"That's The Man!": Admission of Positive Assertions in Court and Police Identification Procedures

JOHN BURCHILL*

> The trial which might determine the accused's fate may well not be that in the courtroom but at the pre-trial confrontation, with the State aligned against the accused, the witness the sole jury, ... and with little or no effective appeal from the judgment there rendered by the witness - "that's the man".
>
> *United States v Wade*, (1967) 388 US 218

I. INTRODUCTION

The Crown's burden in every case includes the need to prove that the offence has been committed and also that it was committed by the accused. The defence of identification does not deny that an offence has been committed, but asserts that the Crown has not proven the accused was the person who committed it.

The defence of identification usually arises in cases where the principal players (victim, if any, and witnesses) do not know the accused, or do not know him or her very well, and where there are limited opportunities for observations of facial and other characteristics. The law recognizes that

* Sgt. John Burchill (retired) was a member of the Winnipeg Police Service until 2012. An earlier version of this paper was presented at the First Annual Crown Defence Conference, established as a result of the Sophonow Inquiry, held in Winnipeg on September 26, 2002. It was updated for the Anatomy of a Public Inquiry seminar held at Robson Hall on November 2, 2012. The opinions expressed are those of the writer and do not necessarily represent those of the Crown Defence Conference Committee or the Winnipeg Police Service.

eyewitness identification, particularly in moments of danger and excitement, can be extremely unreliable.[1]

Eyewitness identification is direct evidence against the accused which, if believed, resolves a matter in issue – that the accused is the person who committed the crime. A *voir dire* is generally not necessary to determine the admissibility of identification evidence. However the weight afforded to such evidence at trial may be impeached by the process used in making the identification.

As noted by the Federal/Provincial/Territorial Heads of Prosecutions Committee, there is a "powerful impact at trial of a witness for the prosecution stating with confidence and conviction that the accused was the person observed committing the crime. However ... the most well-meaning, honest and genuine eyewitness can, and has been, wrong."[2] While we think of David Milgaard, Donald Marshall, and even Thomas Sophonow today, the "[e]rrors of recognition have a long documented history".[3]

The case of Adolph Beck is but one example from the past – he was convicted on two occasions in England, first in 1896 and then in 1904, of fraud, and jailed on the eyewitness testimony of twenty-two women. No less than ten of these women gave positive identification evidence. An article in *The Canadian Bar Review* commented on the case:

> *The Criminal Appeals Act* [1907 (UK), 7 Edw 7, c 23] ...was passed as the result of the regrettable miscarriage of justice in the well-known case of Adolph Beck. Mr. Beck, a respectable mining engineer, was arrested on three occasions and convicted at the Old Bailey in London of obtaining goods under false pretences. The trials were conducted before the Recorder, Sir Forrest Fulton, and a jury. It subsequently transpired that it was a cruel case of mistaken identity, and the real offender, who was an accomplished rogue and who closely resembled Mr. Beck, was caught and punished.
>
> Mr. Beck was released from custody and compensated by the British Treasury, but not until after he had served the whole of two sentences and a portion of the third.[4]

---

1 Adopted from *Criminal Defences*, Cindy Rotar, Perth District Collegiate. On-line: <http://teacherweb.com/ON/PerthDistrictCollegiateInstitute/CindyRotar/CriminaldefencesSV.pdf>.

2 *Report on the Prevention of Miscarriages of Justice*, (Ottawa: FPT Heads of Prosecutions Committee Working Group, 2004) at 42.

3 *R v Spatola* [1970], 3 OR 74 at 82, [1970] 4 CCC 241, (Ont CA) [*Spatola* cited to OR].

4 W J O'Hearn, KC, "The Court of Criminal Appeal", (1923) 1:7 Can Bar Rev 577 at 578-579. See also F Gorphe, "Showing Prisoners to Witnesses for Identification" (1930) 1:1 Am J Pol Sci 79, for a discussion on many European cases at the turn of the last century

However, in some cases, the most important (and sometimes the only) evidence of a suspect's guilt is his identification by an eyewitness. While the courts have often noted the potential dangers involved in the pre-trial procedures related to eyewitness identification, there has also been an expressed concern about the lack of well-known, uniform identification procedures. These included the dangers involved in suggestive identification techniques and the ability to reconstruct and evaluate the trustworthiness of such procedures at trial. As noted by Laskin, JA almost forty-five years ago in *R v Spatola:*

> Errors of recognition have a long documented history. Identification experiments have underlined the frailty of memory and the fallibility of powers of observation. Studies have shown the progressive assurance that builds upon an original identification that may be erroneous ... The very question of admissibility of identification evidence in some of its aspects has caused sufficient apprehension in some jurisdictions to give pause to uncritical reliance on such evidence, when admitted, as the basis of conviction...[5]

Such was the case in the prosecution of Thomas Sophonow where the witnesses either failed to identify him during the initial pre-trial investigative procedures or at best only provided tentative identifications. However, as noted by the Manitoba Court of Appeal:

> The degree of certainty with which each witness originally identified the accused and that expressed at the third trial .... [got] surer not only with time, but also with each successive appearance to testify ... The jury should have been asked to consider whether the qualification given to their original identification was not more reliable than the assurance displayed in the witness box. Subsequent affirmation of an earlier qualified identification can arise from a subconscious wish by a witness to defend the identification originally made. It should have been made clear to the jury that mistaken identification by several witnesses has occurred before.[6]

Besides a "subconscious wish by a witness to defend the identification originally made", witnesses can be susceptible to various forms of influence that can affect their original selection of the accused as a suspect. The United States Supreme Court also noted this occurrence in *Wade*:

---

involving faulty eyewitness identification.

5 *Spatola, supra* note 3 at 82, cited with approval in *R v Burke*, [1996] 1 SCR 474 at 498, 46 CR (4th) 195.

6 *R v Sophonow* (1986), 50 CR (3d) 193 at 222-223, 38 Man R (2d) 198 (Man CA), leave to appeal to SCC refused, [1986] 1 SCR xiii [*Sophonow*].

> A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pre-trial identification. A commentator has observed that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor and perhaps it is responsible for more such errors than all other factors combined." Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.[7]

The identification of Thomas Sophonow, 15-years after the decision in *Wade*, came as a result of most, if not all, of the suggestible influences identified by that court. As noted by Commissioner Cory in his inquiry into the investigation and prosecution of Thomas Sophonow,[8] Sophonow's picture stood out from the rest and might just as well have carried a notation saying "here I am".[9]

The line-up questioned by Commissioner Cory consisted of eight individuals. However, the picture of Thomas Sophonow was the only one taken outdoors, it was the only picture to have a tree and car in the background (the rest had a wall as a backdrop), it was the only one on 8¼ x 11 cm Polaroid paper (the rest were on 10 x 10 cm Polaroid paper), and it was the only one that did not have the person's name written across the bottom. Sophonow was the only one wearing a sheepskin coat (at least four were just wearing shirts), he was one of only two people dressed exactly like the suspect (wearing a cowboy hat, glasses and a moustache) in both front and side views, and he was only one of three people who was wearing the "the distinguishing feature of the killer" (cowboy hat), in both front and side views.

Commissioner Cory also found the identification parade or live line-up to be just as unfair, as Thomas Sophonow was the tallest person in the gallery and one of only four people wearing glasses. Furthermore, one of the witnesses had viewed the photographic line-up only four days prior to picking him out at the identification parade. The witness then had his choice reinforced by an officer at the line-up who told him "he had picked the person being investigated as the suspect".[10] The result of this conversation

---

7 *United States v Wade*, (1967) 388 US 218, at 233-35 [citations omitted].

8 *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation*, (Winnipeg: Manitoba Justice, 2001) [*Sophonow Inquiry*].

9 *Ibid* at 24.

10 *Ibid* at 25.

may have been the basis for the witness's change from a tentative identification of Thomas Sophonow to one of absolute certainty. As noted by Dr. Loftus in Commissioner Cory's report, "often the main reason for someone's change in testimony is as a result of receiving or being supplied with new information from police officers".[11]

Sophonow's example is but one case of procedural errors in the acquisition and admission of eyewitness identification evidence. However, and notwithstanding the rich literature on eyewitness identification, many police agencies do not have written policies for eyewitness identification procedures.

In a recent survey of eyewitness identification procedures in law enforcement agencies, the Police Executive Research Forum (PERF) found that most agencies have no written policy for the five critical eyewitness procedures examined by the survey: 76.9% reported no written policy for show-ups, 64.3% report no written policy for photo lineups, 84% reported no written policy for live lineups, 90.6% report no written policy for composites, and 92.1% report no written policy for mugshot searches.[12]

As a result, some jurisdictions have resorted to passing laws requiring the police establish eyewitness identification procedures outlining the methods for collecting and preserving such evidence. For example, section 175.50(2), *Wisconsin Act 60*, reads in part "Each law enforcement agency shall adopt written policies for using an eyewitness to identify a suspect upon viewing the suspect in person or upon viewing a representation of the suspect. The policies shall be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases."[13]

No such laws exist (yet) in Manitoba, and while this paper does not purport to be an exhaustive review of the jurisprudence on eyewitness

---

11 *Ibid* at 30.

12 Police Executive Research Forum, *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies* (Washington, DC: Police Executive Research Forum, 2013), online: <http://policeforum.org/library/eyewitness-identification/ NIJEyewitnessReport.pdf>. This survey was submitted to the National Institute of Justice, US Department of Justice in 2013.

