BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND AND WALES

The Supreme Court of Mexico

Re. Hugo Sanchez Ramirez

Primera Sala, Suprema Corte de Justicia de la Nación
Amparos Directos: 4/2012 y 5/2012
Facultad de Atracción: 134/2011 y 135/2011
QUEJOSO: Hugo Sánchez Ramírez

AMICUS SUBMISSIONS ON BEHALF OF THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES AND THE SOLICITORS' INTERNATIONAL HUMAN RIGHTS GROUP

February 2012

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1. This document is respectfully addressed to:

Ministro Arturo Zaldívar Lelo de Larrea
Ministro José Ramón Cossío Díaz
Ministro Guillermo I. Ortíz Mayagoitia
Ministro Jorge Mario Pardo Rebolledo
Ministra Olga María del Carmen Sánchez Cordero de García Villegas

of the Supreme Court of Mexico, as a joint submission by the Human Rights Committee of the Bar of England and Wales and the Solicitors' International Human Rights Group.

2. The first named *amicus*, the Bar Human Rights Committee ("BHRC") is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world. It is also concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial.

3. The second named *amicus*, the Solicitors' International Human Rights Group ("SIHRG") promotes awareness of international human rights within the legal profession and mobilises solicitors into effective action in support of those rights. The Group encourages human rights lawyers overseas and conducts related missions, research, campaigns and training. The SIHRG's organisation is designed to

promote the application of solicitors' skills in realising the observance of international human rights standards.

In submitting this short brief, the authors respectfully adopt the legal framework as set out in the complainant's request for ***amparo*** of 18th May 2011, in the Commission's application dated 2nd August 2009 at paragraphs 60-174 and in the resolution of the First Chamber of the Honourable Supreme Court of Justice, in taking direct responsibility for the ***amparo*** proceedings, dated 19th October 2011.

5. In the light of the comprehensive and very careful analysis of the relevant international and regional law and standards contained in the request for **amparo**, with which the authors of this document are in substantial and respectful agreement, they seek to focus their submissions to the Court on a number of specific issues relating to the investigative obligations of the state with direct bearing on the complainant's case.

6. In particular, and in the light of the factual summary of Mr Sanchez's case, as set out in the application for ***amparo*** dated 18th May 2011, made to the Second Circuit Collegiate Court in the State of Mexico, and in the Honourable Supreme Court's resolution, the authors will seek to highlight:

a) Standards and procedures applicable to identification evidence

b) The exclusion of illegally obtained or unsafe evidence

c) Child or vulnerable witnesses and the obtaining of identification evidence.

7) The focus of the information we provide will relate to the standards and landmark legislation and jurisprudence of our jurisdiction and that of **European Court of Human Rights (ECtHR),** and the **European Convention on Human Rights (ECHR)**, with reference, in particular to **Article 6** of the Convention, which has a comparable provision in **Article 8** of the **American Convention on Human Rights**.

ARTICLE 6: Right to a Fair Trial

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and the facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

The Exclusion of illegally obtained evidence

Per curiam, the law of England and Wales places a previous common law judicial discretion on a statutory footing:

Section 78 of the **Police and Criminal Evidence Act 1984**

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, **including the circumstances in which the evidence was obtained,** the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

8) Identification evidence generally

In the authors' jurisdiction, evidence of identification was long the subject of scrutiny before the passing of the ***Police and Criminal Evidence Act 1984*** *and the Codes of Practice issued thereunder. (See Appendix 1) The mistaken identification of a man called Adolf Beck by 15 witnesses led to a Committee of inquiry being set up in 1905, and was substantially responsible for the setting up of the Court of Criminal Appeal in 1907. Concerns surrounding this area of evidence led to the establishment of a Committee to examine Evidence of Identification in the 1970s, under a renowned judge, Lord Devlin, the institution of special procedures in such cases by the then Attorney – General, and the response of the Court of Appeal in* ***R v Turnbull [1977] 63 Cr. App. R. 132, C.A.****,(See Appendix 2) still the leading case on the appropriate approach to such evidence:*

" First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence."

. In 1984, Code D of the Codes of Practice under the 1984 Act was issued. It is informative to consider the judgement in that case (See Appendix 2) and further discussion on the topic in ***R v Forbes[2001] 1A.C.473, H.L.*** *(See Appendix 3)*

9) Identification Procedures under the 1984 Act

Identification procedures are governed by Code D of the Codes of Practice issued under the provisions of the 1984 Act. The current, amended, dispensations came into force on 31st January 2008. The provisions relevant to this discussion relate to visual identification procedures and, in particular, the use of photographs of suspects. Reference is made to decided authority under previous editions of the Code which do not substantially change the situation.

1.1 This Code of Practice concerns the principal methods used by police to identify people in connection with the investigation of offences and the keeping of accurate and reliable criminal records.

1.2 identification by witnesses arises e.g., if the offender is seen committing the crime and a witness is given an opportunity to identify the suspect in a video identification, identification parade or similar procedure. The procedures are designed to:

- **Test the witness' ability to identify the person they saw on a previous occasion,**
- **Provide safeguards against mistaken identification.**

1.5 taking photographs of arrested persons applies to recording and checking identity and locating and tracing persons who:

- **Are wanted for offences**
- **Fail to answer to their bail**

1.7 The provisions of the Police and Criminal Evidence Act 1984 (PACE) and this Code are designed to make sure fingerprints, samples, impressions and photographs are taken, used and retained, and identification procedures carried out, only when justified and necessary for preventing, detecting or investigating crime. If these provisions are not observed, the application of the relevant procedures in particular cases may be open to question.

2.1 This Code must be readily available at all police stations for consultation by:

- **Police officers and support staff**
- **Detained persons**
- **Members of the public**

The provisions of the Code include its annexes.

First description

3.1 A record shall be made of the suspect's description as first given by a potential witness. This record must:

(a) be made and kept in a form which enables details of that description to be accurately produced from it, in a visible and legible form, which can be given to the suspect or the suspect's solicitor in accordance with this Code; and
(b) unless otherwise specified, be made before the witness takes part in any identification procedures under paragraphs 3.5 to 3.10, 3.21 or 3.23.
A copy of the record shall where practicable, be given to the suspect or their solicitor before any procedures under paragraphs 3.5 to 3.10, 3.21 or 3.23 are carried out. See Note 3E

a) Cases where the suspect's identity is not known

3.3 A witness must not be shown photographs, computerised or artist's composite likenesses or similar likenesses or pictures (including 'E-fit' images) if the identity

of the suspect is known to the police and the suspect is available to take part in a video identification, an identification parade or a group identification. If the suspect's identity is not known, the showing of such images to a witness to obtain identification evidence must be done in accordance with *Annex E*.

b) Cases where the suspect is known and available

3.4 If the suspect's identity is known to the police and they are available, the identification procedures set out in paragraphs 3.5 to 3.10 may be used. References in this section to a suspect being 'known' mean there is sufficient information known to the police to justify the arrest of a particular person for suspected involvement in the offence. A suspect being 'available' means they are immediately available or will be within a reasonably short time and willing to take an effective part in at least one of the following which it is practicable to arrange:

- **video identification;**
- **identification parade; or**
- **group identification.**

Video identification

3.5 A "video identification" is when the witness is shown moving images of a known suspect, together with similar images of others who resemble the suspect. Moving images must be used, unless:

- **The suspect is known but not available (see *paragraph 3.21* of the Code); or**
- **In accordance with *paragraph 2A of Annex A* of this Code, the identification officer does not consider that the replication of a physical feature can be achieved or the it is not possible to conceal the location of the feature on the image of the suspect.**

The identification officer may then decide to make use of video identification but using still images.

Video identifications must be carried out in accordance with *Annex A.*

Identification parade

3.7 An "identification parade" is when the witness sees the suspect in a line of others who resemble the suspect.

3.8 Identification parades must be carried out in accordance with *Annex B.*

Group identification

3.9 A "group identification" is when the witness sees the suspect in an informal group of people. *(Per curiam, at e.g. the exit of a Metro station or other such public place, depending on questions of security, flight of the suspect etc.)*

3.10 Group identifications must be carried out in accordance with *Annex C.*

Arranging identification procedures

3.11 Except for the provisions in *paragraph 3.19,* the arrangtements for, and the conduct of, the identification procedures in paragraphs 3.5 to 3.10 and circumstances in which an identification procedure must be held shall be the responsibility of an officer not below inspector rank who is not involved with the investigation, "the identification officer". ……No officer or any other person involved with the investigation of the case against the suspect, beyond the extent required by these procedures, may take any part in these procedures or act as the identification officer……where an identification procedure is required it must be held as soon as practicable.

Circumstances in which an identification procedure must be held

3.12 Whenever:

(i) a witness has identified a suspect or purported to have identified them prior to any identification procedure set out in paragraphs 3.5 to 3.10 having been held; or

(ii) there is a witness available, who expresses an ability to identify the suspect, or where there is a reasonable chance of the witness being able to do so, and they have not been given the opportunity to identify the suspect in any of the procedures set out in paragraphs 3.5 to 3.10, and the suspect disputes being the person the witness claims to have seen, an identification procedure shall be held

unless it is not practicable or it would serve no purpose in proving or disproving whether the suspect was involved in committing the offence. For example, when it is not disputed that the suspect is already well known to the witness who claims to have seen them commit the crime.

Per curiam, by 3.14, the order of precedence established as between the various forms of identification procedure is 1) video identification, 20 identification parade if both practicable and more suitable than 1) 3) group identification. The facts of this case disclose that Hugo Sanchez was in police custody and thus known and available.

By section 67(11) of PACE it is provided that ***"in all criminal and civil proceedings any such code (of practice) shall be admissible in evidence, and if any provision of such code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."***

10) In **R v Forbes [2001] 1 A.C. 473 HL** the House of Lords (nunc Supreme Court) held that paragraph 2.3 (now 3.12) of the Code should not be construed to cover all possible situations; nevertheless it imposed a mandatory obligation on police officers, subject to certain exceptions *specified in the code*, to hold an identification parade whenever the suspect disputed the identification and consented to it. That obligation remained even though the suspect had been unequivocally identified. No distinction could be drawn where the police produced a suspect to a witness and where a witness produced a suspect to the police. The appeal was dismissed because there had been two "untainted", if informal, identifications of the appellant and an assessment of the whole history of the case and its facts led the House to the conclusion that the evidence was rightly admitted, there had been a fair trial and the conviction could not be regarded as unsafe.

In **Forbes**, Lord Bingham of Cornhill reviewed the previous authorities on the subject, in particular **R v Brown [1991] Crim.L.R 368, R v Conway [1990] 91 Cr. App. R. 143, Graham [1990] 91 Crim. L.R 212,** cases in which the failure to hold an identification procedure was held to be a breach of a mandatory requirement of the code. He also reviewed **R v. Popat [1998] 2 Cr.App.R. 208 (see Appendix 4)** where

the legislation and the codes were reviewed and where it was said by Hobhouse LJ that "although section D of the Code of Practice does not contain any broad statement of principle or object, there is a clear objective that identification parades, well conducted, should be the normal method of identification. **It is clearly intended that practices should be avoided which might corrupt or devalue identification evidence.** It is also implicitly recognised that the inability of a witness to pick out a suspect on a formal identification parade may be helpful to the administration of justice and to the suspect should he subsequently have to stand trial." The Lord Justice went on to say in **Popat** "the mandatory obligation……..relates to a situation where a suspect is being produced by the police to a witness, not by the witness to the police. It outlaws the police attempting to obtain an identification of a known suspect by a witness otherwise than by a formal identification parade or one of the other methods of identifying known suspects authorised *by the code.* Further, where a previous identification was made under adverse circumstances or may for other reasons have been unreliable or doubtful, good practice may require that the suspect be put on an identification parade to establish whether the witness can confirm his believed identification. Decided cases illustrate this. There ought to be an identification parade where it would serve a useful purpose. The failure to hold an identification parade may affect the fairness of the trial or the safety of a verdict."

In **Forbes,** Lord Bingham went on to say that there had been a breach in that case of Code D for the following reasons:

(1) Code D is intended to be an intensely practical document, giving police officers clear instructions on the approach that they should follow in specified circumstances. It is not an old fashioned literalism but sound interpretation to read the Code as meaning what it says.

(2) *The code* was revised in 1995 to provide that an identification parade shall be held (if the suspect consents) and unless the exceptions apply) *whenever* a suspect disputes an identification. This imposes a mandatory obligation on the police. There is no warrant for reading additional conditions into this simple text.

(3) Neither the language of Code D nor the decided cases support the distinction drawn in **Popat** between a suspect being produced by the police to a witness rather than by a witness to the police."

(4) *The Court* cannot accept that the mandatory obligation to hold an identification parade…does not apply if there has been a "fully satisfactory" or "actual and

complete" or "unequivocal" identification of the suspect by the relevant witness. Such an approach, in *the Court's* opinion, subverts the clear intention of the Code. First, it replaces an apparently hard edged mandatory obligation by an obviously difficult judgmental decision. Such decisions are bound to lead to challenges in the courts and resulting appeals. Second, it entrusts that decision to a police officer whose primary concern will (perfectly properly) be to promote the investigation and prosecution of crime rather than to protect the interests of the suspect. An identification parade, if held, may, of course, strengthen the prosecution, but it may also protect the suspect against the risk of mistaken identification, and a suspect should not, save in circumstances which are specified or exceptional, be denied his prima facie right to such protection on the decision of a police officer. Third, this approach overlooks the important fact that grave miscarriages of justice have, in the past, occurred from identifications which were "fully satisfactory", "actual and complete" and "unequivocal" but proved to be wholly wrong."

He went on to say in his speech " We agree with the Court of Appeal in **Popat** that *the Code* should not be construed to cover all possible situations. If an eye-witness of a criminal incident makes plain to the police that he cannot identify the culprit, it will very probably be futile to invite that witness to attend an identification parade. If an eye-witness may be able to identify clothing worn by a culprit but not the culprit himself, it will probably be futile to mount an identification parade rather than simply inviting the witness to identify the clothing. If the case is one of pure recognition of someone well-known to the eye-witness, it may again be futile to hold an identification parade. But save in cases such as these, or other, exceptional circumstances, the effect of *the Code* is clear: if (a) the police have sufficient information to justify the arrest of a particular person for suspected involvement in an offence, and (b) an eye-witness has identified **or may be able to identify** that person, and (c) the suspect disputes his identification as person involved in the commission of that offence, an identification parade must be held if (d) the suspect consents and (e) *the exceptions in the Code* do not apply.

The question to the House of Lords, certified by the Court of Appeal **"Do the provisions of paragraph D2.3 *(now paragraph 3.12)* of the Code of Practice apply where a suspect has already been positively identified, whether or not in the manner permitted under *the Code?"*** was answered in the affirmative by the House.

11) Per curiam: it should be noted that these case were concerned with identification parades, i.e. "line ups" rather than video procedures which were not at the time in force, or available. The dispensation today places video procedures at the top of the list of available methods. They are, by their nature, much easier, cheaper and more convenient than the older "line-up" procedures and far more easily arranged. The fact that the House of Lords judgment deals with "line up" parades, with all the difficulties inherent in them, underlines the importance of observing the Code of Practice. The effect of the ***1984 Act*** *and* ***Code D*** *is to place a properly conducted identification procedure as an action of paramount importance in a case involving the identification of suspects. Failure to observe the requirement may well result in evidence of identification being excluded as leading to unfairness in the proceedings. The provisions are in place to protect the integrity of the prosecution as well as to preserve the rights of the suspect, including his right to a fair trial under* ***Article 6 of the European Convention.*** *See also* **R v Preddie [2011 EWCA Crim. 312 (See Appendix 5)**

12) Section 78 of The Police and Criminal Evidence Act 1984 and Code D

This exclusionary provision comes into play where questions of improperly obtained identifications are concerned. The section deals with the adverse effect on the fairness of the proceedings inherent in admitting such evidence. Whilst it is important that the ***Code*** *should be observed, under this provision, where there has been a breach, it is for the trial judge, in the exercise of his discretion, and after hearing submissions from both parties, to decide whether or not to allow the challenged evidence to be given, by applying the test prescribed by* ***section 78.*** *The fundamental issue whether the* ***Code*** *applies or not, will be whether the identification evidence would have such an adverse effect on the fairness of the proceedings that it should be excluded. Where insufficient regard is had to fair identification practices and adducing reliable identification evidence, the discretion under* ***section 78*** *is likely to be exercised, in the absence of which, convictions are likely to be treated as unsafe.* **R v. Popat (above).**

Each case must be determined on its own facts, such is the exercise of judicial discretion; the resolution of two preliminary issues should be of considerable assistance in determining the fundamental issue as to the fairness of the proceedings.

First, did the breach of the ***Code*** *give rise to the mischief which the* ***Code*** *was designed to prevent? If so, the identification may be flawed. Secondly was the breach*

*caused by a flagrant disregard for the **Code**, or was the breach, or the cumulative effect of more than one breach, capable of engendering considerable suspicion that the identification procedure was unfair? If so, even if the breach of a particular provision did not lead to the mischief intended to be prevented, the evidence of identification may be so tainted with unfairness that it should not be admitted. The **Court of Appeal** in* **R v. Walsh 91 Cr.App.R 161** *stated that significant and substantial breaches of the(1984) **Act** or the **Codes** mean that "prima facie, at least, the standards of fairness set by Parliament have not been met." " So far as a defendant is concerned, it seems to us also to follow that to admit evidence against him which has been obtained in circumstances where these standards have not been met, cannot but have an adverse effect on the proceedings. This does not mean, of course, that in every case of a significant or substantial breach of...the Code of Practice the evidence will automatically be excluded. Section 78 does not so provide. The task of the Court is not merely to consider whether there would be an adverse effect on the fairness of the proceedings, but such an adverse effect that justice requires the evidence to be excluded."*

*13) The **Criminal Appeals Act 1968, section 2** provides:*

2(1) Subject to the provisions of this Act, the Court of Appeal –

(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and

(b) shall dismiss such an appeal in any other case.

*Per curiam: If a conviction is tainted by unfairness, it is submitted that because of the operation of **Article 6 of ECHR,** that conviction should be viewed as unsafe. A conviction at the end of a trial which fails to match up to the requirements of Article 6 can never be anything other than unsafe.*

14) Conclusions

The authors of these submissions contend that the evidence of identification would not have been admitted into the trial process in our jurisdiction. If they were admitted at trial, the conviction would have been regarded as unsafe by the Court of Appeal. The reasoning for these conclusions is as follows:

1) No proper identification proceedings were carried out as set out in **Code D**. *No appropriate safeguards to preserve the integrity of the identification were in place.*

2) The showing of photographs of arrested suspects to the witnesses, in the manner in which they were shown, would have been wholly objectionable in our jurisdiction and a significant or substantial breach of the ***Code****.*

3) The 10 photographs shown to the witnesses were of three suspects and did not include control photographs of any other person who was not a suspect.

4) Witness not to be prompted or guided

Annex E

D:5. When the witness is shown the photographs, they shall be told the photograph of the person they saw may, or may not, be amongst them and if they cannot make a positive identification, they should say so. The witness shall also be told they should not make a decision until they have viewed at least twelve photographs. The witness shall not be prompted or guided in any way but shall be left to make any selection without help.

5) The photographs of the complainant Hugo Sanchez, as shown to the witnesses were tendentious and suggestive to a quite unacceptable degree, in that they showed images of the complainant posed carrying a placard which identifies him by name and, further, identified the complainant as being held for crimes of carrying firearms and kidnapping. An identification based on such material would certainly have been excluded from evidence, if, in the unlikely event, the prosecution had sought to rely on it. Stretching for the furthermost bounds of possibility, if it had been allowed as evidence, and if a conviction had followed, the Court of Appeal, in our opinion would have quashed the conviction as being unsafe.

6) The initial statements of the two witnesses that they would be unable to identify the culprit would have been given considerable weight in the assessment of an identification, which was deeply flawed for other reasons in any event.

7) Equally their subsequent retractions of their identifications would have affected the view taken of the product of already flawed procedures.

8) No lawyer appears to have been present at the showing of the photographs to the witnesses, nor is there any indication as to whether the complainant was given a reasonable opportunity to have a lawyer or friend present. ***(Code D Annex B paragraph D:1)***

9) ***Annex E of Code D at D6*** *provides that "if a witness makes a positive identification from photographs, unless the person identified is otherwise eliminated from enquiries or is not available, other witnesses shall not be shown photographs, but both they and the witness who has made the identification, shall be asked to attend a video identification, an identification parade or participate in a group identification unless there is no dispute about the suspect's identification." This did not happen in the complainant's case and would be considered a significant breach in this jurisdiction, even more so taking into account the communication between the two witnesses in the period between their respective identifications.*

10) Although the situation pertaining at the time of the purported identifications is not clear to the authors at this time, the Honourable Supreme Court is respectfully asked to consider the following provisions:

2.15A Any procedure in this Code involving the participation of a witness who is or appears to be mentally disordered, otherwise mentally vulnerable or a juvenile should take place in the presence of a pre-trial support person unless the witness states that they do not want a support person to be present. A support person

must not be allowed to prompt any identification of a suspect by a witness. See Note 2AB.

2AB The Youth Justice and Criminal Evidence Act 1999 guidance "Achieving Best Evidence in Criminal Proceedings" indicates that a pre-trial support person should accompany a vulnerable witness during any identification procedure unless the witness states that they do not want a support person to be present. It states that this support person should not be (or not be likely to be) a witness in the investigation.

For all the above reasons the authors conclude that the identification of the complainant was deeply flawed and had his trial taken place in this jurisdiction the operation of section 78 PACE 1984 and Article 6 ECHR would have resulted in the exclusion of any such evidence, failing which, on Appeal, the conviction would have been quashed as unsafe

Dated: 14 February 2012 **Respectfully submitted,**

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Representatives for the Amici Curiae

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Appendix 1

POLICE AND CRIMINAL EVIDENCE ACT 1984

CODE D

CODE OF PRACTICE FOR THE IDENTIFICATION OF PERSONS BY POLICE OFFICERS

Commencement - Transitional Arrangements
This code has effect in relation to any identification procedure carried out after midnight on 31 January 2008

1 Introduction

1.1 This Code of Practice concerns the principal methods used by police to identify people in connection with the investigation of offences and the keeping of accurate and reliable criminal records.

1.2 Identification by witnesses arises, e.g., if the offender is seen committing the crime and a witness is given an opportunity to identify the suspect in a video identification, identification parade or similar procedure. The procedures are designed to:

• test the witness' ability to identify the person they saw on a previous occasion
• provide safeguards against mistaken identification.

While this Code concentrates on visual identification procedures, it does not preclude the police making use of aural identification procedures such as a "voice identification parade", where they judge that appropriate.

1.3 Identification by fingerprints applies when a person's fingerprints are taken to:

• compare with fingerprints found at the scene of a crime

• check and prove convictions

• help to ascertain a person's identity.

1.3A Identification using footwear impressions applies when a person's footwear impressions are taken to compare with impressions found at the scene of a crime.

1.4 Identification by body samples and impressions includes taking samples such as blood or hair to generate a DNA profile for comparison with material obtained from the scene of a crime, or a victim.

1.5 Taking photographs of arrested people applies to recording and checking identity and locating and tracing persons who:
• are wanted for offences
• fail to answer their bail.

1.6 Another method of identification involves searching and examining detained suspects to find, e.g., marks such as tattoos or scars which may help establish their identity or whether they have been involved in committing an offence.

1.7 The provisions of the Police and Criminal Evidence Act 1984 (PACE) and this Code are designed to make sure fingerprints, samples, impressions and photographs are taken, used and retained, and identification procedures carried out, only when justified and necessary for preventing, detecting or investigating crime. If these provisions are not observed, the application of the relevant procedures in particular cases may be open to question.

2 General
2.1 This Code must be readily available at all police stations for consultation by:
• police officers and police staff
• detained persons
• members of the public

2.2 The provisions of this Code:
• include the Annexes
• do not include the Notes for guidance.

2.3 Code C, paragraph 1.4, regarding a person who may be mentally disordered or otherwise mentally vulnerable and the Notes for guidance applicable to those

provisions apply to this Code.

2.4 Code C, paragraph 1.5, regarding a person who appears to be under the age of 17 applies to this Code.

2.5 Code C, paragraph 1.6, regarding a person who appears blind, seriously visually impaired, deaf, unable to read or speak or has difficulty orally because of a speech impediment applies to this Code.

2.6 In this Code:
• 'appropriate adult' means the same as in Code C, paragraph 1.7,
• 'solicitor' means the same as in Code C, paragraph 6.12
and the Notes for guidance applicable to those provisions apply to this Code.

2.7 References to custody officers include those performing the functions of custody officer, see paragraph 1.9 of Code C.

2.8 When a record of any action requiring the authority of an officer of a specified rank is made under this Code, subject to paragraph 2.18, the officer's name and rank must be recorded.

2.9 When this Code requires the prior authority or agreement of an officer of at least inspector or superintendent rank, that authority may be given by a sergeant or chief inspector who has been authorised to perform the functions of the higher rank under PACE, section 107.

2.10 Subject to paragraph 2.18, all records must be timed and signed by the maker.

2.11 Records must be made in the custody record, unless otherwise specified. References to 'pocket book' include any official report book issued to police officers or police staff.

2.12 If any procedure in this Code requires a person's consent, the consent of a:
• mentally disordered or otherwise mentally vulnerable person is only valid if given in the presence of the appropriate adult

• juvenile, is only valid if their parent's or guardian's consent is also obtained unless the juvenile is under 14, when their parent's or guardian's consent is sufficient in its own right. If the only obstacle to an identification procedure in section 3 is that a juvenile's parent or guardian refuses consent or reasonable efforts to obtain it have failed, the identification officer may apply the provisions of paragraph 3.21. See Note 2A.

2.13 If a person is blind, seriously visually impaired or unable to read, the custody officer or identification officer shall make sure their solicitor, relative, appropriate adult or some other person likely to take an interest in them and not involved in the investigation is available to help check any documentation.When this Code requires written consent or signing, the person assisting may be asked to sign instead, if the detainee prefers. This paragraph does not require an appropriate adult to be called solely to assist in checking and signing documentation for a person who is not a juvenile, or mentally disordered or otherwise mentally vulnerable (see Note 2B and Code C paragraph 3.15).

2.14 If any procedure in this Code requires information to be given to or sought from a suspect, it must be given or sought in the appropriate adult's presence if the suspect is mentally disordered, otherwise mentally vulnerable or a juvenile. If the appropriate adult is not present when the information is first given or sought, the procedure must be repeated in the presence of the appropriate adult when they arrive. If the suspect appears deaf or there is doubt about their hearing or speaking ability or ability to understand English, and effective communication cannot be established, the information must be given or sought through an interpreter.

2.15 Any procedure in this Code involving the participation of a suspect who is mentally disordered, otherwise mentally vulnerable or a juvenile must take place in the presence of the appropriate adult. See Code C paragraph 1.4.

2.15A Any procedure in this Code involving the participation of a witness who is or appears to be mentally disordered, otherwise mentally vulnerable or a juvenile should take place in the presence of a pre-trial support person.However, the support-person must not be allowed to prompt any identification of a suspect by a witness. See Note 2AB.

2.16 References to:

• 'taking a photograph', include the use of any process to produce a single, still or moving, visual image

• 'photographing a person', should be construed accordingly

• 'photographs', 'films', 'negatives' and 'copies' include relevant visual images recorded, stored, or reproduced through any medium

• 'destruction' includes the deletion of computer data relating to such images or making access to that data impossible.

2.17 Except as described, nothing in this Code affects the powers and procedures:
(i) for requiring and taking samples of breath, blood and urine in relation to driving offences, etc, when under the influence of drink, drugs or excess alcohol under the:

• Road Traffic Act 1988, sections 4 to 11

• Road Traffic Offenders Act 1988, sections 15 and 16

• Transport and Works Act 1992, sections 26 to 38;

(ii) under the Immigration Act 1971, Schedule 2, paragraph 18, for taking photographs and fingerprints from persons detained under that Act, Schedule 2, paragraph 16 (Administrative Controls as to Control on Entry etc.); for taking fingerprints in accordance with the Immigration and Asylum Act 1999; sections 141 and 142(3), or other methods for collecting information about a person's external physical characteristics provided for by regulations made under that Act, section 144;

(iii) under the Terrorism Act 2000, Schedule 8, for taking photographs, fingerprints, skin impressions, body samples or impressions from people:

• arrested under that Act, section 41,

• detained for the purposes of examination under that Act, Schedule 7, and to whom the Code of Practice issued under that Act, Schedule 14, paragraph 6, applies ('the terrorism provisions')
See Note 2C;

(iv) for taking photographs, fingerprints, skin impressions, body samples or impressions from people who have been:

• arrested on warrants issued in Scotland, by officers exercising powers under the Criminal Justice and Public Order Act 1994, section 136(2)

• arrested or detained without warrant by officers from a police force in Scotland exercising their powers of arrest or detention under the

Criminal Justice and Public Order Act 1994, section 137(2), (Cross Border powers of arrest etc.).

Note: In these cases, police powers and duties and the person's rights and entitlements whilst at a police station in England and Wales are the same as if the person had been arrested in Scotland by a Scottish police officer.

