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IDENTIFICATION PARADE: CURRENT POSITION AND ISSUES IN MALAYSIA

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Abstract

Much has been said regarding identification. Identification does not refer only to fingerprints. It covers other types of identification such as footprints, voice and identification parade. This paper only focuses on identification parade. Once a person is suspected of committing a crime, he or she may be caused to be made available for an identification parade. Identification is a line of people who stand next to each other while the victim or bystander tries to identify them as the person who has committed the crime Identification parade is usually carried out to test the trustworthiness of the evidence per se. This paper serves to set out briefly the principles and guidelines set down by case laws that should be followed and applied during an identification parade. This paper provides the current position of identification parade and also the evidentiary value of identification parade in the eyes of the court. Identification in Malaysia has been progressing. There is a new form of identification being applied together with the identification parade which is dock identification. However, there are few issues pertaining to identification parade that are identified in this paper which are the lack of knowledge in conducting identification parade, the principles enunciated in case laws are mere guidelines and the reliability of witness which would need redresses to overcome the issues.

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1. Introduction

Although advances in DNA profiling, eyewitness identification still plays an important in criminal cases. One of the ways where law enforcement agencies carry out identification is through identification parade. Identification parade is held where there is some doubt as to the identity of the persons who are alleged to have committed an offence. Identification parade is no doubt a very important part of the investigation for the court to determine the credibility of witnesses on the point of identification. There is no specific provision under the Evidence Act 1950 or Criminal Procedure Code in Malaysia with regard to identification parades. There are however numerous case laws that provide guidelines on identification evidence. Any infirmity or defectiveness in the conduct of identification parades will render the identification to be of little or no value (*PP v. Mohamed Majid,* 1976).

2. Problem Statement

Identification parade has been used as a mechanism to identify suspect or suspects in Malaysia since many years ago. The witness identification in the parade is conducted before the trial and is always tendered as evidence in the courtroom. Court gives high probative value for proper identification. The issue arises with regard to identification parade is whether the Turnbull guideline is mandatory for the court to follow or whether the court can deviate from it? The issue also arises about the way to conduct proper identification parade in Malaysia as Turnbull only laid down the general principles of an identification parade. There are also some conflicting decisions on how to conduct proper identification parade in Malaysia including the issue of dock identification in the absence of identification parade. Other key issues which arises is the reliability of witness pertaining to the mental capacity to remember.

3. Research Questions

The research questions are as follow:

- how identification parade is conducted in Malaysia?
- How the courts in Malaysia admit the evidence of identification parade in Malaysia?
- What is the evidentiary value of identification parade?
- Whether the guidelines laid down in *R v. Turnbull* (1976) are mandatory to be followed?
- How reliable is a witness in identifying during an identification parade?
- Why enforcement agency is unable to carry out identification parade successfully?

4. Purpose of the Study

The research outlined three objectives to be achieved as follow:

- to investigate how identification parade is conducted in Malaysia.
- to identify the admissibility of evidence of identification parade in Malaysia.
- to analyse the issues pertaining to identification parade in Malaysia.

5. Research Methods

The research is a pure legal research which employed qualitative design method to achieve the objectives of this research. The article used exploratory, explanatory and critical analysis methods to analyse the current position and issues pertaining to identification parade in Malaysia.

6. Findings

The research has few finding relating to identification parade in Malaysia.

6.1. Principle under *R v. Turnbull* (1976)

In *R v. Turnbull* (1976), Court of Appeal provided useful guidelines in regards to matter concerning identity. There is plethora of authorities that have followed the principles and guidelines set out in Turnbull. In *Jaafar bin Ali v. PP* (1998), Augustine Paul J referred to Criminal Evidence (3rd Edition) by Andrews and Hirst which rearranged the Turnbull guidelines into four issues as follows:

a) The requirement for the judge to caution the jury about the dangers of identification.

First, whenever a case or evidence against the accused depends wholly or substantially on the one or more identifications in which the accused alleges to be mistaken, the judge should warn and caution the jury before convicting upon relying the definitiveness of the identification. Further, the judge should warn of the chances that a mistaken witness could be believable. It is also prudent to note, that jury to be warned of the danger mistaken recognition of close relatives and friends which are sometimes made.

b) The requirement of the judge to guide the jury to look at different particular issues that may affect the quality or cogency of evidence before them.

Furthermore, the judge should guide the jury to look at intently the conditions of which the identification by each witness came to be made. To what extent the witness observed the accused? What was the distance? In what light? Was the observation or view blocked in any way, as for example by passing traffic or press of people? Did the witness see the perpetrator before? How frequent? If only occasionally, had he any special reasons in recalling the accused? How long had passed since the original observation until subsequent identification to the police? Was there any material disparity between the portrayal of the accused given by the witness to the police which was first seen by them and his actual appearance? …. Lastly, he should caution the jury of any specific shortcoming which had showed up in the identification evidence.