13 Wis Stat § 175.50 (2012). See also Tex Code Crim Proc Ann art 38.20 (West 2011) in force as of September 1, 2011, requiring law enforcement agencies to adopt written procedures for both in-person and photo-based police lineups. These regulations are designed to make it less likely that eyewitnesses make mistakes when they identify suspects.

identification; it should be seen as a guide on how to avoid impeaching the process of admitting eyewitness identification evidence (which is generally within the control of the police) in lieu of such legislation. Or, conversely, a guide to impeaching the process by identifying procedural errors or omissions that are commonly overlooked by the police. Unless either the witness or the process can be impeached, the evidence will be admitted.

II. THE ROLE OF THE POLICE IN THE IDENTIFICATION PROCESS

Because eyewitness identification is admissible as direct evidence implicating the accused, the process used in making the identification, often under the control of the police, is usually the subject of attack in impeaching the credibility of the identification made.

In *R v Miaponoose*, Charron JA, writing for a unanimous court referred to the role of the police in the identification process when she said:

> I would add that it is clear that the police also have a duty to ensure the integrity of the identification process. Their role indeed may be most important of all since they are usually in control of the methods chosen to recall or refresh the memory of eyewitnesses. While it may not be possible to improve upon the reliability of a witness's original perception of a person, it is crucial that procedures which tend to minimize the inherent dangers of eyewitness identification evidence be followed as much as possible in any given case. Irreversible prejudice to an accused may flow from the use of inappropriate police procedure and, unless adequately counterbalanced during the course of the judicial process, may result in a serious miscarriage of justice.[14]

In *Miaponoose* the police used an inappropriate pre-trial investigation procedure ("show-up") that was highly prejudicial and rendered the victim's subsequent identification of the accused as meaningless, as it did not objectively test the victim's ability to recognize the suspect. In this case, the police officer agreed at trial that he had not followed proper procedures.

By comparison, Commissioner Cory also observed that the errors made by the Winnipeg Police during the *Sophonow* investigation "contravened the practice and procedure recognized as being appropriate in 1982".[15] In fact, as noted in *Wade*, the courts have long recognized the frailties of eyewitness identification posed by suggestive police practices.

---

[14] *R v Miaponoose*, (1996), 30 OR (3d) 419 at 424-425, 110 CCC (3d) 445 (Ont CA)[*Miaponoose* cited to OR].

[15] *Sophonow Inquiry*, *supra* note 8 at 30.

As far back as 1910, the English Court of Criminal Appeal held that poor police procedures that tended to jeopardize an independent identification of a suspect would not be condoned:

> I desire to say that if we thought in any case that justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction which followed. The police ought not, either directly or indirectly, do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it is so.[16]

In *R v Goldhar*, a case that occurred over 40 years before *Sophonow*, Chief Justice Robertson of the Ontario Court of Appeal commented upon the proper procedure in the matter of police line-ups. While recognizing the importance of identifying the person they are looking for by showing photographs, Justice Robertson cautioned that the usefulness of such a person as a witness may thereafter be seriously impaired if the police are not careful in the manner in which the photograph is displayed.

> At least two things should be made clearly to appear that are seldom even referred to in evidence. First, it should appear that there has been nothing whatever done to indicate to the witness the person in the line-up who is suspected by the police, either by showing a photograph or by description, or an indication of the position in the line-up. In the second place, it should appear that the selection of the other person to form the line-up has been made fairly, so that the suspect will not be conspicuously different from all others in age or build, colour or complexion or costume or in any other particular. Where these precautions have been observed, and it so appears by the evidence, identification by means of a line-up becomes much more convincing to a Judge or a jury than the mere statement that on a line-up the witness picked out the accused.[17]

A few years later the Ontario Court of Appeal had occasion to comment again on police procedures with respect of a witness who was shown a single photo of a suspect believed to have passed her a bad cheque. The witness then identified the suspect in court and he was subsequently convicted at trial. On appeal, Laidlaw JA, speaking for the Court, reaffirmed the need for pre-trial identification procedures to proceed without suggestion, assistance or bias created directly or indirectly:

> Anything which tends to convey to a witness that a person is suspected by the authorities, or is charged with an offence, is obviously prejudicial and wrongful ...

---

16 *R v Dickman*, (1910), 5 Cr App R 135 at 142-3, Lord Alverstone CJ.

17 *R v Goldhar, R v Smokler*, [1941] 2 DLR 480 at 481, 76 CCC 270 (Ont CA)[*Smokler*].

> permitting a witness to see a single photograph of a suspected person or of a prisoner, after arrest and before scrutiny, can have no other effect, in my opinion, than one of prejudice to such a person.[18]

Consequently, Laidlaw JA quashed the appellant's conviction, stating that the police procedures had rendered the teller's evidence valueless and, in the absence of any other evidence, "it would be unfair and unsafe to convict him".[19] Laidlaw's decision suggests that an improper line-up can destroy otherwise good evidence. This principle was implicit in *R v Faryna*, a subsequent decision from the Manitoba Court of Appeal, where a conviction was quashed and an acquittal substituted due to the conduct of a police line-up.

> We are thus left with a situation in which a woman who saw a man very briefly formed an impression as to his distinguishing characteristics. She next was asked to identify the accused when he was presented to her in a police line-up, which can be best described as the situation in which the police identified their suspect to her by means of juxtaposition, and distinction from the others in the line-up. Having identified the man so indicated as her assailant, there is a reasonable apprehension that her subsequent descriptions of her assailant, both at the preliminary inquiry and at trial, were based on impressions she formed of the man in the police line-up, rather than of the man she saw for fleeting seconds at the time of the assault. This is not to impute any ill motive to Mrs. Cudmore. It simply reflects the inherent danger in identification evidence of this type and highlights the reasons why police line-ups must be conducted properly if any weight is to be given to the evidence obtained as a result.[20]

However, unless the identification procedure is so highly prejudicial as to make the trial unfair, it is ultimately up to the trier of fact to determine what weight to attribute to the evidence. Although the Supreme Court has recognized that there are certain frailties associated with identification evidence that must be brought to the attention of the jury, properly admitted identification evidence should not be effectively removed from the jury's consideration by means of the trial judge's instruction. As was stated by Weiler JA in *R v Gagnon* "the evidence of tainting is a factor going to the weight of the evidence which is exclusively the province of the jury."[21]

The jurisprudence is similar in the United States where an 8-1 majority of the Supreme Court recently affirmed that eyewitness identification evidence

---

18 *R v Smierciak*, [1947] 2 DLR 156 at 157-158, (1946), 87 CCC 175 (Ont CA).

19 *Ibid* at 160.

20 *R v Faryna*, (1982), 18 Man R (2d) 185 (CA) at 195-6, 3 CCC (3d) 58.

21 *R v Gagnon*, (2000), 147 CCC (3d) 193 at 237-238, 136 OAC 116.

of questionable reliability is not prohibited by introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. The Court's unwillingness to adopt a rule that eyewitness evidence should be pre-screened by a trial court for reliability "rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence".[22]

In fact "without the taint of improper state conduct" the fallibility of eyewitness evidence does not warrant a due process rule requiring a trial court to screen the evidence for reliability before allowing the jury to assess its creditworthiness. Even then suppression of the identification is not the inevitable consequence. It is only when "the corrupting effect of the police-arranged suggestive circumstances" creates a substantial likelihood of misidentification that the identification should be suppressed.[23]

For example, in *R v Biddle*, in which the Ontario Court of Appeal ruled that the single showing of a suspect's picture to a victim did not corrupt or destroy the subsequent photo line-up as the pictures themselves (a single black and white passport picture verses a full colour police arrest photograph) were completely different. The court noted:

> The identification of the accused in a proper photo line-up was obviously weakened by the earlier showing of a single photograph of the accused to her. That incident however did not render her evidence valueless. The passport photograph and the photograph of the accused used in the photo line-up were quite different. A reasonable jury, alerted to the danger in relying on the identification made at the photo line-up because of the earlier use of a single photograph, could still conclude that the two photographs were sufficiently different that the photo line-up, conducted about a month after the incident with the passport photograph, provided a meaningful test of the victim's ability to identify her attacker.[24]

Nevertheless, in *R v Zurowski*,[25] the Supreme Court of Canada overturned the accused's conviction for dangerous driving causing bodily harm and

---

22 *Perry v New Hampshire*, 132 S Ct 716 (2012) at 728.

23 *Ibid* at 720 (empahsis added). See also *R v Whitman* 2005 BCSC 1574, 35 CR (6th) 12, in which Justice Romily accepted the identification evidence of a witness precisely because he had called the police and pointed out the accused without any tainting by faulty police procedures.

24 *R v Biddle* (1993), 84 CCC (3d) 430, rev'd on other grounds [1995] 1 SCR 761 [*Biddle*]. See also *R v Jir*, 2002 BCCA 100 and *R v Cheema*, 2007 BCCA 476, where questioned identification evidence was supported by other evidence before the court.

25 *R v Zurowski*, 2003 ABCA 315 at para 56, 19 CR (6th) 166, [*Zurowski CA*], rev'd [2004] 3 SCR 509, 361 AR 201. See also *R v Hanemaayer*, 2008 ONCA 580, 234 CCC (3d) 3

leaving the scene of an accident because of the frailties of the identification evidence, which included the single showing of the suspect's picture. In this case four Crown witnesses identified Mr. Zurowski as the driver of the offending vehicle, but the procedures used in making these identifications were seriously flawed. As outlined by Justice Berger, the following "taints" occurred in this case:

1. The police did not obtain full descriptions of the person observed as soon as possible after the alleged observations;
2. Live or proper photographic line-ups were not conducted;
3. Two of the witnesses viewed a photograph of the accused in a newspaper account of the incident;
4. A single photograph of the accused was shown to one of the witnesses;
5. In court identification of the accused in shackles was made 16-months after the incident without the benefit of a prior live or photographic line-up.[26]

A majority of the Alberta Court of Appeal had previously held that while "infirmities in investigatory procedures may weaken eyewitness evidence",[27] such evidence should not be excluded. Rather questions of identification should go to weight only. As noted by McClung, JA:

> [The] courts should be reassured by the overwhelming number of eyewitness testimony convictions that prove to be not only reliable but correct. Bank tellers who squint can still remember and recognize. Those who suffer from tinnitus may still hear enough to accurately recite what they heard. Those who are shown photographs of suspects do not always suppress what they originally saw. Their testimony, taken on oath, a solemn occasion, may still result in nothing but the truth. All are heard, all are scrutinized. If requisite scrutiny is observed, judges and juries may still act upon evidence that in other cases has been found to be fallible. It remains a case by case process.[28]

However, in dissent, Justice Berger held that the inability of the police to obtain fuller, more detailed descriptions of the suspect made it impossible to compare with descriptions given by the witnesses at trial and to cross-check

---

[*Hanemaayer*], where a conviction was overturned due in part to suggestive identification procedures such as using a picture that stood out from the rest and telling the witness they had picked the right person.