2.18 Nothing in this Code requires the identity of officers or police staff to be recorded or disclosed:

(a) in the case of enquiries linked to the investigation of terrorism;

(b) if the officers or police staff reasonably believe recording or disclosing their names might put them in danger.
In these cases, they shall use warrant or other identification numbers and the name of their police station. See Note 2D
2.19 In this Code:

(a) 'designated person' means a person other than a police officer, designated under the Police Reform Act 2002, Part 4, who has specified powers and duties of police officers conferred or imposed on them;
(b) any reference to a police officer includes a designated person acting in the exercise or performance of the powers and duties conferred or imposed on them by their designation.

2.20 If a power conferred on a designated person:

(a) allows reasonable force to be used when exercised by a police officer, a designated person exercising that power has the same entitlement to use force;

(b) includes power to use force to enter any premises, that power is not exercisable by that designated person except:

(i) in the company, and under the supervision, of a police officer; or

(ii) for the purpose of:
• saving life or limb; or
• preventing serious damage to property.

2.21 Nothing in this Code prevents the custody officer, or other officer given custody of the detainee, from allowing police staff who are not designated persons to carry out individual procedures or tasks at the police station if the law allows. However, the officer remains responsible for making sure the procedures and tasks are carried out correctly in accordance with the Codes of Practice. Any such person must be:
(a) a person employed by a police authority maintaining a police force and under the control and direction of the Chief Officer of that force;
(b) employed by a person with whom a police authority has a contract for the provision of services relating to persons arrested or otherwise in custody.

2.22 Designated persons and other police staff must have regard to any relevant provisions of the Codes of Practice.

Notes for guidance

2A For the purposes of paragraph 2.12, the consent required from a parent or guardian may, for a juvenile in the care of a local authority or voluntary organisation, be given by that authority or organisation. In the case of a juvenile, nothing in paragraph 2.12 requires the parent, guardian or representative of a local authority or voluntary organisation to be present to give their consent, unless they are acting as the

appropriate adult under paragraphs 2.14 or 2.15. However, it is important that a parent or guardian not present is fully informed before being asked to consent. They must be given the same information about the procedure and the juvenile's suspected involvement in the offence as the juvenile and appropriate adult. The parent or guardian must also be allowed to speak to the juvenile and the appropriate adult if they wish. Provided the consent is fully informed and is not withdrawn, it may be obtained at any time before the procedure takes place.

2AB The Youth Justice and Criminal Evidence Act 1999 guidance "Achieving Best Evidence in Criminal Proceedings" indicates that a pre-trial support person should accompany a vulnerable witness during any identification procedure. It states that this support person should not be (or not be likely to be) a witness in the investigation.

2B People who are seriously visually impaired or unable to read may be unwilling to sign police documents. The alternative, i.e. their representative signing on their behalf, seeks to protect the interests of both police and suspects.

2C Photographs, fingerprints, samples and impressions may be taken from a person detained under the terrorism provisions to help determine whether they are, or have been, involved in terrorism, as well as when there are reasonable grounds for suspecting their involvement in a particular offence.
2D The purpose of paragraph 2.18(b) is to protect those involved in serious organised crime investigations or arrests of particularly violent suspects when there is reliable information that those arrested or their associates may threaten or cause harm to the officers. In cases of doubt, an officer of inspector rank or above should be consulted.

3 Identification by witnesses

3.1 A record shall be made of the suspect's description as first given by a potential witness. This record must:

(a) be made and kept in a form which enables details of that description to be accurately produced from it, in a visible and legible form, which can be given to the suspect or the suspect's solicitor in accordance with this Code; and

(b) unless otherwise specified, be made before the witness takes part in any identification procedures under paragraphs 3.5 to 3.10, 3.21 or 3.23.
A copy of the record shall where practicable, be given to the suspect or their solicitor before any procedures under paragraphs 3.5 to 3.10, 3.21 or 3.23 are carried out.
See Note 3E

(a) Cases when the suspect's identity is not known

3.2 In cases when the suspect's identity is not known, a witness may be taken to a particular neighbourhood or place to see whether they can identify the person they saw. Although the number, age, sex, race, general description and style of clothing of other people present at the location and the way in which any identification is made cannot be controlled, the principles applicable to the formal procedures under paragraphs 3.5 to 3.10 shall be followed as far as practicable. For example:

(a) where it is practicable to do so, a record should be made of the witness' description of the suspect, as in paragraph 3.1(a), before asking the witness to make an identification;

(b) care must be taken not to direct the witness' attention to any individual unless, taking into account all the circumstances, this cannot be avoided. However, this does not prevent a witness being asked to look carefully at the people around at the time or to look towards a group or in a particular direction, if this appears necessary to make sure that the witness does not overlook a possible suspect simply because the witness is looking in the opposite direction and also to

enable the witness to make comparisons between any suspect and others who are in the area; See Note 3F

(c) where there is more than one witness, every effort should be made to keep them separate and witnesses should be taken to see whether they can identify a person independently;

(d) once there is sufficient information to justify the arrest of a particular individual for suspected involvement in the offence, e.g., after a witness makes a positive identification, the provisions set out from paragraph 3.4 onwards shall apply for any other witnesses in relation to that individual. Subject to paragraphs 3.12 and 3.13, it is not necessary for the witness who makes such a positive identification to take part in a further procedure;

(e) the officer or police staff accompanying the witness must record, in their pocket book, the action taken as soon as, and in as much detail, as possible. The record should include: the date, time and place of the relevant occasion the witness claims to have previously seen the suspect; where any identification was made; how it was made and the conditions at the time (e.g., the distance the witness was from the suspect, the weather and light); if the witness's attention was drawn to the suspect; the reason for this; and anything said by the witness or the suspect about the identification or the conduct of the procedure.

3.3 A witness must not be shown photographs, computerised or artist's composite likenesses or similar likenesses or pictures (including 'E-fit' images) if the identity of the suspect is known to the police and the suspect is available to take part in a video identification, an identification parade or a group identification. If the suspect's identity is not known, the showing of such images to a witness to obtain identification evidence must be done in accordance with Annex E.

(**b) Cases when the suspect is known and available**

3.4 If the suspect's identity is known to the police and they are available, the identification procedures set out in paragraphs 3.5 to 3.10 may be used. References in this section to a suspect being 'known' mean there is sufficient information known to the police to justify the arrest of a particular person for suspected involvement in the offence. A suspect being 'available' means they are immediately available or will be within a reasonably short time and willing to take an effective part in at least one of the following which it is practicable to arrange:

• video identification;

• identification parade; or

• group identification.

Video identification

3.5 A 'video identification' is when the witness is shown moving images of a known suspect, together with similar images of others who resemble the suspect. Moving images must be used unless:
• the suspect is known but not available (see paragraph 3.21 of this Code); or
• in accordance with paragraph 2A of Annex A of this Code, the identification officer does not consider that replication of a physical feature can be achieved or that it is not possible to conceal the location of the feature on the image of the suspect.
The identification officer may then decide to make use of video identification but using still images.

3.6 Video identifications must be carried out in accordance with Annex A.
Identification parade

3.7 An ‘identification parade’ is when the witness sees the suspect in a line of others who resemble the suspect.

3.8 Identification parades must be carried out in accordance with Annex B.
Group identification

3.9 A ‘group identification’ is when the witness sees the suspect in an informal group of people.

3.10 Group identifications must be carried out in accordance with Annex C.

Arranging identification procedures

3.11 Except for the provisions in paragraph 3.19, the arrangements for, and conduct of, the identification procedures in paragraphs 3.5 to 3.10 and circumstances in which an identification procedure must be held shall be the responsibility of an officer not below inspector rank who is not involved with the investigation, ‘the identification officer’. Unless otherwise specified, the identification officer may allow another officer or police staff, see paragraph 2.21, to make arrangements for, and conduct, any of these identification procedures. In delegating these procedures, the identification officer must be able to supervise effectively and either intervene or be contacted for advice. No officer or any other person involved with the investigation of the case against the suspect, beyond the extent required by these procedures, may take any part in these procedures or act as the identification officer. This does not prevent the identification officer from consulting the officer in charge of the investigation to determine which procedure to use. When an identification procedure is required, in the interest of fairness to suspects and witnesses, it must be held as soon as practicable.
Circumstances in which an identification procedure must be held

3.12 Whenever:

(i) a witness has identified a suspect or purported to have identified them prior to any identification procedure set out in paragraphs 3.5 to 3.10 having been held;

or

(ii) there is a witness available, who expresses an ability to identify the suspect, or where there is a reasonable chance of the witness being able to do so, and they have not been given an opportunity to identify the suspect in any of the procedures set out in paragraphs 3.5 to 3.10,
and the suspect disputes being the person the witness claims to have seen, an identification procedure shall be held unless it is not practicable or it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence. For example, when it is not disputed that the suspect is already well known to the witness who claims to have seen them commit the crime.

3.13 Such a procedure may also be held if the officer in charge of the investigation considers it would be useful.

Selecting an identification procedure

3.14 If, because of paragraph 3.12, an identification procedure is to be held, the suspect shall initially be offered a video identification unless:

a) a video identification is not practicable; or

b) an identification parade is both practicable and more suitable than a video

identification; or

c) paragraph 3.16 applies.
The identification officer and the officer in charge of the investigation shall consult each other to determine which option is to be offered. An identification parade may not be practicable because of factors relating to the witnesses, such as their number, state of health, availability and travelling requirements. A video identification would normally be more suitable if it could be arranged and completed sooner than an identification parade.

3.15 A suspect who refuses the identification procedure first offered shall be asked to state their reason for refusing and may get advice from their solicitor and/or if present, their appropriate adult. The suspect, solicitor and/or appropriate adult shall be allowed to make representations about why another procedure should be used. A record should be made of the reasons for refusal and any representations made. After considering any reasons given, and representations made, the identification officer shall, if appropriate, arrange for the suspect to be offered an alternative which the officer considers suitable and practicable. If the officer decides it is not suitable and practicable to offer an alternative identification procedure, the reasons for that decision shall be recorded.

3.16 A group identification may initially be offered if the officer in charge of the investigation considers it is more suitable than a video identification or an identification parade and the identification officer considers it practicable to arrange.

Notice to suspect

3.17 Unless paragraph 3.20 applies, before a video identification, an identification parade or group identification is arranged, the following shall be explained to the suspect:

(i) the purposes of the video identification, identification parade or group identification;
(ii) their entitlement to free legal advice; see Code C, paragraph 6.5;

(iii) the procedures for holding it, including their right to have a solicitor or friend present;

(iv) that they do not have to consent to or co-operate in a video identification, identification parade or group identification;

(v) that if they do not consent to, and co-operate in, a video identification, identification parade or group identification, their refusal may be given in evidence in any subsequent trial and police may proceed covertly without their consent or make other arrangements to test whether a witness can identify them, see paragraph 3.21;

(vi) whether, for the purposes of the video identification procedure, images of them have previously been obtained, see paragraph 3.20, and if so, that they may co-operate in providing further, suitable images to be used instead;

(vii) if appropriate, the special arrangements for juveniles;

(viii) if appropriate, the special arrangements for mentally disordered or otherwise mentally vulnerable people;

(ix) that if they significantly alter their appearance between being offered an identification procedure and any attempt to hold an identification procedure, this may be given in evidence if the case comes to trial, and the identification officer may then consider other forms of identification, see paragraph 3.21 and Note 3C;

(x) that a moving image or photograph may be taken of them when they attend for any identification procedure;

(xi) whether, before their identity became known, the witness was shown photographs, a computerised or artist's composite likeness or similar likeness or image by the police, see Note 3B;

(xii) that if they change their appearance before an identification parade, it may not be practicable to arrange one on the day or subsequently and, because of the appearance change, the identification officer may consider alternative methods of identification, see Note 3C;

(xiii) that they or their solicitor will be provided with details of the description of the suspect as first given by any witnesses who are to attend the video identification, identification parade, group identification or confrontation, see paragraph 3.1.

3.18 This information must also be recorded in a written notice handed to the suspect.The suspect must be given a reasonable opportunity to read the notice, after which, they should be asked to sign a second copy to indicate if they are willing to co-operate with the making of a video or take part in the identification parade or group identification. The signed copy shall be retained by the identification officer.

3.19 The duties of the identification officer under paragraphs 3.17 and 3.18 may be performed by the custody officer or other officer not involved in the investigation if:
(a) it is proposed to release the suspect in order that an identification procedure can be arranged and carried out and an inspector is not available to act as the identification officer, see paragraph 3.11, before the suspect leaves the station;

or

(b) it is proposed to keep the suspect in police detention whilst the procedure is arranged and carried out and waiting for an inspector to act as the identification officer, see paragraph 3.11, would cause unreasonable delay to the investigation.
The officer concerned shall inform the identification officer of the action taken and give them the signed copy of the notice. See Note 3C

3.20 If the identification officer and officer in charge of the investigation suspect, on reasonable grounds that if the suspect was given the information and notice as in paragraphs 3.17 and 3.18, they would then take steps to avoid being seen by a witness in any identification procedure, the identification officer may arrange for images of the suspect suitable for use in a video identification procedure to be obtained before giving the information and notice. If suspect's images are obtained in these circumstances, the suspect may, for the purposes of a video identification procedure, co-operate in providing new images which if suitable, would be used instead, see paragraph 3.17(vi).

(c) Cases when the suspect is known but not available

3.21 When a known suspect is not available or has ceased to be available, see paragraph 3.4, the identification officer may make arrangements for a video identification (see Annex A). If necessary, the identification officer may follow the video identification procedures but using still images. Any suitable moving or still images may be used and these may be obtained covertly if necessary. Alternatively, the identification officer may make arrangements for a group identification. See Note 3D. These provisions may also be applied to juveniles where the consent of their parent or guardian is either refused or reasonable efforts to obtain that consent have failed (see paragraph 2.12).

3.22 Any covert activity should be strictly limited to that necessary to test the ability of the witness to identify the suspect.

3.23 The identification officer may arrange for the suspect to be confronted by the witness if none of the options referred to in paragraphs 3.5 to 3.10 or 3.21 are practicable. A "confrontation" is when the suspect is directly confronted by the witness. A confrontation does not require the suspect's consent. Confrontations must be carried out in accordance with Annex D.

3.24 Requirements for information to be given to, or sought from, a suspect or for the suspect to be given an opportunity to view images before they are shown to a witness, do not apply if the suspect's lack of co-operation prevents the necessary action.

(d) Documentation

3.25 A record shall be made of the video identification, identification parade, group identification or confrontation on forms provided for the purpose.

3.26 If the identification officer considers it is not practicable to hold a video identification or identification parade requested by the suspect, the reasons shall be recorded and explained to the suspect.

3.27 A record shall be made of a person's failure or refusal to co-operate in a video identification, identification parade or group identification and, if applicable, of the grounds for obtaining images in accordance with paragraph 3.20.
(e) Showing films and photographs of incidents and information released to the Media

3.28 Nothing in this Code inhibits showing films or photographs to the public through the national or local media, or to police officers for the purposes of recognition and tracing suspects. However, when such material is shown to potential witnesses, including police officers, see Note 3A, to obtain identification evidence, it shall be shown on an individual basis to avoid any possibility of collusion, and, as far as possible, the showing shall follow the principles for video identification if the suspect is known, see Annex A, or identification by photographs if the suspect is not known, see Annex E.

3.29 When a broadcast or publication is made, see paragraph 3.28, a copy of the relevant material released to the media for the purposes of recognising or tracing the suspect, shall be kept. The suspect or their solicitor shall be allowed to view such material before any procedures under paragraphs 3.5 to 3.10, 3.21 or 3.23 are carried out, provided it is practicable and would not unreasonably delay the investigation. Each witness involved in the procedure shall be asked, after they have taken part, whether they have seen any broadcast or published films or photographs relating to the offence or any description of the suspect and their replies shall be recorded. This paragraph does not affect any separate requirement under the Criminal Procedure and Investigations Act 1996 to retain material in connection with criminal investigations.

(f) Destruction and retention of photographs taken or used in identification Procedures

3.30 PACE, section 64A, see paragraph 5.12, provides powers to take photographs of suspects and allows these photographs to be used or disclosed only for purposes related to the prevention or detection of crime, the investigation of offences or the conduct of prosecutions by, or on behalf of, police or other law enforcement and prosecuting authorities inside and outside the United Kingdom or the enforcement of a sentence. After being so used or disclosed, they may be retained but can only be used or disclosed for the same purposes.

3.31 Subject to paragraph 3.33, the photographs (and all negatives and copies), of suspects not taken in accordance with the provisions in paragraph 5.12 which are taken for the purposes of, or in connection with, the identification procedures in paragraphs 3.5 to 3.10, 3.21 or 3.23 must be destroyed unless the suspect:

(a) is charged with, or informed they may be prosecuted for, a recordable offence;
(b) is prosecuted for a recordable offence;

(c) is cautioned for a recordable offence or given a warning or reprimand in accordance with the Crime and Disorder Act 1998 for a recordable offence; or

(d) gives informed consent, in writing, for the photograph or images to be retained for purposes described in paragraph 3.30.

3.32 When paragraph 3.31 requires the destruction of any photograph, the person must be given an opportunity to witness the destruction or to have a certificate confirming the destruction if they request one within five days of being informed that the destruction is required.

3.33 Nothing in paragraph 3.31 affects any separate requirement under the Criminal Procedure and Investigations Act 1996 to retain material in connection with criminal investigations.

Notes for guidance

3A Except for the provisions of Annex E, paragraph 1, a police officer who is a witness for the purposes of this part of the Code is subject to the same principles and procedures as a civilian witness.

3B When a witness attending an identification procedure has previously been shown photographs, or been shown or provided with computerised or artist's composite likenesses, or similar likenesses or pictures, it is the officer in charge of the investigation's responsibility to make the identification officer aware of this.

3C The purpose of paragraph 3.19 is to avoid or reduce delay in arranging identification procedures by enabling the required information and warnings, see sub-paragraphs 3.17(ix) and 3.17(xii), to be given at the earliest opportunity.

3D Paragraph 3.21 would apply when a known suspect deliberately makes themself 'unavailable' in order to delay or frustrate arrangements for obtaining identification evidence. It also applies when a suspect refuses or fails to take part in a video identification, an identification parade or a group identification, or refuses or fails to take part in the only practicable options from that list. It enables any suitable images of the suspect, moving or still, which are available or can be obtained, to be used in an identification procedure. Examples include images from custody and other CCTV systems and from visually recorded interview records, see Code F Note for Guidance 2D.

3E When it is proposed to show photographs to a witness in accordance with Annex E, it is the responsibility of the officer in charge of the investigation to confirm to the officer responsible for supervising and directing the showing, that the first description of the suspect given by that witness has been recorded. If this description has not been recorded, the procedure under Annex E must be postponed. See Annex E paragraph 2

3F The admissibility and value of identification evidence obtained when carrying out the procedure under paragraph 3.2 may be compromised if:

(a) before a person is identified, the witness' attention is specifically drawn to that

person; or

(b) the suspect's identity becomes known before the procedure.

4 Identification by fingerprints and footwear impressions

(A) Taking fingerprints in connection with a criminal investigation

(a) General

4.1 References to 'fingerprints' means any record, produced by any method, of the skin pattern and other physical characteristics or features of a person's:

(i) fingers; or

(ii) palms.

(b) Action

4.2 A person's fingerprints may be taken in connection with the investigation of an offence only with their consent or if paragraph 4.3 applies. If the person is at a police station consent must be in writing.

4.3 PACE, section 61, provides powers to take fingerprints without consent from any person over the age of ten years:

(a) under section 61(3), from a person detained at a police station in consequence of being arrested for a recordable offence, see Note 4A, if they have not had their fingerprints taken in the course of the investigation of the offence unless those previously taken fingerprints are not a complete set or some or all of those fingerprints are not of sufficient quality to allow satisfactory analysis, comparison or matching.

(b) under section 61(4), from a person detained at a police station who has been charged with a recordable offence, see Note 4A, or informed they will be reported for such an offence if they have not had their fingerprints taken in the course of the investigation of the offence unless those previously taken fingerprints are not a complete set or some or all of those fingerprints are not of sufficient quality to allow satisfactory analysis, comparison or matching.

(c) under section 61(4A), from a person who has been bailed to appear at a court or police station if the person:

(i) has answered to bail for a person whose fingerprints were taken previously and there are reasonable grounds for believing they are not the same person; or

(ii) who has answered to bail claims to be a different person from a person whose fingerprints were previously taken;
and in either case, the court or an officer of inspector rank or above, authorises the fingerprints to be taken at the court or police station;

(d) under section 61(6), from a person who has been:

(i) convicted of a recordable offence;

(ii) given a caution in respect of a recordable offence which, at the time of the caution, the person admitted; or

(iii) warned or reprimanded under the Crime and Disorder Act 1998, section

65, for a recordable offence.

4.4 PACE, section 27, provides power to:

(a) require the person as in paragraph 4.3(d) to attend a police station to have their fingerprints taken if the:

(i) person has not been in police detention for the offence and has not had their fingerprints taken in the course of the investigation of that offence; or

(ii) fingerprints that were taken from the person in the course of the investigation of that offence, do not constitute a complete set or some, or all, of the fingerprints are not of sufficient quality to allow satisfactory analysis, comparison or matching; and

(b) arrest, without warrant, a person who fails to comply with the requirement.

Note: The requirement must be made within one month of the date the person is convicted, cautioned, warned or reprimanded and the person must be given a period of at least 7 days within which to attend. This 7 day period need not fall during the month allowed for making the requirement.

4.5 A person's fingerprints may be taken, as above, electronically.

4.6 Reasonable force may be used, if necessary, to take a person's fingerprints without their consent under the powers as in paragraphs 4.3 and 4.4.

4.7 Before any fingerprints are taken with, or without, consent as above, the person must be informed:

(a) of the reason their fingerprints are to be taken;

(b) of the grounds on which the relevant authority has been given if the power mentioned in paragraph 4.3 (c) applies;

(c) that their fingerprints may be retained and may be subject of a speculative search against other fingerprints, see Note 4B, unless destruction of the fingerprints is required in accordance with Annex F, Part (a); and

(d) that if their fingerprints are required to be destroyed, they may witness their

destruction as provided for in Annex F, Part (a).

(c) Documentation

4.8 A record must be made as soon as possible, of the reason for taking a person's fingerprints without consent. If force is used, a record shall be made of the circumstances and those present.

4.9 A record shall be made when a person has been informed under the terms of paragraph 4.7(c), of the possibility that their fingerprints may be subject of a speculative search.

(B) Taking fingerprints in connection with immigration enquiries

Action

4.10 A person's fingerprints may be taken for the purposes of Immigration Service enquiries in accordance with powers and procedures other than under PACE and for

which the Immigration Service (not the police) are responsible, only with the person's consent in writing or if paragraph 4.11 applies.

4.11 Powers to take fingerprints for these purposes without consent are given to police and immigration officers under the:

(a) Immigration Act 1971, Schedule 2, paragraph 18(2), when it is reasonably necessary for the purposes of identifying a person detained under the Immigration Act 1971, Schedule 2, paragraph 16 (Detention of person liable to examination or removal);

(b) Immigration and Asylum Act 1999, section 141(7)(a), from a person who fails to produce, on arrival, a valid passport with a photograph or some other document satisfactorily establishing their identity and nationality if an immigration officer does not consider the person has a reasonable excuse for the failure;

(c) Immigration and Asylum Act 1999, section 141(7)(b), from a person who has been refused entry to the UK but has been temporarily admitted if an immigration officer reasonably suspects the person might break a condition imposed on them relating to residence or reporting to a police or immigration officer, and their decision is confirmed by a chief immigration officer;

(d) Immigration and Asylum Act 1999, section 141(7)(c), when directions are given to remove a person:
• as an illegal entrant,
• liable to removal under the Immigration and Asylum Act 1999, section 10,
• who is the subject of a deportation order from the UK;

(e) Immigration and Asylum Act 1999, section 141(7)(d), from a person arrested under UK immigration laws under the Immigration Act 1971, Schedule 2, paragraph 17;

(f) Immigration and Asylum Act 1999, section 141(7)(e), from a person who has made a claim:
• for asylum
• under Article 3 of the European Convention on Human Rights; or

(g) Immigration and Asylum Act 1999, section 141(7)(f), from a person who is a dependant of someone who falls into (b) to (f) above.

4.12 The Immigration and Asylum Act 1999, section 142(3), gives a police and immigration officer power to arrest, without warrant, a person who fails to comply with a requirement imposed by the Secretary of State to attend a specified place for fingerprinting.

4.13 Before any fingerprints are taken, with or without consent, the person must be informed:

(a) of the reason their fingerprints are to be taken;

(b) the fingerprints, and all copies of them, will be destroyed in accordance with Annex F, Part B.

4.14 Reasonable force may be used, if necessary, to take a person's fingerprints without their consent under powers as in paragraph 4.11.

4.15 Paragraphs 4.1 and 4.8 apply.

(C) Taking footwear impressions in connection with a criminal investigation

(a) Action

4.16 Impressions of a person's footwear may be taken in connection with the investigation of an offence only with their consent or if paragraph 4.17 applies. If the person is at a police station consent must be in writing.

4.17 PACE, section 61A, provides power for a police officer to take footwear impressions without consent from any person over the age of ten years who is detained at a police station:

(a) in consequence of being arrested for a recordable offence, see Note 4A; or if the detainee has been charged with a recordable offence, or informed they will be reported for such an offence; and

(b) the detainee has not had an impression of their footwear taken in the course of the investigation of the offence unless the previously taken impression is not complete or is not of sufficient quality to allow satisfactory analysis, comparison or matching (whether in the case in question or generally).

4.18 Reasonable force may be used, if necessary, to take a footwear impression from a detainee without consent under the power in paragraph 4.17.

4.19 Before any footwear impression is taken with, or without, consent as above, the person must be informed:

(a) of the reason the impression is to be taken;

(b) that the impression may be retained and may be subject of a speculative search against other impressions, see Note 4B, unless destruction of the impression is required in accordance with Annex F, Part (a); and
(c) that if their footwear impressions are required to be destroyed, they may witness their destruction as provided for in Annex F, Part (a).

(b) Documentation

4.20 A record must be made as soon as possible, of the reason for taking a person's footwear impressions without consent. If force is used, a record shall be made of the circumstances and those present.

4.21 A record shall be made when a person has been informed under the terms of paragraph 4.19(b), of the possibility that their footwear impressions may be subject of a speculative search.

Notes for guidance

4A References to ‘recordable offences’ in this Code relate to those offences for which convictions, cautions, reprimands and warnings may be recorded in national police records. See PACE, section 27(4). The recordable offences current at the time when this Code was prepared, are any offences which carry a sentence of imprisonment on conviction (irrespective of the period, or the age of the offender or actual sentence passed) as well as the non-imprisonable offences under the Vagrancy Act 1824 sections 3 and 4 (begging and persistent begging), the Street Offences Act 1959, section 1 (loitering or soliciting for purposes of prostitution), the Road Traffic Act 1988, section 25 (tampering with motor vehicles), the Criminal Justice and Public Order Act 1994, section 167 (touting for hire car services) and others listed in the National Police Records (Recordable Offences) Regulations 2000 as amended.
4B Fingerprints, footwear impressions or a DNA sample (and the information derived from it) taken from a person arrested on suspicion of being involved in a recordable

offence, or charged with such an offence, or informed they will be reported for such an offence, may be subject of a speculative search. This means the fingerprints, footwear impressions or DNA sample may be checked against other fingerprints, footwear impressions and DNA records held by, or on behalf of, the police and other law enforcement authorities in, or outside, the UK, or held in connection with, or as a result of, an investigation of an offence inside or outside the UK. Fingerprints, footwear impressions and samples taken from a person suspected of committing a recordable offence but not arrested, charged or informed they will be reported for it, may be subject to a speculative search only if the person consents in writing. The following is an example of a basic form of words:

"I consent to my fingerprints, footwear impressions and DNA sample and information derived from it being retained and used only for purposes related to the prevention and detection of a crime, the investigation of an offence or the conduct of a prosecution either nationally or internationally.

I understand that my fingerprints, footwear impressions or DNA sample may be checked against other fingerprint, footwear impressions and DNA records held by or on behalf of relevant law enforcement authorities, either nationally or internationally.

I understand that once I have given my consent for my fingerprints, footwear impressions or DNA sample to be retained and used I cannot withdraw this consent."

See Annex F regarding the retention and use of fingerprints and footwear impressions taken with consent for elimination purposes.

5 Examinations to establish identity and the taking of photographs

(A) Detainees at police stations

(a) Searching or examination of detainees at police stations

5.1 PACE, section 54A (1), allows a detainee at a police station to be searched or examined or both, to establish:
(a) whether they have any marks, features or injuries that would tend to identify them as a person involved in the commission of an offence and to photograph any identifying marks, see paragraph 5.5; or

(b) their identity, see Note 5A.
A person detained at a police station to be searched under a stop and search power, see Code A, is not a detainee for the purposes of these powers.

5.2 A search and/or examination to find marks under section 54A (1) (a) may be carried out without the detainee's consent, see paragraph 2.12, only if authorised by an officer of at least inspector rank when consent has been withheld or it is not practicable to obtain consent, see Note 5D.

5.3 A search or examination to establish a suspect's identity under section 54A (1) (b) may be carried out without the detainee's consent, see paragraph 2.12, only if authorised by an officer of at least inspector rank when the detainee has refused to identify themselves or the authorising officer has reasonable grounds for suspecting the person is not who they claim to be.