Each of these issues goes to the very nature of the identification evidence. If the quality is great and stays great at the end of the accused case, the risk of mistaken identification is reduced; but the poorer the quality, the higher the risk.

c) The question of when a jury may properly be permitted by the judge to convict the accused even in the absence of other supporting evidence.

In the judgement, when the nature of the identification is great, as when the identification is made after a long span of observation, or in a adequate conditions by a relative, a neighbour, a dear companion, a workmate and so forth, the jury can safely be left to access the value of the identifying evidence, even though there is no other evidence to corroborate it: provided always, however, that a sufficient caution has been given. Were court to decide contrary, injustice would happen.

When in the decision of the trial judge, the nature of the identifying evidence is bad, as for example when it depends solely on a transitory look or on a longer observation made in challenging conditions, the circumstances is altogether different. The judge should then acquit the accused unless there is other evidence which goes to corroborate the correctness of the identification.

d) The question of what other evidence may properly be regarded as capable of supporting an identification.

This supporting evidence may be corroboration in the sense counsels utilize the word, yet it require not be so if its impact is to ensure that there has been no mistake in the identification. For example, Y sees the perpetrator; he gets only a fleeting short lived look of the criminals face as he keeps running off, however he sees him going into a close by house. Later, he picks him out in the identity parade. If there was no more evidence than this, the poor natureof the identification would amount to acquittal; but this would be so if there was evidence that the house into which the accused was alleged by X to have run was his father's.

Another case of other evidence not amounting to corroboration can be seen in the case of *R v. Long* (1973). The perpetrator was accused of robbery, had been recognised by three witness in different place on various events, but each had only a short opportunity for observation. Immediately after the robbery, the accused had left his home and could not be traced by the police. At some point later he was seen by them, he claimed to know who had done the robbery and offered hemp to find the perpetrator. At his trial, he put forward a plausible defence which the jury rejected.

The trial judge ought to recognize the jury the evidence which he adjudges is capable or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so. A jury, for instance, may believe that support for identification evidence could be found when in fact that the accused had not given evidence before them. An accused's non-appearance from the witness-box cannot provide evidence of anything, and the judge should tell the jury so. But he would entitled to tell them that when accessing the quality of the identification evidence, they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused himself.

Care ought to be taken by the judge when giving directions to the jury about the corroboration for identification which may be considered from the fact that they have rejected an alibi. False alibis may be given for many reasons: an accused, who has only his own evidence to rely on, may fabricate an alibi and get some witness's to support it because he fears that his own evidence will not be enough. Moreover, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only where the jury are satisfied that the sole reason for the for the creation of the alibi was to trick them

and there is no other reasons for its being put forward, that fabrication can provide any support for identification evidence.

6.2. Process of identification parade.

The whole process of identification Parade is enumerated in Mallal's Criminal Procedure Code (Mallal's Criminal Procedure, 2013). Identification parade must be carried out at the earliest opportunity and all available witnesses should be required to attend at the very first parade. The proper practise in England is that parade should be carried out by the police officer on duty in charge of the police station and not by the officer in charge of the investigation. The witnesses must be allowed to see the accused until the moment when everything is ready and they walk to pick him out, and they should not have been previously assisted by photographs or by any verbal or written description.

The accused should be put together with a number of person, which is not less than 10 for one accused, 15 if two and so on. He should be allowed to stand wherever among these people, who stand in a row, and he may change his position for each identification parade being conducted. The officer in charge of the identification should ask the accused if he has any objection to any of the persons present of to the arrangements made, and he should previously have been asked if he wished to have his solicitor, family member or friend present. Every effort should be made to make the parade a fair one and to see that the accused admits that it is so. The place selected for the parade should be well lighted. A suspect may be invited to walk or move in any way likely to be distinctive.

The line up of persons in the identification parade should be of similar character. It is a settled practise for the police to parade persons of similar height, built and ages and the same nationality of the suspect of to identify the suspect (*R v. Dickman,* 1910; *R v. Bundy,* R 272). When the accused had brown eyes and the person with such brown eyes had not been mixed in the parade the evidence of the identification had to be rejected (*Chander v. S A,* 1973). When the accused is a bearded man, with a tape on his neck waited with the witnesses outside the magistrate's court and among five other persons in the parade none was similarly bearded the evidence had to be rejected (*Yeshwant v. S A,* 1973).