26 *Zurowski* CA, *ibid* at para 56.

27 *Ibid* at para 13.

28 *Ibid* at para 15.

them with the actual appearance of the accused. Furthermore, the failure to conduct a live or photographic line-up was equally troubling, as the reliability of the witnesses' identification could not be tested before trial.

Justice Berger further went on to quote from *R v Dhillon*[29] and *R v Goldhar*[30] that identification procedures will be "seriously compromised" when a witness is shown photographs of only one person, who is later accused. The risk of mistaken identification is even greater when, as in this case, a single photograph is shown to a witness. The danger is that the witness will identify the picture as opposed to the face viewed at the scene of the crime.

The Supreme Court, in one sentence, allowed the appeal, reversed the decision of the majority and entered an acquittal.

It is important, then, that the process established and used by police be followed to avoid tainting or destroying the value (by diminishing the weight given to it) of the tendered eyewitness identification evidence.

III. Reliability of Eyewitness Testimony

As in many cases of eyewitness identification, the honesty and integrity of the eyewitness in either case was not at issue. The jurisprudence on eyewitness identification makes it clear, however, that testing the reliability of the evidence of identity goes beyond a determination of whether an eyewitness is being honest in his or her testimony. The decision of the Alberta Court of Appeal in *Atfield*[31] is instructive in distinguishing between the credibility of eyewitnesses and a determination of the reliability of their evidence based on the circumstances surrounding the identification:

> The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence. In cases where the criminal act is not contested and the identity of the accused as the perpetrator the only issue, identification is determinative of guilt or

---

29 *R v Dhillon*, (2002), 166 CCC (3d) 262, 5 CR (6th) 317 (Ont CA).

30 *R v Goldhar, R v Smokler, supra* note 17.

31 *R v Atfield*, (1983), 42 AR 294, 25 Alta LR (2d) 97 [*Atfield* cited to AR].

> innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak.[32]

The sufficiency of identification evidence will depend on the circumstances surrounding the original identification. While it may not be possible to improve upon the reliability of a witness's original perception of a suspect, it is crucial that procedures which tend to minimize the inherent dangers of eyewitness identification be followed and that all relevant circumstances surrounding the original identification be fully disclosed to the defence and made available for scrutiny by the trier of fact.[33]

In *Miaponoose*, Justice Charron stated that eyewitness testimony is in effect opinion evidence, which is very difficult to assess. The witness' opinion when he/she says "that is the man" is partly based on a host of psychological and physiological factors, many of which are not well understood by jurists. One example pointed out by the court is the brain's need to fill in missing information to perceive a total picture of any event.

> Since perception and memory are selective processes, viewers are inclined to fill in perceived events with other details, a process which enables them to create a logical sequence. The details people add to their actual perception of an event are largely governed by past experience and personal expectations. Thus, the final recreation of the event in the observer's mind may be quite different from reality.
> Witnesses are often completely unaware of the interpretative process whereby they fill in the necessary but missing data. They will relate their testimony in good faith, and as honestly as possible, without realizing the extent to which it has been distorted by their cognitive interpretive processes. Thus, although most eyewitnesses are not dishonest, they may nevertheless be grossly mistaken in their identification.[34]

It is important to note, however, that the evidentiary standards for eyewitness identification used by the criminal courts is different than that used by the civil courts and/or regulatory or disciplinary bodies. For example, in *Jawosrski v Canada*,[35] an RCMP officer was dismissed from the force after

---

[32] *Ibid* at 296.

[33] *Miaponoose*, *supra* note 14, citing Law Reform Commission of Canada, *Police Guidelines: pretrial eyewitness identification procedures* (Ottawa: Department of Justice, 1983), online: <http://www.lareau-legal.ca/Pretrial.pdf>. This paper concluded "the need for comprehensive police guidelines is particularly acute in the area of pre-trial eyewitness identification procedures, because eyewitness testimony is inherently unreliable" at 7.

[34] *Ibid* at 422.

[35] *Jaworski v Canada (Attorney General)*, (2000), 25 Admin LR (3d) 142, 255 NR 167 (FCA)(cited to Admin LR), leave to appeal to SCC refused, 28052 (January 25, 2011), aff'ing (TD) [1998] 4 FC 154.

being found guilty by an Adjudication Board of conducting himself in a disgraceful manner and bringing discredit to the Force. In this case a woman had observed a man masturbating in public and called the police. The police responded immediately and stopped Jaworski in the vicinity, as he matched the basic description given by the witness. One of the other officers then told the witness that they had a man who matched the description that she had given. She was asked to come outside to see him, which she reluctantly did. On first seeing Jaworski, who was surrounded by Metro Toronto police officers, she said that she thought that he was the man whom she had seen earlier that evening, but added that she could not be 100% sure.

Some six weeks later, the Metro police showed the witness eight head-and-shoulder photographs of men with moustaches and asked her to identify the man whom she had seen exposing himself and masturbating. She was told to put out of her mind her recollection of the man whom she had seen with the police on the evening of the incident in question. The witness subsequently picked out the photograph of Jaworski as the one that looked most like the man she had seen masturbating. Again, she told the officer with her that she was not absolutely sure that she had picked out the right man, because, as she said, "I looked at him, but I wasn't thinking to remember his face." The photographs all showed men with moustaches, although she had not previously mentioned that the man she had seen had a moustache.

At the hearing in early December 1996 before the adjudication board, Ms. Hutcheon again identified Constable Jaworski, although she testified that she had not expected to be able to do so. The hearing was held some twenty months after she had first identified him on the night of the incident. She also testified that when she had first been asked to identify the perpetrator on the night of the incident, she had been sure that he was the man, but she had not said so because she was nervous and was concerned about the effect on him if he were a family man.

> The major submission made by counsel on behalf of Jaworski was that the "one man show-up" was so deeply flawed that it tainted the witness's subsequent identification of the officer at the "photo line-up" and at the hearing, which in any event by its very nature could be of very little probative value.
>
> Moreover, counsel argued, since a criminal conviction on this evidence for even a minor offence would not have survived scrutiny on appeal, it could not be permitted to sustain a decision to dismiss him from the Force, a more serious sanction than any likely to have been meted out by a criminal court for public indecency if he had been prosecuted and convicted.
>
> Counsel also emphasised that criminal appeal courts were more prepared to overturn findings of fact made on the basis of flawed identification processes than other kinds

> of factual finding because they were in as good a position as the trier of fact to assess the reliability, or otherwise, of such evidence. An appeal court may overturn a criminal conviction when it is satisfied that the verdict is "unreasonable or cannot be supported on the evidence".[36]

While the Court agreed that it would be an error of law for a trial judge not to direct the jury, or herself, about the frailty of identification evidence based on an improperly conducted identification process, they noted that a less onerous standard of proof is required in administrative proceedings.[37]

IV. R v HIBBERT

The leading decision on the issue of eyewitness identification evidence is the Supreme Court's 2002 decision in *R v Hibbert*.[38] Arbour J, writing for the majority, re-affirmed the danger associated with eyewitness identification evidence. Sharing the concerns of Commissioner Cory in the Inquiry regarding Thomas Sophonow and his recommendations regarding the conduct of live and photo line-ups,[39] she felt it would have been prudent to emphasize for the benefit of the jury the very weak link between the confidence level of the witness and the accuracy of their recall. Specifically, the effect of having seen the accused arrested by the police as her alleged assailant on television could not be undone. She could not be expected to divorce her previous recollection of her assailant from the mental image that she formed after having seen the appellant on television.

> What will be required to displace the danger that the jury will give an eyewitness identification weight that it does not deserve will vary with the facts of individual cases. Here, at a second trial, and in light of the identification history, I think a stronger warning would have been appropriate.[40]

In this case, a real estate agent was savagely attacked while she was working at an open house. The case against the accused was largely based on circumstantial evidence, but also rested on the victim's knowledge of personal details told to her by the accused and on his in-court identification by the victim and a neighbour.

---

36 *Ibid* at para 62-64.

37 *Ibid* at para 65.

38 *R v Hibbert*, 2002 SCC 39, [2002] 2 SCR 445 [*Hibbert*].

39 *Sophonow Inquiry*, *supra* note 8 at 31-34.

40 *Hibbert*, *supra* note 38 at paras 50-53.

The victim could barely speak when she arrived at the hospital but related a detailed description of the man who assaulted her and the personal details he shared with her to the attending doctor. She also provided these same details to a constable who came to see her in the treatment room that same afternoon. After the bandages were removed from her eyes, a police sketch artist prepared a composite sketch. A few days later, while still in hospital, she was shown an eight-person photo line-up that included a picture of the accused. While viewing the line-up, she expressed that she thought that she had seen the accused before, and said "I feel like I've had a conversation with him".[41] She also indicated that it might not have been on the day of the attack, and could have been some time before. On the day of the photo line-up the victim was tired, in a great deal of pain, and under the effects of morphine.