5.4 Any marks that assist in establishing the detainee's identity, or their identification as a person involved in the commission of an offence, are identifying marks. Such marks may be photographed with the detainee's consent, see paragraph 2.12; or without their consent if it is withheld or it is not practicable to obtain it, see Note 5D.

5.5 A detainee may only be searched, examined and photographed under section 54A, by a police officer of the same sex.

5.6 Any photographs of identifying marks, taken under section 54A, may be used or disclosed only for purposes related to the prevention or detection of crime, the investigation of offences or the conduct of prosecutions by, or on behalf of, police or other law enforcement and prosecuting authorities inside, and outside, the UK. After being so used or disclosed, the photograph may be retained but must not be used or disclosed except for these purposes, see Note 5B.

5.7 The powers, as in paragraph 5.1, do not affect any separate requirement under the Criminal Procedure and Investigations Act 1996 to retain material in connection with criminal investigations.

5.8 Authority for the search and/or examination for the purposes of paragraphs 5.2 and

5.3 may be given orally or in writing. If given orally, the authorising officer must confirm it in writing as soon as practicable. A separate authority is required for each purpose which applies.

5.9 If it is established a person is unwilling to co-operate sufficiently to enable a search and/or examination to take place or a suitable photograph to be taken, an officer may use reasonable force to:

(a) search and/or examine a detainee without their consent; and

(b) photograph any identifying marks without their consent.

5.10 The thoroughness and extent of any search or examination carried out in accordance with the powers in section 54A must be no more than the officer considers necessary to achieve the required purpose. Any search or examination which involves the removal of more than the person's outer clothing shall be conducted in accordance with Code C, Annex A, paragraph 11.

5.11 An intimate search may not be carried out under the powers in section 54A.
(b) Photographing detainees at police stations and other persons elsewhere than at a police station

5.12 Under PACE, section 64A, an officer may photograph :
(a) any person whilst they are detained at a police station; and

(b) any person who is elsewhere than at a police station and who has been:-

(i) arrested by a constable for an offence;

(ii) taken into custody by a constable after being arrested for an offence by a person other than a constable;

(iii) made subject to a requirement to wait with a community support officer under paragraph 2(3) or (3B) of Schedule 4 to the Police Reform Act 2002;

(iv) given a penalty notice by a constable in uniform under Chapter 1 of Part 1 of the Criminal Justice and Police Act 2001, a penalty notice by a constable under section 444A of the Education Act 1996, or a fixed penalty notice by a constable in uniform under section 54 of the Road Traffic Offenders Act 1988;

(v) given a notice in relation to a relevant fixed penalty offence (within the meaning of paragraph 1 of Schedule 4 to the Police Reform Act 2002)

by a community support officer by virtue of a designation applying that paragraph to him;

(vi) given a notice in relation to a relevant fixed penalty offence (within the meaning of paragraph 1 of Schedule 5 to the Police Reform Act 2002) by an accredited person by virtue of accreditation specifying that that paragraph applies to him; or

(vii) given a direction to leave and not return to a specified location for up to 48 hours by a police constable (under section 27 of the Violent Crime Reduction Act 2006).

5.12A Photographs taken under PACE, section 64A:

(a) may be taken with the person's consent, or without their consent if consent is withheld or it is not practicable to obtain their consent, see Note 5E; and

(b) may be used or disclosed only for purposes related to the prevention or detection of crime, the investigation of offences or the conduct of prosecutions by, or on behalf of, police or other law enforcement and prosecuting authorities inside and outside the United Kingdom or the enforcement of any sentence or order made by a court when dealing with an offence. After being so used or disclosed, they may be retained but can only be used or disclosed for the same purposes. see Note 5B.

5.13 The officer proposing to take a detainee's photograph may, for this purpose, require the person to remove any item or substance worn on, or over, all, or any part of, their head or face. If they do not comply with such a requirement, the officer may remove the item or substance.

5.14 If it is established the detainee is unwilling to co-operate sufficiently to enable a suitable photograph to be taken and it is not reasonably practicable to take the photograph covertly, an officer may use reasonable force, see Note 5F.

(a) to take their photograph without their consent; and

(b) for the purpose of taking the photograph, remove any item or substance worn on, or over, all, or any part of, the person's head or face which they have failed to remove when asked.

5.15 For the purposes of this Code, a photograph may be obtained without the person's consent by making a copy of an image of them taken at any time on a camera system installed anywhere in the police station.

(c) Information to be given

5.16 When a person is searched, examined or photographed under the provisions as in paragraph 5.1 and 5.12, or their photograph obtained as in paragraph 5.15, they must be informed of the:

(a) purpose of the search, examination or photograph;

(b) grounds on which the relevant authority, if applicable, has been given; and
(c) purposes for which the photograph may be used, disclosed or retained.
This information must be given before the search or examination commences or the photograph is taken, except if the photograph is:

(i) to be taken covertly;

(ii) obtained as in paragraph 5.15, in which case the person must be informed as

soon as practicable after the photograph is taken or obtained.

(d) Documentation

5.17 A record must be made when a detainee is searched, examined, or a photograph of the person, or any identifying marks found on them, are taken. The record must include the:

(a) identity, subject to paragraph 2.18, of the officer carrying out the search, examination or taking the photograph;

(b) purpose of the search, examination or photograph and the outcome;

(c) detainee's consent to the search, examination or photograph, or the reason the person was searched, examined or photographed without consent;

(d) giving of any authority as in paragraphs 5.2 and 5.3, the grounds for giving it and the authorising officer.

5.18 If force is used when searching, examining or taking a photograph in accordance with this section, a record shall be made of the circumstances and those present.

(B) Persons at police stations not detained

5.19 When there are reasonable grounds for suspecting the involvement of a person in a criminal offence, but that person is at a police station voluntarily and not detained, the provisions of paragraphs 5.1 to 5.18 should apply, subject to the modifications in the following paragraphs.

5.20 References to the 'person being detained' and to the powers mentioned in paragraph

5.1 which apply only to detainees at police stations shall be omitted.

5.21 Force may not be used to:

(a) search and/or examine the person to:

(i) discover whether they have any marks that would tend to identify them as a person involved in the commission of an offence; or

(ii) establish their identity, see Note 5A;

(b) take photographs of any identifying marks, see paragraph 5.4; or

(c) take a photograph of the person.

5.22 Subject to paragraph 5.24, the photographs of persons or of their identifying marks which are not taken in accordance with the provisions mentioned in paragraphs 5.1 or 5.12, must be destroyed (together with any negatives and copies) unless the person:

(a) is charged with, or informed they may be prosecuted for, a recordable offence;

(b) is prosecuted for a recordable offence;

(c) is cautioned for a recordable offence or given a warning or reprimand in accordance with the Crime and Disorder Act 1998 for a recordable offence; or

(d) gives informed consent, in writing, for the photograph or image to be retained as in paragraph 5.6.

5.23 When paragraph 5.22 requires the destruction of any photograph, the person must be given an opportunity to witness the destruction or to have a certificate confirming the destruction provided they so request the certificate within five days of being informed the destruction is required.

5.24 Nothing in paragraph 5.22 affects any separate requirement under the Criminal Procedure and Investigations Act 1996 to retain material in connection with criminal investigations.

Notes for guidance

5A The conditions under which fingerprints may be taken to assist in establishing a person's identity, are described in Section 4.

5B Examples of purposes related to the prevention or detection of crime, the investigation of offences or the conduct of prosecutions include:

(a) checking the photograph against other photographs held in records or in connection with, or as a result of, an investigation of an offence to establish whether the person is liable to arrest for other offences;

(b) when the person is arrested at the same time as other people, or at a time when it is likely that other people will be arrested, using the photograph to help establish who was arrested, at what time and where;

(c) when the real identity of the person is not known and cannot be readily ascertained or there are reasonable grounds for doubting a name and other personal details given by the person, are their real name and personal details. In these circumstances, using or disclosing the photograph to help to establish or verify their real identity or determine whether they are liable to arrest for some other offence, e.g. by checking it against other photographs held in records or in connection with, or as a result of, an investigation of an offence;
(d) when it appears any identification procedure in section 3 may need to be arranged for which the person's photograph would assist;
(e) when the person's release without charge may be required, and if the release is:

(i) on bail to appear at a police station, using the photograph to help verify the person's identity when they answer their bail and if the person does not answer their bail, to assist in arresting them; or

(ii) without bail, using the photograph to help verify their identity or assist in locating them for the purposes of serving them with a summons to appear at court in criminal proceedings;

(f) when the person has answered to bail at a police station and there are reasonable grounds for doubting they are the person who was previously granted bail, using the photograph to help establish or verify their identity;

(g) when the person arrested on a warrant claims to be a different person from the person named on the warrant and a photograph would help to confirm or disprove their claim;

(h) when the person has been charged with, reported for, or convicted of, a recordable offence and their photograph is not already on record as a result of (a) to (f) or their photograph is on record but their appearance has changed since it was taken and the person has not yet been released or brought before a court.

5C There is no power to arrest a person convicted of a recordable offence solely to take their photograph. The power to take photographs in this section applies only where the person is in custody as a result of the exercise of another power, e.g. arrest for fingerprinting under PACE, section 27.

5D Examples of when it would not be practicable to obtain a detainee's consent, see paragraph 2.12, to a search, examination or the taking of a photograph of an identifying mark include:

(a) when the person is drunk or otherwise unfit to give consent;

(b) when there are reasonable grounds to suspect that if the person became aware a search or examination was to take place or an identifying mark was to be photographed, they would take steps to prevent this happening, e.g. by violently resisting, covering or concealing the mark etc and it would not otherwise be possible to carry out the search or examination or to photograph any identifying mark;

(c) in the case of a juvenile, if the parent or guardian cannot be contacted in sufficient time to allow the search or examination to be carried out or the photograph to be taken.

5E Examples of when it would not be practicable to obtain the person's consent, see paragraph 2.12, to a photograph being taken include:

(a) when the person is drunk or otherwise unfit to give consent:

(b) when there are reasonable grounds to suspect that if the person became aware a photograph, suitable to be used or disclosed for the use and disclosure described in paragraph 5.6, was to be taken, they would take steps to prevent it being taken, e.g. by violently resisting, covering or distorting their face etc, and it would not otherwise be possible to take a suitable photograph;

(c) when, in order to obtain a suitable photograph, it is necessary to take it covertly; and

(d) in the case of a juvenile, if the parent or guardian cannot be contacted in sufficient time to allow the photograph to be taken.

5F The use of reasonable force to take the photograph of a suspect elsewhere than at a police station must be carefully considered. In order to obtain a suspect's consent and co-operation to remove an item of religious headwear to take their photograph, a constable should consider whether in the circumstances of the situation the removal of the headwear and the taking of the photograph should be by an officer of the same sex as the person. It would be appropriate for these actions to be conducted out of public view.

6 Identification by body samples and impressions

(A) General

6.1 References to:

(a) an 'intimate sample' mean a dental impression or sample of blood, semen or any other tissue fluid, urine, or pubic hair, or a swab taken from any part of a person's genitals or from a person's body orifice other than the mouth;

(b) a 'non-intimate sample' means:

(i) a sample of hair, other than pubic hair, which includes hair plucked with the root, see *Note 6A*;

(ii) a sample taken from a nail or from under a nail;

(iii) a swab taken from any part of a person's body other than a part from which a swab taken would be an intimate sample;

(iv) saliva;

(v) a skin impression which means any record, other than a fingerprint, which is a record, in any form and produced by any method, of the skin pattern and other physical characteristics or features of the whole, or any part of, a person's foot or of any other part of their body.

(B) Action

(a) Intimate samples

6.2 PACE, section 62, provides that intimate samples may be taken under:

(a) section 62(1), from a person in police detention only:

(i) if a police officer of inspector rank or above has reasonable grounds to believe such an impression or sample will tend to confirm or disprove the suspect's involvement in a recordable offence, see *Note 4A*, and gives authorisation for a sample to be taken; and

(ii) with the suspect's written consent;

(b) section 62(1A), from a person not in police detention but from whom two or more non-intimate samples have been taken in the course of an investigation of an offence and the samples, though suitable, have proved insufficient if:

(i) a police officer of inspector rank or above authorises it to be taken; and

(ii) the person concerned gives their written consent. See *Notes 6B* and *6C*

6.3 Before a suspect is asked to provide an intimate sample, they must be warned that if they refuse without good cause, their refusal may harm their case if it comes to trial, see *Note 6D*. If the suspect is in police detention and not legally represented, they must also be reminded of their entitlement to have free legal advice, see Code C, *paragraph 6.5*, and the reminder noted in the custody record. If *paragraph 6.2(b)* applies and the person is attending a station voluntarily, their entitlement to free legal advice as in Code C, *paragraph 3.21* shall be explained to them.
6.4 Dental impressions may only be taken by a registered dentist. Other intimate samples, except for samples of urine, may only be taken by a registered medical practitioner or registered nurse or registered paramedic.

(b) Non-intimate samples

6.5 A non-intimate sample may be taken from a detainee only with their written consent or if *paragraph 6.6* applies.

6.6 (a) under section 63, a non-intimate sample may not be taken from a person without consent and the consent must be in writing

(aa) A non-intimate sample may be taken from a person without the appropriate consent in the following circumstances:

(i) under section 63(2A) where the person is in police detention as a consequence of his arrest for a recordable offence and he has not had a non-intimate sample of the same type and from the same part of the

body taken in the course of the investigation of the offence by the police or he has had such a sample taken but it proved insufficient.

(ii) Under section 63(3) (a) where he is being held in custody by the police on the authority of a court and an officer of at least the rank of inspector authorises it to be taken.

(b) under section 63(3A), from a person charged with a recordable offence or informed they will be reported for such an offence: and
(i) that person has not had a non-intimate sample taken from them in the course of the investigation; or
(ii) if they have had a sample taken, it proved unsuitable or insufficient for the same form of analysis, see *Note 6B*; or

(c) under section 63(3B), from a person convicted of a recordable offence after the date on which that provision came into effect. PACE, section 63A, describes the circumstances in which a police officer may require a person convicted of a recordable offence to attend a police station for a non-intimate sample to be taken.

6.7 Reasonable force may be used, if necessary, to take a non-intimate sample from a person without their consent under the powers mentioned in *paragraph 6.6*.

6.8 Before any intimate sample is taken with consent or non-intimate sample is taken with, or without, consent, the person must be informed:
(a) of the reason for taking the sample;
(b) of the grounds on which the relevant authority has been given;
(c) that the sample or information derived from the sample may be retained and subject of a speculative search, see *Note 6E*, unless their destruction is required as in *Annex F*, Part A.

6.9 When clothing needs to be removed in circumstances likely to cause embarrassment to the person, no person of the opposite sex who is not a registered medical practitioner or registered health care professional shall be present, (unless in the case of a juvenile, mentally disordered or mentally vulnerable person, that person specifically requests the presence of an appropriate adult of the opposite sex who is readily available) nor shall anyone whose presence is unnecessary. However, in the case of a juvenile, this is subject to the overriding proviso that such a removal of clothing may take place in the absence of the appropriate adult only if the juvenile signifies, in their presence, that they prefer the adult's absence and they agree.

(c) Documentation

6.10 A record of the reasons for taking a sample or impression and, if applicable, of its destruction must be made as soon as practicable. If force is used, a record shall be made of the circumstances and those present. If written consent is given to the taking of a sample or impression, the fact must be recorded in writing.

6.11 A record must be made of a warning given as required by *paragraph 6.3*.

6.12 A record shall be made of the fact that a person has been informed as in *paragraph 6.8(c)* that samples may be subject of a speculative search.

Notes for guidance

6A When hair samples are taken for the purpose of DNA analysis (rather than for other purposes such as making a visual match), the suspect should be permitted a reasonable choice as to what part of the body the hairs are taken from.When hairs are plucked, they should be plucked individually, unless the suspect prefers otherwise and no more should be plucked than the person taking them reasonably considers

necessary for a sufficient sample.

6B (a) An insufficient sample is one which is not sufficient either in quantity or quality to provide information for a particular form of analysis, such as DNA analysis. A sample may also be insufficient if enough information cannot be obtained from it by analysis because of loss, destruction, damage or contamination of the sample or as a result of an earlier, unsuccessful attempt at analysis.
(b) An unsuitable sample is one which, by its nature, is not suitable for a particular form of analysis.

6C Nothing in paragraph 6.2 prevents intimate samples being taken for elimination purposes with the consent of the person concerned but the provisions of paragraph 2.12 relating to the role of the appropriate adult, should be applied. Paragraph 6.2(b) does not, however, apply where the non-intimate samples were previously taken under the Terrorism Act 2000, Schedule 8, paragraph 10.

6D In warning a person who is asked to provide an intimate sample as in paragraph 6.3, the following form of words may be used:

"You do not have to provide this sample/allow this swab or impression to be taken, but I must warn you that if you refuse without good cause, your refusal may harm your case if it comes to trial."

6E Fingerprints or a DNA sample and the information derived from it taken from a person arrested on suspicion of being involved in a recordable offence, or charged with such an offence, or informed they will be reported for such an offence, may be subject of a speculative search. This means they may be checked against other fingerprints and DNA records held by, or on behalf of, the police and other law enforcement authorities in or outside the UK or held in connection with, or as a result of, an investigation of an offence inside or outside the UK. Fingerprints and samples taken from any other person, e.g. a person suspected of committing a recordable offence but who has not been arrested, charged or informed they will be reported for it, may be subject to a speculative search only if the person consents in writing to their fingerprints being subject of such a search. The following is an example of a basic form of words:

"I consent to my fingerprints/DNA sample and information derived from it being retained and used only for purposes related to the prevention and detection of a crime, the investigation of an offence or the conduct of a prosecution either nationally or internationally.

I understand that this sample may be checked against other fingerprint/DNA records held by or on behalf of relevant law enforcement authorities, either nationally or internationally.

I understand that once I have given my consent for the sample to be retained and used I cannot withdraw this consent."

See Annex F regarding the retention and use of fingerprints and samples taken with consent for elimination purposes.

6F Samples of urine and non-intimate samples taken in accordance with sections 63B and 63C of PACE may not be used for identification purposes in accordance with this Code. See Code C note for guidance 17D.

ANNEX A - VIDEO IDENTIFICATION

(a) General

1. The arrangements for obtaining and ensuring the availability of a suitable set of images to be used in a video identification must be the responsibility of an

identification officer, who has no direct involvement with the case.

2. The set of images must include the suspect and at least eight other people who, so far as possible, resemble the suspect in age, general appearance and position in life. Only one suspect shall appear in any set unless there are two suspects of roughly similar appearance, in which case they may be shown together with at least twelve other people.

2A If the suspect has an unusual physical feature, e.g., a facial scar, tattoo or distinctive hairstyle or hair colour which does not appear on the images of the other people that are available to be used, steps may be taken to:

(a) conceal the location of the feature on the images of the suspect and the other people; or

(b) replicate that feature on the images of the other people.
For these purposes, the feature may be concealed or replicated electronically or by any other method which it is practicable to use to ensure that the images of the suspect and other people resemble each other. The identification officer has discretion to choose whether to conceal or replicate the feature and the method to be used. If an unusual physical feature has been described by the witness, the identification officer should, if practicable, have that feature replicated. If it has not been described, concealment may be more appropriate.

2B If the identification officer decides that a feature should be concealed or replicated, the reason for the decision and whether the feature was concealed or replicated in the images shown to any witness shall be recorded.

2C If the witness requests to view an image where an unusual physical feature has been concealed or replicated without the feature being concealed or replicated, the witness may be allowed to do so.

3. The images used to conduct a video identification shall, as far as possible, show the suspect and other people in the same positions or carrying out the same sequence of movements. They shall also show the suspect and other people under identical conditions unless the identification officer reasonably believes:

(a) because of the suspect's failure or refusal to co-operate or other reasons, it is not practicable for the conditions to be identical; and

(b) any difference in the conditions would not direct a witness' attention to any individual image.

4. The reasons identical conditions are not practicable shall be recorded on forms provided for the purpose.

5. Provision must be made for each person shown to be identified by number.

6. If police officers are shown, any numerals or other identifying badges must be concealed. If a prison inmate is shown, either as a suspect or not, then either all, or none of, the people shown should be in prison clothing.

7. The suspect or their solicitor, friend, or appropriate adult must be given a reasonable opportunity to see the complete set of images before it is shown to any witness. If the suspect has a reasonable objection to the set of images or any of the participants, the suspect shall be asked to state the reasons for the objection. Steps shall, if practicable, be taken to remove the grounds for objection. If this is not practicable, the suspect and/or their representative shall be told why their objections cannot be met and the objection, the reason given for it and why it cannot be met shall be recorded on forms provided for the purpose.

8. Before the images are shown in accordance with *paragraph 7,* the suspect or their solicitor shall be provided with details of the first description of the suspect by any witnesses who are to attend the video identification.When a broadcast or publication is made, as in *paragraph 3.28*, the suspect or their solicitor must also be allowed to view any material released to the media by the police for the purpose of recognising or tracing the suspect, provided it is practicable and would not unreasonably delay the investigation.
9. The suspect's solicitor, if practicable, shall be given reasonable notification of the time and place the video identification is to be conducted so a representative may attend on behalf of the suspect. If a solicitor has not been instructed, this information shall be given to the suspect.The suspect may not be present when the images are shown to the witness(es). In the absence of the suspect's representative, the viewing itself shall be recorded on video. No unauthorised people may be present.

(b) Conducting the video identification

10. The identification officer is responsible for making the appropriate arrangements to make sure, before they see the set of images, witnesses are not able to communicate with each other about the case, see any of the images which are to be shown, see, or be reminded of, any photograph or description of the suspect or be given any other indication as to the suspect's identity, or overhear a witness who has already seen the material. There must be no discussion with the witness about the composition of the set of images and they must not be told whether a previous witness has made any identification.

11. Only one witness may see the set of images at a time. Immediately before the images are shown, the witness shall be told that the person they saw on a specified earlier occasion may, or may not, appear in the images they are shown and that if they cannot make a positive identification, they should say so. The witness shall be advised that at any point, they may ask to see a particular part of the set of images or to have a particular image frozen for them to study. Furthermore, it should be pointed out to the witness that there is no limit on how many times they can view the whole set of images or any part of them. However, they should be asked not to make any decision as to whether the person they saw is on the set of images until they have seen the whole set at least twice.

12. Once the witness has seen the whole set of images at least twice and has indicated that they do not want to view the images, or any part of them, again, the witness shall be asked to say whether the individual they saw in person on a specified earlier occasion has been shown and, if so, to identify them by number of the image. The witness will then be shown that image to confirm the identification, see *paragraph 17*.

13. Care must be taken not to direct the witness' attention to any one individual image or give any indication of the suspect's identity.Where a witness has previously made an identification by photographs, or a computerised or artist's composite or similar likeness, the witness must not be reminded of such a photograph or composite likeness once a suspect is available for identification by other means in accordance with this Code. Nor must the witness be reminded of any description of the suspect.

14. After the procedure, each witness shall be asked whether they have seen any broadcast or published films or photographs, or any descriptions of suspects relating to the offence and their reply shall be recorded.

(c) Image security and destruction

15. Arrangements shall be made for all relevant material containing sets of images used for specific identification procedures to be kept securely and their movements accounted for. In particular, no-one involved in the investigation shall be permitted to view the material prior to it being shown to any witness

16. As appropriate, *paragraph 3.30* or *3.31* applies to the destruction or retention of relevant sets of images.

(d) Documentation

17. A record must be made of all those participating in, or seeing, the set of images whose names are known to the police.

18. A record of the conduct of the video identification must be made on forms provided for the purpose. This shall include anything said by the witness about any identifications or the conduct of the procedure and any reasons it was not practicable to comply with any of the provisions of this Code governing the conduct of video identifications.

ANNEX B - IDENTIFICATION PARADES

(a) General

1. A suspect must be given a reasonable opportunity to have a solicitor or friend present, and the suspect shall be asked to indicate on a second copy of the notice whether or not they wish to do so.

2. An identification parade may take place either in a normal room or one equipped with a screen permitting witnesses to see members of the identification parade without being seen. The procedures for the composition and conduct of the identification parade are the same in both cases, subject to *paragraph 8* (except that an identification parade involving a screen may take place only when the suspect's solicitor, friend or appropriate adult is present or the identification parade is recorded on video).

3. Before the identification parade takes place, the suspect or their solicitor shall be provided with details of the first description of the suspect by any witnesses who are attending the identification parade. When a broadcast or publication is made as in *paragraph 3.28*, the suspect or their solicitor should also be allowed to view any material released to the media by the police for the purpose of recognising or tracing the suspect, provided it is practicable to do so and would not unreasonably delay the investigation.

(b) Identification parades involving prison inmates

4. If a prison inmate is required for identification, and there are no security problems about the person leaving the establishment, they may be asked to participate in an identification parade or video identification.

5. An identification parade may be held in a Prison Department establishment but shall be conducted, as far as practicable under normal identification parade rules. Members of the public shall make up the identification parade unless there are serious security, or control, objections to their admission to the establishment. In such cases, or if a group or video identification is arranged within the establishment, other inmates may participate. If an inmate is the suspect, they are not required to wear prison clothing for the identification parade unless the other people taking part are other inmates in similar clothing, or are members of the public who are prepared to wear prison clothing for the occasion.

(c) Conduct of the identification parade

6. Immediately before the identification parade, the suspect must be reminded of the procedures governing its conduct and cautioned in the terms of Code C, paragraphs 10.5 or 10.6, as appropriate.

7. All unauthorised people must be excluded from the place where the identification parade is held.

8. Once the identification parade has been formed, everything afterwards, in respect of it, shall take place in the presence and hearing of the suspect and any interpreter, solicitor, friend or appropriate adult who is present (unless the identification parade involves a screen, in which case everything said to, or by, any witness at the place where the identification parade is held, must be said in the hearing and presence of the suspect's solicitor, friend or appropriate adult or be recorded on video).

9. The identification parade shall consist of at least eight people (in addition to the suspect) who, so far as possible, resemble the suspect in age, height, general appearance and position in life.Only one suspect shall be included in an identification parade unless there are two suspects of roughly similar appearance, in which case they may be paraded together with at least twelve other people. In no circumstances shall more than two suspects be included in one identification parade and where there are separate identification parades, they shall be made up of different people.

10. If the suspect has an unusual physical feature, e.g., a facial scar, tattoo or distinctive hairstyle or hair colour which cannot be replicated on other members of the identification parade, steps may be taken to conceal the location of that feature on the suspect and the other members of the identification parade if the suspect and their solicitor, or appropriate adult, agree. For example, by use of a plaster or a hat, so that all members of the identification parade resemble each other in general appearance.

11. When all members of a similar group are possible suspects, separate identification parades shall be held for each unless there are two suspects of similar appearance when they may appear on the same identification parade with at least twelve other members of the group who are not suspects.When police officers in uniform form an identification parade any numerals or other identifying badges shall be concealed.

12. When the suspect is brought to the place where the identification parade is to be held, they shall be asked if they have any objection to the arrangements for the identification parade or to any of the other participants in it and to state the reasons for the objection. The suspect may obtain advice from their solicitor or friend, if present, before the identification parade proceeds. If the suspect has a reasonable objection to the arrangements or any of the participants, steps shall, if practicable, be taken to remove the grounds for objection. When it is not practicable to do so, the suspect shall be told why their objections cannot be met and the objection, the reason given for it and why it cannot be met, shall be recorded on forms provided for the purpose.

13. The suspect may select their own position in the line, but may not otherwise interfere with the order of the people forming the line. When there is more than one witness, the suspect must be told, after each witness has left the room, that they can, if they wish, change position in the line. Each position in the line must be clearly numbered, whether by means of a number laid on the floor in front of each identification parade member or by other means.

14. Appropriate arrangements must be made to make sure, before witnesses attend the identification parade, they are not able to:
(i) communicate with each other about the case or overhear a witness who has already seen the identification parade;
(ii) see any member of the identification parade;
(iii) see, or be reminded of, any photograph or description of the suspect or be given any other indication as to the suspect's identity; or
(iv) see the suspect before or after the identification parade.

15. The person conducting a witness to an identification parade must not discuss with

them the composition of the identification parade and, in particular, must not disclose whether a previous witness has made any identification.

16. Witnesses shall be brought in one at a time. Immediately before the witness inspects the identification parade, they shall be told the person they saw on a specified earlier occasion may, or may not, be present and if they cannot make a positive identification, they should say so. The witness must also be told they should not make any decision about whether the person they saw is on the identification parade until they have looked at each member at least twice.

17. When the officer or police staff (see paragraph 3.11) conducting the identification procedure is satisfied the witness has properly looked at each member of the identification parade, they shall ask the witness whether the person they saw on a specified earlier occasion is on the identification parade and, if so, to indicate the number of the person concerned, see *paragraph 28*.

18. If the witness wishes to hear any identification parade member speak, adopt any specified posture or move, they shall first be asked whether they can identify any person(s) on the identification parade on the basis of appearance only. When the request is to hear members of the identification parade speak, the witness shall be reminded that the participants in the identification parade have been chosen on the basis of physical appearance only. Members of the identification parade may then be asked to comply with the witness' request to hear them speak, see them move or adopt any specified posture.

19. If the witness requests that the person they have indicated remove anything used for the purposes of *paragraph 10* to conceal the location of an unusual physical feature, that person may be asked to remove it.

20. If the witness makes an identification after the identification parade has ended, the suspect and, if present, their solicitor, interpreter or friend shall be informed. When this occurs, consideration should be given to allowing the witness a second opportunity to identify the suspect.