The witness should be brought in one by one, and are usually directed to touch the person they identify. Each witness having succeeded or failed, as the case may be, should be taken out by a different door and kept apart from the witnesses who are to come. If the identifying witnesses were waiting outside when the persons were called in for identification parade and the identifying witnesses identified the accused, the identification was unfair (*Gobardhan v. R A,* 1932). Every circumstance connected with the identification, the names of the witnesses and their decisions, must be carefully noted by the officer in charge who must record the proceedings as fully and fairly and carefully.

Further, in *Poovananeswaran a/l Sellan & Anor v. PP* (2016), the issue arose was whether the identification parade conducted to identify the appellant was defective. The appellants claimed that the identification parade was defective because both of them were identified in only one identification parade. The High Court of Shah Alam, in this case, held that where there is more than one accused, the identification parade for all the accused should be done separately as mentioned in the case of *PP v. Jamal & Anor* (2006). The identification must be absolutely independent (*PP v. Aling bin Ayun,* 1970). In a parade, there should not be any disparity of ages among the persons in the parade (*Chan Sin v. PP,*

1949). They do not have to look similar (*Thirumalai Kumar v. PP,* 1977) or wearing the same attire (*Lee Tiaw Chwee v. PP,* 1998). In the event, there are two accused, a separate identification parade must be carried out (*PP v. Chan Choon Keong & Ors,* 1989).

6.3 Evidentiary value of identification parade.

In *S.C. Bahri* (1994), the court addresses the value of identification where the Supreme Court observed thus:

> "It is well settled that substantive evidence of the witness is his evidence in the court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after arrest is of great importance because it furnishes on assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view, it is matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without available and unreasonable delay after arrest of the accused and that all the necessary precautions and safeguards were effectively taken so the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned also who was a stranger to the accused because in that event the chances of his memory fading away are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is in adopting this course that justice and fair play can be assured both to the accused as well as to the prosecution. But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of test identification parade."

In *Rameshkumar Soni v. State of Madhya Pradesh* (1997), the court stated that:

> "The evidence of identity must be thoroughly scrutinised, giving benefit of all doubt to the accused; but if after a through scrutiny there appears to be nothing on record to suspect the testimony of the identification witnesses, the Court ought not to feel shy of basing a conviction on such evidence alone, because of the bare possibility that there could be honest though mistaken identification."

The value of identification parade was explained in *ST Shinde v. State of Marashtra* (1974) as follows:

> "The evidence at test identification is admissible under section 9 of the Evidence Act, it is, at best supporting evidence. It can be used only to corroborate the substantive evidence given by the witnesses in court regarding identification or the accused as the doer of the criminal act. The earlier identification made by the witnesses at the test identification parade, by itself, had no independent value."

Where accused is already known to the witnesses, identification parade shall not be held (*PP v. Sarjeet Singh,* 1994). If a witness do not know the accused before the occurrence and no proper and fair identification parade is held after the necessary precaution and safeguards are taken, a test parade was held to test his power of identification and the witness was also shown the accused by the police before he identified the accused at the identification parade and later in court, his evidence becomes valueless (*Mohanlal Gangaram Gehori v. State of Maharashtra,* 1982); *PP v. Ayavoo Subramaniam,* 2004). If the manner of holding identification parade throws suspicion on police, the evidence is not entitled to any weight (*Bhandari v. R A,* 1940). Technical breaches of identification parade may not vitiate the evidence per se, unless the prejudicial effect overrides its probative force.

6.4 Current application and issues of identification parade in Malaysia.

In Malaysia, Turnbull principles are being applied with certain modification on the fact that it will be the judge that will assess the quality of witness identification. The most recent decision where identification parade was carried out is *Asis Lako v. PP* (2017). It is now a common practise now that after an identification parade is conducted, that dock identification is later carried out in court. Dock identification for the first time has been accepted in the case of *Basah bin Bakhtiar @ Johan v. Public Prosecutor* (2016). In the case of *Goh Kooi Pheng v. PP* (2013) court said when identification parade is carried out is unfair manner to the accused, the subsequent identification was of little value and or significance to the court.

In the case of *PP v. Dharma Raj Ballurajah & Anor* (2016), a quarrel took place between the deceased and the defendants. The witness had seen of the defendants threw a punch to the deceased and a knife was thrown. Two police officers managed to detain and charged them for murder under section 302 of the Penal Code. Identification parade was conducted where the witness identified them. However, the identification parade was improperly conducted and was unfair to the third appellant therefore the court was of the view that the dock identification of both the accused in this case is therefore rendered of little value of significance. However, in the cases of *R v. Cartwright* (1914) and *Jaafar bin Ali v. Public Prosecutor* (1999), the court stated that it is improper to identify a suspect for the first time only when he is in dock where he is a complete stranger to the witness meaning that the very first identification should be carried out through an identification parade and then the following identification can be carried out in the courtroom. This was further agreed in the case of *Magendran Mohan v. PP* (2011).