The accused was subsequently arrested and a local news station showed footage of him being escorted by sheriffs into the courthouse in handcuffs. The victim and her husband watched the news footage that showed the accused at the courthouse in police custody. The victim recorded the news and the following day watched the broadcast and freeze-framed and studied the accused's picture. She subsequently contacted the police and told them they had "got the right man".[42] A constable came to the victim's house, watched the tape with them and then seized the tape.

At trial, the victim positively identified the accused as her attacker. However, her identification had little probative value considering her original identification had been tentative at best and then subsequently contaminated by the news broadcast in which her assailant was "identified". As the victim may have unconsciously adopted the "freeze-framed" impressions of the person she saw on the news broadcast and not the person she saw at the time of the assault, the Court felt that a stronger charge to the jury had been required to counter balance the effect of the in-court identification versus the possibility she had mistakenly identified the wrong person.

Unfortunately, the Crown in this case was stuck with the evidence, as he could not undo the possible contamination already caused by the news release. Like *Sophonow* or *Miaponoose*, the police in this case were arguably in control of the methods chosen to recall or refresh the memory of eyewitnesses (including the timing of the photo line-up and the release of details regarding

---

41 *Ibid* at para 9.

42 *Ibid* at para 11.

the accused's arrest to the media). As such they played a significant role in handicapping the prosecution. While the Supreme Court ordered a new trial, the prosecution opted not to pursue a third trial and stayed the charges against Hibbert on May 8, 2002.

Although there was a significant amount of circumstantial evidence in *Hibbert*, the ruling on identification was not surprising and is not unlike the Courts earlier decision in *R v Reitsma*.[43] In that case the witness made a tentative identification of the suspect to police ("photo #7 is similar to the suspect, although I cannot be 100% sure"), but at trial 11 months later he positively identified him in court, sitting alone in his prison greens, between two Deputy Sheriffs.

The trial judge convicted the accused as he felt the line-up had been presented fairly and the accused had been positively identified in court. There were no specific weaknesses in the identification evidence in the sense of prior misidentifications, prior non-identifications, contradictory descriptions, or failures of any other person to recognize the person. While a majority of the Court of Appeal upheld the conviction, in a dissenting opinion Madame Justice Rowles would have entered an acquittal as the line-up identification had not been positive, thus leaving only the in-court identification. As the accused was the only one in the courtroom the "positive" identification was highly prejudicial and in the opinion of Justice Rowles it was not possible to elevate the complainant's statement on the exhibit that "photo #7 is similar to the suspect" into a positive identification through an assessment of the witness's honesty and fairness:

> The [positive] identification of an accused person for the first time "in the dock" is generally regarded as having little weight. In a dock identification the witness is obviously not required to pick out the person whom he claims to have seen from among a number of other persons of similar age and size and general physical appearance. In a courtroom identification there is also the danger of the witness anticipating that the offender will be present. That danger is accentuated when an accused is readily identifiable in the courtroom as the person accused of the crime. Identification of an accused for the first time in the dock is analogous to a police

---

[43] *R v Reitsma*, (1997), 125 CCC (3d) 1 at 14, rev'd [1998] 1 SCR 769 (BCCA). Also consider how similar the identification evidence was to that of the witnesses in Sophonow. Initially it was quite equivocal - "*No I can't swear. Number 7 is the closest from the side view.*" ... "*This guy, I know him from somewhere. I don't know why. I couldn't be sure with the pictures.*" ... "*If anything he's like this. There's something about this guy.*" At trial, however, it was more positive. See *Sophonow Inquiry*, *supra* note 8.

> "show up" in which the only person shown to the identifying witness is the suspect, and for that reason it is open to the same criticism. Generally, anything which tends to convey to a witness that a person is suspected by the police or is charged with the offence has the effect of reducing or destroying the value of the identification evidence.[44]

On appeal, the Supreme Court reversed the findings of the majority, upheld the minority view of Justice Rowles, and entered an acquittal. As the victim in both *Hibbert* and *Reitsma* had only made tentative identifications when interviewed by the police, their subsequent "positive" identifications of the accused "in the dock" was regarded as having little if any weight.

In *Hibbert*, the police may have compromised their own investigation in their haste to identify a suspect by demanding too much from the victim who was tired, in pain and under the effects of morphine. The police should at least have taken her condition into consideration before showing her the photo line-up. In *Reitsma*, the homeowner had told police that he might be able to make a positive identification if he saw the accused in person; however the police never considered any other identification procedures. While a live line-up may have weakened any subsequent identification of the accused, it would have been a fairer and more reliable process than the having him identified for the first time in "the dock".

V. CORROBORATING DOCUMENTING THE IDENTIFICATION PROCESS

While "in dock" identifications are a notoriously unsafe basis upon which to base a conviction (because of the risk of self-deception and honest mistake, and because they strongly suggest the answer that is ultimately given), there is no absolute rule requiring rejection of such evidence. As noted by Gleeson CJ and McHugh J of the Australian High Court in *R v Festa*:

> [Even] if evidence is of some, albeit slight, probative value, then it is admissible unless some principle of exclusion comes into play to justify withholding it from a jury's consideration. It is not enough to say that it is "weak", and, as already mentioned, whether it is weak might depend on what use is made of it. The totality of the evidence may be such as to render a conviction unsafe. But that does not affect admissibility. And the jury may need to be warned that evidence, if accepted, only shows consistency of appearance between the person and the offender; a fact which

---

[44] *Ibid* at 16.

> may or may not be of much significance depending upon other matters. ... But the weakness of relevant evidence is not a ground for its exclusion.[45]

Nevertheless, as noted by Kirby J of the High Court, "unsatisfactory evidence of an act of identification cannot be turned into evidence of a positive identification by reference to circumstantial or other evidence unrelated to the act of identification".[46]

The majority in *Festa* followed an earlier Supreme Court of Canada decision in *Mezzo v The Queen*, which was recently affirmed by Rothstein J in *R v Hay* that "a properly instructed jury may conclude, notwithstanding the frailties of eyewitness identification, that the eyewitness' testimony is reliable and may enter a conviction on those grounds."[47]

In *Hay* an eyewitness to a murder at a Toronto club described the accused in detail. She had an excellent view of the accused, having confronted him face to face. Within hours she tentatively identified the accused from an older picture used by the police in a photo lineup, stating she was 80% sure. However when the witness was shown a new lineup using a picture taken after the accused's arrest she could not identify him. While the original identification was not positive, the Crown led evidence that the accused had shaved his head after the shooting to alter his appearance and that there was sufficient confirmatory evidence to show the original identification was reliable (i.e. the licence plate on the getaway vehicle belong to Hay's mother, bullets hidden in Hay's laundry hamper matched bullets from the scene, there was gunshot residue found on a white t-shirt in the same hamper, and there was a shaver found in Hay's room with hair clippings).

Nevertheless, where there is corroborating evidence such as videotape or fingerprints, despite failure of a witness to identify the accused or even suggest it may be someone else in the line-up, the Courts, in some cases, have held that evidence to be admissible of a positive identification. For example, in *R v Nikolovski*,[48] the Supreme Court upheld the use of videotape in establishing the suspect's identity where the victim could not:

---

45 *Festa v The Queen*, [2001] HCA 72, at paras 14, 51 (available on Austlii)[*Festa*].

46 *Ibid* at para 165.

47 *R v Hay*, 2013 SCC 61 at para 40, rev'ing 2009 ONCA 398, but affirming on this point [*Hay*]. See also *Mezzo v The Queen*, [1986] 1 SCR 802, 30 DLR (4TH) 161, where McIntyre J stated "[q]uestions of credibility and the weight that should be given to evidence are peculiarly the province of the jury" at 844.

48 *R v Nikolovski*, [1996] 3 SCR 1197, 31 OR (3d) 480 [*Nikolovski*]. See also *R v Abdi*, 2011

> The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.
> So long as the videotape is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identity of the perpetrator. It is relevant and admissible evidence that can by itself be cogent and convincing evidence on the issue of identity. Indeed, it may be the only evidence available. For example, in the course of a robbery, every eyewitness may be killed yet the video camera will steadfastly continue to impassively record the robbery and the actions of the robbers.[49]

Generally, however, in the vast majority of cases, eyewitness identification will be relevant to the issue of identity and, as noted by Rothstein J in *R v White*, the appropriate response is not to exclude the identification, but rather to warn the jury that the evidence may not be as reliable as it seems.[50] Indeed a strong jury instruction is preferable to expert opinion evidence on the frailties of eyewitness identification as the role of the jury may be usurped by that of the witness. As noted by Justice Major in *R v DD*,

> A jury instruction, in preference to expert opinion, where practicable, has advantages. It saves time and expense. But of greater importance, it is given by an impartial judicial officer, and any risk of superfluous or prejudicial content is eliminated. In this appeal, the evidence presented by the expert was precisely what the jury would have been instructed by a proper charge. There is no difference of substance between the two.[51]

However, whenever the case against an accused depends wholly or substantially on the correctness of eyewitness identification, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution. As suggested by the Court in *Virk and Sihota*,[52] the Ontario

---

ONCA 446 (available on WL Can).

49 *Nikolovski, supra* note 48 at 1209-1210.

50 *R v White*, [2011] 1 SCR 433 at para 59, 332 DLR (4th) 39. See also *Hay, supra* note 47 at para 40.

51 *R v DD*, [2000] 2 SCR 275 at paras 67-68, 191 DLR (4th) 60. *R v DD* is cited with approval in the context of eyewitness identification evidence in *R v Woodard*, 2009 MBCA 42 at paras 38-39, 240 Man R (2d) 24, and *R v Henderson*, 2012 MBCA 93 at para 109, 284 Man R (2d) 164. See also Lee Steusser, "Experts on Eyewitness Identification: I Just Don't See It" (2005-6), 31:3 Man LJ 543, for a review on whether expert evidence ought to be permitted in eyewitness identification cases.