21 After the procedure, each witness shall be asked whether they have seen any broadcast or published films or photographs or any descriptions of suspects relating to the offence and their reply shall be recorded.
22. When the last witness has left, the suspect shall be asked whether they wish to make any comments on the conduct of the identification parade.

(d) Documentation

23. A video recording must normally be taken of the identification parade. If that is impracticable, a colour photograph must be taken. A copy of the video recording or photograph shall be supplied, on request, to the suspect or their solicitor within a reasonable time.

24. As appropriate, *paragraph 3.30* or *3.31*, should apply to any photograph or video taken as in *paragraph 23*.

25. If any person is asked to leave an identification parade because they are interfering with its conduct, the circumstances shall be recorded.

26. A record must be made of all those present at an identification parade whose names are known to the police.

27. If prison inmates make up an identification parade, the circumstances must be recorded.

28. A record of the conduct of any identification parade must be made on forms provided

for the purpose. This shall include anything said by the witness or the suspect about any identifications or the conduct of the procedure, and any reasons it was not practicable to comply with any of this Code's provisions.

ANNEX C - GROUP IDENTIFICATION

(a) General

1. The purpose of this Annex is to make sure, as far as possible, group identifications follow the principles and procedures for identification parades so the conditions are fair to the suspect in the way they test the witness' ability to make an identification.

2. Group identifications may take place either with the suspect's consent and cooperation or covertly without their consent.

3. The location of the group identification is a matter for the identification officer, although the officer may take into account any representations made by the suspect, appropriate adult, their solicitor or friend.

4. The place where the group identification is held should be one where other people are either passing by or waiting around informally, in groups such that the suspect is able to join them and be capable of being seen by the witness at the same time as others in the group. For example people leaving an escalator, pedestrians walking through a shopping centre, passengers on railway and bus stations, waiting in queues or groups or where people are standing or sitting in groups in other public places.

5. If the group identification is to be held covertly, the choice of locations will be limited by the places where the suspect can be found and the number of other people present at that time. In these cases, suitable locations might be along regular routes travelled by the suspect, including buses or trains or public places frequented by the suspect.

6. Although the number, age, sex, race and general description and style of clothing of other people present at the location cannot be controlled by the identification officer, in selecting the location the officer must consider the general appearance and numbers of people likely to be present. In particular, the officer must reasonably expect that over the period the witness observes the group, they will be able to see, from time to time, a number of others whose appearance is broadly similar to that of the suspect.

7. A group identification need not be held if the identification officer believes, because of the unusual appearance of the suspect, none of the locations it would be practicable to use satisfy the requirements of *paragraph 6* necessary to make the identification fair.

8. Immediately after a group identification procedure has taken place (with or without the suspect's consent), a colour photograph or video should be taken of the general scene, if practicable, to give a general impression of the scene and the number of people present. Alternatively, if it is practicable, the group identification may be video recorded.

9. If it is not practicable to take the photograph or video in accordance with *paragraph 8,* a photograph or film of the scene should be taken later at a time determined by the identification officer if the officer considers it practicable to do so.

10. An identification carried out in accordance with this Code remains a group identification even though, at the time of being seen by the witness, the suspect was on their own rather than in a group.

11. Before the group identification takes place, the suspect or their solicitor shall be

provided with details of the first description of the suspect by any witnesses who are to attend the identification.When a broadcast or publication is made, as in *paragraph 3.28*, the suspect or their solicitor should also be allowed to view any material released by the police to the media for the purposes of recognising or tracing the suspect, provided that it is practicable and would not unreasonably delay the investigation.

12. After the procedure, each witness shall be asked whether they have seen any broadcast or published films or photographs or any descriptions of suspects relating to the offence and their reply recorded.

(b) Identification with the consent of the suspect

13. A suspect must be given a reasonable opportunity to have a solicitor or friend present. They shall be asked to indicate on a second copy of the notice whether or not they wish to do so.

14. The witness, the person carrying out the procedure and the suspect's solicitor, appropriate adult, friend or any interpreter for the witness, may be concealed from the sight of the individuals in the group they are observing, if the person carrying out the procedure considers this assists the conduct of the identification.

15. The person conducting a witness to a group identification must not discuss with them the forthcoming group identification and, in particular, must not disclose whether a previous witness has made any identification.

16. Anything said to, or by, the witness during the procedure about the identification should be said in the presence and hearing of those present at the procedure.

17. Appropriate arrangements must be made to make sure, before witnesses attend the group identification, they are not able to:
(i) communicate with each other about the case or overhear a witness who has already been given an opportunity to see the suspect in the group;
(ii) see the suspect; or
(iii) see, or be reminded of, any photographs or description of the suspect or be given any other indication of the suspect's identity.

18. Witnesses shall be brought one at a time to the place where they are to observe the group. Immediately before the witness is asked to look at the group, the person conducting the procedure shall tell them that the person they saw may, or may not, be in the group and that if they cannot make a positive identification, they should say so.The witness shall be asked to observe the group in which the suspect is to appear. The way in which the witness should do this will depend on whether the group is moving or stationary.

Moving group

19. When the group in which the suspect is to appear is moving, e.g. leaving an escalator, the provisions of *paragraphs 20* to *24* should be followed.

20. If two or more suspects consent to a group identification, each should be the subject of separate identification procedures. These may be conducted consecutively on the same occasion.

21. The person conducting the procedure shall tell the witness to observe the group and ask them to point out any person they think they saw on the specified earlier occasion.
22. Once the witness has been informed as in *paragraph 21* the suspect should be allowed to take whatever position in the group they wish.

23. When the witness points out a person as in *paragraph 21* they shall, if practicable, be asked to take a closer look at the person to confirm the identification. If this is not practicable, or they cannot confirm the identification, they shall be asked how sure they are that the person they have indicated is the relevant person.

24. The witness should continue to observe the group for the period which the person conducting the procedure reasonably believes is necessary in the circumstances for them to be able to make comparisons between the suspect and other individuals of broadly similar appearance to the suspect as in *paragraph 6*.

Stationary groups

25. When the group in which the suspect is to appear is stationary, e.g. people waiting in a queue, the provisions of *paragraphs 26* to *29* should be followed.

26. If two or more suspects consent to a group identification, each should be subject to separate identification procedures unless they are of broadly similar appearance when they may appear in the same group. When separate group identifications are held, the groups must be made up of different people.

27. The suspect may take whatever position in the group they wish. If there is more than one witness, the suspect must be told, out of the sight and hearing of any witness, that they can, if they wish, change their position in the group.

28. The witness shall be asked to pass along, or amongst, the group and to look at each person in the group at least twice, taking as much care and time as possible according to the circumstances, before making an identification. Once the witness has done this, they shall be asked whether the person they saw on the specified earlier occasion is in the group and to indicate any such person by whatever means the person conducting the procedure considers appropriate in the circumstances. If this is not practicable, the witness shall be asked to point out any person they think they saw on the earlier occasion.

29. When the witness makes an indication as in *paragraph 28,* arrangements shall be made, if practicable, for the witness to take a closer look at the person to confirm the identification. If this is not practicable, or the witness is unable to confirm the identification, they shall be asked how sure they are that the person they have indicated is the relevant person.

All cases

30. If the suspect unreasonably delays joining the group, or having joined the group, deliberately conceals themselves from the sight of the witness, this may be treated as a refusal to co-operate in a group identification.

31. If the witness identifies a person other than the suspect, that person should be informed what has happened and asked if they are prepared to give their name and address. There is no obligation upon any member of the public to give these details. There shall be no duty to record any details of any other member of the public present in the group or at the place where the procedure is conducted.

32. When the group identification has been completed, the suspect shall be asked whether they wish to make any comments on the conduct of the procedure.

33. If the suspect has not been previously informed, they shall be told of any identifications made by the witnesses.

(c) Identification without the suspect's consent

34. Group identifications held covertly without the suspect's consent should, as far as

practicable, follow the rules for conduct of group identification by consent.

35. A suspect has no right to have a solicitor, appropriate adult or friend present as the identification will take place without the knowledge of the suspect.

36. Any number of suspects may be identified at the same time.

(d) Identifications in police stations

37. Group identifications should only take place in police stations for reasons of safety, security or because it is not practicable to hold them elsewhere.

38. The group identification may take place either in a room equipped with a screen permitting witnesses to see members of the group without being seen, or anywhere else in the police station that the identification officer considers appropriate.

39. Any of the additional safeguards applicable to identification parades should be followed if the identification officer considers it is practicable to do so in the circumstances.

(e) Identifications involving prison inmates

40. A group identification involving a prison inmate may only be arranged in the prison or at a police station.

41. When a group identification takes place involving a prison inmate, whether in a prison or in a police station, the arrangements should follow those in *paragraphs 37* to *39*. If a group identification takes place within a prison, other inmates may participate. If an inmate is the suspect, they do not have to wear prison clothing for the group identification unless the other participants are wearing the same clothing.

(f) Documentation

42. When a photograph or video is taken as in *paragraph 8* or *9,* a copy of the photograph or video shall be supplied on request to the suspect or their solicitor within a reasonable time.

43. *Paragraph 3.30* or *3.31*, as appropriate, shall apply when the photograph or film taken in accordance with *paragraph 8* or *9* includes the suspect.

44. A record of the conduct of any group identification must be made on forms provided for the purpose. This shall include anything said by the witness or suspect about any identifications or the conduct of the procedure and any reasons why it was not practicable to comply with any of the provisions of this Code governing the conduct of group identifications.

ANNEX D - CONFRONTATION BY AWITNESS

1. Before the confrontation takes place, the witness must be told that the person they saw may, or may not, be the person they are to confront and that if they are not that person, then the witness should say so.

2. Before the confrontation takes place the suspect or their solicitor shall be provided with details of the first description of the suspect given by any witness who is to attend.When a broadcast or publication is made, as in *paragraph 3.28*, the suspect or their solicitor should also be allowed to view any material released to the media for the purposes of recognising or tracing the suspect, provided it is practicable to do so and would not unreasonably delay the investigation.

3. Force may not be used to make the suspect’s face visible to the witness.

4. Confrontation must take place in the presence of the suspect's solicitor, interpreter or friend unless this would cause unreasonable delay.

5. The suspect shall be confronted independently by each witness, who shall be asked "Is this the person?". If the witness identifies the person but is unable to confirm the identification, they shall be asked how sure they are that the person is the one they saw on the earlier occasion.

6. The confrontation should normally take place in the police station, either in a normal room or one equipped with a screen permitting a witness to see the suspect without being seen. In both cases, the procedures are the same except that a room equipped with a screen may be used only when the suspect's solicitor, friend or appropriate adult is present or the confrontation is recorded on video.

7. After the procedure, each witness shall be asked whether they have seen any broadcast or published films or photographs or any descriptions of suspects relating to the offence and their reply shall be recorded.

ANNEX E - SHOWING PHOTOGRAPHS

(a) Action

1. An officer of sergeant rank or above shall be responsible for supervising and directing the showing of photographs. The actual showing may be done by another officer or police staff, see *paragraph 3.11*.

2. The supervising officer must confirm the first description of the suspect given by the witness has been recorded before they are shown the photographs. If the supervising officer is unable to confirm the description has been recorded they shall postpone showing the photographs.

3. Only one witness shall be shown photographs at any one time. Each witness shall be given as much privacy as practicable and shall not be allowed to communicate with any other witness in the case.

4. The witness shall be shown not less than twelve photographs at a time, which shall, as far as possible, all be of a similar type.

5. When the witness is shown the photographs, they shall be told the photograph of the person they saw may, or may not, be amongst them and if they cannot make a positive identification, they should say so. The witness shall also be told they should not make a decision until they have viewed at least twelve photographs. The witness shall not be prompted or guided in any way but shall be left to make any selection without help.

6. If a witness makes a positive identification from photographs, unless the person identified is otherwise eliminated from enquiries or is not available, other witnesses shall not be shown photographs. But both they, and the witness who has made the identification, shall be asked to attend a video identification, an identification parade or group identification unless there is no dispute about the suspect's identification.

7. If the witness makes a selection but is unable to confirm the identification, the person showing the photographs shall ask them how sure they are that the photograph they have indicated is the person they saw on the specified earlier occasion.

8. When the use of a computerised or artist's composite or similar likeness has led to there being a known suspect who can be asked to participate in a video identification, appear on an identification parade or participate in a group identification, that likeness shall not be shown to other potential witnesses.

9. When a witness attending a video identification, an identification parade or group identification has previously been shown photographs or computerised or artist's composite or similar likeness (and it is the responsibility of the officer in charge of the investigation to make the identification officer aware that this is the case), the suspect and their solicitor must be informed of this fact before the identification procedure takes place.

10. None of the photographs shown shall be destroyed, whether or not an identification is made, since they may be required for production in court.The photographs shall be numbered and a separate photograph taken of the frame or part of the album from which the witness made an identification as an aid to reconstituting it.

(b) Documentation

11. Whether or not an identification is made, a record shall be kept of the showing of photographs on forms provided for the purpose. This shall include anything said by the witness about any identification or the conduct of the procedure, any reasons it was not practicable to comply with any of the provisions of this Code governing the showing of photographs and the name and rank of the supervising officer.

12. The supervising officer shall inspect and sign the record as soon as practicable.

ANNEX F - FINGERPRINTS, FOOTWEAR IMPRESSIONS AND SAMPLES - DESTRUCTION AND SPECULATIVE SEARCHES

(a) Fingerprints, footwear impressions and samples taken in connection with a criminal investigation

1. When fingerprints, footwear impressions or DNA samples are taken from a person in connection with an investigation and the person is not suspected of having committed the offence, see *Note F1*, they must be destroyed as soon as they have fulfilled the purpose for which they were taken unless:

(a) they were taken for the purposes of an investigation of an offence for which a person has been convicted; and

(b) fingerprints, footwear impressions or samples were also taken from the convicted person for the purposes of that investigation.

However, subject to *paragraph 2*, the fingerprints, footwear impressions and samples, and the information derived from samples, may not be used in the investigation of any offence or in evidence against the person who is, or would be, entitled to the destruction of the fingerprints, footwear impressions and samples, see *Note F2*.

2. The requirement to destroy fingerprints, footwear impressions and DNA samples, and information derived from samples, and restrictions on their retention and use in paragraph 1 do not apply if the person gives their written consent for their fingerprints, footwear impressions or sample to be retained and used after they have fulfilled the purpose for which they were taken, see *Note F1*.

3 When a person's fingerprints, footwear impressions or sample are to be destroyed:
(a) any copies of the fingerprints and footwear impressions must also be destroyed;

(b) the person may witness the destruction of their fingerprints, footwear impressions or copies if they ask to do so within five days of being informed destruction is required;

(c) access to relevant computer fingerprint data shall be made impossible as soon as it is practicable to do so and the person shall be given a certificate to this

effect within three months of asking; and

(d) neither the fingerprints, footwear impressions, the sample, or any information derived from the sample, may be used in the investigation of any offence or in evidence against the person who is, or would be, entitled to its destruction.

4. Fingerprints, footwear impressions or samples, and the information derived from samples, taken in connection with the investigation of an offence which are not required to be destroyed, may be retained after they have fulfilled the purposes for which they were taken but may be used only for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution in, as well as outside, the UK and may also be subject to a speculative search. This includes checking them against other fingerprints, footwear impressions and DNA records held by, or on behalf of, the police and other law enforcement authorities in, as well as outside, the UK.

(b) Fingerprints taken in connection with Immigration Service enquiries

5. Fingerprints taken for Immigration Service enquiries in accordance with powers and procedures other than under PACE and for which the Immigration Service, not the police, are responsible, must be destroyed as follows:
(a) fingerprints and all copies must be destroyed as soon as practicable if the person from whom they were taken proves they are a British or Commonwealth citizen who has the right of abode in the UK under the Immigration Act 1971, section 2(1)(b);
(b) fingerprints taken under the power as in *paragraph 4.11(g)* from a dependant of a person in *4.11 (b)* to *(f)* must be destroyed when that person's fingerprints are to be destroyed;
(c) fingerprints taken from a person under any power as in *paragraph 4.11* or with the person's consent which have not already been destroyed as above, must be destroyed within ten years of being taken or within such period specified by the Secretary of State under the Immigration and Asylum Act 1999, section 143(5).

Notes for guidance
F1 Fingerprints, footwear impressions and samples given voluntarily for the purposes of elimination play an important part in many police investigations. It is, therefore, important to make sure innocent volunteers are not deterred from participating and their consent to their fingerprints, footwear impressions and DNA being used for the purposes of a specific investigation is fully informed and voluntary. If the police or volunteer seek to have the fingerprints, footwear impressions or samples retained for
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use after the specific investigation ends, it is important the volunteer's consent to this is also fully informed and voluntary.

Examples of consent for:

• *DNA/fingerprints/footwear impressions - to be used only for the purposes of a specific investigation;*
• *DNA/fingerprints/footwear impressions - to be used in the specific investigation* ***and*** *retained by the police for future use.*

To minimise the risk of confusion, each consent should be physically separate and the volunteer should be asked to sign ***each consent****.*
(a) DNA:
(i) DNA sample taken for the purposes of elimination or as part of an intelligence-led screening and to be used only for the purposes of that investigation and destroyed afterwards:

“I consent to my DNA/mouth swab being taken for forensic analysis. I understand that the sample will be destroyed at the end of the case and that my profile will only be compared to the crime stain profile from this enquiry. I have been advised that the person taking the sample may be required to give evidence and/or provide a written statement to the police in relation to the taking of it”.

(ii) DNA sample to be retained on the National DNA database and used in the future:

“I consent to my DNA sample and information derived from it being retained and used only for purposes related to the prevention and detection of a crime, the investigation of an offence or the conduct of a prosecution either nationally or internationally.”

“I understand that this sample may be checked against other DNA records held by, or on behalf of, relevant law enforcement authorities, either nationally or internationally”.

“I understand that once I have given my consent for the sample to be retained and used I cannot withdraw this consent.”

(b) Fingerprints:

(i) Fingerprints taken for the purposes of elimination or as part of an intelligence-led screening and to be used only for the purposes of that investigation and destroyed afterwards:

“I consent to my fingerprints being taken for elimination purposes. I understand that the fingerprints will be destroyed at the end of the case and that my fingerprints will only be compared to the fingerprints from this enquiry. I have been advised that the person taking the fingerprints may be required to give evidence and/or provide a written statement to the police in relation to the taking of it.”

(ii) Fingerprints to be retained for future use:

“I consent to my fingerprints being retained and used only for purposes related to the prevention and detection of a crime, the investigation of an offence or the conduct of a prosecution either nationally or internationally”.

“I understand that my fingerprints may be checked against other records held by, or on behalf of, relevant law enforcement authorities, either nationally or internationally.”

“I understand that once I have given my consent for my fingerprints to be retained and used I cannot withdraw this consent.”

(c) Footwear impressions:

(i) Footwear impressions taken for the purposes of elimination or as part of an intelligence-led screening and to be used only for the purposes of that investigation and destroyed afterwards:

“I consent to my footwear impressions being taken for elimination purposes. I understand that the footwear impressions will be destroyed at the end of the case and that my footwear impressions will only be compared to the footwear impressions from this enquiry. I have been advised that the person taking the footwear impressions may be

required to give evidence and/or provide a written statement to the police in relation to the taking of it."

(ii) Footwear impressions to be retained for future use:
"I consent to my footwear impressions being retained and used only for purposes related to the prevention and detection of a crime, the investigation of an offence or the conduct of a prosecution, either nationally or internationally".

"I understand that my footwear impressions may be checked against other records held by, or on behalf of, relevant law enforcement authorities, either nationally or internationally."

"I understand that once I have given my consent for my footwear impressions to be retained and used I cannot withdraw this consent."

F2 The provisions for the retention of fingerprints, footwear impressions and samples in paragraph 1 allow for all fingerprints, footwear impressions and samples in a case to be available for any subsequent miscarriage of justice investigation.

Appendix 2

Status: Mixed or Mildly Negative Judicial Treatment

*132 R. v Raymond Turnbull

R. v Joseph Nicholas David Camelo

R. v Christopher John Whitby

R. v Graham Francis Roberts

Court of Appeal
9 July 1976

(1976) 63 Cr. App. R. 132

The Lord Chief Justice , Lord Justice Roskill , Lord Justice Lawton , Mr. Justice Cusack and Mr. Justice
May
July 6, 7, 9, 1976

Evidence—Identification—Visual Identification—Disputed Identity—Summing-up—Guide lines Judges Should Follow in Summing-up Disputed Identification Cases to the Jury.

Whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence allege to be mistaken, the trial judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could all be mistaken. Provided such a warning is given, no particular form of words need be used.

Further, the trial judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. If in any case, whether being dealt with summarily or on indictment, the prosecution have reason to believe that there is a material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance, they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, the trial judge should remind the jury of any specific weaknesses which have appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives ***133*** and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good, the jury can be safely left to assess the value of the identifying evidence even though there is no other evidence to support: provided always, however, that an adequate warning has been given about the special need for caution.

When the quality of the identifying evidence is poor— *i.e.* a fleeting glance or a longer observation made in difficult conditions—the judge should then withdraw the case from the jury and direct an acquittal

unless there is other evidence which goes to support the correctness of the identification.
The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so.

A failure to follow the guidelines set out above and elaborated in the judgment of the Court (*infra*) is likely to result in the conviction being quashed, and will so result if, in the judgment of the Court of Appeal's judgment on all the evidence, the verdict is either unsafe or unsatisfactory.

Appeals against conviction and application for leave to appeal against sentence.
Turnbull and Camelo

On October 13, 1975, at Newcastle-upon-Tyne Crown Court (Judge Smith, Q.C.) the above appellants were jointly convicted, after a re-trial, of conspiracy to burgle (count 1) and were both sentenced to three years' imprisonment.

The following facts were taken from the judgment.

These two appellants were convicted on a re-trial. The case for the Crown in short was that the two appellants had devised a scheme whereby they could induce shopkeepers, customers of the Gosforth Branch of Lloyds Bank Ltd., to post their Night Safe wallets containing their day's takings through the ordinary letterbox in the main front door of the Bank instead of into the Night Safe. The appellants then intended that in the course of the following night or weekend they would break into the Bank through a window at the rear of the Branch, which was unprotected by any burglar alarm, and remove the wallets which would be conveniently lying on the floor just within the Bank's front door.

The first step in the conspiracy was to put the Night Safe out of action by inserting a bent nail into its lock. A notice typed on Bank notepaper and purporting to be signed by a non-existent Area Manager was then fixed above the Night Safe. This notice informed customers that owing to vandalism the Night Safe was out of order and advised them to put their deposits through the Bank letterbox. Over the latter a card was fixed upon which was boldly printed the message “NIGHT SAFE HERE.”’

Between about 5.30 p.m. and 6.30 p.m. on December 21, 1974, a number of unsuspecting shopkeepers and the employees of one Security Firm, following the instructions on the two notices, posted wallets containing over £5,000 takings through the Bank's letterbox. One shopkeeper, however, became
suspicious, and got in touch with the police. In the result, at 7.10 p.m. the Bank Manager, Mr. Salkeld, and his assistant, Mr. Alderson, accompanied by two police constables went to the Bank. They waited outside until the police constables were relieved by Detective Sergeant Wakenshaw, and then the two Bank officials and the detective sergeant went inside. They then set about making preparations to entrap
whoever might be the intended burglars.

Mr. Alderson gave evidence that at about 8 p.m. he was by the front door substituting empty for full Night Safe wallets, when he heard a rustling sound just outside and close to the letterbox. He opened the door and found that the Notice that had been fixed just above the letterbox had been removed. He shouted *134 to alert Mr. Salkeld and Detective Sergeant Wakenshaw, and whilst just outside the front door saw a man walking close to the outside wall of the Bank in which the Night Safe was installed. He described this man as about 5 feet 8 inches tall, as having dark hair, and as wearing a three-quarter length coat similar to the coat which the appellant Turnbull was subsequently shown to have been wearing that night, and which was produced as an exhibit at the trial. Mr. Alderson, however, did not see the man's face.

Nevertheless, the description of the man which he did give fitted the appellant Turnbull so far as it went. In his turn Mr. Salkeld gave evidence that when he heard Mr. Alderson's shout he went out of the Bank's front door and walked clockwise round the Bank by way of the main road on to which it faced, a small back lane, and a side road which entered the main road close to the front door of the Bank. As he did this he saw a van in that side road and took its number. There was no dispute at the trial that that van had been hired by the appellant Camelo shortly before these events and that he was driving it that night. On reaching the main road, the van turned left away from the Bank and in the direction of Newcastle. Mr. Salkeld himself had been unable to recognise anyone who may have been in the van. However, by this time Sergeant Wakenshaw was outside the Bank's front door and he gave unchallenged evidence to the effect that two or three minutes after 8 p.m. he had there seen a van with the appellant Camelo at the wheel drive past fairly slowly down the side road and turn left into the main road.

The principal witness on identity, however, for the Crown was a Detective Constable Smith. He gave evidence that on the relevant night he had signed off duty at Gosforth Police Station, which was not far from the Bank, at 8 p.m. He went to the car park at the rear of the Police Station and drove into the main road to which reference has been made and along it towards the Bank. As he did so, and at a point which it was agreed was some 62 yards from the front door of the Bank, Smith said that he saw a man in that doorway who seemed to be taking a Notice from the door of the Bank. The man left the doorway and started to walk to his left along the pavement with his shoulders hunched to the point in the wall of the Bank where the Night Safe was. There he pulled another Notice quickly off it and as he did so he glanced briefly to his right, that is to say along the main road in the direction from which Detective Constable Smith had been coming.

At the time Smith's car was just passing the Bank, some 10 yards or so from the Night Safe, and Detective Constable Smith's evidence was that as the man turned his head he (Smith) recognised him

and recognised him as the appellant Turnbull. The latter was a man whom the officer had known for some time. Detective Constable Smith said that it was a well lit street and that he had no difficulty in recognising Turnbull. Very shortly after this, Smith saw two men run from the side road into the main road and recognised one of them as Detective Sergeant Wakenshaw. The other in all probability was Mr. Salkeld. Constable Smith then drove in a wide sweep round the Bank in an attempt to intercept Turnbull, but did not see him. He did, however, meet another police officer and, having spoken to him, drove home. He said that about half an hour later he spoke on the telephone to Detective Sergeant Wakenshaw, and that on the following morning, as soon as he reported for duty at the police station, he entered in his notebook that which he had seen on the previous night. Naturally, Constable Smith was cross-examined strongly by counsel for each appellant; various criticisms and matters arising out of his evidence were put to him, but it is not necessary for the purposes of this judgment to go into them in detail.

The action then moved to another part of Gosforth, about a mile away from the Bank. A Woman Police Constable Thompson gave evidence, which was not disputed, that at 8.05 p.m. she was on duty in a police vehicle with a Police Constable Sewell. They saw a blue van with two people in it travelling at a fast speed. Having received a wireless message they followed it and ultimately were *135 able to stop it. As they did so she saw the appellant Turnbull stepping on to the pavement from the side of some bushes nearby. The appellant Camelo was in the driver's seat of the van. She went across and searched the bushes and there she found a number of housebreaking implements.

In the result both appellants were then arrested, taken to the police station and cautioned. In the course of subsequent questioning Camelo purported not to know Turnbull, but it was suggested that if Camelo had said this to the police officer it was said in a purely flippant manner for it was admitted by the defence at the trial that the two appellants did in fact know each other at all material times.

Turnbull also applied for leave to appeal against sentence.

G. F. R. Harkins for the appellant Turnbull. D. A. Orde for the appellant Camelo. John Mathew and M. R. Bell for the Crown.

Roberts

On February 11, 1976, at Plymouth Crown Court (Judge Lavington) the appellant was convicted of wounding with intent, and on February 12, 1976, he was sentenced to three months' detention and ordered to pay £18.50 compensation.

The following facts are taken from the judgment.

The offence was alleged to have taken place on the evening of July 26, 1975, at a dance hall in Plymouth in a passageway behind the stage. According to the victim, a man named Taylor, somebody bumped into him and then butted him on the nose. This led to an exchange of blows and then Taylor's assailant hit him on the top of the head with a pint beer glass. There is some conflict as to whether the glass was broken on Taylor's head or whether it was deliberately smashed against a wall before being used on his head, but in the result he had to have twenty stitches in his head and shoulder. His assailant ran away.

Nothing further material occurred until December 13, 1975, approximately five months later, when the appellant was at the dance hall where the wounding had taken place. Taylor was there too and claimed to recognise the appellant as the man who had attacked him the previous July. The appellant at once denied that he knew anything about it.

On December 18, 1975, the appellant was put on an identification parade. A Miss Kennedy who had witnessed the attack picked him out as the assailant. Her boy friend, one Inman, who had been with her at the material time picked out somebody quite different who certainly had nothing to do with the matter. Michael Selfe for the appellant Roberts. John Mathew and Anthony Donne for the Crown.
Whitby

On November 13, 1974, at the Central Criminal Court (Judge Argyle, Q.C.) the appellant Whitby was convicted of robbery and pleaded guilty to possessing cannabis and cannabis resin. On December 10, 1974, after an adjournment for a social inquiry report, Whitby was sentenced to six years' imprisonment for the robbery, to one month's imprisonment concurrent for the possession of drugs and a suspended sentence of six month's imprisonment imposed on August 13, 1973, on conviction for handling stolen goods was ordered to take effect concurrently, making six years' imprisonment in all.

