound by the result of an identification procedure, but must thoroughly examine the circumstances under which it was carried out. This makes it necessary for the police to conduct matters in a way that obviates objections and to document the procedure used with accounts and photographs. It should be noted that defence counsel is usually given the opportunity to be present.

Identification Procedures

27. At the outset each witness is thoroughly questioned concerning his description of the offender, the clarity of his memory and the extent to which he has discussed his observations with other witnesses or persons interested in the case.

28. There may then follow a form of identification parade. This is not a formal line-up of the kind practised in England and Wales, but a more informal situation in which the suspect is to be viewed in association with other persons. Not less than six others must be present, and if the suspect is said by witnesses to have worn distinctive clothing this should be reproduced in the identification situation or 'interview'.

29. The suspect is placed in a well-lighted room where the other members of the assembled group seek to entertain each other, and the suspect, with ordinary conversation—primarily to put the suspect at his ease and to eliminate any tendency to nervousness on his part. This also gives the witnesses an opportunity to observe any characteristic gestures or facial expressions etc.

30. Witnesses may observe the scene in any convenient manner—from an adjoining room, possibly through an open door, through a window or by means of a mirror.

31. The following are examples of other forms the procedure may take.

1. Several witnesses had observed a young man, walking, clad in military uniform who was suspected of murder. The 'confrontation' was arranged in a large library with detached book-shelves. A policeman was in charge of the confrontation, and acted as 'drill sergeant'. Other members of the group were in uniform and wore numbers. Under the instructions of the policeman, they either walked in between the book-shelves or stood half-turned towards or away from the witnesses, who were placed so that they could not consult one another.
2. A woman disappeared immediately after a visit to a dance hall and was later found murdered. It was very difficult to establish with whom she had had contact at the dance hall, and to eliminate persons who had nothing to do with the case. All the visitors were sought out and interviewed. Finally they were all called to a general meeting at a meeting hall with a platform and seats.

There were 24 persons and they were to be mutually confronted. When they had been allotted numbers and a questionnaire form they took their places on the seats. Each in turn then went up on to the platform and exhibited himself before the others.

The questions on the form were as follows:

1. Which of them do you know?
2. Which of them did you see at the Dance Hall?
3. Which of them did you talk about in your statement?

The answers were made by placing a cross against the question in numbered columns.

Use of Photographs

32. It is accepted that a witness may look through an album of photographs with a view to picking out the offender, provided he is given no help whatsoever in his search. Such a witness, however, must be considered of no further use if the person already suspected by the police is in the book, since he may confuse his original memory of the offender with the pictures he has seen. This rule is in effect a warning to the police that once they have a named suspect, his photograph should not be included among those shown to a witness.

33. The following illustration of the difficulties of recognising a person from his photograph is given.

> The picture of a murderer appeared in a 'wanted' list taken from no less than six different angles because all these pictures were very different. The list, amongst other things, was exhibited at the murderer's former places of work. A witness, who had met the accused on repeated occasions, pointed at each photograph in turn and said 'That's not him, neither is that . . . but this is'.

Other Methods

34. The form of informal 'interview' described above is considered appropriate only if the witness claims to be thoroughly familiar with the appearance of the suspect—and thus gives a full description—and the observation took place under favourable circumstances. If, on the contrary, the observation was of very short duration, took place in bad light, thus giving only an incomplete picture, then the identification must be made under circumstances as similar as possible to those prevailing at the time of the original observation.

35. In some cases the Swedish authorities have gone to considerable lengths to stage practical experiments to test a witness's ability to recognise faces under the conditions of lighting and similar factors which were said to have prevailed at the time of the offence.

36. For identification by voice, on several occasions the suspect and other persons have read a suitable text on tape which is later played back to the witness.

APPENDIX M

LIST OF WITNESSES

I The Cases of Mr Virag and Mr Dougherty

The Committee took oral evidence from

Mr D Fenwick
Mr P A Hamilton
Mr A J Stoller

The Committee also received much help in its enquiries on various points from

Detective Superintendent R. E. Allen
The late Mr B. Anns, QC
Carlton Investigations Ltd
Director of Public Prosecutions
Durham Constabulary
His Honour Judge Gill
Gloucestershire Constabulary
Home Office
Justice
The late Mr Justice Lyell
Merseyside Police
Metropolitan Police
Messrs Michael Freeman & Co
His Honour Judge Mynett, QC, (formerly Mr Kenneth Mynett, QC)
Mr D. Napley
Mr A. J. Olson
Messrs Patterson, Glenton & Stracey, Donald Harvey & Co
Registrar of Criminal Appeals
St Mary Abbots Hospital, Kensington
The Sunday People
His Honour Judge Vowden, QC (formerly Mr Desmond Vowden, QC)
Mr O. Wrightson

II. General

(1) The following submitted written evidence in response to the Committee's request. Those marked with an asterisk also gave oral evidence.

*Association of Chief Police Officers
British Legal Association
*Director of Public Prosecutions (*n*)
Mr R. N. Gooderson
*Home Office
**Justice*
*Justices' Clerks' Society (*n*)

(*n*) Oral evidence only.

*Law Society
*Magistrates' Association
*Metropolitan Police
Metropolitan Stipendiary Magistrates
*National Council for Civil Liberties
Police Federation
Police Superintendents' Association
*Registrar of Criminal Appeals
Scottish Home and Health Department
Senate of the Inns of Court and the Bar (Criminal Bar Association)
Professor Glanville Williams, QC, FBA

(2) On psychological matters, the following gave oral or written evidence:
Dr D. E. Broadbent, CBE, FRS, Department of Experimental Psychology, University of Oxford
Dr L. R. C. Haward, University of Sussex
Miss L. Hilgendorf, The Tavistock Institute of Human Relations
Professor I. M. L. Hunter, University of Keele
Professor L. Taylor, University of York
Mr B. Irving, The Tavistock Institute of Human Relations

(3) Written submissions or information were received from a number of individuals and organisations, including:

Dr W. Bytheway and Mr M. Clarke
Mr E. P. Coke
Messrs Conn, Goldberg & Co
The Hon Mr Justice Cusack
Mr C. Davies
Mr D. Fingleton
Justices Against Identification Law
Mr A. Samuels
Mr W. A. Somers
Mr D. A. Thomas

(4) We are grateful to Mr P. Cole and Mr P. Pringle for copies of their book *Can you Positively Identify This Man*? (Andre Deutsch, 1974) and to Mr Ludovic Kennedy for a proof copy of his book, now published, *A Presumption of Innocence* (Gollancz, 1976).

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