Identification as a Facet of Criminal Law

SYDNEY PAIKIN *
Hamilton

Evidence as to identity based on personal impressions, however bona fide, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury.[1]

I

Although statistics are unavailable on the percentage of criminal cases in which identification of an accused person is the vital factor, the percentage is, in my opinion, sufficiently large to merit an assessment of the objective standards that should be applied in appraising the evidence of identification. The problem daily confronts criminal courts and counsel in this standard situation: a witness positively asserts that an accused person is the same person he saw committing an offence or some act evidentially connected with the offence. How probable is it that the accused person is the same person?

The probabilities obviously rest upon the moral and intellectual qualities essential to the witness's capacity to testify truthfully and upon the sensory powers essential to his capacity to acquire and report knowledge. These admit to a standard analysis. The probabilities further rest upon the psychological environment motivating the identifying witness. This last is most difficult of proper perception and assessment.

Recorded cases amply support Dean Wigmore's conclusion that some of the most tragic miscarriages of justice are due to testimonial errors in this field. As early as 1784 it is recorded that sensory testimony cannot be implicitly depended upon, even when the veracity of the witness is above all suspicion. In that year Sir Thomas Davenport, an eminent barrister and a gentle-

* Sydney Paikin, B.A.Sc., P. Eng. (Toronto), of White & Paikin, Barristers and Solicitors, Hamilton, Ontario.

[1] Extract from the Report by a Committee of Inquiry into the case of Adolf Beck, dated Nov. 14th, 1904. See Watson, Trial of Adolf Beck (Notable British Trials Series, 1924) p. 250.

man reportedly of acute mind and strong understanding, swore positively to the persons of two men whom he charged with robbing him in daylight.[2] But it was proved by conclusive evidence that the men on trial were at the time of the robbery at so remote a distance from the spot as to render their guilt impossible. The consequence was that they were acquitted and, some time afterwards, the robbers were taken and the articles stolen found upon them. Sir Thomas, on seeing these men, candidly acknowledged his error.

The subsequent record shows clearly that what are supposed to be the clearest intimations of the senses are too often deceptive. An extraordinary list of cases of mistaken identity is reported in *Wills on Circumstantial Evidence*.[3] One example illustrates their tenor:[4]

> Two men were convicted before Mr. Justice Grose of a murder, and executed; and the identity of the prisoners was positively sworn to by a lady who was in company with the deceased at the time of the robbery and murder; but several years afterwards two men, who suffered for other crimes, confessed at the scaffold the commission of the murder for which these persons were executed.

Professor Wigmore fully reports an interesting set of similar cases.[5] But the most fascinating collection of these tragic errors is contained in Edwin Borchard's *Convicting the Innocent*.[6] Out of twenty-nine convictions based on erroneous identification of an accused person by the victim of a crime of violence, Professor Borchard reports that in eight cases the wrongfully accused person and the really guilty criminal bore not the slightest resemblance to each other; whereas in twelve other cases, the resemblance, although fair, was still not at all close. In only two cases could the resemblance be called striking.

In the same category lie the cases of Adolf Beck and of Oscar Slater, which achieved real notoriety and which were in large measure responsible for the creation of the Courts of Criminal Appeal in England and Scotland, respectively. Adolf Beck, convicted on erroneous identification in 1896 and again in 1904 on the complaint of numerous women all alleging fraud, was released upon discovery of the true offender.[7] Beck was granted free par-

---

[2] *Rex* v. *Wood & Brown* (referred to in 28 St. Trials 819).

[3] (7th ed.) pp. 192-202.

[4] P. 193; the case referred to is *Rex* v. *Clinch & Mackley*. This case is one of nine classic cases, illustrative of suspect identification testimony, recorded by Watson in the introduction to the Trial of Adolf Beck (*supra*) pp. 72-101.

[5] Science of Judicial Proof (3rd ed.) pp. 250-254.

[6] (Yale University Press, 1932).