The following facts are taken from the judgment.

The brief facts of the case are that an February 14, 1974, a number of men attempted to steal some £23,000 from the wages office of E.M.I. Ltd. in Uxbridge Road, Hayes. This was money to pay employees' wages and had been delivered to the premises shortly before. Two men entered the office next to that in which *136 the money had been placed. One, and possibly both of them, were wearing balaclava helmets. One man was carrying a wooden cosh, the other a pistol. With these they threatened two clerks in the Wages Office, a Mr. Byrne and a Mr. Marshall, and taking the wages bags in holdalls which they were also carrying they made off down a corridor. There they were confronted by another E.M.I. employee, who managed to snatch the holdall from one robber before that robber hit him with a hammer and the other robber struck at him with the wooden cosh. The two men then ran on towards the works entrance, and before they escaped in a stolen motor car driven by a third man they were seen in

different circumstances by a number of other witnesses. In all, including Mr. Byrne and Mr. Marshall, the When Marshall was first seen by the police very shortly after the robbery he told them that he could not describe the man whom it was alleged was this appellant, Whitby, nor assess his age. Nevertheless, he subsequently decided that he did know the man with the balaclava who had threatened him. He decided that it had been this appellant, whom he knew as a fellow employee with E.M.I., and he consequently gave the police Whitby's name and address.

Both Whitby and Lenik were employed by E.M.I. at that time. They worked together on the night shift and had finished work that morning at about 7 a.m. The appellant's evidence was that he took Lenik home in his car and then went on to his own home where he went to bed.
Later that day, however, having been given his name and address by Marshall, the police arrested the appellant and took him to the local police station. He at once denied that he was in any way concerned in the robbery and maintained his denial throughout. He contended that at the time the robbery was being committed he was in bed at home. In this he was supported by his wife who gave evidence to this effect at the trial.

The appellant's house was searched, but the only articles of relevance found were a number of toy guns which he said were his children's. One of them was a somewhat realistic imitation of a real pistol.
In the course of interrogation at the police station the appellant gave two answers which at one stage at the trial it was suggested could be considered as admissions, notwithstanding that overall he was denying any complicity on his part. We were told, however, that Counsel for the Crown did not rely upon them in his final address to the jury at the Central Criminal Court.

Forensic examination of the appellant's clothing revealed a small fragment of glass which was similar to that of the windscreen of the get-away car used by the robbers and which was shattered by one of the witnesses trying to prevent their escape.

Finally, the day after his arrest, the appellant was put on an identity parade. Of the 14 witnesses to the robbery 12 attended, and three purported to identify the appellant.

R. Grey and H. W. Allardyce for the appellant Whitby. John Mathew and R. G. Hawkins for the Crown.

All the above cases raised questions of disputed identity.

The case of Whitby first came before the Court (James and Ormrod L.JJ. and Mars-Jones J.) on May 13, 1976, when the case was adjourned, James L.J. stating that a settled practice in identification cases was essential for the Courts pending possible legislation consequent on the *Devlin Report on Evidence of Indentification in Criminal Cases* . A full Court of five judges would consider the matter.
The appeals of Turnbull and Camelo were argued on July 6, 1976, and those of Whitby and Roberts on July 7, 1976. On the conclusion of argument on both days, the Lord Chief Justice stated that the appeals of Turnbull and Camelo ***137*** would be dismissed and those of Whitby and Roberts would be allowed.

The Court's reasons would be put into writing.

Cur. adv. vult.

July 9: the following judgment of the Court was read.

The Lord Chief Justice:

On October 13, 1975, at Newcastle-upon-Tyne Crown Court the appellants Turnbull and Camelo were convicted of conspiracy to burgle. They were each sentenced to three years' imprisonment. They both appeal against conviction by leave of a single judge. On November 13, 1974, at the Central Criminal Court the appellant Whitby was convicted of robbery and sentenced to six years' imprisonment. He appeals against his conviction by leave of this Court. On February 11, 1976, at Plymouth Crown Court the appellant Roberts was convicted of unlawful wounding and sentenced to three months' detention which he has served. He appeals against his conviction by leave of the single judge.

Each of these appeals raises problems relating to evidence of visual identification in criminal cases. Such evidence can bring about miscarriages of justice and has done so in a few cases in recent years. The number of such cases, although small compared with the number in which evidence of visual identification is known to be satisfactory, necessitates steps being taken by the Courts, including this Court, to reduce that number as far as is possible. In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment.
First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic

or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.
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In our judgment when the quality is good as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the Courts to adjudge otherwise, affronts to justice would frequently occur. A few examples, taken over the whole spectrum of criminal activity, will illustrate what the effects upon the maintenance of law and order would be if any law were enacted that no person could be convicted on evidence of visual identification alone.

Here are the examples. A had been kidnapped and held to ransom over many days. His captor stayed with him all the time. At last he was released but he did not know the identity of his kidnapper nor where he had been kept. Months later the police arrested X for robbery and as a result of what they had been told by an informer they suspected him of the kidnapping. They had no other evidence. They arranged for A to attend an identity parade. He picked out X without hesitation. At X's trial, is the trial judge to rule at the end of the prosecution's case that X must be acquitted?

This is another example. Over a period of a week two police officers, B and C, kept observation in turn on a house which was suspected of being a distribution centre for drugs. A suspected supplier, Y, visited it from time to time. On the last day of the observation B saw Y enter the house. He at once signalled to other waiting police officers, who had a search warrant to enter. They did so; but by the time they got in, Y had escaped by a back window. Six months later C saw Y in the street and arrested him. Y at once alleged that C had mistaken him for someone else. At an identity parade he was picked out by B. Would it really be right and in the interests of justice for a judge to direct Y's acquittal at the end of the prosecution's case?

A rule such as the one under consideration would gravely impede the police in their work and would make the conviction of street offenders such as pickpockets, car thieves and the disorderly very difficult. But it would not only be the police who might be aggrieved by such a rule. Take the case of a factory worker D who during the course of his work went to the locker room to get something from his jacket which he had forgotten. As he went in he saw a workmate, Z, whom he had known for years and who worked nearby him in the same shop, standing by D's open locker with his hand inside. He hailed the thief by name. Z turned round and faced D; he dropped D's wallet on the floor and ran out of the locker room by another door. D reported what he had seen to his chargehand. When the chargehand went to find Z, he saw him walking towards his machine. Z alleged that D had been mistaken. A directed acquittal might well be greatly resented not only by D but by many others in the same shop.

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification: for example, X sees the accused snatch a woman's handbag; he gets only a fleeting glance of the thief's face as he runs off but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not 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 example of supporting evidence not amounting to corroboration ***139*** in a technical sense is to be found in Long [1973] 57 Cr.App.R. 871 . The accused, who was charged with robbery, had been identified by three witnesses in different places on different occasions but each had only a momentary opportunity for observation. Immediately after the robbery the accused had left his home and could not be found by the police. When later he was seen by them he claimed to know who had done the robbery and offered to help to find the robbers. At his trial he put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment odd coincidences can, if unexplained, be supporting evidence.

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was

supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything and the judge should tell the jury so. But he would be entitled to tell them that when assessing 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 should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was.

In setting out these guidelines for trial judges, which involve only changes of practice, not law, we have tried to follow the recommendations set out in the Report which Lord Devlin's Committee made to the Secretary of State for the Home Department in April 1976. We have not followed that Report in using the phrase “exceptional circumstances” to describe situations in which the risk of mistaken identification is reduced. In our judgment the use of such a phrase is likely to result in the build up of case law as to what circumstances can properly be described as exceptions and what cannot. Case law of this kind is likely to be a fetter on the administration of justice when so much depends upon the quality of the evidence in each case. Quality is what matters in the end. In many cases the exceptional circumstances to which the Report refers will provide evidence of good quality but they may not: the converse is also true.

A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this Court on all the evidence the verdict is either unsatisfactory or unsafe.
Having regard to public disquiet about the possibility of miscarriages of justice in this class of case, some explanation of the jurisdiction of this Court may be opportune. That jurisdiction is statutory: we can do no more than the Criminal Appeal Act 1968 authorises us to do. It does not authorise us to re-try cases. It is for the jury in each case to decide which witnesses should be believed. On matters of credibility this Court will only interfere in three circumstances: first, if the jury has been misdirected as to how to assess the evidence; secondly, if there has been no direction at all when there should have been one; and ***140** thirdly, if on the whole of the evidence the jury must have taken a perverse view of a witness but this is rare.

The limitations, such as they are, upon our jurisdiction do not mean that we cannot interfere to prevent miscarriages of justice. In 1966 Parliament released appellate jurisdiction in criminal cases tried on indictment from the limitations which the Criminal Appeal Act 1907 and the case law based upon it had put upon the old Court of Criminal Appeal. The jurisdiction of this Court is wider. We do not hesitate to use our extended jurisdiction whenever the evidence in a case justifies our doing so. In assessing a case, however, it is our duty to use our experience of the administration of justice. In every division of this Court that experience is likely to be extensive and helps us to detect the specious, the irrelevant and what is intended to deceive.

We turn now to consider the facts of these appeals in the light of those observations.

[His Lordship stated the facts relating to Turnbull and Camelo.]

On the facts as outlined, the case against both appellants of course rested principally upon Detective Constable Smith's evidence of his identification of Turnbull. Before the jury could convict either defendant they had to be satisfied of both the honesty and the correctness of this identification. Each of these aspects was challenged not only in the Court below, but also in this Court. The first can be disposed of shortly. The jury saw and heard Constable Smith giving evidence, and being cross-examined, and the criticisms made of his evidence were fully put to them in the course of the summing-up, of which no criticism has been or indeed could be made. By their verdict the jury clearly indicated that they thought this police officer to be an honest witness and there is no ground whatever upon which this Court could come to any contrary conclusion.

On the question of the correctness of the identification, the learned judge did warn the jury of the special need for caution and also explained to them the reason for this. On the other hand, as the appellant's counsel contended before this Court, Smith only had a brief fleeting view of the side of Turnbull's face at night, albeit in a well lit street, from a moving motor car. His identification in such circumstances, it was submitted, could not be relied upon and consequently he contended that the jury's verdict should be set aside as unsafe and unsatisfactory.

Counsel for the Crown accepted that what we have called the quality of the identification by Constable Smith could not be said to have been good, and indicated that had there been no other supporting evidence he would not have been disposed to argue that the appellant's conviction should stand. In the circumstances of the present case, however, and seeking to apply the general principles to which we have referred, he contended that there was ample other evidence which went to support the correctness of Smith's identification.

He pointed out that Smith already knew Turnbull and that his was more recognition than mere identification. Both Smith and Alderson gave a general description of the man they each saw and of the coat which he was wearing that night which was consistent with the facts. A van recently hired by Camelo was in the vicinity at the relevant time and Sergeant Wakenshaw had recognised Camelo at the wheel as the van passed the Bank. A few minutes later, when the van was stopped a mile or so away, both Camelo and Turnbull were in it and there was substantial evidence that at about that time the latter at least had been in possession of housebreaking implements.

We agree. All this was in our judgment clearly evidence which went to support the correctness of Smith's identification of Turnbull, and thus the implication that both he and Camelo had conspired as charged. Given the honesty of Smith's identification which, as we have said, the jury must have accepted, our opinion is that there can be no real doubt about its accuracy. In the result we do not ***141*** think that it can be said that the verdicts in this case were in any way unsafe or unsatisfactory and these appeals against conviction are therefore dismissed.

In so far as Turnbull's renewed application for leave to appeal against sentence is concerned, we have already indicated that this too is dismissed. This was a sophisticated plan to burgle Bank premises, and had it succeeded the appellants would have stolen over £5,000. The sentences passed can be criticised neither in principle nor extent and it was for these reasons that Turnbull's further application was dismissed.

Then we pass to Roberts's Appeal.

[His Lordship stated the facts and continued.]

At the trial Taylor and Miss Kennedy again identified the appellant. At the end of the prosecution case a submission was made inviting the judge to withdraw the case from the jury, but he rejected this and in due course the jury convicted. No criticism is made of the summing up save that it was said there was an error in not pointing out that Inman admitted in cross-examination that he had as good a view as Miss Kennedy. This Court is, however, asked to hold that the verdict was unsafe and unsatisfactory.

The case for the appellant can be summarised in this way. First, that the identifying witness did not claim to have known the assailant before the attack. Secondly, that the attack was all over in a few moments. Thirdly, that the place where the attack took place was dark, lit only by flashing lights of the kind popular in dance halls. Fourthly, that the appellant's conduct after he had been accused was consistent with the honesty of his denial and that in particular he did not deny that he might have been at the dance hall on the evening in question or seek to set up an alibi. He simply said that it was so long ago that he could not remember where he was. Fifthly, it was pointed out that Inman, who had as good a view as Miss Kennedy, could not identify the appellant. Finally, there were discrepancies and contradictions in the descriptions of the assailant given by the identifying witnesses. As to this last matter Taylor's original description of his attacker was that he had thick black curlyish hair which was collar length, long thick sideburns which appeared to be joined like a beard and that he was wearing a white lightweight jumper with a design on it. In evidence-in-chief he described the hair as shoulder length and the clothing as a white floppy jumper. He claimed to have seen the man for a couple of seconds. In cross-examination he described the garment as a white heavyweight cardigan. He did not think his attacker had a beard, though he was not sure, but he was positive the man had a moustache.

Miss Kennedy described the man as having lightish bushy shoulder length hair and as wearing a white T-shirt. In cross-examination she was positive he had a beard and moustache.
There were also discrepancies about the assailant's height. There was moreover evidence that the appellant had never had a beard and had not grown a moustache until after the date of the attack.
No suggestion was made that the identifying witnesses were dishonest. It is conceded that Miss Kennedy in particular was an impressive witness. But the quality of the identifications was not good, indeed there were notable weaknesses in it and there was no evidence capable of supporting the identifications made.
We think it would have been wiser for the trial judge to have withdrawn the case from the jury. In the circumstances the verdict was unsafe and unsatisfactory and for that reason we have allowed the appeal, applying the general principles enumerated earlier in this judgment.

Then, finally, there is the Whitby Appeal. The case against this appellant was based principally upon evidence of identification. A man called Lenik was indicted with Whitby: he was acquitted. On March 15, 1975, leave to appeal against conviction and sentence was originally refused by the single judge. On March 24, *142 1975, these applications were renewed. For the purposes of this appeal it is sufficient to say that over the ensuing months information was received and investigated by the Metropolitan Police with the result that they were satisfied that there had been an incorrect identification in this case and that the appellant had not in fact committed the offence of which he had been convicted.

On November 11, 1975, the Director of Public Prosecutions informed the registrar of this Court by letter that he had taken over the conduct of this case on behalf of the Crown. The appellant's renewed applications ultimately came before this Court on May 13, 1976. On that occasion counsel for the Crown indicated that those concerned with the prosecution had by then grave doubts about the justice of the conviction and that in consequence his instructions were to assist the Court in any way that he could rather than actively to respond to the appellant's appeal. In those circumstances this Court granted leave to appeal and adjourned the hearing to a date to be fixed. It was in fact this particular case which led to the convening of this full Court to consider the various problems which have arisen relating to identification evidence in criminal cases, and which has resulted in the judgment which this Court is now delivering.

[His Lordship stated the facts and continued:]

This essentially was the evidence led against this appellant at the trial and, as will be clear it was founded upon the identification said to have been made by the three witnesses of him on the identification parade. In the course of his summing-up the learned judge did warn the jury that mistakes in identification are possible, but in our opinion the warning that he gave was inadequate. Further, any effect that it might have had upon the jury was, we think, nullified by his final comment on the point: "Nevertheless," says the judge "make no bones about it, there is a massive block of prosecution evidence implicating these two accused in this robbery, three people have identified each of them."

Further, the learned judge gave the jury no help about the quality of the identification of this appellant, which in our view was meagre in the extreme. In so far as Marshall was concerned, as we have already said, he had decided that this appellant had been one of the robbers before he attended any identification parade, and some time after he had told the police he was unable to describe him. That in these circumstances Marshall picked out this appellant on the parade, when his mind was already made up, clearly added nothing to the case against this appellant. The learned judge put this point before the jury merely as an argument raised by the defence. In our view this was not sufficient: the jury should have been given a clear direction about Marshall's purported identification of the appellant on the parade.

In so far as the identification of the appellant by the other two witnesses on the parade was concerned, one of them had at the robbery only seen the man whom he said had been the appellant from the rear. The other had given to the police before the parade a description of a man which in no way fitted the description of the appellant in fact. In addition one must remember that all these identifications were of a man wearing a balaclava helmet who was only seen for a short time in the hurly-burly of a robbery and subsequent chase. Clearly the quality of the identifications in this case was very poor.
Was there any supporting evidence? In the course of his summing-up the learned judge in effect put before the jury the three matters to which we have already referred. First, what were said to amount to admissions in the course of the questioning of this appellant by the police. Counsel for the respondent in this Court told us that he did not rely upon these any more than did Counsel for the Crown at the trial when all the evidence had been called and he was addressing the jury at the end. We agree and in our view nothing that was said by this *143 appellant to the police could in any way be said to be evidence supporting the identifications.

Secondly, the toy gun. There was no real evidence that the man thought to have been this appellant even had a gun at any time during the robbery and in any event we do not think that the discovery of an imitation pistol among his children's toys when his house was searched was in any way supporting of the poor quality of the identifications which were made.

Thirdly, the fragment of glass found on the appellant's coat. As we have said, there was evidence that this was similar to the glass of the windscreen of the get-away car. The forensic witness giving this evidence, however, also accepted that this was a very common type of windscreen glass. Further, there was substantial evidence called on behalf of this appellant that the windscreen of his own similar car had shattered two or three months earlier and that the small piece of glass might well have come from this. In the result the evidence on this point was entirely neutral. This was accepted by counsel for the Crown in the course of the argument on this appeal. In these circumstances we do not think that evidence of the finding of a fragment of glass on the appellant's coat in any way went to support the correctness of the identifications by the three witnesses.

Finally, we feel that we should refer briefly to the way in which the learned judge dealt with the appellant's wife's evidence at the trial. She was called to support his alibi, as such it effectively was, that at the time of the robbery he was in bed asleep at home. Of her evidence the learned judge said: "Let me say, straight away, one hates to pry into these things as between husband and wife, it is extremely distateful, and what can the poor wife do other than back her husband up as much as she possibly can. This is not a criticism of her evidence at all, and you must approach her evidence on the same basis as that of all the other witnesses."

In the first place, the two sentences just quoted were mutually inconsistent. What else was the first other than a criticism of the appellant's wife's evidence?

Secondly, we think that the comment as it was left was unfortunate in that the learned judge did not go on to point out to the jury that as the appellant's alibi was that he was at home with his wife, who else could he have called to support it? This is a situation which not infrequently arises. In such circumstances it will almost certainly be present in the jury's mind that the witness is the defendant's wife and they will no doubt make what they think is the proper allowance for this fact. They should, however, be warned in most, if not all, similar cases that they should not necessarily regard the fact that the witness is the defendant's wife as derogating from the worth of her evidence when the nature and content of the defence is such that anyone would expect her to be called as a witness in any event.

In the result we think that the quality of the identification evidence in this case was very poor and that there was no evidence of the nature to which we have referred put before the jury which could be said to support the correctness of the identifications. It follows, in our judgment, that the statement by the learned judge that there was a "massive block of evidence" implicating the appellant was factually incorrect and in consequence a serious misdirection. In these circumstances we have no doubt that this conviction was both unsafe and unsatisfactory, and it was on these grounds that we allowed this appeal.

Representation

Solicitors: Registrar of Criminal Appeals , for the appellants Turnbull and Camelo; Reginald Johnson & Co., Hayes , for the appellant Whitby; Lewis, Swallow & Dunkerley , for the appellant Roberts. Director of Public Prosecutions for the Crown.
Appeals of Turnbull and Camelo dismissed. Appeals of Whitby and Roberts allowed.

Appendix 3

Status: Positive or Neutral Judicial Treatment

*430 R. v Forbes

House of Lords

14 December 2000

[2001] 1 Cr. App. R. 31

(Lord Bingham Of Cornhill , Lord Steyn , Lord Hoffmann , Lord Cooke Of Thorndon and Lord Hutton)

November 27, 28, December 14, 2000 1

EVIDENCE

Identification

Complainant identifying defendant in street—Whether identification parade required—Whether admission of identification evidence unfair—No appropriate direction given to jury—Whether conviction unsafe—

Criminal Appeal Act 1968 (c. 19), s.2 (as amended by Criminal Appeal Act 1995 (c. 35), s.2)— Police and Criminal Evidence Act 1984 (c. 60), ss.66, 78, Codes of Practice, Code D, para. 2.3 — Human Rights Act 1998 (c. 42), Sched. 1, art. 6 .

H2 The defendant was charged with attempted robbery. The facts were that the complainant, who had just obtained cash from a cashpoint machine, was confronted by an assailant who attempted to rob him. The complainant escaped to a waiting vehicle which drove off and he saw the assailant in the street. As the car passed the latter, the complainant made eye contact with the assailant who spat towards the vehicle. The complainant immediately called the police who drove him round the streets in search of the assailant. In due course, the complainant identified the defendant as his assailant. The defendant denied the accusation and asked repeatedly for an identification parade to be held. At his trial the recorder, following Popat [2000] 2 Cr.App.R. 208 , held that since there had been a full and complete identification of the defendant, an identification parade was unnecessary. She accordingly admitted the complainant's identification evidence without considering section 78 of the Police and Criminal Evidence Act 1984 and, in summing up, gave no direction to the jury as to any breach of Code D3 of the Codes of Practice, made under section 66 of the 1984 Act. The Court of Appeal, declining to follow Popat , held that there had been a breach of paragraph D2.3 of the Code, but that the identification evidence had been properly admitted and the conviction was safe. On appeal therefrom to the House of Lords, it was also argued that the defendant's rights under Article 6 of the European Convention on Human Rights relating to his right to a fair trial, as set out in Schedule 1 to the Human Rights Act 1998 , had been infringed. ***431**

H3 Held, that (1) paragraph D2.3 of the Code should not be construed to cover all possible situations; nevertheless, it imposed a mandatory obligation on police officers, subject to certain exceptions specified in D2.4, D2.7 or D2.10, to hold an identification parade whenever the suspect disputed the identification

and consented to it. That obligation remained even though the suspect had been unequivocally identified. No distinction could necessarily be drawn where the police produced a suspect to a witness and where a witness produced a suspect to the police. Thus, there had been a breach of paragraph D2.3.
H4 Popat [1998] 2 Cr.App.R. 208 not followed.

H5 (2) Dismissing the appeal, that although Article 6 of the European Convention on Human Rights guarantees the right to a fair trial, it had to be assessed on all the facts and the whole history of the proceedings in the particular case to judge whether a defendant's rights had been infringed, and, if so, a conviction would be held to be unsafe within the meaning of section 2 of the Criminal Appeal Act 1968 , as amended. It was true that the recorder made no exercise of judgment under section 78 of PACE ; but as the Court of Appeal had held, the evidence was compelling and untainted, and there had been in effect two informal identifications of the defendant by the complainant. Thus, the evidence had been rightly admitted. The fact that a breach of Code D was established, the failure of the recorder to give the jury a direction on the breach of Code D2.3 and its consequences did not lead the Appellate Committee to regard the defendant's trial as unfair or his conviction unsafe.

H6 Quinn [1995] 1 Cr.App.R. 480, CA approved. Brown and Stott, [2001] 2 W.L.R. 817; [2001] R.T.R. 11;

[2001] H.R.L.R. 9 and Togher and others, [2001] 1 Cr.App.R. 457 considered.

H7 Decision of the Court of Appeal, Criminal Division [1999] 2 Cr.App.R. 501 affirmed.

H8 (For breaches of Code D2.3, see Archbold 2001, paras 14-34a and 14-78; and for breaches of Code D, see, *ibid.* , 14-84. For section 78 of the Police and Criminal Evidence Act 1984 , see *ibid.* , para. 15-428. For the Human Rights Act 1998, Schedule 1, art. 6 , see *ibid.* , paras 16-57 to 63.)

H9 Appeal from the Court of Appeal (Criminal Division).

H10 This was an appeal by the defendant, Anthony Leroy Forbes, brought with leave dated January 11, 2000, of the Appellate Committee of the House of Lords (Lord Browne-Wilkinson, Lord Hope of Craighead and Lord Millett) from the judgment dated April 30, 1999, of the Court of Appeal (Laws L.J., Garland J. and Judge Crane), dismissing an appeal by the defendant against his conviction on September 11, 1998, in the Crown Court at Snaresbrook (Miss Recorder J. Hughes Q.C.) for attempted robbery. The Court of Appeal, pursuant to section 33(2) of the Criminal Appeal Act 1968 , certified that the following point of law of general public importance was involved in their decision, namely, “Do the provisions of paragraph D2.3 of the Code of Practice apply where a suspect has already been positively identified, whether or not in the manner permitted under paragraph D2.17 of the Code?” ***432**

H11 The facts are stated in the opinion of the Appellate Committee.

H12 The appeal was argued on November 27 and 28, 2000, when the following additional cases were cited: Allen [1995] Crim.L.R. 643, CA ; Bell [1998] Crim.L.R. 879, CA ; Blackburn (1853) 6 Cox.C.C. 333 ; Chapman (1911) 28 T.L.R. 81 ; Chadwick (1917) 12 Cr.App.R. 247, CCA : Criminal Cases Review Commission, ex p. Pearson [2000] 1 Cr.App.R. 141; [1999] 3 All E.R. 498, DC ; Dwyer (1925) 18 Cr.App.R. 145, CCA ; Davis , unreported, July 17, 2000, CA; El Hannachi [1998] 2 Cr.App.R. 216 , CA; Keane (1977) 65 Cr.App.R. 247 , CCA; R. v. Khan (Sultan) [1997] A.C. 558 , HL; Khan v. United Kingdom , unreported, May 12, 2000; Arthurs v. Attorney-General for Northern Ireland (1970) 54 Cr.App.R. 161 ; Mills v. R. [1995] 1 W.L.R. 511, PC ; Malashev [1997] Crim.L.R. 587, CA and Saidi v. France (1993) 17 E.H.R.R. 251 .

H13 *Robin Purchas Q.C.* and *Sherry Nabijou* for the defendant.

David Perry and *Piers Wauchope* for the Crown.

H14 Their Lordships took time for consideration.

December 14: LORD BINGHAM OF CORNHILL:

1 This is the considered opinion of the Committee.

2 The appellant Anthony Leroy Forbes was convicted by a jury of attempted robbery. He appealed to the Court of Appeal Criminal Division, which upheld much of his argument but dismissed his appeal. Leave to appeal to the House was refused but the Court of Appeal certified that a point of law of general public importance was involved in its decision. The question is:
“Do the provisions of paragraph D2.3 of the Code of Practice apply where a suspect has already been positively identified, whether or not in the manner permitted under paragraph D2.17 of the Code?”

3 The House gave leave to appeal against the decision of the Court of Appeal. At issue are the proper construction and application of the provisions relating to identification parades in Code D of the Codes of Practice issued under the Police and Criminal Evidence Act 1984 . In its judgment in the present case the Court of Appeal departed from an earlier considered judgment of the Court (Hobhouse L.J., Bracewell and Sachs JJ.) in Popat [1998] 2 Cr.App.R. 208 . Implicit in the certified question is an invitation to the House to choose between these two decisions. Should the certified question be answered in the affirmative, a subsidiary question arises as to the proper determination of this appeal.

4 The judgment of the Court of Appeal (Laws L.J., Garland J. and Judge Crane) in this case is reported at [1999] 2 Cr.App.R. 501 , where the facts are fully rehearsed. For present purposes a brief summary will suffice. In the early evening of May 2, 1998 Mr Tabassum was driven by a friend into Ilford to obtain some money from a cashpoint machine. He left his friend's parked car and withdrew £10. He was then approached by a man who blocked his path and asked for money, at first on compassionate grounds. ***433** On being refused, the man became aggressive. Mr Tabassum went away but was pursued by the man who threatened to “cut him up” and, standing very close to Mr Tabassum, revealed what looked like the handle of a knife. Mr Tabassum made good his escape and rejoined his friend in his car. They drove off and Mr Tabassum (as he later testified) saw his assailant in the street. As their car passed Mr Tabassum made eye contact with the man who spat towards the car as it went by. Mr Tabassum called the police on a mobile telephone, and gave a description of his assailant. The police answered Mr Tabassum's call a few minutes later and drove Mr Tabassum around the streets in a police car to look for the man. In due course Mr Tabassum identified to the police as his assailant a man who turned out to be the appellant. Mr Tabassum was sure he had identified the right man, and the police arrested the appellant, who denied he had done anything wrong. The appellant continued to deny the accusation against him, and on three occasions before the trial asked for an identification parade to be held. No identification parade was held.

5 At the trial, objection was taken to the admission of evidence of Mr Tabassum's identification of the appellant in the street, partly because of inconsistencies in different descriptions given by him of his assailant and partly because there had been no identification parade, which was contended to be a breach of paragraph 2.3 of Code D of the Codes of Practice. The recorder rejected that submission and said:

"I am satisfied in this case, for the purposes of the definition in Popat and indeed for the definition as required by the codes, that a full and complete identification had been made at the scene and in those circumstances it was not necessary for there to be an identification parade and I rule that the evidence of identification shall be admitted."

