Identification - the need to take care

Law

See generally Renton and Brown "Criminal Procedure" at 24-73 to 24-77.

1. The prosecution in a criminal trial cannot succeed in the absence of corroborated evidence identifying the accused as the perpetrator of the crime libelled (*Lord Advocate's Ref (No. 1 of 2023)* [2023] HCJAC 40, 2024 JC 140 at paragraph [239](a)). In contemporary practice, a witness's identification is frequently captured at an identification parade, usually of the VIPER variety. Such identifications usually occur reasonably close in time to the events in question and are subject to various safeguards, notably a selection of alternative visual images or, exceptionally, physical stand-ins. What occurred during such procedures is often agreed in a joint minute. If not, the law permits the combination of facts spoken to by the witness who made the identification and a police officer who conducted the procedure to constitute admissible evidence of identification; *Muldoon v Heron* 1970 JC 30.

2. *Murphy v HM Advocate* [2007] HCJAC 57, 2007 SLT 109 makes clear that there was a long- recognised practice that a witness speaking to the commission of a crime should be asked to make a dock identification (at paragraph [90(1)]).

But failure to follow that practice does not affect the admissibility of other evidence pointing to the accused as the perpetrator (*Murphy* at paragraph [90(2)]). While dock identification was once considered the best evidence that the accused was the perpetrator, other evidence inferring that he was is not inadmissible as contrary to the best evidence rule. It is indirect but not a substitute (*Murphy* at paragraph [90(3)]). Such evidence is admissible even where a witness is not asked to make a dock identification or does not give evidence of unwillingness or inability to do so (*Murphy* at paragraph [90(3)]). There is no requirement for evidence to be led explaining why a dock identification has not been made before it can be admitted (*Murphy* at paragraph [90(3)]). In assessing the significance to be attached to the fact that a witness has not made a dock identification, the jury can bear in mind, as matters of common human experience, without having heard evidence on these points, that people's appearances tend to change with the passage of time, and the clarity and reliability of their recollections may diminish with the passage of time

(*Murphy* at paragraph [90(5)]). For an example of the type of directions which may appropriately be given, see those of the trial judge at paragraph [46].

Visual identification

3. "It has been said before in a number of cases that where one starts with an emphatic positive identification by one witness then very little extra is required. That little else must of course be evidence which is consistent in all respects with the positive identification evidence which has been given."

It is not appropriate to direct a jury to this effect (*Ralston v HM Advocate* 1987 SCCR 467, 472 per Lord Justice General Emslie); explained and followed in *Murphy v HM Advocate* 1995 JC 16, 19 per Lord Justice Clerk Ross:

> "In that passage the Lord Justice General is simply making the point that evidence may afford corroboration even though it is small in amount provided it has the necessary character or quality, and it will have the necessary character and quality if it is consistent with the positive identification evidence which requires corroboration" (See also *Mair v HM Advocate* 1997 SLT 817; *Kelly v HM Advocate* 1999 JC 35)

In *Kearney v HM Advocate* [2007] HCJAC 3 at paragraphs [31] and [28] the Appeal Court said:

> "We do not consider that it is advisable or helpful for trial judges to use [expressions like "where you have evidence from an eye witness identifying someone whom the eyewitness knows as the assailant and you accept that evidence as credible and reliable, assuming you do, then not very much more is needed to corroborate that evidence"]. We consider that the general rules relating to the requirement of corroboration should not be diminished or devalued simply because there is one clear fundamental source of evidence against the accused for which corroboration is being sought. We consider it to be the wiser course for the trial judge simply to direct the jury that having identified the primary source of evidence against the [accused] to emphasise that there must be a secondary independent source of evidence confirmatory of the substance of the case. Whatever may be its quantity, it is its quality that the jury has to assess independently of the primary source."

and corroboration ought to be explained according to contemporary caselaw; e.g., *Lord Advocate's Ref (No. 1 of 2023)* [2023] HCJAC 40, 2024 JC 140 applying *Fox v*

HM Advocate 1998 JC 94: i.e. as being evidence which provides support for, or confirmation of, or fits with, the main source of evidence. An assertion by a witness that the accused does not look unlike the perpetrator is not a good identification (*MacDonald v HM Advocate* 1998 SLT 37).