The first issue relating to identification parade in Malaysia is whether the *Turnbull* guidelines are mandatory to be followed by the trial judge or is it a mere guideline. In the case of *Mohammad Yazri Minhat v. PP* (2003), where in the Court of Appeal remarked as follows:

> "Now the English case of Turnbull did not lay down any proposition of law embodied in concrete. As all members of the criminal bar are aware, the several propositions in Turnbull are known as the "Turnbull guidelines". And that is what they really are. They are just guidelines and each case depends on its own facts. What was said in Turnbull does not amount to inflexible rules with no exceptions whatsoever."

The above proposition was agreed in the case of *Mohamas Yazri v. PP* (2003).There are other cases like *Ahmad Nazari bin Abdul Majid v. PP* (2009) and *PP v. Joachim Selvanathan & Ors* (2009) which agreed that Turnbull directions are only directions.

The second issue is relating to the reliability of the witness or victim himself. The fragility of memories continues to misidentification even though the court is practising the Turnbull guidelines. There are three stages. The first stage is acquisition, where an event is originally observed or information is taken in. The second stage is retention where memory is stored and the third stage is retrieval where memory is recalled.

Retention is the time between an event and recollection. It is very important especially during identification parade to identify the perpetrator of a criminal offence. Once encoded in memory, the memory will not remain intact and would fade over time and changes taking place. It is something of common sense. The retention stage is a great danger because that memory will become contaminated by new or other information. Faces are complicated, we have not one face but thousands of different faces. It is a common and know fact that people fail to recognise someone they know or mistaken one person to another. There is also delay of days or several weeks before and identification parade is conducted. As memory fades over time, there is the likelihood that witness accuracy will also be in decline.

The third issue is the lack of knowledge of the enforcement officers to conduct an identification parade. This is well in the High Court case of *Public Prosecutor v. Dharma Raj Ballurajah & Anor* (2016), the conduct of the identification parades suffers from infirmities that do not assist the prosecution in proving positively, the identification of the accused persons. There were two accused persons involved and thus the proper way was to put them separately for identification purpose with not less than nine or ten persons (*PP v. Chan Choo Keong & Ors,* 1989). Yet, no separate parade was held for each accused and only 11 participants were involved in the parade line up including both accused. Besides that, all witnesses were kept in the same holding room during the identification parade, and at the conclusion of the identification, each witness had returned to the holding room. This leaves open the possibility of the opportunity of the witnesses to discuss the case and inform the other witnesses of the position of the suspects in the line up, given the fact that they remained in their position unchanged throughout the exercise.

Although it has been established that it is the duty of the officer conducting the parade to look for participants who are of similar age, stature and appearance as the accused person (*PP v. Pasupathy Kanagasaby,* 2001), there are still instances in which the officer failed to follow this procedure. In the recent case of *Public Prosecutor v. Tay Ee Hung* (2016), there was a serious flaw in the way the identification parade was conducted. First, the eyewitnesses were shown with the photography of the accused when they were briefed by the police officer before the parade was conducted which led to the positive identification of the accused. Second, the age of the participants in identification line up was either too young or too old compared to the age of the accused. Further, the accused was the only one bald and wearing different clothing as he was in police custody. The interesting part of the case is that PW10, Inspector Alis bin Nen who conducted the parade admitted that the ideal age and height of the participants should be more or less the same with the accused, but curiously, the flaw was still persistent.

Other latest cases that the Court held the identification parade as defective are in the case of *Poovaneswaran a/l Sellan & Anor v. Pendakwa Raya* (2016) in which the victim identified both the appellants in one single identification, and similarly in the case of *Public Prosecutor v. Nazariman Bujang & Anor* (2016) in which the learned Session Court Judge, learned counsel for the respondent and even the learned DPP, had conceded that the identification parade that was arranged by the police was unsatisfactory.

7. Conclusion

It is evident that identification parade is part and parcel of a criminal investigation. The guidelines provided in the case of *R v. Turnbull* (1976) is still being applied in Malaysian courts today. Dock identification is being applied together with identification parade to support the reliability of an identification. However, there is still some important issues that needs to be addressed such as the reliability of the witness in an identification parade, officers carrying identification parade has very little knowledge or guidelines to be followed when carrying out identification parade and also since precedent shows that guidelines provided in *R v. Turnbull* (1976) are merely guidelines, whether the court can deviate or is it still mandatory guidelines for the court to follow.

Acknowledgments

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