6 The judgments of the Court of Appeal in Popat and in the present case will be considered in detail below.

Background

7 In many criminal investigations and trials there is little or no doubt that a crime has been committed and the issue (at both the investigatory and trial stages) is who committed it. In such cases reliance may be placed on a wide range of means, of which DNA samples and fingerprints are obvious examples, to link the suspect or defendant with the crime. Where such means are available they are invaluable, whether to confirm suspicion and strengthen proof or to avert suspicion and defeat proof. In many cases of this class, however, it is the evidence of eye-witnesses who saw (or claim to have seen) the criminal incident, or the events leading up to or following it, which is relied on to connect the suspect or defendant with the commission of the offence. Such eye-witnesses, relying on what they have seen, identify the suspect or defendant as the person responsible for the criminal conduct in question. This appeal is concerned, and concerned only, with eye- ***434*** witness evidence of this kind, which we shall call "eye-witness identification evidence". For purposes of this discussion we shall assume that the identification is disputed by the suspect or defendant, because if it is not, no issue arises.

8 It has been recognised for very many years that eye-witness identification evidence, even when wholly honest, may lead to the conviction of the innocent. Following two notorious miscarriages of justice caused by honest but mistaken eye-witness identification, a Departmental Committee was appointed under the chairmanship of Lord Devlin. In its report (*Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* , H.C. 338, 1976) the Departmental Committee highlighted the problem (in paragraph 8.1):

"We are satisfied that in cases which depend wholly or mainly on eye-witness evidence of identification there is a special risk of wrong conviction. It arises because the value of such evidence is exceptionally difficult to assess; the witness who has sincerely convinced himself and whose sincerity carries conviction is not infrequently mistaken. We have found no forensically practicable way of detecting this sort of mistake …"

9 The Departmental Committee shared the general view that identification of the defendant in the dock was undesirable, for obvious reasons, and favoured the extended use of identification parades. In paragraph 8.7 it stated:

"Identification on parade or in some other similar way in which the witness takes the initiative in picking out the accused should be made a condition precedent to identification in court, the fulfilment of the condition to be dispensed with only when the holding of a parade would have been impracticable or unnecessary. An example of its being impracticable is when the accused refuses to attend. An example of its being unnecessary is when the accused is already well-known to the witness …"

10 Recognising the danger inherent in cases dependent on eye-witness identification evidence and in the light of this report, a specially constituted Court of Appeal of exceptional strength gave guidance in Turnbull (1976) 63 Cr.App.R. 132, [1977] Q.B. 224 both on the circumstances in which a trial judge should withdraw a case from the jury and on the directions which should be given where a case is left to the jury for decision.

11 The Royal Commission on Criminal Procedure under the chairmanship of Sir Cyril Philips, which reported in 1981 (Cmnd 8092) , did not examine identification procedures in detail, partly because of the work which had already been done on the subject. But in paragraph 3.138 the Royal Commission said: ***435***
"We would, however, comment that, in accordance with our general approach, there is a case in principle for regulating by statute identification procedures as well as other aspects of pre-trial criminal procedure. We therefore recommend that when the Government is considering legislation in the field of pre-trial criminal procedure it should examine the possibility of making identification procedures subject to statutory control as well."

12 The report of the Philips Royal Commission bore fruit in the Police and Criminal Evidence Act 1984 (PACE) . Among other detailed objectives that Act sought to recommend procedures which would provide for the effective investigation and prosecution of crime while at the same time, and importantly, safeguarding the legitimate rights and interests of those suspected and accused.

13 In pursuance of this objective section 66 of PACE provided for the issue by the Secretary of State of Codes of Practice to govern the exercise by police officers of statutory powers to search persons and vehicles; the detention, treatment, questioning and identification of persons by police officers; the searching of premises by police officers; and the seizure by police officers of property found on persons or premises. Thus such codes, requiring the approval of Parliament by affirmative resolution, were to govern the conduct of police officers, who were (by section 67(8) as originally enacted) to be liable to disciplinary proceedings for failure to comply, although such failure was not of itself to render the officer liable to any criminal or civil proceedings (section 67(10)). Being directed by the Secretary of State to police officers, the codes could not govern the admissibility at trial of any evidence obtained in breach of the codes. But section 67(11) of the Act provided:

"In all criminal and civil proceedings any such code shall be admissible in evidence, and if any provision of such a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."

This provision was supplemented by section 78 of the Act which conferred discretion on the Court (or confirmed the discretion of the Court) to refuse to allow prosecution evidence to be given if it appeared to the court that having regard to all the circumstances, including the circumstances in which the evidence had been obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

14 The first version of Code D, applicable to eye-witness identification procedure, took effect on January 1, 1986. Section 2 was headed (as in succeeding versions of the Code) "Identification by witnesses". The opening paragraphs were headed "(a) Suspect at the police station: the decision as to the method of identification", and paragraph 2.1 provided: ***436**

"2.1 In a case which involves disputed identification evidence a parade must be held if the suspect asks for one and it is practicable to hold one. A parade may also be held if the officer in charge of the investigation considers that it would be useful."

Paragraph 2.11 was headed "(e) Street identification" and read:

"2.11 A police officer may take a witness to a particular neighbourhood or place to observe the persons there to see whether he can identify the person whom he said he saw on the relevant occasion. Care should be taken however not to direct the witness's attention to any individual. Where the suspect is at a police station, the provisions of paragraphs 2.1 to 2.10 must apply."

15 The second version of Code D, applicable from April 1, 1991, reproduced paragraph 2.1 of the earlier code as paragraph 2.3 and paragraph 2.11 of the earlier Code as paragraph 2.17. But the distinction between the suspect at the police station and street identification was replaced by a distinction between "(a) Cases where the suspect is known" and "(b) Cases where the identity of the suspect is not known". In this version of the Code paragraph 2.1 listed the methods of identification by witnesses which might be used by the police, the first of these being an identification parade.

16 The third version of Code D, which took effect on April 10, 1995, is the version applicable to this case. The distinction between cases where the suspect is known and cases where the identity of the suspect is not known was preserved, but guidance was given on the meaning of this distinction. A guidance note provides:

"References in this section to a suspect being 'known' means there is sufficient information known to the police to justify the arrest of a particular person for suspected involvement in the offence."
Paragraph 2.1 continued to list the methods of identification which might be used, still listing an identification parade first. But in paragraph 2.3 the duty laid on the police investigating officer was rephrased and strengthened:

"2.3 Whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents unless paragraphs 2.4 or 2.7 or 2.10 apply. A parade may also be held if the officer in charge of the investigation considers that it would be useful, and the suspect consents."
The paragraphs which provide limited exceptions to the requirement stated in the first sentence of paragraph 2.3 are in these terms:

"2.4 A parade need not be held if the identification officer considers that, whether by reason of the unusual appearance of the suspect or for some other reason, it would not be practicable to assemble sufficient people who resembled him to make a parade fair. ***437**

2.7 A group identification takes place where the suspect is viewed by a witness amongst an informal group of people. The procedure may take place with the consent and co-operation of a suspect or covertly where a suspect has refused to co-operate with an identification parade or a group identification or has failed to attend. A group identification may also be arranged if the officer in charge of the investigation considers, whether because of fear on the part of the witness or for some other reason, that it is, in the circumstances, more satisfactory than a parade.

2.10 The identification officer may show a witness a video film of a suspect if the investigating officer considers, whether because of the refusal of the suspect to take part in an identification parade or group identification or other reasons, that this would in the circumstances be the most satisfactory

course of action."

17 Thus it is plain that if an identification parade is practicable it is the preferred mode of identification. Paragraph 2.17 was also revised, to strengthen the protection afforded to the suspect. It now reads: "2.17 A police officer may take a witness to a particular neighbourhood or place to see whether he can identify the person whom he said he saw on the relevant occasion. Before doing so, where practicable a record shall be made of any description given by the witness of the suspect. Care should be taken not to direct the witness's attention to any individual."

18 Thus the operation of the Code hinges on the distinction between cases where the suspect is known and cases where the identity of the suspect is not known. This distinction may be directed to different cases or to different stages of the same case. The test is whether there is sufficient information known to the police to justify the arrest of a particular person for involvement in a suspected offence. There will not be sufficient information known to the police to justify the arrest of a particular person unless the police have some apparently reliable evidence implicating that person. In cases where the identity of the suspect is known to the police, various methods of identification are in some circumstances permissible, but the Code is clear that an identification parade is the preferred method. While the second sentence of paragraph 2.3 confers a discretion on the investigating officer, the first sentence imposes a duty to which the exceptions are of very limited scope. Thus, if the police have sufficient information to justify the arrest of a particular person for suspected involvement in an offence, and that person disputes that he has been correctly identified as the person who has committed the offence, and the identification of him as the person who committed the offence depends (even in part) on eye-witness identification evidence, and the suspect consents, the Code requires that an identification parade be held unless one of the exceptions applies. At the identification parade the eye-witness will have the opportunity, subject to the strict regime governing the ***438*** conduct of such parades, to identify the suspect. If the eye-witness fails to identify the suspect, that will ordinarily strengthen his position during the investigation and at trial. If the eye-witness does identify him at the identification parade, this is likely to weaken his position at both stages, unless it appears that the eye-witness is identifying not the culprit who committed the crime but the person identified on an earlier occasion. If the suspect apprehends that an identification parade may strengthen the prosecution case, he will no doubt be advised to withhold his consent to the holding of a parade.

The authorities

19 In three cases decided by the Court of Appeal under the two earlier versions of Code D it was held to be a plain breach of paragraph 2.1 or 2.3 not to hold an identification parade if eye-witness identification evidence was disputed and the suspect expressly or impliedly requested one, and the Court recognised the potential detriment to a suspect denied the opportunity to test by means of a parade the reliability of an eye-witness's identification: see Brown [1991] Crim.L.R. 368 and transcript, CACD, December 18, 1990 ; Conway (1990) 91 Cr.App.R. 143 ; Graham [1994] Crim.L.R. 212 and transcript, CACD, August 17, 1993 . In Brown (transcript, at page 7C) the Court did not accept a submission that if there was a satisfactory street identification there was no need for an identification parade, although accepting that there might be circumstances in which, following a street identification, an identification parade might be otiose. We know of no cases to the contrary effect on these two versions of the Code. The 1995 revision of the Code must, we conclude, have been drafted on this foundation of authority. Macmath [1997] Crim.L.R. 586 (and transcript, CACD, March 26, 1997) , decided under the current version of the Code, again treated failure to hold an identification parade as a breach of a mandatory requirement of the Code. A similar ruling was given in Wait [1998] Crim.L.R. 68 (and transcript, CACD, June 23, 1997) .

20 The Court of Appeal gave judgment in Popat [1998] 2 Cr.App.R. 208 on March 23, 1998 . The appellant had been convicted of sexual and other offences committed on June 10 and November 6, 1996. Following a watch kept by the victim and a police officer on the street where the victim lived, the victim had identified the appellant to the police officer and he had been arrested. There had been no identification parade. It was argued on appeal that the trial judge, should have excluded evidence of the street identification under section 78 , because there had, in breach of Code D, been no identification parade. In the course of a lengthy reserved judgment of the Court delivered by Hobhouse L.J. the legislation and the codes were reviewed and it was pointed out, quite correctly, that even where non-compliance with the Code is shown exclusion of evidence is not an inevitable consequence. At page 213E the Court said:

"Although Section D of the Code does not contain any broad ***439*** statement of principle or object, there is a clear objective that identification parades, well conducted, should be the normal method of identification. It is clearly intended that practices should be avoided which might corrupt or devalue identification evidence. It is also implicitly recognised that the inability of a witness to pick out a suspect on a formal parade may be helpful to the administration of justice and to the suspect should he subsequently have to stand trial (*e.g.* Graham (supra))."

Then, at page 214C, the Court continued:

"The proposition advanced by the appellant with some support from previous judgments of this Court is that once the suspect has become known to the police there arises a duty in all disputed cases to hold an identification parade attended by the witness. There must always be an identification parade (unless excused by paragraphs 2.4, 2.7 or 2.10) unless the suspect admits that it is he who committed the alleged crime. In our judgment this is a misinterpretation of the Code. The identification of the suspect by the witness has already taken place and it is not a case where the suspect is being produced to the witness by the police but rather the other way round."

21 Having referred to the discretionary power of the investigating officer to call for an identification parade under the second sentence of paragraph 2.3 of the Code, the Court said at page 215C:
"In our judgment the second section of Code D is not to be construed as if it expressly provided for all possible situations. It provides a scheme to be followed and principles to be applied. The mandatory obligation in the first sentence of paragraph 2.3 relates to a situation where a suspect is being produced by the police to a witness not by the witness to the police. It outlaws the police attempting to obtain an identification of a known suspect by a witness otherwise than by a formal identification parade or one of the other methods of identifying known suspects authorised by paragraphs 2.4, 2.7 or 2.10. Further, where a previous identification was made under adverse circumstances or may for other reasons have been unreliable or doubtful, good practice may require that the suspect be put on an identification parade to establish whether the witness can confirm his believed identification. Decided cases illustrate this. There ought to be an identification parade where it would serve a useful purpose. The failure to hold an identification parade may affect the fairness of the trial or the safety of a verdict."

22 The Court then considered Brown , Conway , Macmath and Wait , to which we have made reference above and observed (at page 219B):
"In each of these cases the informal identification of the suspect was treated as being open to doubt. If there has not been a fully satisfactory ***440*** previous identification of the suspect by the witness then there is no reason to say that paragraph 2.3 does not apply. This is to be contrasted with the class of case where (whatever other Turnbull points might be available on other aspects of the case) there is no basis to criticise the informal identification. If it is a one to one identification carried out under good conditions and there is no risk of any corruption of the reliability of the identification then made, the identification by the witness is complete and it can truly be said that no further identification is required and no useful purpose would be served by holding an identification parade."

23 At page 220A of its judgment the Court referred to a sequence of cases which it considered to have been decided on a basis inconsistent with what were described as dicta in Brown , Conway , Macmath and Wait . With one exception, we do not think that these authorities were inconsistent with the cases mentioned. In Oscar [1991] Crim.L.R. 778 (transcript, CACD, June 14, 1991) , decided under the 1986 Code, there was no request for an identification parade and it was held not to be an identification case at all. In Rogers [1993] Crim.L.R. 386 (transcript, CACD, January 13, 1993) , there was again no request for a parade: the case concerned an informal identification and no reference was made in the judgment to paragraph 2.1. Brizey (unreported, CACD, March 10, 1994) and Greaves (unreported, CACD, May 6, 1994) focused on paragraph 2.17; no request was made in either case for a parade and no reference was made to paragraph 2.3. In Hickin [1996] Crim.L.R. 584 (transcript, CACD, March 8, 1996) , a case arising under the 1991 Code to which considerable weight was attached, reference was made to paragraphs 2.13 and 2.17, but not to paragraph 2.3. No request for a parade was made. Vaughan (unreported, CACD, April 30, 1997) and Bush (unreported, CACD, January 27, 1997) both turned on paragraph 2.17. The exception is Anastasiou [1998] Crim.L.R. 67 (transcript, CACD, June 23, 1997) in which the Court of Appeal held that an identification parade following an informal identification would be a farce: it could have added nothing to the identification already made, and in the circumstances the police officers would have been doing no more than confirm that the man upon the parade was the man that they had already arrested. The Code was thus held to have no apparent application.

24 Following its review of these cases the Court in Popat (at page 233C) expressed its conclusion:
"In our judgment it is important in evaluating these authorities to differentiate between what are in truth breaches of the Code and what are only failures to have proper regard to the purposes of the Code. The cases illustrate also that the specific provisions of the Code are not all-embracing and that there may be situations which fall outside them. Viewed as a whole the decisions do not bear out the literalist *dicta* which treat the first sentence of paragraph 2.3 as requiring the holding of a formal identification parade whenever a suspect has ***441*** become known and notwithstanding that he has previously been properly and adequately identified by the relevant witness. It is thus not correct that paragraph 2.3 requires that an already identified suspect be stood on an identification parade simply because he continues to dispute his identification.

Therefore, in our judgment, the effect of the Code and the law is that when a suspect has become known and disputes his identification as the peson who committed the crime alleged and the police wish to rely upon identification evidence provided by a witness, the question must be asked whether that witness has already made an actual and complete identification of that individual. If the answer to that question is yes then the mandatory requirement of the first sentence of paragraph 2.3 does not apply. If the answer is no, paragraph 2.3 must be complied with and any failure to do so will amount to a breach of the Code. What is an actual and complete prior identification of the relevant individual by the relevant witness will depend upon the facts of each individual case and the difficulties of assessment which this may involve have already been illustrated by the cases to which we have referred. But it is clear from the authorities that they may include situations which do not fit within paragraph 2.17 or any other individual paragraph of the Code. But where, as in the present case, there has been unequivocal identification of the relevant person by the relevant witness properly carried out in accordance with the provisions of paragraph 2.17, there can, in our judgment, be no question but that the requirements of the Code have been complied with and that there is no obligation thereafter under the first sentence of paragraph 2.3 to hold an identification parade for that witness again to identify the same man."

The appeal was accordingly dismissed. That decision has been followed in later cases, including Popat

(No. 2) [2000] 1 Cr.App.R. 387 .

25 In the present case the Court of Appeal declined to follow Popat : see its judgment reported at [1999] 2 Cr.App.R. 501 . It was argued on appeal, as at trial, that the failure to hold an identification parade following Mr Tabassum's street identification of the appellant had been a breach of Code D2.3 and that evidence of the street identification should therefore have been excluded by the trial judge. Since the trial judge had relied on Popat in concluding that there had been no breach, the Court of Appeal considered that authority and other authorities in considerable detail. Its conclusion was that there had been a breach on the facts of this case. The Court held that the obligation to hold an identification parade was mandatory if the conditions specified in paragraph 2.3 were met, which in this case they were, unless the exceptions applied, which they did not. The interpretation of paragraph 2.3 adopted in Popat was held to amount to a rewriting of the Code. While the existence and cogency of other identifying evidence ***442*** (including evidence of a street identification under paragraph 2.17) might be very relevant to the trial judge's decision whether or not to admit identification evidence despite a breach of paragraph 2.3, it was not relevant to the separate and prior question whether there had been such a breach.

The application of Code D2.3

26 In argument before the House the appellant contended that there had been a breach of paragraph 2.3 for very much the same reasons as had been given by the Court of Appeal. For the Crown it was argued that the law had been correctly stated in Popat . We are of opinion that there was a breach of the Code for the following reasons:

(1) Code D is intended to be an intensely practical document, giving police officers clear instructions on the approach that they should follow in specified circumstances. It is not old-fashioned literalism but sound interpretation to read the Code as meaning what it says.

(2) Paragraph 2.3 was revised in 1995 to provide that an identification parade shall be held (if the suspect consents, and unless the exceptions apply) *whenever* a suspect disputes an identification. This imposes a mandatory obligation on the police. There is no warrant for reading additional conditions into this simple text.

(3) Neither the language of Code D nor the decided cases support the distinction drawn in Popat between a suspect being produced by the police to a witness rather than by a witness to the police.

(4) We cannot accept that the mandatory obligation to hold an identification parade under paragraph 2.3 does not apply if there has previously been a “fully satisfactory” or “actual and complete” or “unequivocal” identification of the suspect by the relevant witness. Such an approach in our opinion subverts the clear intention of the code. First, it replaces an apparently hardedged mandatory obligation by an obviously difficult judgmental decision. Such decisions are bound to lead to challenges in the courts and resulting appeals. Second, it entrusts that decision to a police officer whose primary concern will (perfectly properly) be to promote the investigation and prosecution of crime rather than to protect the interests of the suspect. An identification parade, if held, may of course strengthen the prosecution, but it may also protect the suspect against the risk of mistaken identification, and a suspect should not save in circumstances which are specified or exceptional be denied his prima facie right to such protection on the decision of a police officer. Third, this approach overlooks the important fact that grave miscarriages of justice have in the past resulted from identifications which were “fully satisfactory”, “actual and complete” and “unequivocal” but proved to be wholly wrong. It is against such identifications, as well as against ***443*** uncertain and equivocal identifications, that paragraph 2.3 is intended to offer protection to the suspect.

27 We agree with the Court of Appeal in Popat that paragraph 2.3 should not be construed to cover all possible situations. If an eye-witness of a criminal incident makes plain to the police that he cannot identify the culprit, it will very probably be futile to invite that witness to attend an identification parade. If an eye-witness may be able to identify clothing worn by a culprit, but not the culprit himself, it will probably be futile to mount an identification parade rather than simply inviting the witness to identify the clothing. If a case is one of pure recognition of someone well-known to the eye-witness, it may again be futile to hold an identification parade. But save in cases such as these, or other exceptional circumstances, the effect of paragraph 2.3 is clear: if (a) the police have sufficient information to justify the arrest of a particular person for suspected involvement in an offence, and (b) an eye-witness has identified or may be able to identify that person, and (c) the suspect disputes his identification as a person involved in the commission of that offence, an identification parade must be held if (d) the suspect consents and (e) paragraphs 2.4, 2.7 and 2.10 of Code D do not apply.
28 We accordingly answer the certified question in the affirmative.

The effect of the breach

29 It was readily and rightly accepted for the appellant that even if the failure to hold an identification parade was (as we have concluded) a breach of Code D2.3, it does not necessarily follow that the evidence of Mr Tabassum's identification should have been excluded. That would depend on an exercise of judgment under section 78 of PACE , taking account of all the circumstances of the case. But it was argued that in the circumstances here the appellant had been denied a fair trial and his conviction should be considered unsafe. The starting point of this argument was the recorder's ruling (correct in the light of Popat , but wrong in the light of our decision) that there had been no breach of paragraph 2.3. From this it had followed that the recorder had never exercised her judgment whether evidence of Mr Tabassum's

street identification should be admitted or not, that the appellant's counsel had been denied the opportunity to cross-examine the police investigating officer on his decision not to hold an identification parade and that the jury had not been directed on the breach of the Code and the possibility of prejudice to the defence of the appellant.

30 Reference was made in argument to the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights . That is an absolute right. But, as the Judicial Committee of the Privy Council has very recently held in Brown v. Stott [2001] 2 W.L.R. 817, [2001] R.T.R. 121 , the subsidiary rights comprised within that article are not absolute, and it is always necessary to consider all the facts and the whole history of the proceedings in a particular case to judge whether a defendant's right to ***444** a fair trial has been infringed or not. If on such consideration it is concluded that a defendant's right to a fair trial has been infringed, a conviction will be held to be unsafe within the meaning of section 2 of the Criminal Appeal Act 1968 . We would endorse the recent judgment of the Court of Appeal Criminal Division (Lord Woolf C.J., Steel and Butterfield JJ.) in Togher, Doran and Parsons [2001] 1 Cr.App.R. 33 .

31 Since no accusation of bad faith was made against the police investigating officer in this case, and since he acted in accordance with the law as then authoritatively laid down, the appellant could have gained no benefit from cross-examination of that officer. That is a complaint without substance.

32 The appellant has a more substantial complaint that the recorder made no exercise of judgment under section 78 whether to admit evidence of Mr Tabassum's street identification or not. It is true that she did not. But the Court of Appeal had no doubt that this evidence was rightly admitted, despite the breach of D2.3 and we agree with the Court of Appeal's conclusion (at page 517E):
“The evidence was compelling and untainted, and was supported by the evidence (which it was open to the jury to accept) of what the appellant had said at the scene. It did not suffer from such problems or weaknesses as sometimes attend evidence of this kind: as, for example, where the suspect is already visibly in the hands of the police at the moment he is identified to them by the complainant.”
In this case there were in effect two informal identifications, one when the appellant spat at the passing car and a second when Mr Tabassum identified the appellant to the police.

33 The appellant also has a substantial complaint that the recorder did not direct the jury that there had been a breach of the Code nor give any direction on the effect of that breach. It is in our judgment important that the position should be clear. In any case where a breach of Code D has been established but the trial judge has rejected an application to exclude evidence to which the defence objected because of that breach, the trial judge should in the course of summing up to the jury (a) explain that there has been a breach of the Code and how it has arisen, and (b) invite the jury to consider the possible effect of that breach. The Court of Appeal has so ruled on many occasions, and we approve those rulings: see, for example Quinn [1995] 1 Cr.App.R. 480 at 490F. The terms of the appropriate direction will vary from case to case and breach to breach. But if the breach is a failure to hold an identification parade when required by D2.3, the jury should ordinarily be told that an identification parade enables a suspect to put the reliability of an eye-witness's identification to the test, that the suspect has lost the benefit of that safeguard and that the jury should take account of that fact in its assessment of the whole case, giving it such weight as it thinks fair. In cases where there has been an identification ***445** parade with the consent of the suspect, and the eye-witness has identified the suspect, in circumstances involving no breach of the code, the trial judge will ordinarily tell the jury that they can view the identification at the parade as strengthening the prosecution case but may also wish to alert the jury to the possible risk that the eye-witness may have identified not the culprit who committed the crime but the suspect identified by the same witness on the earlier occasion.

34 It remains to consider whether the recorder's failure to direct the jury on the breach of D2.3 and its consequences infringed the appellant's right to a fair trial or rendered his conviction unsafe. On this question we are of the same opinion as the Court of Appeal which (at page 518G of its judgment) said:
“In the present case, however, in our judgment the conviction is not rendered unsafe by the recorder's exiguous reference to the fact that no parade was held. As we have already said, the evidence of street identification was compelling and untainted. It would be wholly artificial to suppose that a reasonable jury might have taken a different view if they had been told that the appellant had been deprived of the chance that the complainant might not have picked out the appellant on a parade.”
Again, we bear in mind that there were in effect two informal identifications.

35 The circumstances of this case do not lead us to regard the appellant's trial as unfair or his conviction as unsafe.

Recommendation

36 The Committee recommend that the Appeal be dismissed; and that the certified question be answered in the affirmative.

H15 *Appeal dismissed. Certified question answered in affirmative* .

H16 **Representation**

Solicitors: Sternberg Reed Taylor & Gill , Barking , for the defendant; Crown Prosecution Service .
C.B. 1.

Appendix 4

Status: Mixed or Mildly Negative Judicial Treatment

*208 R. v Chetan Popat

Court of Appeal

23 March 1998

[1998] 2 Cr. App. R. 208

(Lord Justice Hobhouse , Mrs Justice Bracewell and Mr Justice Sachs):

March 4, 23, 1998

EVIDENCE

Identification

Whether identification parade required—Code of Practice for the Identification of Persons by Police Officers—paragraph D.2.3— Police and Criminal Evidence Act 1984(c. 60) s.66 .

By paragraph 2.3 of the Code of Practice D to the Police and Criminal Evidence Act 1984 :

"Whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents unless paragraphs 2.4 or 2.7 or 2.10 apply. A parade may also be held if the officer in charge of the investigation considers that it would be useful, and the suspect consents."

The appellant was convicted of committing serious sexual offences on June 10 and November 6, 1996. The issue at trial was whether the appellant had committed the offences and whether the victim's evidence that he was the man was credible and reliable. The appellant was arrested after the victim had identified him in the street to a police officer on November 26, 1996. It was contended on appeal that in failing to hold an identification parade, the police had breached paragraph 2.3 of Code D and that the judge should have excluded the street identification to the police officer, pursuant to section 78 of the 1984 Act.

Held, dismissing the appeal, that

(1) there is no requirement under paragraph D.2.3 of the Code of Practice that an already identified suspect should be put on an identification parade simply because he continues to dispute the identification. If a witness has already made an actual and complete identification of the person who committed the offence the mandatory requirement of the first sentence of paragraph D.2.3 does not apply. What is an actual and complete prior identification of the relevant witness by the relevant individual will depend on the facts of the individual case.

(2) In the circumstances of this case there was no obligation to hold an identification parade and no reason to suppose that the victim's identification to the police officer was unreliable.
Brown [1991] Crim.L.R. 368 ; Conway (1990) 91 Cr.App.R. 143 ; Macmath [1997] Crim.L.R. 586 ; Waite , unreported, June 23, 1997; Oscar [1991] Crim.L.R. 778 ; Rogers [1993] Crim.L.R. 386 ; Hickin and Others [1996] Crim.L.R. 584 ; Vaughan , unreported, April 30, 1997; Bush , unreported, January 27, 1998; Anastasiou [1998] Crim.L.R. 67 ; Malashev [1997] Crim.L.R. 587, considered .
*209

[For identification parades see Archbold (1998) paras 14-28 et seq.]

Appeal against conviction.

On July 27, 1997 at the Central Criminal Court (Judge Rogers, Q.C.) the appellant was convicted of attempted rape (count 1), indecent assault (counts 2 and 3) and intimidation of a witness (count 4). He was sentenced to four years' detention in a young offender institution on count 1, two years' concurrent on count 2, four years' consecutive on count 3 and two years' concurrent on count 4, making eight years'

detention in a young offender institution in all. The facts appear in the judgment. The appeal was argued on March 4, 1998.

Miss Shani Barnes (assigned by the Registrar of Criminal Appeals) for the appellant.

Miss Sasha Wass for the Crown.

Cur. adv. vult.

March 23. The following judgment was handed down.