52 *R v Virk and Sihota*, (1983), 33 CR (3d) 378 (available on WL Can)(BCCA) [*Virk*]. See also

Model Jury Charge and the Criminal Jury Instructions (CRIMJI) are useful models for judges to use as guides on what is required when identification is an issue:

1. Original observation - how long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g. by passing traffic or a press of people? Had the witness ever seen the accused before? How long a time elapsed between the original observation and the subsequent identification to the police? Did the accused have any special distinguishing features, either physical or in his speech or dress?
2. Subsequent identification - was the identification wholly independent and not induced by any suggestion? If photographs were shown to witness, were they representative? If witness identified accused in court after being picked out of a photograph, is he merely identifying the accused with the photograph, rather than with the man originally observed? Was the subsequent identification made by reference to features not mentioned to police when the witness was first seen by them?
3. Identification parade - has it been show that nothing whatever was done to indicate the accused to the witness, either by showing a photograph or by description, or an indication of his place in the line-up? Was the accused conspicuously different from others in the line-up in age, build, colour, complexion, dress or otherwise?
4. Remind jury of any specific weaknesses in the identification evidence; e.g. any material discrepancy between the description given to the police in the first instance, and his actual appearance; contradictory descriptions; failure of another witness with equal opportunity to recognize accused.
5. Remind the jury that even though recognition by the witness of someone previously known to him is usually stronger than identification of a stranger, mistakes are sometimes made in recognition of close relatives and friends.
6. Identify for the jury the evidence which is capable of supporting this identification, e.g.:
   a) Fingerprints or other tell-tales at the scene of the crime;
   b) Incriminatory evidence found on person or premises of accused, including gunpowder residue;
   c) Accused seen going into a building, or getting into a car which he can be identified;
   d) Accused has given an alibi which is not only disbelieved, but which jury are satisfied was given to deceive police.
7. If the quality of the identification evidence is poor, e.g. based on a fleeting glance or is a mere impression, with no description of the characteristics which distinguish the accused from any other person, e.g. "That's the man", then unless there is supporting evidence, the jury should be clearly instructed that in

---

R v Mastin, (1991), 65 CCC (3d) 204, 5 CR (4th) 141 [*Mastin*]; *R v Fengstad*, (1994) 27 CR (4th) 383 (available on WL Can).

> the view of the judge, the identification does not provide a safe basis for conviction.[53]

These guidelines were not new and had been adapted from those expressed by the English Court of Appeal (Criminal Division) in *R v Turnbull*,[54] and as adopted and amplified by the Canadian courts in *R v Duhamel*,[55] and *R v Atfield*.[56]

Invariably many of these recommendations deal with the pre-trial investigative procedures carried out by the police, including the initial details provided to the police by the witnesses and all subsequent identification parades and techniques. Most importantly is the need to preserve this evidence for future examination, both to assist the witness in recalling details that have since faded with time and to allow the trier of fact to reach an appropriate conclusion as to the reliability of the evidence. As noted by Hill J in *R v Gordon*,[57] the need to clearly document all details and statements made by the identifying witnesses from the beginning to the end of the process "fosters confidence that the principle of independence in observation, mental recording, memory, and recounting of the description has been maintained."[58]

This statement was echoed by Commissioner Cory in *The Inquiry Regarding Thomas Sophonow*.[59] He recommended that the identification procedures carried out by the police be properly documented. Everything should be recorded on video or audiotape from the time that the officer meets the witness, before the photographs are shown through until the completion of the interview. In addition, there should be a form for the signature and the comments of both the officer conducting the line-up and the witness.[60]

---

53 *Virk*, *supra* note 52 at 386-387.

54 *R v Turnbull*, (1976), 63 Cr App R 132.

55 *R v Duhamel*, 56 CCC (2d) 46, [1981] 1 WWR 22 (ABCA).

56 *Atfield*, *supra* note 31.

57 *R v Gordon*, 2002 CarswellOnt 1654 (WL Can) at para 64 (Ont Sup Ct)[*Gordon*]. This passage was also cited with approval by Madame Justice MacKenzie in *R v Cook*, 2002 BCSC 847 at para 37 (available on WL Can).

58 *Ibid.*

59 *Sophonow Inquiry*, *supra* note 8.

60 *Ibid.* The eyewitness identification recommendations stemming from the inquiry have been published online for reference, Manitoba Justice, *The Inquiry Regarding Thomas Sophonow: Eyewitness Identification Recommendations*, online: Manitoba Justice

Notwithstanding these recommendations, the courts in Manitoba had been careful prior to the Inquiry not to accept eyewitness identification where the process was not properly documented by the police and/or presented to the court for review. For example, in *R v Ouellette*,[61] the Manitoba Court of Appeal overturned a conviction where the photo line-up was not made available to the court as it undermined the evidence upon which the conviction was based:

> One of the eyewitnesses had made a positive identification of the accused which, under the circumstances, could found a conviction but the witness had been shown a photopac a few weeks after the robbery, from which he identified a photo of the accused - it was possible that the subsequent identifications by the witness at the preliminary inquiry and trial were based upon the photograph of the accused that the witness had seen - That would not be a major problem if the photopac was fair but the photopac was never put into evidence and there was no visible way to judge its fairness here - the only evidence on that aspect tended to suggest that the photopac may have been unfair - the absence of the photopac as an exhibit at trail undermined the evidence upon which the conviction was based.[62]

Similarly, in *R v Welsh*,[63] PCJ Joyal (as he then was) excluded the evidence of a witness who was unable to remember making an out-of-court statement of identification to the police when he was shown a photo line-up. Unfortunately, without a signed witness "identification form", there was no document upon which the Court could see the witness's signature representing confirmation of the identification in question. Similarly there was no explanation written in the witness's own hand (now part of such an identification form) as to why the witness picked the photograph that was selected.[64]

<http://www.gov.mb.ca/justice/publications/sophonow/eyewitness/recommend.html#1>. See also *Gordon*, *supra* note 57 at 32.

61 *R v Ouellette* (1994), 100 Man R (2d) 318 (CA)(available on WL Can) [*Ouellette*]. See also *R v Hanemaayer*, *supra* note 25, where the line-up used in the identification was not available for the court to review.

62 *Ouellette*, *ibid* at 318-19 (empahsis added).

63 *R v Welsh*, 45 CR (5th) 166 (available on WL Can)(Man Prov Ct) [*Welsh*].

64 *Ibid* at para 28. See also *R v James*, 2011 ONCA 839, 283 CCC (3d) 212, where a witness claimed to have no recollection of making a prior identification of the accused. While the prior out of court identification was necessary, the Crown did not proffer any evidence of threshold reliability to justify admitting the identification under the principled exception to the hearsay rules. A new trial was ordered.

In *Welsh*, the witness could not remember identifying the suspect who robbed him and because the police did not keep proper documentation regarding the identification procedure, his out-of-court identification could not even be admitted as a principled exception to the hearsay rules. However, where all the identification procedures have been properly documented (in writing, on videotape or audiotape), the courts will allow the out of court statement of identification to be admitted where the identifying witness is unable to identify the accused at trial, but can testify that he previously gave an accurate description or made an accurate identification. Where the identifying witness testifies that he previously identified the perpetrator of the offence, evidence of out-of-court statements is admissible as original evidence to show who it was that the identifying witness previously identified.[65]

For example, in *R v Swanston*[66] the victim identified his attacker twice: once at a police line-up and then at the preliminary hearing. Both took place shortly after the robbery. At trial, one and a half years later, the victim was unsure of his identification. The Crown was not permitted to call police witnesses who were present when the previous identifications were made, and the accused was acquitted. On appeal, Chief Justice Nemetz concluded:

> To prevent the Crown from adducing the evidence of the police officer who observed the doctor identifying the robber was to deprive the trier of fact of the opportunity to consider all the evidence concerning the identification of the person who assaulted and robbed the victim. This was error in law ... None of the exclusionary rules of evidence is infringed by permitting the identifying witness, who cannot identify the accused in Court, to state that whoever he identified on an earlier occasion was the culprit. The Crown may, then, prove by another witness that the man identified by the identifying witness was the accused in the dock. [67]

The *Swanston* case is helpful because it suggests that the witness must first be able to say that he or she identified someone before a police officer can be called to testify that the witness identified the accused. As stated by Nemetz CJBC, only after the witness testifies that he or she identified the culprit may the Crown "then" adduce other evidence demonstrating that the witness identified the accused on the earlier occasion.

---

65 *R v Tat and Long*, (1997), 35 OR (3d) 641, 117 CCC (3d) 481 (Ont CA)[*Tat and Long*].

66 *R v Swanston*, (1982), 65 CCC (2d) 453, [1982] 2 WWR 546, (BC CA)(*Swanston* cited to CCC).

67 *Ibid* at 458.

Swanston was followed by the Ontario Court of Appeal in *R v Langille*.[68] At issue in that case was police testimony bolstering the testimony of a witness/victim to a gas-bar robbery. The victim, a Ms. Armas, gave descriptions of the robber to police constables shortly after the robbery. She participated in the preparation of the composite drawing and identified the appellant in a photograph array and at trial. Ms. Armas was cross-examined on differences between her description of the robber at the appellant's preliminary hearing and at trial and on the opportunity she had to observe the robbery.