The need to take care

4. It can be necessary in some circumstances to impress on the jury the importance of assessing with particular care the weight they should attach to visual identification evidence. However, the law does not require that, whenever the prosecution rely on identification evidence, the judge must warn the jury to take particular care in view of the risk of mistaken identity. The need for any such direction and its form depend on the facts of the particular case.

5. A 1977 Practice Note (Practice Note issued by Lord Justice General Emslie on 18 February 1977. See Renton & Brown's Criminal Legislation Vol III Division C Para C1-O1 et soq. See also *Beaton v HM Advocate* 2004 SCCR 467 at paragraphs [14] to [17] and *Farmer v HM Advocate* 1991 SCCR 986) identified it as sound practice for judges to remind the jury of the importance of approaching the evidence with particular care where the only evidence inculpating an accused was visual identification, where the opportunity for accurate and reliable observation of the perpetrator was limited or fleeting and the accused was not previously known to the witnesses. The Practice Note advised that, where appropriate, judges should assist the jury by indicating the tests they might apply in measuring the reliability of the identification. It is plain that such warnings were envisaged for situations where identification was in dispute. The Practice Note comes from a time when there was no video/mobile phone recording, no DNA evidence or cell site analysis. However, it remains relevant with its application dependent on the totality of the evidence available in the particular case.

6. Subsequent appeal cases have demonstrated that there is no universal requirement to advise the jury to take care and that it is a matter of judicial discretion. In giving the opinion of the court in *McAvoy v HM Advocate* 1991, LJC Ross explained:

> "When identification is in issue in a case, the trial judge may feel it desirable to remind the jury that errors can arise in identification and there have been cases of mistaken identity with the result that the jury must consider the evidence of identification with some care. A trial judge may go on to remind the jury (if this is the case) that the witnesses were not familiar with the person

> whom they identified prior to the occurrence of the alleged crime. That being so the jury may wish to ask themselves how long the witness had the person whom he identified in view – whether it was a mere fleeting glance or something more? Whether the person concerned was clearly visible? He may also suggest that the jury may wish to ask themselves how positive the identification was and whether the person identified was nondescript or had some distinctive features or characteristics. However, precisely what the trial judge says in this connection is a matter for his discretion" (*McAvoy v HM Advocate* 1991 JC 16, 26 per Lord Justice Clerk Ross. See also *Chalmers v HM Advocate* 1994 SCCR 651; Webb v HM Advocate 1996 JC 166).

7. Where there are no circumstances that might make an eye-witness identification difficult, a trial judge does not need to give particular directions that special care has to be given (*Scott v HM Advocate* [2007] HCJAC 68, 2008 SCCR 110, at paragraph [25]). If the only evidence is eye-witness identification and there is an objective reason to question its reliability, current practice is to advise the jury to take care when assessing that evidence. There is no mandatory formulation of what a judge should say when advising the jury to take care. The trial judge is not under a duty to repeat all the criticisms by the defence of evidence founded on by the Crown. It is sufficient to point out that various criticisms had been made, and direct them that they required to consider them in their evaluation of the evidence (*Dickson v HM Advocate* [2005] HCJAC 39, 2005 SCCR 344 at paragraph [25]).

8. Judges will find contemporary guidance in *Finnegan v HM Advocate* [2024] HCJAC 33, 2025 JC 20, *Beck v HM Advocate* [2013] HCJAC 51, 2013 JC 232 and *Ferguson v HM Advocate* 2000 SCCR 954 (Lord Reed). In *Finnegan* under reference to the Practice Note of 1977, Lord Justice General Carloway at paragraph [16] of the opinion of the court summarised *Ferguson* before encapsulating the law at paragraph [17]:

> "In *Ferguson v HM Advocate* 2000 SCCR 954, the Crown relied on a dock identification, even though the witness had not picked out the accused at an identification parade. The sheriff did not direct the jury to take particular care. In delivering the opinion of the court, Lord Reed said (at para 12) in relation to the identification evidence:
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> "The reliability of his evidence had been challenged by cross-examination and criticised in the appellant's speech to the jury. The sheriff reminded the jury of the need to take account of such criticisms in considering the evidence …

> [T]he sheriff was entitled to take the view that the directions which he gave provided the necessary guidance for the jury."