HOBHOUSE, L.J.:

This is an appeal with the leave of the full court by a young man Chetan Popat who on July 21 of last year after a trial at the Central Criminal Court before His Honour Judge Rogers Q.C. and a jury was convicted on an indictment containing four counts. Counts one and two related to an incident said to have occurred on June 10, 1996 involving an attempted rape and the indecent assault of a 30 year old married woman, S. The third and fourth counts related to an incident said to have occurred on November 6 of that year involving a further indecent assault on the same woman and a threat to intimidate her as a potential witness. The appellant was convicted on all counts. The relevant issue at the trial was whether it was the appellant who had committed the offences in question and whether the victim's evidence that he was the man was credible and reliable. The point raised on this appeal is one of the proper understanding of Code of Practice D under section 66 of the Police and Criminal Evidence Act 1984 and in particular whether there was a breach of paragraph D.2.3 of the 1995 Edition of the Code which provides:

"Whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents unless paragraphs 2.4 or 2.7 or 2.10 apply. A parade may also be held if the officer in charge of the investigation considers that it would be useful, and the suspect consents."

No identification parade was held at which the victim was asked to identify the appellant. The exceptions in paragraphs 2.4, 2.7 and 2.10 did not apply. The appellant submits that there was a breach of the Code and that the trial Judge should have excluded the victim's evidence of identification under section 78 of the Act on the ground that it "would have such an adverse affect on the fairness of the proceedings that the court ought not to admit it". The reason why the Crown submit that there was no *210 breach of paragraph 2.3 is that there had already been a proper and valid identification of the appellant by the victim under paragraph 2.17 . The point raised by this appeal therefore is one which requires this Court to visit yet again the relationship between these two paragraphs of Code D and the conflicting dicta contained in judgments of this Court.

For present purposes the relevant facts can be briefly summarised. Mrs S lived in north-west London. On the morning of June 10, 1996 she had dropped her children off at a playgroup and then went for a walk in her local park. She noticed two young Asian men walking towards her. One of the men, whom she described as about 5ft 6in tall of slim build and with a prominent nose and thick gold coloured earring in his left ear, said to her: "Show us your tits." She ignored him but as she passed he reached out and grabbed her left breast. A struggle ensued in which the second man also took part. He held her from behind while the first man put his hands on her breasts and then bit her on her breast. He then attempted to rape her whilst the second man held her from behind. He then further indecently assaulted her before the two men let her go. She said the incident lasted between five and ten minutes in all. She was able to see the man's face clearly and at close range for most of the time. She reported the incident to the police and was examined by a police doctor.

Subsequent to that incident she went away and did not return until September. She said that about a week after her return she saw the same man again in the street. She was coming out of her house and he was walking towards her from about 200 yards away. He walked towards and passed her and after passing he looked back several times but he said nothing.

She said that she saw him for a third time about a fortnight later in her local High Street. He was in a group of young Asians and as he passed her he said "How's your tits." She again had a good view of him. It was about midday. She was sure it was the same man. On the evening of November 6 she was walking to the shops and she saw him again. He pulled her into an alleyway and pushed her onto the ground. A security light came on so she had a good view of him. He kicked her and sat across her chest. He said:

"What have you said? Who have you told? You'd better keep your mouth shut." He then indecently assaulted her by attempting to put his penis in her mouth. The incident ended with his running off. She said later that she noticed that he had a facial twitch. She reported the incident to the police and was again examined by the police doctor.

After the first incident on June 10, the police had arrested two suspects one of whom they released after questioning because they were satisfied that he could not have committed the offences. The other suspect was required to stand on an identification parade. The witness did not identify him as her assailant. He was released.

In October the police continued to be concerned to see if she could identify to them the man about whom she had told them. To this end it was arranged for the witness to keep a watch, accompanied by a plain

clothes *211 police officer, for the man to whom she was referring. Most of these observations were from or in the vicinity of the flat where she lived but there was also a session that took place in the shopping centre. Sessions were held on October 29, October 31, November 14, November 25 and November 26.

On November 26 she was keeping watch in the company of WPC Miller from the front window on the first floor of the house in which her flat was. This was a house set back about six feet from the pavement line with a clear view of the street in both directions. This session started at 11 a.m. At 12.50 p.m. she observed a man walking down the pavement towards the house whom she said was the man whom she had seen on the five occasions already referred to. She said that as soon as he came close enough for her to see his face she recognised him immediately. She also recognised the flinching on the left side of his face which she remembered from the incident in the alleyway. She also remarked upon the way that he walked with a swagger which she also remembered from previous occasions. She told WPC Miller "That's him." WPC Miller asked her "Are you sure." She replied "Yes." WPC Miller then went out into the street and with the assistance of another officer arrested the man.

The man they arrested was this appellant. It was not in dispute that he was the man whom the witness had seen walking past her house a few moments before and whom she had pointed out to WPC Miller. It was however clear from what subsequently occurred that he was disputing that he was the man who had committed the offences on June 10, and November 6.

In interview the appellant denied the offences and gave explanations for his movements on the days in question which were, he said, inconsistent with his being the assailant.

At the trial it was submitted on behalf of the appellant that the evidence of the witness concerning her identification of the appellant on November 26 should be excluded under section 78 of the Police and Criminal Evidence Act 1984 . The judge rejected this submission. There was no basis for criticising what had occurred on November 26. At that time there was no suspect known to the police or known to the witness otherwise than by his appearance. The witness had not been shown photographs of any suspect nor had anything else occurred which would be likely to make her identification on that day suspect. It was broad daylight. The circumstances of the observation and its duration were both ideal. It was faintly suggested that the witness may have been desperate to identify someone and therefore identified the first remotely similar young man who passed her house on that occasion. There was no basis for this suggestion. She had refrained from identifying anyone on the earlier identification parade; she had not identified anyone on any of the previous observation sessions.

Subsection (b) Code D deals with "Cases where the identity of the suspect is not known" and provides: *212

"2. 17 A police officer may take a witness to a particular neighbourhood or place to see whether he can identify the person whom he said he saw on the relevant occasion. Before doing so, where practicable a record shall be made of any description given by the witness of the suspect. Care should be taken not to direct the witness's attention to any individual. 2.18 A witness must not be shown photographs, photofit, identikit or similar pictures if the identity of the suspect is known to the police and he is available to stand on an identification parade. If the identity of the suspect is not known, the showing of such pictures to a witness must be done in accordance with annex D."

There is a note for guidance concerning when a suspect is "known".
"D.2E References in this section to a suspect being "known" means there is sufficient information known to the police to justify the arrest of a particular person for suspected involvement in the offence. A suspect being "available" means that he is immediately available to take part in the procedure or he will become available within a reasonably short time."

The Codes of Practice are issued by the Secretary of State under section 66 of the Police and Criminal Evidence Act . One of the headings is "The Detention, Treatment, Questioning and Identification of Persons by Police Officers". Section 67(8) as originally enacted made it a disciplinary offence for a police officer to fail to comply with any provision of a Code but did not of itself render him liable to any criminal or civil proceedings (section 67(10)). Section 67(11) provides that in all criminal and civil proceedings the Code shall be admissible in evidence and if relevant to any question arising in those proceedings be taken into account in determining that question. Thus there is an obligation on police officers (and others charged with the duty of investigating offences) to have regard to and by necessary implication comply with the provisions of the Code. It is part of the purpose of sections 66 and 67 and the Codes that they should guide and direct police officers' conduct in this way. Failure to comply with the Codes may have disciplinary consequences for police officers. The importance of the Codes as laying down requirements which police officers must follow has been stressed in Quinn [1995] 1 Cr.App.R. 480, 488 .

But there is a more fundamental purpose which is to provide standards which can be applied to police conduct and to ensure, as far as it is practicable to do so, the quality and reliability of the evidence collected by police officers and used in criminal proceedings. The areas of interviewing and obtaining admissions from suspects are one example of this; another is identification evidence. Thus the Codes have a direct bearing upon questions arising under sections 76–78 of the Act. At a trial, the trial judge has to consider any question of compliance with the Code in deciding the question of fairness under section 78. But it is not a simple relationship between a question of compliance and the question of fairness. Even where *213 the Code has been complied with, a proper exercise of the discretion under section 78,

or the related inherent discretion that the judge has in relation to prejudicial or inherently unreliable evidence, may require the judge to rule that the evidence should not be admitted. Compliance with the Code is a factor but it is not the only factor, nor is it a decisive factor. Similarly non-compliance with the Code is not decisive. It is again only a factor, maybe a cogent factor, in the decision to admit or exclude evidence. In the context of identification evidence the Turnbull principles 1 are always relevant as is the ability of the judge to give appropriate directions and warnings to the jury. It is and remains the duty of the judge appropriately to direct and warn the jury about all matters which may affect the reliability of identification evidence and, in particular, any breaches of the Code that may have taken place. (Quinn (supra) at p. 490; Graham [1994] Crim.L.R. 210 .) It will thus often be the case that these elements of discretion on the part of the judge and his summing-up will supersede any question about the strict interpretation of the Code. Indeed, in the present case, the judge in his summing-up did warn and direct the jury about the significance of the fact that the defendant had not been asked to stand upon any identification parade even though it was his view that the Code did not impose any mandatory obligation to hold one.

When one comes to any decision by the Court of Appeal, the Court is concerned with the safety of the conviction. This takes the critical question one further step away from the question of the interpretation of the Code. Whether or not a conviction was safe has to be assessed having regard to all the relevant circumstances. One of those circumstances will be the decision of the judge not to exclude evidence under section 78; and it is only as an element in that process that the interpretation of the Code comes into the analysis. Thus the appellate decisions have probably all been decided upon grounds to which the actual interpretation of the Code was either not essential or only secondary. However, the judgments contain dicta which it is difficult to reconcile concerning the correct interpretation of the Code and, in particular, the relationship between paragraph D.2.17 and D.2.3 .

Although section D of the Code does not contain any broad statement of principle or object, there is a clear objective that identification parades, well conducted, should be the normal method of identification. It is clearly intended that practices should be avoided which might corrupt or devalue identification evidence. It is also implicitly recognised that the inability of a witness to pick out a suspect on a formal parade may be helpful to the administration of justice and to the suspect should he subsequently have to stand trial. (e.g. Graham (supra).)

Section D.2 is headed "Identification by Witnesses". It is divided into two main sections—"(a) Cases where the suspect is known" and "(b) Cases where the identity of the suspect is not known". This division creates a problem because every suspect starts off by being unknown to the police, *214 save where they observe a known individual committing a crime, and there is the stage at which every suspect, although previously unknown, becomes known to the police. The note D.2E already quoted provides guidance as to when an unknown suspect becomes a 'known' suspect. But it is obviously possible, and contemplated by the Code that identification by the relevant witness may have taken place at a time before the suspect became a known suspect. The subject matter is identification by the witness. It may be that the suspect is presented to the witness by the police for identification by the witness in which case section (a) applies: or it may be that the witness, already able to identify a suspect, at that time unknown to the police, identifies him as an identified individual to the police so that the police then know who he is. It is this latter situation which is represented by this case. It was the witness who identified the appellant to the police. She did so in the presence of a police officer by pointing him out to the police officer and stating that she was sure that he was the man whom she had seen on the previous occasions and who had assaulted and threatened her. He then became known to the police. He did not dispute that he was the man she had pointed out to the police. There is no suggestion that an identification parade was required to confirm that fact.

The proposition advanced by the appellant with some support from previous judgments of this Court is that once the suspect has become known to the police there arises a duty in all disputed cases to hold an identification parade attended by the witness. There must always be an identification parade (unless excused by paragraphs 2.4, 2.7 or 2.10) unless the suspect admits that it is he who committed the alleged crime. In our judgment this is a misinterpretation of the Code. The identification of the suspect by the witness has already taken place and it is not a case where the suspect is being produced to the witness by the police but rather the other way round.

The present case is not concerned with any of the situations which give rise to the special problems such as where the suspect has been arrested after being pursued and is then identified at the point of arrest. Nor with the situation where, at the scene of the crime, a witness points out to police officers who have arrived on the scene those whom the witnesses say were the miscreants. Nor is it concerned with the type of problems that might arise in the immediate aftermath of the commission of a crime where the suspects are looked for in the vicinity with the assistance of the witnesses. All these situations give rise to potential and special problems which are not specifically addressed in the Code. They require realistic decisions to be taken and evaluations made. Delay in identifying or excluding the suspect may be unacceptable or contrary to the interests of justice. These situations become particularly acute when the police have to decide whom to arrest or whether formally to arrest someone they have already detained.

Further, good practice may in a number of situations require the holding *215 of an identification parade notwithstanding that there has previously been some informal identification of the suspect by the witness. Again, there will be a whole range of situations which give rise to this consideration. The second sentence of paragraph 2.3 gives the officer in charge of the investigation a discretion to hold an identification parade whenever he considers it useful to do so. It is clearly useful to do so wherever it would assist the interests of justice to hold an identification parade. It may also be useful to hold one in order to establish

that a witness cannot identify a suspect as well as to establish that he can. Indeed there can be situations where, come the trial, a witness is not going to be relied upon as an identifying witness but where it is nevertheless desirable in the interests of justice that an identification parade attended by that witness should be held. It is however difficult to express that conclusion as a breach of the mandatory terms of the Code rather than as a failure to comply fully with the spirit and purposes of the Code. It also raises difficulties for the simple application of section 78: there is no identification evidence to be excluded. (Skeetes , unreported February 5, 1998).

In our judgment the second section of Code D is not to be construed as if it expressly provided for all possible situations. It provides a scheme to be followed and principles to be applied. The mandatory obligation in the first sentence of paragraph 2.3 relates to a situation where a suspect is being produced by the police to a witness not by the witness to the police. It outlaws the police attempting to obtain an identification of a known suspect by a witness otherwise than by a formal identification parade or one of the other methods of identifying known suspects authorised by paragraphs 2.4, 2.7 or 2.10 . Further, where a previous identification was made under adverse circumstances or may for other reasons have been unreliable or doubtful, good practice may require that the suspect be put on an identification parade to establish whether the witness can confirm his believed identification. Decided cases illustrate this. There ought to be an identification parade where it would serve a useful purpose. The failure to hold an identification parade may affect the fairness of the trial or the safety of a verdict.

With this introduction we will now turn to the decided cases (some of which were decided under earlier editions of the Code). We have obtained transcripts of those which are not fully reported. To take first the case of Brown [1991] Crim.L.R. 368 which is strongly relied upon by the appellant. There had been a robbery of a young couple in the street. The issue at the trial was whether the appellant was one of the two men who had robbed them. The identifying witness was the young woman. The circumstances of the robbery made it difficult for her to identify her attacker. But she apparently believed that she might be able to identify him again. She and her companion were taken round the neighbourhood in a police vehicle and within minutes she made a positive identification of the appellant. There was some confusion in the evidence precisely how she had made her identification from the police car. The appellant was arrested and disputed *216 that he had any connection with the robbery. He said that he had just come from the pub. He was arrested. He subsequently asked for an identification parade. Farquharson L.J. delivering the judgment of the Court said:

“Two issues arise. First of all it is said that Miss Bird, as the complainant, should have attended the identification parade. The fact that she did not was a contravention of paragraph D.2.1 [#2.3] of the Code of Practice to the Police and Criminal Evidence Act 1984 for the identification of persons by witnesses and that accordingly evidence of identification should not have been admitted or alternatively the jury should have been warned of the effect of the breach and her non-attendance at the identification parade.” (p. 5)
“It was submitted on behalf of the Crown that D.2.11 [#2.17] stood alone and that if there was a satisfactory street identification there was no need for an identification parade under D.2.1, which was the argument acceded to by the learned assistant recorder. However, in our view that argument overlooks the mandatory provisions of D.2.1 which says very clearly: “In a case which involves disputed identification evidence a parade must be held if the suspect asks for one …”.

It may in some circumstances be otiose where there has been a street identification but, as was pointed out in the course of argument in this case, there is always the possibility that the witness, seeing the suspect ranged against a number of people of roughly similar appearance, may have doubts or, as D.C. Hardcastle did, identify the wrong person and of course the loss of the possibility of that happening is the prejudice relied upon on behalf of the appellant and the failure in fact to hold an identification parade.
It was suggested at one stage that there must be some difference between when there is a known suspect and when there is no suspect, but that in our view merely mirrors the distinction between D.2.11, permissive, and D.2.1 mandatory.

We therefore come to the conclusion, without hesitation, that there was a breach of the Code in this case.” (pp. 7–8)

They however decided, having examined other evidence which tended to confirm the correctness of the witness's identification, to uphold the conviction. The judgment therefore contains a clear dictum that paragraph 2.3 is overriding and requires an identification parade to be held regardless of what has gone before and regardless of whether the suspect has already been identified by the relevant witness at a time when he was not known to the police. It would appear that the judgment was influenced by the fact that the court believed that an identification parade attended by the witness would have served a useful purpose. But this did not, having a regard to the case as a whole, make the conviction unsafe.

In Conway (1990) 91 Cr.App.R. 143 , the relevant witnesses said that they knew the men in question by sight. They subsequently ascertained from others what they said were the names of the people they knew by sight. The *217 defendant was arrested. He requested an identification parade. None was held. At the Magistrates' court the witnesses were allowed to make a dock identification of the defendant. It was held by the Court of Appeal that there had been a clear breach of the Code and that the identification evidence should have been excluded. The defendant's appeal against his conviction was allowed. What had happened in this case was clearly most unsatisfactory. There had never been any acceptable identification of the defendant. The police, having arrested the suspect, should have gone through the

proper procedure to ascertain whether or not the witnesses could identify the man they had arrested. The Court of Appeal clearly thought that there was room for error.

In Macmath [1997] Crim.L.R. 586 two young women had witnessed a nasty assault taking place on Christmas Eve in a street in Bath. The witnesses were immediately taken on a tour of the area in a police car and they identified a group of three men one of whom was the appellant. He admitted that he had been at the scene but denied that he had participated in the violence. The issue at the trial was whether he had been correctly identified as being a participant. Giving the judgment of the Court Henry L.J. said:

"It was under [paragraph 2.17] that the police took both girls for their tour around the neighbourhood in the police car. The Code does not deal with the situation where there is more than one potential identifying witness. In an ideal world, there would only be one potential witness in each car to preserve the integrity of each and every identification. But that was not practicable here, and given the need for speed, it seems to us that it would not have been practicable to take a description either. We see no breach of the Code here: in a volatile situation the primary need is to identify suspects before they disperse. So it was that both girls picked out the three men—though Emma's evidence obviously suffered from the fact that it followed Deborah's. That fact could be properly dealt with by an appropriate direction to the jury. However, once Macmath had been identified as a suspect, then Code D.2(a) "cases where the suspect is known" applies. Under D.2.3: "whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents …". That requirement operates unless any of the exceptions set out in the Code apply, and none do here though the appellant had admitted his presence at the scene, but denied his participation, it was still an identification case for the reason that there were a fair number of people in the vicinity at the time, and so presence would not necessarily be evidence of identification as a participant." (p. 7)

They held that the trial judge had wrongly failed to consider the possibility that the young women or either of them might have failed to identify the defendant at the parade. They pointed out that the "street" identification was doubtful. It was an identification of a group rather than *218 of an individual and one of the witnesses (Emma) conceded that she only recognised two of the three of them. The identification was made by two girls under circumstances where they may have influenced each other: indeed there was some evidence that this was what had happened. Further one of the witnesses had described the defendant as having had blonde hair when in fact it was brown. The defendant's conviction was quashed.

Here again the explanation of the decision is that it was in doubt whether there had ever been any identification, or proper identification, of the defendant by the witnesses in the street. The suspect although known was still not satisfactorily identified and an identification parade should have been held to establish that he could be. It seems that the mandatory requirement of paragraph 2.3 had been broken. Waite (June 23, 1997 unreported) concerned an identification by the victim of a robbery. He said he knew his three assailants by sight. He saw them again on a subsequent occasion. A few days later he saw two of them again. He followed them and managed to flag down a police car. The police then arrested the two men he had pointed out. One, Mr Love, admitted that he had been one of the robbers; the other, Mr Waite, disputed that he was one of the robbers. There were problems about the witness's evidence. After the attack he had been unable to describe his attackers. He said that they were young white men and gave a very vague description of their clothing. Hutchison L.J. giving the judgment of the Court said: "In the course of his evidence—and this is an important point in the case—he asserted that he was unable to tell one white man from another and that might account for his inability to give any sort of detailed description."

There were other inconsistencies in his evidence. The primary issue at the trial was whether Waite was correctly identified as one of the robbers. No identification parade had been held. At the trial there were problems whether the evidence satisfied the Turnbull criteria. But the point was also taken and relied upon on appeal that there had been a breach of the mandatory requirement to hold an identification parade. It appears to have been conceded that the case did involve a breach of the Code. Brownwas followed . The view of the trial judge that there had not been a breach was, in the judgment of the Court of Appeal, "flawed in that it [was] predicated on the assumption that the victim would have picked out the appellant and that had he done so the evidence would have been of little value to the prosecution" (p. 16). They pointed out that the purpose of an identification parade can be to establish the inability of the witness to identify the suspect. They referred to the fact that the judge had failed to give the jury an adequate direction and warning about the absence of an identification parade and had failed to tell them that there had been a breach of the Code (citing Conway and Quinn). They added:

"We emphasise that we are dealing with the facts of this case where plainly it would have been material to have a parade. The witness was *219 somebody who could not tell one white man from another. The contention for the defence was that he might have assumed that someone with Mr Love whom he recognised was necessarily someone who had been with him on the night in question. He had not been put to the test of seeing if he could pick out the defendant from a line of men at an identification parade. It was suggested for the defence that [the victim] had erroneously allowed himself to believe the appellant, who was with Love at the time of the arrest, had been with him on the night in question." (p. 16)
Having particular regard to the deficient summing-up the Court of Appeal quashed the conviction.

In each of these cases the informal identification of the suspect was treated as being open to doubt. If there has not been a fully satisfactory previous identification of the suspect by the witness then there is no

reason to say that paragraph 2.3 does not apply. This is to be contrasted with the class of case where (whatever other Turnbull points might be available on other aspects of the case) there is no basis to criticise the informal identification. If it is a one to one identification carried out under good conditions and there is no risk of any corruption of the reliability of the identification then made, the identification by the witness is complete and it can truly be said that no further identification is required and no useful purpose would be served by holding an identification parade.

In contrast to such cases, there are decisions of the Court of Appeal where it has been held that there was no breach of the Code even though no identification parade was held. Some cases are what is called "recognition" cases where the suspect was already well known to the witness before the commission of the alleged crime and the witness is giving evidence that he saw that individual commit the crime; the fact that the suspect was and is known to the witness is not in dispute. These are not cases which come within section 2 of Code D. (But see Tavernier , September 26, 1997, unreported which appears to adopt a different view.)

Similarly there are cases such as Oscar [1991] Crim.L.R. 778 where the evidence of the witness was that she looked out of her window and saw in her garden a man wearing distinctive clothes which she was able to describe. She was not able to see his features but gave an indication of his height, and build. She saw him attempting to break into some premises on the other side of the road and rang the police. Police came and found and arrested a suspect. He was wearing clothes which fitted the witness's description. No identification parade was held. This was not an identification case because the witness was not purporting to have identified any individual person. All she was doing was giving evidence of her observation of an unknown man wearing certain distinctive clothes. It was thus in truth a circumstantial case raising the question: Was it remotely likely that there would be two identically dressed men in the *220 vicinity of the commission of the crime? The Court of Appeal adopted a purposive approach to the Code which is consistent with the analysis which we have made earlier in this judgment.

There is a sequence of decisions of the Court of Appeal decided on a basis which is inconsistent with the dicta in Brown , Conway , Macmath and Waite (supra).

The case of Rogers [1993] Crim.L.R. 386 involved a pursuit of a suspect by a witness and police officers. The police officers caught the suspect. The witness was allowed then and there to identify him as the person he had seen earlier committing criminal offences. No identification parade was held. The Court of Appeal did not consider that there had been any breach of the Code. Until the witness made his identification there was no "known" suspect within the meaning of the Code. Police officers would have had to release the suspect. They adopted a similar approach to that adopted in the case of Oscar .

The judgment of the Court of Appeal delivered by Mitchell J. in Hickin and others [1996] Crim.L.R. 584 is rightly described in the Criminal Law Review as an important judgment. The facts of the case were not dissimilar to those in the case of Macmath . It involved an incident of violent disorder in Blackpool involving two groups of football supporters. Two members of one group were viciously attacked and injured by about seven of the members of the other group. Those who were injured were unable to identify who had attacked them. There were video cameras in the area which, although they enabled men in the area to be identified did not cover the actual violent incident. Three members of the public who had witnessed the attack assisted the police. The police took two of them in a car around the adjoining area to help pick out those involved. Having rounded up men believed to belong to the relevant group of supporters, the three witnesses were invited to point out men whom they could identify as having committed acts of violence. There were a number of difficulties about the exercise which the police carried out. The men rounded up had included men subsequently known not to have been involved and did not include all the men who may have been involved. It appears also that the composition of the assembled men was not constant. From time to time some men managed to slip away and others were added by the police. Further, the evidence of the two witnesses who had been taken round in the police car was not wholly satisfactory. One said that he had made no individual identification from the police car. Fourteen men were in due course charged and committed for trial for public order offences. The identification evidence was not wholly dependant upon the evidence of the three witnesses; there were other identifying features. The jury acquitted seven of the defendants and convicted the other seven who then appealed to the Court of Appeal. No identification parade had ever been held and one of the points raised at the trial and on the appeal was whether there had been a breach of the Code. The Court of Appeal concluded that there had not been any breach. They *221 considered that the situation with which the police were faced was not specifically covered by the Code. They rejected the literalist approach to the construction of paragraph 2.3 .

The cases to which they were referred included Oscar and Rogers but, surprisingly, not Brown or Conway . They had cited to them the cases of Brizey (March 1994, unreported) and Greaves (May 1994, unreported). In neither of those cases had there been an identification parade. In Brizey convictions were upheld after witnesses of a robbery had been driven round the adjoining area and picked out two men. In Greaves , witnesses were similarly taken around the adjoining streets in a police car and had identified a group of four youths pointed out to them by the police: the Court of Appeal did not consider that there had been any breach of the Code.

The conclusion of the Court in Hickin [1996] Crim.L.R. 584 , was that:

"What each of the four cases illustrates is that Code D is not to be interpreted in such a way as to require the police to act in a manner which would be an affront to common sense." (p. 14 of the transcript)

"We find it unnecessary to decide whether the situation confronting the Blackpool police on the night of May 21, 1994 was one which is catered for in the Code. However, following Oscar and Rogers we strongly incline to the view that it was not. We accept that the high water mark of the submission that it was is that these men were arrested suspects at the time of the identifications. This (in other words) is said to be a case where the identity of the suspects was "known" and that therefore it is appropriate to proceed only by way of identification parade. That course was not taken and the police accordingly acted in contravention of the Code. That is the nub of the submission.

The circumstances in which a person can be characterised as a known suspect were not defined in the 1991 Edition of Code D. Some assistance is however given in paragraph 2E of the 1995 Edition …" (p. 15 of the transcript)

They then quoted the relevant paragraph. They recognised that there was a powerful argument that the men were "known" suspects but then asked themselves what were the realities of the situation. They pointed out the desirability of acting immediately, in the group situation at the scene of the incident to confront the available witnesses with the available suspects. They saw no objection in principle to such a course being taken. They stressed the importance of the appearance and clothing of the suspects on the night in question to the process of identification. They concluded that there had been no breach of the Code.

The importance of this judgment is that it is a considered rejection of the literalist approach and the argument that paragraph 2.3 must apply in all *222 situations. In the upshot, having reviewed the evidence relevant to each appellant's conviction, they allowed five of the appeals and dismissed the other two.

Hickin was cited and relied upon in Vaughan , April 30, 1998, unreported, where there had been a street identification of a suspect under arrest which did not comply with paragraph 2.17 and no identification parade. The Court decided the case on the basis of a breach of paragraph 2.17 and did not say, as they would have done on the literalist view, that there had been a breach of paragraph 2.3 .

Bush (January 27, 1998 unreported) concerned an incident in a nightclub in which a man was injured by another who was unknown to him. The police were already on the premises. They gathered people together in the foyer and invited the victim to pick out his attacker. The victim picked out the defendant. No identification parade was held. The argument at the trial and on appeal was that there had been a breach of paragraph 2.3 . On appeal it was also suggested that the procedure followed did not comply with paragraph 2.17 . A number of authorities were cited including Oscar , Rogers and Hickin . The Court of Appeal approved the view of the trial judge that the Code did not apply in this situation. The police needed to know at once whether the witness could identify a person or whether those then present could be eliminated as suspects. The Court of Appeal expressed its opinion in somewhat tentative terms but their approach was clearly inconsistent with the view that the Code always requires an identification parade to be held as soon as the suspect has become "known".