[7] Watson, Trial of Adolf Beck (Notable British Trials Series, 1924) p. 117.

dons in respect of his convictions and a committee of inquiry recommended the payment of an indemnity. The case stimulated public opinion to a degree novel for a people noted for their confidence in the stability of their legal system.

Oscar Slater was less fortunate: he spent twenty years in jail before he was exonerated of the murder of Miss Marion Gilchrist.[8] Miss Gilchrist was brutally beaten to death in Glasgow in 1908. Her maidservant and a tenant positively identified Slater. Certain circumstantial evidence seemed corroborative and Slater was convicted in 1909 by a majority verdict of nine against six. The testimony was, however, so suspect that the Undersecretary of State for Scotland ordered a stay of execution and commuted the sentence to life imprisonment. This act could not silence public dissatisfaction and subsequent investigation led to the creation of the Court of Criminal Appeal for Scotland. Influential investigators pressed the case, among them Sir Arthur Conan Doyle — one of his few real-life criminal investigations.[9] The Court of Criminal Appeal for Scotland finally exonerated Slater in 1928, and he was soon granted an indemnity of £6,000 by special act of Parliament.

Convictions on mistaken identification are by no means restricted to foreign jurisdictions. The case of David Meisener provides a notorious example in Canadian annals. On the 14th of August, 1934, John Labatt of London, Ontario, was kidnapped in extraordinary circumstances. From a long list of police photographs, Mr. Labatt, an engineer and a citizen of repute, identified David Meisener as one of his abductors. At a subsequent police line-up Meisener was positively identified not only by Mr. Labatt but by thirteen other witnesses, all of whom at the trial of Meisener gave positive identification testimony. Meisener was found guilty and sentenced to fifteen years imprisonment. Within a year Michael McCardell confessed to the offence and completely exonerated Meisener. On examination-in-chief by the Crown at McCardell's trial, Mr. Labatt admitted that McCardell had been his abductor and guard, and not Meisener. Meisener was granted a new trial by the Minister of Justice and was acquitted of the offence before Mr. Justice Kingstone and a jury in March 1936.[10]

These cases illustrate that the emotional balance of the vic-

[8] Roughead, Trial of Oscar Slater (Notable British Trials Series, 4th ed. 1950).

[9] Doyle, Memoirs and Adventures (Little, Brown & Co., 1924) pp. 216-220.

[10] The first Meisener trial is the subject of an absorbing chapter in the memoirs of the late Charles Bell, K.C.: Who Said Murder (The Macmillan Company of Canada, 1935).

tim or eyewitness may be so disturbed by his extraordinary experience that his powers of perception become distorted and his identification frequently untrustworthy. Into the identification enter other motives, not necessarily stimulated by the accused personally — the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another.

It is a source of concern that the errors in these cases have been discovered only after expensive and influential investigation or after confession by the real culprit. There must be an unknown but uncomfortable number of those convicted by similar testimony who have served and are serving their sentences without hope of establishing their innocence. Thus is searching inquiry necessary, during every stage of police investigation and judicial proceedings, into the liability to mistake when the question of identity is the subject of direct evidence.

Psychological inquiry into the portions of recalled experience that are fact and those that are the stimulated products of imagination has, during the past quarter century, increased. Classic in this field has been the work of Edgar James Swift, and we may well ponder the results of such an experiment as he reports in *Psychology and the Day's Work*, noting that in it the usual uncertainties of intellectual capacity, moral capacity, subjectivity and bias were minimized.

Professor Swift reports[11] that during a regular seminar at Washington University the following scene, which had been carefully rehearsed, was suddenly enacted before the eyes of the students, who were seated in a semi-circle. An altercation was heard in the corridor, then the door burst open and four students, two young men and two young women, dashed into the room. Miss *R* immediately after entering dropped a brown paper package on the floor. This package contained a brick, so that the occurrence might not be too inconspicuous. *K* flourished a large yellow banana as if it were a pistol, and all struggled across the room to the side opposite the door, where Professor Swift himself was seated among several members of the class. He stood up at once, protesting at the interruption and, as he rose, he threw a small torpedo to the floor. *H* fell back crying, "I'm shot", and was caught by Miss *R*. All four then hurried out through the open door, Miss *T* picking up the brown paper package which had been

[11] Swift, Psychology and the Day's Work (Charles Scribner & Sons) pp. 291 ff.

dropped near the door by Miss *R*. The entire scene lasted less than thirty seconds — all the class jumped up and crowded against the wall, believing that it was a real riot.