In *Beck v HM Advocate* [2013] HCJAC 51, 2013 JC 232, under reference to the Practice Note, it was said (Lord Justice Clerk (Carloway), delivering the Opinion of the Court at paragraph [49]) that:

> "each case will depend on its own facts and circumstances (*Kearns v HM Advocate* 1999 JC 124, Lord Justice Clerk (Cullen) at 126). A trial judge has to gauge whether and to what extent it is desirable to give a jury a cum nota warning in relation to particular testimony. Care must be taken not to patronise the jury, to offer them glimpses of the obvious or to trespass unnecessarily into their province".
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> "If the only evidence is eye-witness identification and there is an objective reason to question its reliability, current practice is to advise the jury to take care when assessing that evidence (*Webb v HM Advocate* 1996 JC 166, LJC (Ross) at 172). The choice of words in which to do so is a matter for the trial judge. In a straightforward case: "little more than a broad statement on reliability of testimony may be needed" (citing *McAvoy v HM Advocate* 1991 JC 16, Lord Justice Clerk (Ross), delivering the Opinion of the Court at 26)."

9. Identification based on alleged recognition of the accused's voice is competent (*Lees v Roy* 1990 SLT 665). Asking a suspect to speak at an identification parade does not breach the accused's right to silence, or right not to incriminate himself/herself/themselves. These rights relate to an accused's right not to be compelled to answer substantive questions concerning the crime, such as where the accused was at the relevant time, whom the accused was with, what the accused was doing and what the accused heard or saw. The taking of a voice sample focuses on timbre, intonation, register, accent, pronunciation and identifying features similar to facial features, hair colour, height and build, fingerprints and DNA from blood, hair or skin samples (*McFadden & Spark v HM Advocate* [2009] HCJAC 78, 2009 SCCR 902 at paragraph [35]).

10. Where a witness speaks to a visual identification it may still be proper practice for the witness to be asked to identify the accused in court (*Bruce v HM Advocate* 1936 JC 93 – see however *Holland v HM Advocate* 2005 1 SC (PC) 3). It is especially important to adopt an appropriate practice for identification when there is more than one accused on trial (*Reekie v Smith* 1987 SCCR 453, 455 per Lord Justice Clerk Ross).

11. The use of emulator sheets is not *per se* inadmissible. There may be issues which arise in relation to their use such as the lack of a written record of the identification from the sheets. The weight to be given to such evidence is for the jury who may well require a direction pointing to potential pitfalls as the case may require (*Bell v HM Advocate* [2014] HCJAC 127, at paragraphs [12] and [15]).

12. Whilst it is now common and sound practice for VIPER identifications to be carried out, it could still be necessary to direct the jury on the particular dangers of a dock identification where a witness previously failed to identify at an identification procedure if the identification is disputed. Judges should consider giving an appropriate and authoritative direction in all cases of this kind (*Holland v HM Advocate* 2005 1 SC (PC) 3 at paragraph [58]. An interesting criticism of this decision is to be found in Fiona Raitt and Pamela Ferguson "Re-configuring Scots criminal procedure – seismic shifts?" 2006 10 Edinburgh Law Review 102. The decision in *Brodie v HM Advocate* [2012] HCJAC 147, 2013 JC 142 confirms this and provides guidance as to what should be said in such circumstances, which will vary from case to case - see paragraph [19]). A trial judge should not invite the jury to speculate as to what might have occurred in the event of a parade having taken place, i.e. the failure to hold a parade has deprived the accused of the possibility of an inconclusive result from such a parade (*Brodie v HM Advocate* at paragraphs [24] and [25]).

13. *Anderson v HM Advocate* [2009] HCJAC 91, 2010 SCCR 382, demonstrates the sort of robust directions on identification which may be necessary where, for example, a witness accepts identification was affected by seeing the accused sitting in the dock beside a security officer and two other accused whom the witness recognised from the incident, and where an accused was pointed out to the witness outside the court room.

14. NB: the specimen directions which follow are only suggestions. They will not always be necessary. They are intended for cases in which an eye-witness identification is material, disputed and there is particular reason why it may be mistaken, eg a fleeting glimpse unsupported by other evidence. If they are needed, judges should adapt them according to the circumstances of the case and can use their own words.