In Anastasiou [1998] Crim.L.R. 67 the identifying witnesses were policemen who had been called to a nightclub. They had seen an incident of violence taking place in the car park. The attacker had run back into the nightclub. The premises were searched with the assistance of other officers who had been called. They were very crowded. Eventually a man was found on the roof differently dressed to the man who had been seen in the car park but whom the original officers then identified as being the man they had seen committing the offence. The identification was strenuously disputed. No identification parade was held. The defendant submitted that there had been a breach of paragraph 2.3 ; Brown was cited. The Court of Appeal rejected this argument:

"It seems to us that when the appellant was found and arrested he was so because he was identified by the arresting officers as the man whom they had seen committing an assault not long before. Until then he did not become a suspect. It is obvious that there was no prior opportunity to put him on an identification parade. Unavoidably the identification here occurred when the appellant was found and arrested. No more formal mode of identification was possible. If he had thereafter been placed on an identification parade it would indeed have been what the *223 recorder called a "farce". It could have added nothing to the identification already made. In the circumstances the officers would have been doing no more than confirming that the man on the parade was the man that they had arrested. The Code had no apparent application and even if it had, the evidence would have been properly admitted under section 78 of the Police and Criminal Evidence Act . The omission of an identification parade in these circumstances cannot have had any adverse affect on the fairness of the proceedings." (pp. 8–9)

This decision of the Court of Appeal therefore had two strands. The first is that it rejects the literalist approach and does not follow the dicta in Brown . The relevant identification having already taken place paragraph 2.3 did not apply. Secondly, they adopted the purposive approach of asking themselves whether the holding of an identification parade would have served any useful purpose. They concluded that in that case it would not. This forms a basis for distinguishing the decisions which have held that an identification parade should have been held.

In our judgment it is important in evaluating these authorities to differentiate between what are in truth

breaches of the Code and what are only failures to have proper regard to the purposes of the Code. The cases illustrate also that the specific provisions of the Code are not all-embracing and that there may be situations which fall outside them. Viewed as a whole the decisions do not bear out the literalist dicta which treat the first sentence of paragraph 2.3 as requiring the holding of a formal identification parade whenever a suspect has become known and notwithstanding that he has previously been properly and adequately identified by the relevant witness. It is thus not correct that paragraph 2.3 requires that an already identified suspect be stood on an identification parade simply because he continues to dispute his identification.

Therefore, in our judgment, the effect of the Code and the law is that when a suspect has become known and disputes his identification as the person who committed the crime alleged and the police wish to rely upon identification evidence provided by a witness, the question must be asked whether that witness has already made an actual and complete identification of that individual. If the answer to that question is yes then the mandatory requirement of the first sentence of paragraph 2.3 does not apply. If the answer is no, paragraph 2.3 must be complied with and any failure to do so will amount to a breach of the Code. What is an actual and complete prior identification of the relevant individual by the relevant witness will depend upon the facts of each individual case and the difficulties of assessment which this may involve have already been illustrated by the cases to which we have referred. But it is clear from the authorities that they may include situations which do not fit within paragraph 2.17 or any other individual paragraph of the Code. But where, *224 as in the present case, there has been an unequivocal identification of the relevant person by the relevant witness properly carried out in accordance with the provisions of paragraph 2.17 , there can, in our judgment, be no question but that the requirements of the Code have been complied with and that there is no obligation thereafter under the first sentence of paragraph 2.3 to hold an identification parade for that witness again to identify the same man.

The purposive approach which we consider to be correct is also supported by what was said by the Court of Appeal in the case of Malashev [1997] Crim.L.R. 587 which stressed that considerations of fairness and reliability should govern the distinction between formal and informal methods of identification and emphasised the practical considerations that are applicable in any given case where identifications have to be carried out either at the scene of the crime or in its immediate aftermath.

One of the difficulties that is demonstrated by the judgments to which we have referred is that it seems that the Court of Appeal often did not have the opportunity to look at the overall impact of the previously decided cases. In this judgment we have attempted to carry out that task. We have attempted to provide guidance to those charged with the duty of complying with Code D upon the ambit and effect of paragraph 2.3 especially in relation to suspects previously identified under paragraph 2.17 . Nothing we have said should be taken as detracting from the importance of complying with the provisions of the Code and in particular those relating to known suspects. The improvements which they have brought about in the quality of identification evidence and the fairness of trials is well established. Further, it is always necessary to have regard to the purposes of Code D both in interpreting and applying the Code and assessing situations which are not expressly covered by it. The overall purpose is one of adopting fair identification practices and adducing reliable identification evidence. Where insufficient regard is had to these purposes the discretion to exclude evidence under section 78 is likely to be exercised and convictions will be liable to be treated as unsafe.

Returning to the present case we conclude that there was, on the facts of this case, no breach of the Code. The requirements of fairness did not call for the exclusion of the witness's evidence of identification. The judge was right to admit it. Whether or not he was strictly under an obligation to do so, he gave the jury an adequate warning and direction about the relevance of the absence of any identification parade. As to the evaluation of the identification issue at the trial there were some points of detail which the appellant was entitled to and did rely upon as for example, the evidence of the appellant's wearing of earrings. But there was also evidence which tended to corroborate or support the witness's identification in that after his arrest articles were found at the place where the appellant was living which the witness was able to say were very similar to those which she had seen the man in question wearing on earlier occasions. There is no reason to *225 suppose that her identification was unreliable. In our judgment the convictions of this appellant were safe and his appeal must be dismissed.

Representation

Solicitor: Crown Prosecution Service, Harrow .

Appeal dismissed.
1.
i.e. (1976) 63 Cr.App.R. 132 ; [1977] Q.B. 224 .

Appendix 5

Regina v Keith Preddie

No: 2010/3894/D2

Court of Appeal Criminal Division

9 February 2011

[2011] EWCA Crim 312

2011 WL 664473

Before: Lord Justice Jackson Mr Justice Openshaw the Common Serjeant His Honour Judge Barker QC

(Sitting as a Judge of the CACD)
Wednesday, 9 February 2011

Representation

Mr C Royle appeared on behalf of the Appellant.
Mr I McLoughlin appeared on behalf of the Crown.
Judgment
Lord Justice Jackson:
1 This judgment is in five parts, namely:

Part 1. Introduction,

Part 2. The Facts,

Part 3. The Criminal Proceedings,

Part 4. The Appeal to the Court of Appeal,

Part 5. Conclusion.

Part 1 Introduction

2 This is an appeal against conviction essentially on the ground that the appellant was convicted on the basis of flawed identification evidence. It is important at the outset to set out the relevant provisions of the Code of Practice which deals with these matters.

3 Pursuant to the Police and Criminal Evidence Act 1984 the Secretary of State has issued a number of Codes of Practice to regulate the investigation of crime and to ensure the fair treatment of suspects. The fourth of these codes is Code D Practice for the Identification of Persons by Police Officers. Section D.3 of Code D is entitled “Identification by Witnesses.” This section includes the following provisions:

“3.1 A record shall be made of the suspect's description as first given by a potential witness. This record must:
(a) be made and kept in a form which enables details of that description to be accurately produced from it, in a visible and legible form, which can be given to the suspect or the suspect's solicitor in accordance with this Code;
…

3.2 In cases when the suspect's identity is not known, a witness may be taken to a particular neighbourhood or place to see whether they can identify the person they saw. Although the number, age, sex, race, general description and style of clothing of other people present at the location and the way in which any identification is made cannot be controlled, the principles applicable to the formal procedures under paragraphs 3.5 to 3.10 shall be followed as far as practicable. For example:

(a) where it is practicable to do so, a record should be made of the witness' description of the suspect, as in paragraph 3.1(a), before asking the witness to make an identification;

(b) care must be taken not to direct the witness' attention to any individual unless taking into account all the circumstances, this cannot be avoided. However, this does not prevent a witness being asked to look carefully at the people around at the time or to look towards a group or in a particular direction, if this appears necessary to make sure that the witness does not overlook a possible suspect simply because the witness is looking in the opposite direction and also to enable the witness to make comparisons between any suspect and others who are in the area;
…
(d) once there is sufficient information to justify the arrest of a particular individual for suspected involvement in the offence, e.g., after a witness makes a positive identification, the provisions set out from paragraph 3.4 onwards shall apply for any other witnesses in relation to that individual. Subject to paragraphs 3.12 and 3.13, it is not necessary for the witness who makes such a positive identification to take part in a further procedure;
(e) the officer or police staff accompanying the witness must record, in their pocket book, the action taken as soon as, and in as much detail, as possible. The record should include: the date, time and place of the relevant occasion the witness claims to have previously seen the suspect; where any identification was made; how it was made and the conditions at the time (e.g., the distance the witness was from the suspect, the weather and light); if the witness's attention was drawn to the suspect; the reason for this; and anything said by the witness or the suspect about the identification or the conduct of the procedure."

Having set out the relevant provisions of the Code, we must now turn to the facts.

Part 2. The facts

4 In the early hours of Saturday 13th February 2010 Mr Ziyad Shoaib was waiting at a bus stop on Hartlington Road, Feltham. He was on his way home from work. Two young men approached. They attacked Mr Shoaib, punching and kicking him. They stole his bank debit card and forced him to reveal his PIN number before running off.

5 Mr Shoaib dialled 999 and reported the robbery to the police. In his 999 call he gave a very brief description of the two assailants. He said that one was a black male and one was an Asian male aged around 18 years.

6 The police sent the two most readily available officers to attend on Mr Shoaib. They were PC Poppy and PC Johnson. They arrived and spoke to Mr Shoaib. An ambulance also arrived in order to take Mr Shoaib to hospital because of his injuries.

7 Before Mr Shoaib was taken to hospital, however, he was taken by the police officers on a drive around the area. The objective was to see if Mr Shoaib could identify the robbers. As the police officers were driving around with Mr Shoaib in the car, they saw their colleagues arresting two suspects. There was quite a struggle in progress. Therefore PC Poppy and PC Johnson stopped their car and went over to assist.

8 Mr Shoaib recalls that he looked out of the window of the police car and recognised the two suspects as the men who had attacked him. Mr Shoaib recalls telling the police this in answer to a question. Shortly after that Mr Shoaib was taken to hospital for treatment.

9 The two men who were arrested were the appellant and a young man called Lloyd Francis. The two suspects were taken to the police station. The police officers also returned to the police station and wrote up their notes or made their statements. PC Poppy and PC Johnson recorded in their statements the description of the two assailants which had been given by Mr Shoaib when they first arrived at the scene. That description was as follows:

"There were two males, one possibly mixed race or Asian wearing grey trousers and grey hooded top. The second a black male with a maroon top and braided style ponytail."
However, the two officers did not record in their notebooks or their statements anything about Mr Shoaib identifying the two suspects at the time when the police car pulled up and PC Johnson and PC Poppy assisted in effecting the arrest.

10 Later that day, after his injuries had been treated at hospital, Mr Shoaib attended at Acton Police Station for an identification parade. The video identification procedure was adopted. Mr Shoaib picked out the appellant and Lloyd Francis in that procedure.

11 In the case of Lloyd Francis there could be little doubt about his involvement in the robbery. This

was because there was blood on his person and the DNA from that blood matched the DNA of Mr Shoaib.

12 The two suspects were duly interviewed at the police station. The appellant in interview denied that he had been involved in the robbery of Mr Shoaib and indeed denied that he had been present or anywhere near the commission of that offence.

13 Following the interviews of the suspects and the other police investigations, criminal proceedings followed.

Part 3. The Criminal Proceedings

14 Both the appellant and Lloyd Francis were charged on an indictment containing one count of robbery, relating to the incident on 13th February 2010. The prosecution case was that Lloyd Francis was the man described as having been of mixed race or Asian, and that the appellant was the man whom Mr Shoaib had described as being the black man.

15 In view of the DNA evidence, Mr Francis had no prospect of acquittal and he duly pleaded guilty. The appellant however, against whom there was no DNA evidence, pleaded not guilty. His defence was that he had not been involved in or present at the robbery. In other words the appellant asserted that this was a case of mistaken identification. It was therefore for the prosecution to prove that the appellant had been correctly identified as the second robber and that had to be proved to the criminal standard.

16 The trial of the appellant took place in June 2010 at Isleworth Crown Court before Mr Recorder Brigden and a jury. At the start of the trial there was a voire dire . The reason for the voire dire was to ascertain whether Mr Shoaib had seen the two suspects at the time of arrest. Mr Charles Royle, defence counsel, who appears today in this court as well, had it in mind that he may be able to argue that the video identification procedure was tainted. The taint might well turn out to be that Mr Shoaib had seen the two suspects at the time of arrest and was simply picking out the two men whom he had seen being arrested. However, in the course of the voire dire events took an unexpected course. Mr Shoaib gave evidence to the effect that he had not only seen the two suspects at the time of arrest but also he had positively identified them as his two assailants. As previously mentioned, this was not a matter which featured in the witness statements of any of the police officers. Nor did it feature in the witness statement of Mr Shoaib.

17 In those circumstances, Mr Royle submitted to the court that there was now new evidence of a previously unknown street identification by the principal witness. Furthermore, this street identification had been conducted in a manner which breached a number of provisions of the Code. Therefore, submitted Mr Royle, the evidence of the initial street identification should be excluded. The Recorder briefly adjourned the hearing in order that further witness statements could be obtained from the police officers, in order to see whether they confirmed Mr Shoaib's recollection of the street identification.

18 Further witness statements were duly obtained before the trial proceeded and those have been furnished to this court today. It can be seen that the effect of those statements is that the officers describe taking Mr Shoaib on a drive around in the area of the robbery and they give a further account of the arrest of the suspects. However, they say nothing about any street identification conducted by Mr Shoaib at the time of the arrest.

19 With the benefit of these further witness statements, the arguments between counsel continued. It must be said that the Bench interrupted defence counsel in the course of his perfectly proper submissions more frequently than was either appropriate or conducive to an efficient disposal of this necessary application.

20 The Recorder in due course rejected the submission that the evidence of the street identification should be excluded. The trial then proceeded. The first witness was Mr Shoaib and he duly gave evidence of his initial identification of the two suspects. That evidence, including the cross-examination of Mr Shoaib, was summarised as follows by the Recorder in his summing-up and there is no suggestion that this summary is in any way inaccurate:

“”I called the police and gave a description from outside the Airman Pub and at some point they said: ‘We've got’” — when the police arrived — “’we've got two people and they look like you describe.’” And they drove off for 40 seconds approximately and he was asked: “Are these the two people?” I said: ‘Yes. I recognise them.”

“I saw two young men surrounded by policemen. A police” — this is in cross-examination — he was asked again, quite rightly, the police constable said or the police constables, we do not know who it was, said: “Are these the two men who attacked you?” “And I said: ‘Yes,’ after having looked at them. I was in the car; the two were on the pavement. I took my time. I looked at the dress and height. I looked at them for about 35 seconds. They were” — do you remember, he pointed out — “they were about eight to 10 yards away. It was cold, it was not raining. There was quite good street lighting.” And when pressed, he said: “I could've got the right people; I could have got the wrong people, but I was convinced about this defendant and I do not agree” — when he was accused of making a mistake by defence

counsel, quite properly — “I do not agree I made a mistake.””

21 After Mr Shoaib had left the witness box several police officers gave evidence, including those who went to Mr Shoaib's initial assistance and those who were involved in the arrest of the two suspects. None of the police officers gave evidence to the effect that Mr Shoaib had identified the two suspects at the time of the arrest.

22 On behalf of the defence there was just the one witness, namely the appellant. The appellant gave evidence to the effect that on the night in question he had been to a party in Fruen Road, he had seen some policemen there and he was outside the party for a while. He left Fruen Road and he went into Bedfont Road, where apparently he was seen by a police officer. Then he said he met the co-defendant Lloyd Francis at the railway station. This was the first time he had seen Mr Francis that day. He then went up New Road, into Hounslow Road and he was arrested at the road junction. So the appellant gave evidence broadly in line with his interview to the effect that he had not been involved in the robbery and he had met Lloyd Francis by chance at a time when, as it subsequently turned out, Mr Lloyd Francis had finished carrying out the robbery.

23 The Recorder in his summing-up directed the jury that the central issue in the case was one of identification. In giving that direction the Recorder was plainly correct. The Recorder gave to the jury certain directions about identification evidence to which we shall return in Part 4 of this judgment.

24 In due course the jury returned a unanimous verdict of guilty.

25 The appellant was aggrieved by his conviction and maintains that the identification evidence against him was flawed. Accordingly he has appealed against conviction to this court.

Part 4. The Appeal to the Court of Appeal

26 The essential grounds of appeal are two-fold. First, it is said that there were errors by the police in obtaining identification evidence. Secondly, it is said that there were errors by the Recorder in conduct of the trial. We shall first examine the alleged errors on the part of the police.

27 The first point made by Mr Royle is that no street identification at all should have been undertaken in this case. Mr Royle draws our attention to the opening words of paragraph D.3.2 of Code D. Mr Royle submits that this was not a case where the suspect's identity was not known. This was a case where two suspects were being arrested. The officers arresting them had concluded that they entertained reasonable suspicion and that the circumstances were such that the suspects could be arrested and taken to the police station. In those circumstances, submits Mr Royle, the police should have avoided any attempt at street identification. If the two officers accompanying Mr Shoaib needed to assist in arresting the suspects (with whom there was something of a struggle), then they should have left Mr Shoaib in the company of the paramedics in the ambulance and they should have gone to assist by themselves. There was no need for Mr Shoaib to identify or indeed come within close sight of the two suspects.

28 We see considerable force in these submissions and we think that Mr Royle's contention is correct. The opening words of paragraph D.3.2 of the Code, are backed up by the opening words of sub–paragraph (d) of that section of the Code, which is to the same effect. It is clear that the police had taken a decision that they had sufficient grounds to warrant the arrest of Francis and the appellant. In those circumstances the proper course would have been to avoid any contamination of the witness and for the first identification procedure to be carried out at the police station. Indeed, we understood from the very helpful submissions of the prosecution today (Mr McLoughlin appearing for the prosecution, although he was not counsel at trial) that it is not seriously disputed that the police had sufficient material in their view to warrant arresting the suspects and taking them back to the police station.

29 The next point made by Mr Royle is that if the police decided to do a street identification then they should have conducted such an identification properly, and in accordance with the procedures in Code D. Mr Royle submits that there were three breaches of Code D in relation to the street identification. The first breach was that no record was made of the description of the suspect given by Mr Shoaib before he conducted the street identification. The second alleged breach of the Code is that the police did not take care not to direct the witness's attention towards the suspect. Mr Royle submits that it was quite plain who the suspect was from the circumstances in which the street identification took place, and that was a breach of paragraph D.3.2(b). Thirdly, submits Mr Royle, there was a breach of paragraph D.3.2(e) in that no record was made by the police officers of the street identification. Indeed not only were the details required by sub–paragraph (e) not set out in the record but the police officers' statements are entirely silent about this matter.

30 We shall examine each of these alleged breaches separately. So far as the first matter is concerned, it seems to us that if the police were going to carry out a street identification in circumstances where there was no necessity for the procedure at all, then they should certainly have taken care to record the description of the assailants given by Mr Shoaib before they asked him whether or not the two individuals being arrested were the men who had attacked him. There would be no particular problem for the police in doing this. A very brief description had already been recorded as a consequence of the 999 call in a CAD message on the police computer system. When the two officers first arrived to talk to Mr Shoaib, he gave them the very brief description of his assailants which we have read out in Part 2 of this judgment. That could rapidly have been recorded

by PC Poppy or PC Johnson. However, it was not done. The first time when those two officers recorded this description was when they got back to the police station and were writing out their statements. In this regard, therefore, we accept the submission that there was a failure by the police to comply with the first part of paragraph D.3.1 of the Code and there was also a failure to comply with paragraph D.3.2(a) of the Code.

31 We come now to the second alleged breach of the Code. Here Mr Royle points out that when Mr Shoaib was conducting the street identification it was perfectly obvious who the suspects were, because there were two individuals struggling and surrounded by police officers who were restraining them. It did not take much imagination for Mr Shoaib to know where he should be looking. On this point Mr McLoughlin for the prosecution submits that really no alternative course was practicable.

The police could not release hold of the two suspects because it was quite obvious that they would run away. No phraseology of the question could sensibly leave Mr Shoaib in any doubt as to who were the individuals he was being required to consider for identification purposes. Mr McLoughlin accepts that the question put to Mr Shoaib could have been more open than the form of words used, but he submits that that is of no practical consequence.

32 We see force in the prosecution's submissions in relation to this Code breach. If a street identification was going to be undertaken there was no way of avoiding the fact that Mr Shoaib would see who the two suspects were, and would have his attention drawn to them. Indeed that is a further reason why a street identification would be inappropriate in all the circumstances. But if the procedure was to be adopted, we do not think it involved a breach of sub–paragraph (b).

33 We now come to the third breach of the Code, namely a failure to comply with paragraph D.3.2(e) in that PC Poppy and PC Johnson failed to make any record whatsoever of the street identification which had been carried out. As a matter of fact it is clear that there was this breach of the Code. It is clear that no record was made of the street identification. There is no possible justification for that omission because when the police officers got back to the police station and were making their statements they could well have written out an account of what happened at the scene of the arrest, but they did not do so.

34 In the result therefore, in relation to this limb of the case we hold that there were two breaches of Code D as previously identified. Therefore, drawing the threads together, we accept that overall there was a breach of the Code in deciding to carry out a street identification and then, having made that decision, there were two further breaches of the Code by the police in carrying it out.

35 We come now to the second limb of this appeal, namely the contention that there were errors by the Recorder in the conduct of the trial.

36 The first matter complained of is that the Recorder erred in his ruling before the jury were sworn in, when he declined to exclude evidence of the street identification. The Recorder having listened, with a number of interruptions, to the submissions of counsel concluded that it was doubtful whether there was any breach of the Code. The Recorder also decided that, if there was a breach of the Code, then in the exercise of his discretion he would admit the identification evidence to be given by Mr Shoaib in relation to what he saw at the time of the arrest.

37 We do not agree with the Recorder's analysis. In our view there were clear breaches of the Code as identified above. There was no necessity for any breaches of the Code to be committed because the police could easily have taken the suspects to the police station and conducted a satisfactory identification parade at that location.

38 We now turn to the significance which the Recorder ought to have attached to the breaches of the Code. For this purpose it is necessary briefly to review some of the authorities relating to Code D.

39 In Popat [1998] 2 Cr.App.R 208 , the appellant was the subject of a street identification. There was no subsequent identification parade conducted at the police station. A number of breaches of Code D occurred. The Court of Appeal carefully reviewed the matter and concluded that Popat's conviction was safe and they dismissed his appeal against conviction.

40 In R v Forbes [2001] 1 AC 473, the House of Lords gave guidance about the conduct of trials where Code D had been breached. In the course of that judgment the House of Lords disapproved this court's decision in Popat . At paragraph 20 of the speech of Lord Bingham, in sub-paragraph (i), the following comment on the Code is set out:

“Code D is intended to be an intensely practical document, giving police officers clear instructions on the approach that they should follow in specified circumstances. It is not old-fashioned literalism but sound interpretation to read the Code as meaning what it says.”
In paragraph 23 of his speech, Lord Bingham commented as follows on the effect of breaches of the Code:

“It was readily and rightly accepted for the appellant that even if the failure to hold an identification parade was (as we have concluded) a breach of Code D 2.3, it does not necessarily follow that the evidence of Mr Tabussum's identification should have been excluded. That would depend on an exercise of judgment under Section 78 of PACE, taking

account of all the circumstances of the case. But it was argued that in the circumstances here the appellant had been denied a fair trial and his conviction should be considered unsafe. The starting point of this argument was the recorder's ruling (correct in the light of R v Popat , but wrong in the light of our decision) that there had been no breach of paragraph 2.3. From this it had followed that the Recorder had never exercised her judgment whether evidence of Mr Tabassum's street identification should be admitted or not, that the appellant's counsel had been denied the opportunity to cross-examine the police investigating officer on his decision not to hold an identification parade and that the jury had not been directed on the breach of the code and the possibility of prejudice to the defence of the appellant."

41 In K v Director of Public Prosecutions the victim was approached by a group of four persons, two black males, one white male and one mixed race black female, and was asked for money. The victim handed over his wallet which was searched and then returned to him. He was required to hand over his mobile phone, which he duly did. After the robbery the victim contacted the police who attended the scene. The victim described the group of four who had robbed him. A dog handler came to the scene. Two officers took the victim in their car to look for the group of four, whilst the dog and his handler started to track the path of the group. The dog and the handler were making good progress in that regard. In the meantime the police officers saw a group of four whom they thought might be the robbers. The officer told one of the suspects to walk to the police car with him as he wished to see if that suspect would be identified by the victim as a person responsible for the robbery. They pulled him over to the car and held him at the window. The victim, looking through the window of the police car, identified the person brought there as one of the four who had robbed him.

42 In due course the appellant, who had been so identified by the victim, stood trial at Grays Magistrates' Court before the District Judge. The appellant was convicted. However the Divisional Court, comprising Rose LJ and Henriques J, quashed that conviction. At paragraph 38, Henriques J giving the judgment of the court said this:

"The difficulty … is that, at the time when witness and suspect were permitted to view one another, the safeguards built into the statute and the Codes of Practice were simply not being observed. This was a clear case in which the victim should not have been directed towards the suspect."

Henriques J went on to say that this was a case in which there should have been no confrontation. Instead, the victim and the suspect should have been kept apart, and an identification procedure should have been carried out later at the police station in accordance with Code D. The court thereafter ruled that the identification evidence should not have been admitted, and that therefore the conviction should be quashed.

43 In our view the Recorder in this case ought to have adopted the same analysis as that of the Divisional Court in K v DPP . This was a case where there were clear breaches of the Code of Practice and the Recorder ought to have disallowed the identification evidence. The evidence of the street identification could not safely or properly be adduced in view of the serial breaches of the Code which had occurred. Furthermore, the evidence of the video identification later that day could not be of any value. This was because the witness, Mr Shoaib, had seen quite close up the two suspects being arrested and there was therefore a substantial chance that during the video procedure, with the best will in the world and however honestly he attempted to do the task, Mr Shoaib would simply pick out the two suspects whom he had seen being arrested.

44 We bear in mind the observation of Lord Bingham in Forbes that Code D is an intensely practical document giving police officers clear instructions on the approach which they should follow. Unfortunately the fact is that in this case the police officers simply did not follow that clear and practical guidance.

45 We therefore conclude that the Recorder erred in his ruling at the start of the trial. Unfortunately, however, the Recorder's errors do not stop there. Having allowed the identification evidence to be admitted and the trial to proceed, the Recorder failed to give proper guidance in the summing-up.

46 There are three areas of concern in relation to the summing-up. First, the Recorder did not give a proper direction in relation to identification in accordance with the Court of Appeal's decision in Turnbull [1997] QB 224 . The Recorder gave part of the standard form Turnbull direction but he did not express this as a straightforward direction of the court. Instead, on a number of occasions he used phrases which suggested that the guidance which he was giving reflected a defence submission. At one point he interjected in the Turnbull direction "This is the point that defence counsel makes". At another point he interjected that "Defence counsel has quite understandably and correctly pointed out certain matters".

47 Mr McLoughlin for the prosecution submits that these blemishes in the Turnbull direction do not matter because what the Recorder was doing was identifying sound submissions made by the defence and bolstering them or supporting them. We do not agree with that submission. In our view the Turnbull direction ought to be given with the imprimatur of the court and it ought to be made clear that that is a direction of law from the judge to the jury. Thereafter, when the judge comes to summarise the competing arguments of the parties, he can of course point out those aspects of the Turnbull direction upon which the defence place reliance. That, however, does not mean that the

Turnbull direction should be given with interjections about defence submissions. We also note that a normal part of the Turnbull direction was omitted. This is the observation that wrongful convictions have occurred in the past because of mistaken identification.

48 The second area of concern in relation to the summing up relates to the video identification. The Recorder in his summing-up failed to tell the jury that the evidence which they had heard about the video identification was of no significance. The Recorder should have said that the evidence was of no significance because by the time of the video identification Mr Shoaib had already seen the two suspects earlier that day and had identified them as his assailants.

49 The fact that the video evidence was of no weight had, no doubt, been drawn to the attention of the jury during the course of the trial. Indeed we understand that that was common ground between counsel. Nevertheless, when the Recorder or judge sums such a case up at the end, if a piece of evidence, apparently damaging to the defendant, is in fact of no significance, then that should be explained to the jury.

50 The third area of concern in relation to the summing-up relates to the breaches which had occurred of Code D. The Recorder dealt with the question of the Code and breaches of the Code in the course of his directions of law. He referred to the arguments of counsel and observed that “arguably” there was a breach of Code D. In our view that was wrong. The Recorder ought to have identified all of the breaches of the Code which occurred and directed the jury's attention to those matters. However, this matter does not stop there. The House of Lords in Forbes have stated that the trial judge should explain to the jury the significance of any breaches of the Code and the prejudice or possible prejudice which these might cause to the defence. The Recorder gave no such direction in this case. Indeed, the Recorder tended to belittle the breaches of the Code in so far as they occurred by pointing out that the Crown in their submissions were relying on “a degree of commonsense.”

51 Let us now draw the threads together. In our view the identification evidence was flawed by reason of breaches of the Code and it should not therefore have been admitted. Furthermore, there were serious defects in the summing-up as outlined just now. When we stand back and look at this case in the round, we take the view that the conviction of the appellant is not safe and accordingly this appeal against conviction is allowed.

52 MR MCLOUGHLIN: My Lord, just for the sake of completeness and so I can get back to those instructing me to say I have raised this, it is implicit within your Lordships' ruling that there is no question of a retrial because the identification evidence against this defendant has been found to be flawed in the ways that you have outlined and therefore the Crown would simply have no evidence of identification to put before a second jury.

53 LORD JUSTICE JACKSON: You are clearly entitled to apply for a retrial if you see fit. However, we do not see how any such application could possibly succeed. I do not know if that indication is of any assistance.

54 MR MCLOUGHLIN: Indeed, it is. At least I may say that I raised it and had the reaction from your Lordships that I did.