Langille, like *Swanston*, was a case where the identifying witness was able to recall having made an earlier identification. The issue was whether, given that state of affairs, police testimony regarding her earlier identification and descriptions could be used to strengthen her testimony. The Court held that it was admissible as part of the narrative or identification process:

> This evidence establishes that Ms. Armas was able to offer a description of the robber on the day of the robbery. The jury was entitled to hear what that description was. This evidence, Ms. Armas' identification of the appellant's photograph in a photograph array and her role in the preparation of the composite drawing go to establish that Ms. Armas was able to describe the male person who robbed the gas bar ... on the afternoon of August 11, 1988, and that Ms. Armas identified the appellant on an earlier occasion. In my view this evidence is admissible as original evidence. To the extent that evidence of Ms. Armas' description of the suspect and her previous identification of the suspect can be said to be hearsay or a prior consistent statement, this evidence is properly viewed as an exception to the rule against hearsay and the acceptance of prior consistent statements. Reference to distinguishing characteristics (or the failure to refer to obvious distinguishing characteristics) goes to the weight of visual identification evidence.
>
> Ms. Armas' description, given to Constable Keenan, was used by him in the preparation of the composite drawing, etc. The composite drawing is no more than Constable Keenan's graphic representation of the description he received from Ms. Armas. In my view both the description received and the composite drawing are admissible. It is to be noted that Ms. Armas took the position that the composite drawing resembled the suspect. This is not a case where some special comment or caution was required with respect to the composite drawing.[69]

However, as noted by Doherty JA in *Tat and Long*[70] the situation presented in *Swanston* did not require that the police officers' evidence be received as evidence identifying the accused as the robber. The officers'

---

68 *R v Langille*, (1990), 75 OR (2d) 65, 59 CCC (3d) 544 (*Langille* cited to OR).

69 *Ibid* at 75-76 [citations omitted].

70 *Supra* note 65.

evidence merely identified the accused as the person previously identified by the victim. Their evidence had no hearsay purpose and was offered only to prove that the victim had identified the accused at the line-up and at the preliminary inquiry. The evidence identifying the accused as the robber came from the victim's testimony that he had accurately identified his assailant on those two prior occasions. The victim's evidence identified the robber as the person he had previously identified, and the police officers' evidence identified the accused as the person previously identified by the victim.[71]

Interestingly, in *Hibbert*,[72] the victim provided a detailed description of the man who assaulted her to the attending doctor and to a police constable who came to see her in the treatment room that same afternoon. After the bandages were removed from her eyes she again provided the details to a police sketch artist who prepared a composite sketch that was circulated to the media. The victim then made a tentative identification of the accused during a photo line-up and then a positive identification of him in court. In light of *Tat and Long*, *Swanston* and *Langille* (which were cited with approval by the Supreme Court in *R v Starr*[73]), one must pause to consider what the outcome could have been if the victim had not identified her attacker in court – arguably it would have been a much stronger case.

VI. PRESERVING THE IDENTIFICATION EVIDENCE

R v Sparkes,[74] an Australian case involving the brutal, prolonged and degrading sexual attack of a 17-year old girl during the early morning hours of October 1, 1983, shows the value of preserving identification evidence where the victim is unable to identify her attacker. The complainant in this case had not consumed any alcohol and within two hours of the assault she provided a very detailed description of her attacker to the police. A few days later, with the assistance of a police artist, she completed a "Photofit" composite of the suspect.

---

71 *Swanston*, *supra* note 66.

72 *Hibbert*, *supra* note 38.

73 *R v Starr*, 2000 SCC 40, [2000] 2 SCR 144.

74 *R v Colin John Sparkes*, [1996] TASSC 106 at paras 33-35, (1996), 6 Tas R 178, aff'd [1998] TASSC 18(5 March 1998) (CA) [*Sparkes*], citing Lord Watkins in *R v Cook*, [1987] 1 QB 417 (CA).

Ultimately the accused was arrested - but not until 1996 - thirteen years after the attack. At trial the victim could not, nor was she asked to, identify the accused. However, the Crown sought to admit the victim's detailed description of her attacker, along with the composite drawing and two photographs taken of the accused around that time of the assault so that the jury would know whether the complainant's description of her assailant could have applied to him at that time. After a lengthy *voir dire*, the judge admitted the victim's description of her attacker, the composite drawing and the pictures of the accused into evidence.

With respect to the composite drawing ("Photofit"), objection was taken to the admission into evidence of the Photofit on the bases that it offended the hearsay rule and/or it was no more than a prior consistent statement. Citing the English Court of Appeal in *R v Cook*,[75] Justice Underwood admitted the evidence as proof of prior identification, which is neither hearsay nor a prior consistent statement:

> We regard the production of the sketch or photofit by a police officer making a graphic representation of a witness's memory as another form of the camera at work, albeit imperfectly and not produced contemporaneously with the material incident but soon or fairly soon afterwards. As we perceive it the photofit is not a statement in writing made in the absence of a defendant or anything resembling it in the sense that this very old rule against hearsay has ever been expressed to embrace. It is we think *sui generis*, that is to say, the only one of its kind. It is a thing apart, the admissibility to evidence of which would not be in breach of the hearsay rule.
>
> Seeing that we do not regard the photofit as a statement at all it cannot come within the description of an earlier consistent statement which, save in exceptional circumstances, cannot ever be admissible in evidence. The true position is in our view that the photograph, the sketch and the photofit are in a class of evidence of their own to which neither the rule against hearsay nor the rule against the admission of an earlier consistent statement applies.[76]

With respect to the photographs, Justice Underwood also admitted those, indicating that they were relative to the issue of identity as the accused's physical appearance had changed dramatically since 1983:

> It is well established that it is permissible for a jury to compare witnesses' descriptions of the offender with the accused sitting in the dock, even though the accused is not part of the evidence on the trial. The Crowns submission was that as the crimes were committed thirteen years ago, the photographs and the evidence of Mr Storay about the photographs is admissible simply to give the jury a picture of what the accused

---

75 *Ibid.*

76 *Sparkes, supra* note 74 at 425. See also *R v Constantinou*, (1990) 91 Cr App R 74.

> looked like at that time and to enable them to compare the photograph with the photofit made by the complainant. No witness will look at the photographs and from them identify the accused as the attacker but, according to the submission, the photographs will assist the jury consider the case against the accused when hearing the complainant's description of her attacker and looking at the photofit. The physical characteristics of the accused in 1983 are relevant facts on the trial. If the accused had his arm in plaster at the time the crimes were committed, evidence of that fact and evidence of his appearance at that time would all be admissible. So too, a photograph of the accused with his arm in plaster would be admissible. In this case, a photograph of the accused taken at the time the crime was committed or about that time, is admissible on the basis that the physical characteristics of the accused are facts relevant to a fact in issue *viz*, identity.[77]

Sparkes[78] shows the advantage of preserving the witness's original identification evidence in both written and graphic form. While she could not identify her attacker (and no attempt was made to do so), the accuracy of those recorded observations and their admission in court thirteen years later assisted the court in assessing the witness's reliability and credibility, and no doubt allowed the jury to come to an informed decision.

As noted by the Law Reform Commission of Canada's report on Pre-trial Identification Procedures,

> descriptions of the offender furnished by witnesses to the police soon after the commission of a crime can play an important role in determining the reliability of any eyewitness identification. The witness's identification might be called into question if there are material discrepancies between the witness's description and the actual appearance of the person whom the witness identifies; of the original description by the witness dos not include a prominent and distinguishing characteristic possessed by the person identified; if the witness is unable to offer a description of the accused, or offers only a vague description, but later purports to be able to identify the person with certainty; or if the description contains details that could not have been perceived by the witness at the original viewing. One the other hand, a prior detailed description which is later confirmed by an identification of the suspect can support the reliability and credibility of the eyewitness testimony.[79]

Courts of Appeal will frequently quash convictions if the witnesses are unable to offer a description of the suspect before identifying him or her, or if their descriptions are so vague that they are of no real assistance in finding a suspect. For example, in *R v Smith*, the Ontario Court of Appeal stated:

---

77 *Sparkes, supra* note 74 at para 48 [citation omitted][emphasis added].

78 *Ibid.*

79 N Brooks, "Police Guidelines: Pre-trial Eyewitness Identification Procedures", *Law Reform Commission of Canada*, Government of Canada (1983), at 88-89 [emphasis added][Brooks].

> If the identification of an accused depends upon the unreliable and shadowy mental operations, without reference to any characteristic which can be described by the witnesses, and he is totally unable to testify what impression moved his senses or stirred and classified his memory, such identification, unsupported and alone, amounts to little more than a speculative opinion or unsubstantiated conjecture, and at its strongest is a most insecure basis upon which to found that abiding and moral assurance of guilt necessary to eliminate reasonable doubt. [80]

Thus, in *R v Spatola*[81] Justice Laskin held that

> bare recognition unsupported by reference to distinguishing marks, and standing alone, is a risky foundation for conviction even when made by a witness who has seen or met the accused before. [However], where some distinguishing marks are noticed and later verified, there is a strengthening of credibility to the nature of such marks.[82]

A case in point is *R v Quercia*[83] in which the Ontario Court of Appeal entered an acquittal after the complainant failed to describe her assailant as having the distinctive features of the accused, which were a pockmarked face and a left eye askew, although she had had an adequate opportunity to make such observations:

> Accepting the fairness of the line-up procedure, the reality remains that the photograph of the appellant is inconsistent with the description given by the victim of her assailant in two significant respects. One is driven to the conclusion that either her initial description was accurate in its main features, in which case the appellant could not have been her attacker, or that her recollection of what her assailant looked like had inexplicably changed significantly in the several days between the attack and the photograph line-up. If the latter conclusion is drawn, it is difficult to accept her subsequent and different recollection at the time of the photograph line-up as totally reliable.
>
> There is virtually no other evidence confirming her identification ... In my judgment the verdict is unreasonable and cannot be supported by the evidence.[84]

In *R v Harvey*,[85] a more recent case from the Ontario Court of Appeal, the accused's conviction was overturned on the basis that the victim failed to

---

80 *R v Smith*, [1952] OR 432 (CA) at 436, 103 CCC 58.