The twenty-nine students of the class were then told that the scene had been "made to order" and they were asked to write out in detail their memory and observation of what had just occurred.

Three of the actors were actual members of the class, and Miss *R*, although not a member of the class, was a senior student, prominent in college activities, and all the class knew her. Of the twenty-nine "witnesses" to the occurrence, only three remembered that four persons entered the room; and, although no disguises were used, not a single person recognized all the actors. Many described the occurrence with words such as "mob" or "crowd". Though all the actors were persons they met every day, seven students recognized three, eleven recognized two, seven recognized one, and four recognized no one. Surprising as these figures may seem to those who think that even under excitement they could recognize an acquaintance whom they had seen at least three times a week for eight months, eight "saw" persons who not only took no part in the performance, but were not even present. Of these eight, two "saw" one young woman who had never been in the class and was not present.

The descriptoins of clothing were so general as to be worthless for purposes of identification and, if details were given, they were generally found to be inaccurate. Only one witness spoke of the brown paper parcel. No one saw Miss *T* pick it up. Several students "saw" the flash of a pistol. *Five of the reports did not contain a single item of truth or fact.* Three witnesses saw nothing except confusion and a mob bursting into the room. Professor Swift concluded:

> Identification is always fundamental in criminal cases, and positive recognition by well-intended, uninterested persons is commonly accepted unless the alibi is convincing. In our drama experiment the observers were all well acquainted with the participants, yet they were surprisingly incompetent as witnesses. The 'witnesses' proved to have had little definite knowledge of what really happened, and had a crime actually been committed, their testimony should have had slight value; yet it would have been accepted because they were eye-witnesses.

II

Given one person seen on two occasions, the process of identification is arrived at by applying the quality of "sameness". The essential assumption in such application is that two persons

are first thought of as existing and that the one is alleged, because of common features, to be the same as the other.

The process of constructing an inference of identity consists usually in adding together a number of characteristics, each of which, by itself, might be a feature of many persons, but all of which together make it more probable that they co-exist in a single person only. Each additional characteristic reduces the chances of more than one person being involved. Rarely can a single characteristic alone be so inherently peculiar to a single person that it, in itself, makes up the evidencing feature or mark. The evidencing feature is usually a group of characteristics that, as a whole, constitute a feature capable of being associated with a single person. It is by adding characteristic to characteristic that we obtain a composite feature or mark which cannot be supposed to be associated with more than a single person. The process of recognition, being often more or less subconscious, is thus built up; and though the process may be quite correct, even though no specific characteristics or marks can be given as reason for recognition, the risk of injustice is so serious that the great possibility of error should cause the judicial tribunal to hesitate before accepting, as affirmative identification evidence, an assertion of "sameness" that is not founded upon specific characteristics.

Whoever invokes the process of recognition and identifies before a judicial tribunal, it is urged, must establish identification, beyond alternative conclusion, from remembered characteristics of the person previously observed.

Shakespeare used just such a standard of identification as a comedy base in *The Comedy of Errors*. A scullery maid, mistaking Dromio of Syracuse for his twin brother, Dromio of Ephesus, caused no little confusion. As the Syracuse Dromio later described it:

> O, sir . . . this drudge . . . laid claim to me; called me Dromio; . . . told me what privy marks I had about me, as the mark of my shoulder, the mole in my neck, the great wart on my left arm. . . .[12]

Our courts have always been cautious in approaching the problem of identification. There is indeed consistent reference to the care that must be exhibited by the tribunal in passing upon direct evidence of identification, particularly in the English Court of Criminal Appeal, which has since its inception treated inadequate identification testimony as injustice meriting its serious consideration. In *Rex* v. *John Millichamp*[13] Trevethin L. C. J. stated:

[12] Shakespeare: The Comedy of Errors, Act III, Scene II.
[13] (1921), 16 Cr. App. Rep. 83.