Possible form of direction on eyewitness identification: the need to take care

"In this case the Crown ask you to accept the eyewitness evidence as credible and reliable, and that it points to the accused as the perpetrator of the crime. The defence asks you not to accept these identifications as reliable, and to conclude that this is a case of mistaken identity. So, the quality of the identification evidence is a critical issue.

You will have to decide if the Crown has proved that the accused has been identified as the perpetrator of the crime. The evidence for that would have to come from two different sources, both credible and reliable. If you are not satisfied with that evidence, the Crown would have failed to prove one of the essential facts, and you would have to acquit the accused.

Our powers of observation can be fallible. Errors can occur in identification. Sometimes we think we recognise somebody we have seen before. Sometimes we are right, sometimes we are wrong. Some people are better at it than others. Mistakes about identification have been made in court cases in the past. These have to be guarded against. But it does not follow from that that any mistakes have been made here. You have to judge the soundness of the identifications in this case.

You will need to take particular care in assessing the quality of this evidence. You may want to consider:

1. What opportunity did the witnesses have to see the person concerned? Was it a fleeting glimpse, or a longer look? Was there time for reliable observations to be made? Was the person clearly visible, or was the sighting obscured in some way?
2. What was the state of the lighting?
3. Was the person previously known to the witness and recognised as such, or a total stranger?
4. Was the person someone with some easily distinguishable feature or not?
5. How positive have the identifications been, both in court and at the [video] identification parade? What were the reasons why the accused was picked out?

6. Have the memories of the witnesses been affected in any way?

In evaluating such evidence you should have regard to all of the evidence in the case, including any agreed facts and circumstantial or other evidence which may support the soundness of an identification. [Specify as appropriate.]

To regard the identification evidence as acceptable, you do not need to conclude that the witnesses have made 100% cast-iron certain identifications. But you would need to be satisfied that you can rely on the substance of what they said."

(Where a material and disputed dock identification is made but there was no prior opportunity of identification of the accused eg because no identification parade was held)

Reference is made to paragraph [19] of Brodie v HM Advocate [2012] HCJAC 147, 2013 JC 142 which could be adapted as appropriate.

You will remember that there was no prior opportunity for witness [X] to confirm that the accused was indeed the person responsible for what the Crown argue occurred. The witness described seeing the incident and says that the accused was responsible. The incident is said to have occurred on (Insert date). There has been no identification (VIPER) parade held in the meantime. If such a parade had taken place, in addition to the accused there would have been a number of other persons images produced. These images would have borne a similarity to the accused. In such circumstances any identification of the accused by the witness would have taken place in more testing circumstances. When an accused person is in the dock accompanied by a court officer/ court officers it may mean that the identification of the individual is not as difficult. In short, it is a matter for you to decide whether these considerations cause you to question the identification made of the accused by witness [X].

In evaluating such evidence you should have regard to all of the evidence in the case, including any agreed facts and circumstantial or other evidence which may support the soundness of an identification. [Specify as appropriate.]

(Where identification is disputed and a dock identification made, but the witness attended at an ID parade and failed to identify the accused)

In addition to this general guidance on dealing with eye-witness identification, I want to draw attention to a particular feature in this case.

Here the witness [X] identified the accused in court as the perpetrator of this [attack]. But at the [visual] identification parade, on which the accused appeared, X failed to pick out the accused/ picked out a stand-in instead.

The defence say you should not regard [X's] identification as reliable, because:

- X's recollection would be fresher at the parade than now. That was much closer in time to the incident than this trial.
- With stand-ins of similar appearance on the parade, the chance of [X] simply picking out someone who resembles the perpetrator is reduced. That's some check on the accuracy of X's identification.
- There is a risk [X's] identification has been affected simply by seeing the accused sitting under guard in the dock.

So, in essence, the defence say a dock-only identification:

1. Lacks the safeguards of an identification parade
2. The accused's presence in the dock positively increases the risk of a wrong identification.

- On the other hand the Crown say: [X] has been cross-examined about identification. These points were put to X.
- X did not accept this identification had been influenced in any way and sticks by it.
- X gave an explanation for identifying the accused in court, having failed to do so at the (Viper) parade.
- This identification is backed up by other evidence in the case. [Specify as appropriate.]

It asks you to accept this identification as sound.

This is not an easy task, and you will need to approach it with care. Ultimately, it is for you, the jury, to consider all of the evidence and decide whether you regard [X's] identification of the accused in these circumstances as reliable.