81 *Spatola*, *supra* note 3.

82 *Ibid* at 82.

83 *R v Quercia* (1990),75 OR (2d) 463, 60 CCC (3d) 380 (Ont CA)(*Quercia* cited to OR).

84 *Ibid* at 472-473.

85 *R v Harvey*, (2001), 57 OR (3d) 296, 160 CCC (3d) 52 (Ont CA),appeal to SCC refused [2004] 4 SCR 311 [*Harvey*]. But see *R v Crate*, 2012 ABCA 144, 522 AR 239 [*Crate*] where the witnesses recalled that the perpetrator had a distinguishing feature tattooed on the side of his neck (his birth date). Although the accused attended court with his neck

describe the accused's "clear blue eyes" in her detailed statement to the police. However at trial, after seeing the accused's picture (in which his eyes were very distinctive), the victim described her assailant's eyes and hair as his most distinguishing features. As the victim failed to note these "distinguishing features" when she originally spoke to the police, the accused's conviction was over turned. Had she given that information to the police before seeing the photo line-up, it would have significantly enhanced the reliability of her identification, as Justice Doherty found his blue eyes were in fact a distinctive feature of his picture. Her reference to the eyes had much less probative value when it was made only after seeing the photograph in which the eyes were a prominent feature.[86]

Even for professional witnesses, such as police officers, the failure to record or note physical descriptions can result in the loss of significant eyewitness identification. Such was the case in *R v Laliberty (DS)*[87] in which Justice Nurgitz acquitted Mr. Laliberty of trafficking, not because he was innocent but because he had a reasonable doubt as to identification. One of the concerns noted by the Justice was that the officer who purchased drugs from him had not observed the tattoos on his inside forearm during the buy and that the physical description he provided of the suspect was quite general. While he believed that the officer was being truthful in his testimony, he could not rule out that perhaps he was mistaken given the "power of suggestion" from looking at the accused's driver's license photo prior to his arrest.

---

covered, photographs taken by police when he was arrested were admitted to confirm the presence of the tattoo as described by the witnesses. In admitting the evidence the Court stated *"To suggest that ... the assailant was another man of similar appearance, with the same birthdate as the appellant tattooed in the same place on his neck, would utterly defeat the role of logic and common sense in adjudication"* at para 18.

86 *Harvey, supra* note 85 at 305. But see *Patterson v United States*, 384 A 2d 663 (DC 1978), in which the court held that showing a single photo to a witness just before trail to "refresh" the witness' memory, while unnecessarily suggestive, was not conducive to irreparable misidentification where there had been a previous, unequivocal, unsuggestive and otherwise constitutionally permissible identification.

87 *R v Laliberty (DS)*, MBQB Docket: CR-97-01-18737 (unreported), Nurgitz J. See also *R v Sheppard*, 2002 MBQB 156, 164 Man R (2d) 264 [*Sheppard*], where an acquittal was entered based on the undercover officer's delay of 2½ months before viewing a photo line-up of the suspect. Other cases involving undercover officers include: *R v Brand*, (1995) 98 CCC (3d) 477, 40 CR (4th) 137 (Ont CA) [*Brand*], and *R v Edwardson*, (1993), 79 CCC (3d) 508 (BCCA)(available on WL Can).

However, where a detailed description is obtained and pre-trial identification procedures are done fairly and in accordance with strict guidelines (see the proposed checklist for interviewing witnesses in the appendix), eyewitness evidence will be admitted as reliable and upheld on appeal (although the case may fail for other reasons).

For example, in *R v Dilling*, the police detained the driver of a vehicle for a prostitution (summary conviction) related offence following the driver's communication with an undercover police officer. One of the detaining police officers took an un-posed Polaroid picture of the driver without informing him the photograph was about to be taken. The sole purpose for taking the photograph was to assist the undercover police officer with identifying the driver. At trial, the judge admitted the accused's identification, stating:

> The taking of the photograph did not create new evidence of identification. It only preserved existing evidence of identification. It is analogous to but more efficient than the placing of a sketch of the accused's face in the undercover officer's notebook. Because I have found the person to whom the undercover officer [communicated with] was the same person stopped by the cover team, and because his photograph was given to her so soon after the incident, it is as if Cst Rogers sketched the image of the accused herself and put it in her notebook.[88]

The accused appealed his conviction to the BC Supreme Court and then to the BC Court of Appeal, challenging the taking of the photograph as a violation of his section 7 (right to privacy and right against self-incrimination), section 8 (search and seizure), and section 10 (right to counsel) *Charter* rights. The conviction was upheld in both courts and in finding no constitutional violations had occurred the Court of Appeal stated:

> The camera recorded what the eye of each police officer could see at the moment it was taken. For the purposes of later identification a still photograph records less than deliberate police scrutiny. Examples of what the camera could not record are demeanour and repetitious or involuntary body movement. A still photograph is no more permanent than a sketch or the officer's notes ... In my view, the taking of an unposed photograph is not an inappropriate way to preserve evidence of identity in less serious crimes ... [it] was a means of refreshing the recollection of the undercover officer that the person answering the charge in the court-room was the person who communicated with her.[89]

---

88 *R v Dilling*, 1991 CarswellBC 2184 at para 47 (WL Can)(BC Prov CT), aff'd BCSC Dec 10, 1991.

89 *R v Dilling*, (1993), 84 CCC (3d) 325, 24 CR (4th) 171 (BCCA), leave to appeal to SCC

As further noted by Novakowski,[90] a similar result was found in *R v Multani*[91] when a police officer pulled over a van for failing to stop at a yellow light contrary to the provincial *Motor Vehicle Act*. Following a request by the officer, the accused provided the vehicle's insurance but was unable to produce his driver's licence. After obtaining the driver's name, address and date of birth, the officer returned to his patrol car to get his Polaroid camera. The officer approached the accused, told the accused to look at him, and then took his picture. The officer printed the driver's name and the violation ticket number on the bottom of the photo. The officer testified that people who have failed to produce driver's licences in the past have given false names and to properly identify drivers he carries a Polaroid camera to take a photo of the driver to keep with his notes. After the photograph was taken the officer learned the accused was a prohibited driver. The photograph was not published or circulated. The accused was convicted at trial of prohibited driving and appealed to the BC Supreme Court arguing, among other grounds, that the trial judge erred in concluding the taking of the photograph did not violate his right to be secure against unreasonable search or seizure.[92]

After reviewing numerous cases concerning the taking of photographs, the appeal court found that the accused was not charged with an indictable offence and therefore the *Identification of Criminals Act*[93] did not justify the taking of the photograph. However, in recognizing that not every person investigated will be charged and that "proper identification evidence assists in identifying the innocent as well as the guilty",[94] there was "no reason to infer from the *Identification of Criminals Act* that Parliament meant to abolish photographing of suspects as an investigative tool in summary conviction cases".[95] In finding the taking of the photograph reasonable, the court held that:

> When [the officer] observed [the accused] at the scene it was his duty to identify him properly, and in the course of doing so to make and record accurate evidence of identity. In the course of doing so, he could make notes of his observations, and he could have made a sketch in his notes had he chosen to do so. Generally, a

---

refused, 23759 (June 16, 1994)[*Dilling* CA].

90 See M Novakowski, "In Service" 10-8 Newsletter 2:8 (August 2002) at 8.

91 2002 BCSC 68 (available on WL Can)[*Multani*].

92 *Ibid* at 1.

93 RSC 1985, c I-1.

94 *Multani*, *supra* note 91 at para 23.

95 *Ibid.*

> photograph will provide evidence that is more reliable than notes or sketches. Because traffic enforcement officers had frequently experienced drivers unable to produce driver's licences, giving false names, [the officer] and others had adopted a practice of taking Polaroid pictures which they did not publish, but kept solely for the purpose of their own notes. As this case does not come within the ambit of the Identification of Criminals Act, I find it to be distinguishable from the cases to which that Act applies. In those circumstances, I find the reasoning of the B.C. Court of Appeal in the *R v Dilling* case is applicable. There has been no unreasonable search and seizure, and the photograph is properly admissible.[96]

These cases demonstrate that the police may make appropriate efforts to obtain photographs of a person without their consent in public places provided no physical compulsion is involved and the methods employed are non-intrusive and without trespass or other improper means in an effort to assist them with identification later in court.

As such, where a detailed description is obtained and pre-trial identification procedures are done fairly and in accordance with strict guidelines (see Appendix for a proposed checklist for when reviewing eyewitnesses identification), eyewitness evidence will be admitted as reliable and upheld on appeal (although the case may fail for other reasons).

For example, in *R v Gill*,[97] the Supreme Court of Canada upheld the conviction of the accused even after the sole witness mistakenly identified a second individual during the Preliminary Inquiry. However, because the victim had, without hesitation or equivocation, picked out the accused's picture from a fairly presented 10-person police line-up on the day of the assault, the identification was deemed to be reliable notwithstanding this error (at trial the witness selected only the accused's picture and explained his error at the preliminary occurred because he was rattled by defence counsel). No other witnesses were called and the accused was convicted.

An appeal based on the reliability of the witness's identification evidence was dismissed by the Manitoba Court of Appeal, which stated

> ...there is nothing to indicate that the learned judge misdirected himself as to the law concerning identification evidence. He was entitled to conclude that Harding's evidence was both truthful and reliable. I see no foundation to interfere with the conviction because of alleged frailties in the evidence....[98]

---

96 *Ibid* at para 23. See also *R v Acosta-Medina*, 2002 BCCA 33, 91 CRR (2d) 142.