> This court is slow to reverse a jury's verdict, but here we must. Mr. Sheldon's opportunities for identification were too slight. . . .

A similar sentiment is expressed by the court in *Rex* v. *Bundy*,[14] *Rex* v. *Gilling*,[15] *Rex* v. *Phillips* [16] and *Rex* v. *Finch*.[17]

A more detailed assessment of the inadequacies of such testimony characterizes the Australian cases. Thus the High Court of Australia in *Craig* v. *The King*: [18]

> . . . in England the Court of Criminal Appeal does not hesitate to set aside a conviction where there is reasonable possibility that witnesses as to identification have been mistaken. The course of decision becomes stronger when it is remembered that the English court is not empowered to order a new trial, but must, if it intervenes at all, quash the conviction and terminate all proceedings upon the indictment. The reason for the special care which the English Court has accorded to cases dependent upon evidence as to identity is probably to be discovered in the historical fact that a proved instance of miscarriage of justice through honest mistake in identification (the case of Beck) led to the establishment of the Court of Criminal Appeal in England. . . . The jury was not warned, as we think they should have been, as to the special care with which they should approach and weigh the evidence of identifying witnesses in cases where there is no other evidence implicating an accused person. An illustration of such a warning is contained in the charge to the jury of Lord Guthrie, who presided at the Slater trial. He said:
>
> > 'Next we must consider the evidence of identification and its value. Not a word too much has been said on that matter by the Lord Advocate and Mr. McLure. It is extremely important. I express the point of view thus — it would not be safe to convict the prisoner merely on the evidence of personal impression of his identity with the man seen flying from the house, on the part of a stranger to him, without reference to any marked personality or personal peculiarities and without corroboration derived from other kinds of evidence. My proposition involves a distinction between the identification, by personal impression, of a strange person, and the identification, by personal impression of a familiar person. Suppose that a father told you that his son, who was resident in his house, had been seen by him in Princess Street yesterday. That would be admissible evidence. But if a person who had only seen the son once in his life told you that he had seen him in Princess Street yesterday, that would be evidence of slender value, unless the son had a marked personality or unless he had some peculiarity about him, such as a very peculiar walk, or unless there were corroboration, such as that the man, when spoken to, answered to the name of the particular individual. . . . Then again, people differ as to the extent of a resemblance, or even whether there is any. You may have seen a strong resemblance, but one of your friends says that he can see no resemblance at all, and, when the two

[14] (1910), 5 Cr. App. Rep. 270.
[15] (1916), 12 Cr. App. Rep. 131.
[16] (1924), 18 Cr. App. Rep. 151.
[17] (1916), 12 Cr. App. Rep. 77.
[18] (1933), 49 C. L. R. 429.

> people are brought together, you see that there is nothing but a very general similarity. That applies to the personal impression of a stranger in reference to a stranger.'
>
> When, many years after the trial, the charge of Lord Guthrie came to be reviewed before the Scottish High Court, under the provisions of the Criminal Appeal (Scotland) Acts, 1926-1927, the validity of this portion of the charge was sustained. In our opinion, a warning of a similar character was called for in the present case.[19]

So too the Canadian decisions have generally stressed care.[20] The most thorough Canadian decision in this field is the scholarly judgment of Mr. Justice O'Halloran in *Rex* v. *Yates*.[21] That was an appeal to the British Columbia Court of Appeal from a conviction for indecent assault. The appeal hinged on the identification of the appellant, who was picked out by the complainant six weeks after the assault. In part Mr. Justice O'Halloran states:

> On cross-examination she said she identified him by 'his face', and when pressed to say in what way, she explained it was because 'he looked young and had a moustache cut low' like the appellant. . . . She could not remember any other characteristics by which he could be identified. . . . [The jury] ought to have been warned of the danger of accepting as proof of identity such a vague general description as 'young with a low cut moustache'. With respect, the learned judge ought to have told the jury that such testimony, standing alone, could furnish nothing to distinguish the appellant from dozens of other young men who easily fit that general description, and that, standing alone, it was too weak and indefinite to establish any characteristic or combination of traits by which an individual may be recognized and his identity proven. . . . The little girl's physical description of her assailant, standing alone, was not evidence by which anyone could be identified. . . .
>
> Reverting to the evidence of physical description ('young man with low cut moustache'), it cannot identify because it lacks enough elements to show 'sameness'. There is no evidence whatever of (for example) voice, height, size, cast of countenance, complexion, physique, jaws,

---

[19] See too *Davies & Cody* v. *the King* (1937), 57 C.L.R. 170, at p. 181.

[20] *Rex* v. *Henderson* (1944), 81 C.C.C. 132; *Rex* v. *Bagley* (1926), 46 C.C.C. 257. But see *Rex* v. *Minichello* (1939), 72 C.C.C. 413, where the British Columbia Court of Appeal decided that in the particular circumstances a two second period of observation afforded the identifying witness sufficient opportunity to observe the bandit's features. The court, in part, held (p. 414): "Marshall, who remained cool and collected throughout, testified that he looked closely at the accused for about two seconds before running for his gun, and driving the bandit away. Only the forehead would be concealed. He was positive on the question of identification. The appellant was under a light some two feet away from Marshall. The latter could see his eyes, although he did not look at them. If he could see his eyes he could also see his nose, mouth and jaw, enabling him to receive an impression of a definite cast of countenance." It is difficult to justify the court's conclusion that Marshall (the identifying witness) both looked at and saw the bandit's nose, mouth and jaw, because he saw *although he did not look at* the bandit's eyes. The reasoning seems inconsistent with that of the English cases and with the later decision of the same court in *Rex* v. *Yates* (*infra*).

[21] (1946), 85 C.C.C. 335.

nose, eyes, forehead, carriage, colour of eyes and hair or otherwise . . . of the assailant by which a positive declaration 'this is he' can withstand reasoned scrutiny. . . .

If the objective facts available here only through sensory perception do not exist, then no trustworthiness many be attached in this case to solemn asseverations of identification such as 'I am positive that is the man'.

III

The problem is as large as it is fascinating. Psychology infringes here on law. Great care must be the guide, but each case must be treated in the light of the peculiar facts disclosed. These submissions are offered, in conclusion, as guiding principles where the testimonial assertion is one of identification:

(1) the identity of a person always is a matter of inference and opinion, based on remembered facts;

(2) during a period of observation, particularly if the period is attended by emotion and stress, the ordinary mind will perceive only a few facts and will record and retain still fewer;

(3) if evidence of personal identity is to have any value, the recognition by the witness of the prisoner must have proceeded from the witness's unaided recollection of the physical appearance of characteristics of the person previously observed;

(4) the net effect, it is urged, should be this: When identification is in issue, the bare assertion "this is he" should have no probative value. The tribunal should direct itself to a rigorous clinical analysis of the accompanying characteristics upon which the allegation of "sameness" is based. From such characteristics the inference of "sameness" may be concluded, if they, beyond alternative conclusion, serve circumstantially to check the testimonial assertion.

The Liberality of Law

We call ourselves a learned profession. Let me remind you that we are also a liberal profession. The difference between a trade and a profession is that the trader frankly carries on his business primarily for the sake of pecuniary profit while the members of a profession profess an art, their skill in which they no doubt place at the public service for remuneration, adequate or inadequate, but which is truly an end in itself. The professional man finds his highest rewards in his sense of his mastery of his subject, in the absorbing interest of the pursuit of knowledge for its own sake, and in the contribution which, by reason of his attainments, he can make to the promotion of the general welfare. It is only by the liberality of our learning that we can hope to merit the place in public estimation which we claim and to render to the public the services which they are entitled to expect from us. (Rt. Hon. Lord Macmillan, Law and History, from *Law and Other Things*)