97 *R v Gill*, (1987), 50 Man R (2d) 33, 39 CCC (3d) 506 (CA), aff'd [1989] 1 SCR 295, 62 Man R (2d) 236 (cited to Man R). See also *Patterson v United States*, *supra* note 86.

98 *Gill* CA, *ibid* at para 20.

The Supreme Court subsequently affirmed this decision without reasons.

In another similar case from Manitoba, *R v Willis*,[99] the accused claimed at trial that he was mistakenly identified for his brother – the person who really committed the crime. The brother was present in court and testified that he, not the accused, was the person who assaulted the victim. However, the judge concluded that they looked nothing alike and that the victim had "positively identified the accused from a [proper] photo pack put before him by investigating officers".[100] Willis was convicted at trial and on appeal the decision was unanimously upheld by the Court of Appeal, which stated in its reasons for doing so that "in our view, [the line-up] contains photos of persons with sufficiently similar characteristics so as to constitute an acceptable basis for testing the credibility of the victim's identification evidence".[101]

Eyewitness evidence is like trace evidence – it is susceptible to contamination if not handled properly. The preceding cases show that honest, sincere, and well-meaning eyewitnesses (both Crown and Defence) can be wrong about identity. The result can be failure to identify the true perpetrator of a crime or erroneous identification of an innocent person. As the police, for the most part, are in control of the identification process they need to be aware of the psychological factors that can lead to a false identification and adopt procedures to prevent them.

Given the importance of eyewitness identifications and the number of exonerations of persons who were convicted based on faulty eyewitness identification, law enforcement agencies should work with other criminal justice stakeholders to implement eyewitness identification procedures that reflect the views of the courts and the academic literature on the subject. This paper provides a good overview of the subject for Canadian practitioners.

---

99 *R v Willis*, (1995), 100 Man R (2d) 40 (available on WL Can)(CA).

100 *Ibid* at para 2.

101 *Ibid* at para 3.

VII. APPENDIX

(Proposed Checklist for Reviewing Eyewitness Identification)

In *R v Chu*,[102] the trial judge set out a list of criteria that can assist other courts in analyzing eyewitness evidence for reliability. This list is also beneficial to police officers and crown prosecutors who are often responsible for how the evidence is collected and presented in court. A modified copy of that list, with some additional criteria added from cases heard since *Chu* was decided, is laid out below.

1. The opportunity to observe the person being identified. This necessarily includes the consideration of such factors as distance, the presence of any obstructions to view (e.g. passing traffic, press of people), vantage point and type of view (e.g. full front, profile, back), lighting (day vs. night, streetlights, car lights, etc), and the witnesses need for any visual aids (ie: glasses).[103]

2. The duration of the opportunity to observe the person being identified, in other words, was the view just a "fleeting glance" or a longer observation (i.e. driver of a speeding vehicle v. standing on a street corner). Did the witness make any assumption of identity based on circumstances as opposed to personal observation?[104]

3. The conditions under which the observation was made. This would include a consideration of the following factors: what was the lighting, if any? Was the person being observed or the observer moving or stationary? Was the movement towards each other or away from each other? What was the emotional state of the observer at the time of the viewing?[105]

4. Is the person observed known or unknown to the witness or have they seen the person before and under what circumstances. Was

---

102 *R v Chu*, 1997 CarswellOnt 5209 (WL Can)(Ont Ct J, Prov Div).

103 *Virk, supra* note 52; *R v Hang* (1990), 55 CCC (3d) 195 (available on WL Can)[*Hang*].

104 *R v Bigsky*, 2006 SKCA 145, [2007] 4 WWR 99 [*Bigsky*]; *R v Mastin, supra* note 52; *Festa, supra* note 45.

105 *Bigsky, ibid*; *Puerto Rico v Hernandez*, [1973] FC 1206, 1 NR 46 (FCA); *Virk, supra* note 52.

there any special reason to remember the accused? (e.g. did they resemble a famous person, previous customer or an acquaintance?).[106]

5. Had the witness been consuming any alcohol or drugs that might have affected their perception or recollection of the events?[107]

6. What is the eyewitness' demonstrated ability to describe the person being observed. This includes the consideration of such questions as, was the description given a general one or one rich in detail; what was the quality of the physical description? Does the witness have any special training or background that would help with their description and ability to observe (e.g. artist). Was a composite drawing or photograph made of the suspect?[108]

7. Are there any outstanding characteristics (i.e. physical features, unique mannerisms or traits) involved in that initial description which the accused does possess (e.g. scar, tattoo, limp, nervous twitch, mole, deformity)?[109]

8. Was there any material discrepancy in the eyewitness description of the person being observed and the actual appearance of the accused as revealed by the evidence? Did the person being observed demonstrate the presence or absence of any distinctive feature in his or her physique, speech, mannerisms, or dress that was overlooked by the eyewitness?[110]

9. The presence of contradictions in the description or descriptions. Were there any material contradictions in the description itself of the eyewitness? Were there contradictory descriptions of the person being observed given by other eyewitnesses? Is the fact that other witnesses, with equal opportunity to observe the person in question, failed to

---

106 *R v Bitternose*, 2005 SKCA 157 (available on WL Can); *R v Joehnck*, 2006 SKCA 68 (available on WL Can); *Hibbert*, *supra* note 38.

107 *R v Jack*, 2013 ONCA 80 at para 16, 294 CCC (3d) 163.

108 *R v Sparkes*, *supra* note 74; *R v Zurowski* CA, *supra* note 25. *R v Mezzo*, *supra* note 47 (the victim in this case had prepared a detailed composite drawing of the suspect).

109 *R v Brand*, *supra* note 87; *R v Yates*, [1946] 2 DLR 521, 85 CCC 334, *R v Crate*, *supra* note 85.

110 *R v Quercia*, *supra* note 83; *R v Krell*, 1995 CarswellAlta 1250 (WL Can)(Alta Prov Ct); *R v Harvey*, *supra* note 85.

identify the person in question relevant on the facts of the particular case?[111]

10. What was the level of interest of the witness in the events at the time they occurred? Type of offence itself may produce stress and anxiety (e.g. armed robbery). In this regard, what was the witness' mental state? (e.g. afraid?, curious?).[112]

11. What is the particular lapse of time involved between the time of the actual observation of the assailant and the time of the identification, be it by way of pointing out the individual to the police, providing a physical description in a police statement, participating in a photo line-up process or making an in-court identification. It appears to be generally accepted that the longer than lapse of time is, the less reliable it becomes.[113]

12. What were the conditions and circumstances of the identification process? Was the identification wholly independent or was it induced by discussions with other individuals and other outside influences? If the same witness identified the assailant a number of times and in different ways, did one identification process influence another? For example, if an eyewitness sees a photograph of the accused in a photo line-up, has that influenced that witness' ability to identify the accused in a subsequent process, such as in a live line-up or court?[114]

13. The ability of the eyewitness to identify the person being observed subsequent to the period of observation. Is the eyewitness able to pick out the accused in a photo line-up or in court and was their choice sure or unsure? What was the witnesses' initial level of confidence in their ability to identify the suspect?[115]

---

111 *Virk*, *supra* note 52; *R v Nguyen*, 1994 CarswellBC 1025 (WL Can)(CA); *R v Candir*, 2009 ONCA 915, 250 CCC (3d) 139.

112 *Hibbert*, *supra* note 38.

113 *R v Sheppard*, *supra* note 87; *Virk*, *supra* note 52; *Hang*, *supra* note 103; *R v Zurowski* CA, *supra* note 25; *Sophonow Inquiry*, supra note 8.

114 *R v Sutton* (1970), 3 CCC 152, 12 Man R 571 (Ont CA); *Biddle*, *supra* note 24; *Miaponoose supra* note 14.

115 Brooks, *supra* note 79.

14. If an in-person or photo line-up procedure was used to make identification, has the integrity of the procedure been compromised in any way? For instance, in a photo line-up was the photograph of the accused appropriate and representative of him? Was the accused notably different from the other persons appearing in the photo line-up in terms of age, build and size, colour and complexion, physical appearance, dress or otherwise?[116]

15. Did the line-up procedure, in-person or by way of photographs, single out in any way the accused? Was the identification in the photo line-up (or court) made by reference to any features that were not mentioned to the police in an earlier identification by the eyewitness?[117]

16. Is cross-cultural identification an issue with the witness?[118]

17. What kinds of records were kept of the identification procedure, including what was said to the witness and all comments made by the witness upon identification or partial identification. Was a copy of the line-up preserved and did the witness sign and date anything, regardless of whether or not an identification was made.[119]

18. Was there any circumstantial or corroborating evidence to support the witnesses' statement? (e.g. surveillance photographs or video tape, unique clothing, vehicle license plate, bait money, disguises, etc). [120]

19. Was the witnesses' identification evidence hypnotically induced, aided or assisted?[121]

---

116 *R v Williams* 66 CCC (2d) 234 (Ont CA)(available on WL Can); *Sophonow*, supra note 6.

117 *R v H(RT)*, (2001), 56 OR (3d) 119, 159 CCC (3d) 180; *R v Harvey*, supra note 85.

118 *R v McIntosh and McCarthy*, 117 CCC (3d) 385; *R v Sheppard*, supra note 87.

119 *R v Gordon, supra* note 57; *R v Welsh, supra* note 63; *R v Ouellette, supra* note 61.

120 *R v Nikolovski, supra* note 48; *R v Leaney* [1989] 2 SCR 393, [1989] 6 WWR 332; *R v Smith* (1975), 12 NSR (2d) 289 (available on WL Can).

121 In *R v Trochym* 2007 SCC 6, [2007] 1 SCR 239, the Supreme Court held that hypnotically refreshed memory is not admissible as evidence. However, memory that is recalled independent of the hypnosis process may be.