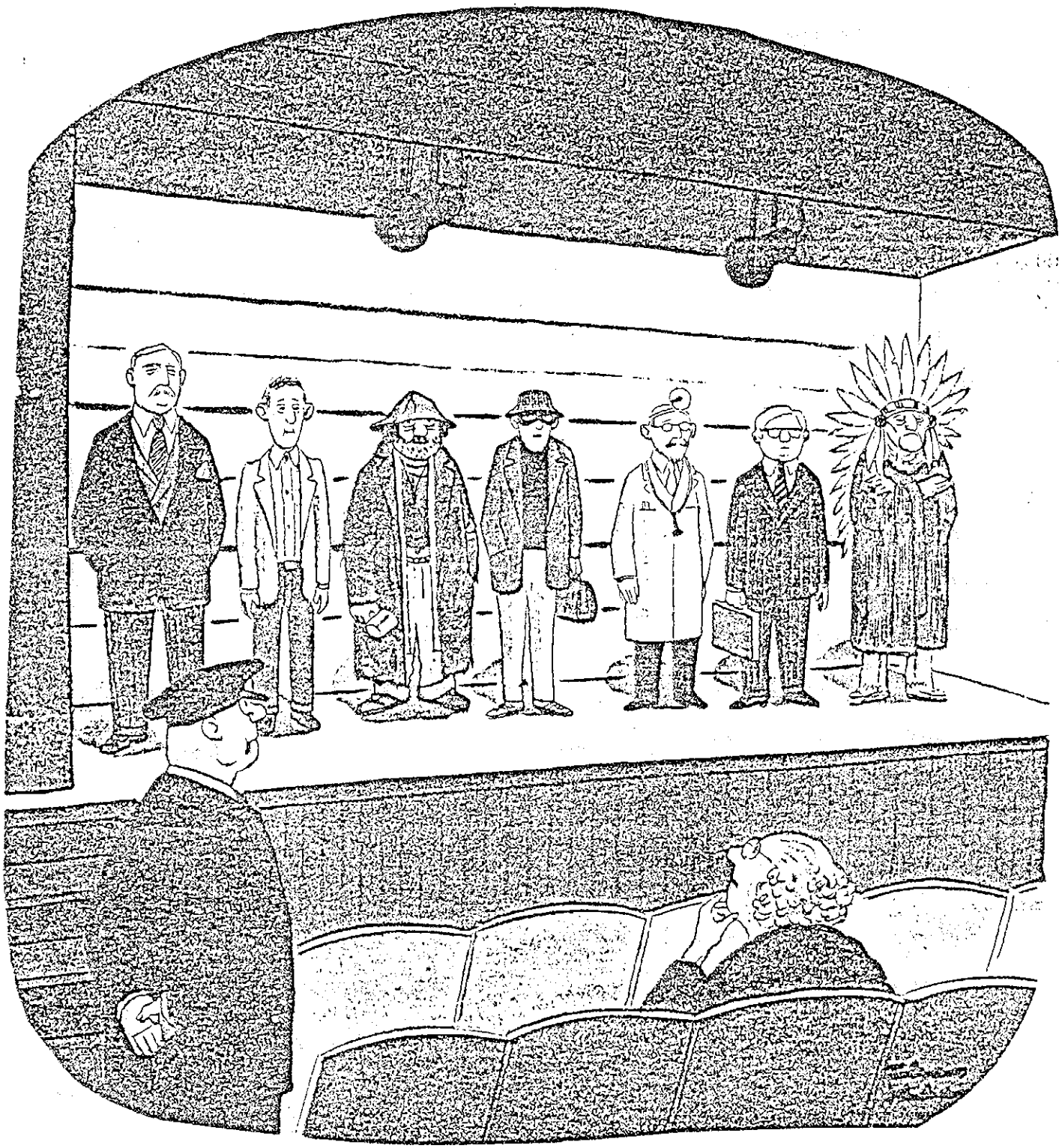
RECENT DEVELOPMENTS IN THE LAW ABOUT ALIBI AND IDENTIFICATION EVIDENCE



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RECENT DEVELOPMENTS IN THE LAW ABOUT ALIBI AND IDENTIFICATION EVIDENCE[1].

The purpose of this paper is threefold: to consider problems in the law from the point of view of trial judge; to review the recent cases; and to consider the alibi provisions in the draft Uniform Evidence Act.

ALIBI

The problem about alibi evidence is not the alibi, it is the timing of it. Without notice of it, the Crown is surprised and cannot rebut without an adjournment to investigate. The Court is understandably reluctant to adjourn, and inclined as a result to view the last-minute alibi with a baleful eye. Some adverse comment might spring to mind. Against this is the right of the accused to remain silent. What adverse comment is appropriate, and when?

The Report of the Task Force is silent on the alibi issue, but the Uniform Law Conference of Canada proposed, as an addendum, the sections found in the draft Act[2].

I

But, first, what is the present state of the law?

The accused is entitled to wait until his trial to put forward his defence. One cannot infer guilt from pre-trial silence, especially after a caution[3] or at the preliminary hearing[4]. The failure to co-operate with the police is not a sign of guilt:

it is no part of the law that the innocent, more than the guilty, throw over the right of silence and protest innocence from the start[5]. Indeed, the Crown should not lead evidence of extracurial silence because it proves nothing[6]. No comment is required or appropriate.

The situation changes after the Crown's case is closed. The moment the accused has been waiting for has come. As Martland, J. says for the Supreme Court of Canada in Vezeau[7], the jury is entitled to draw an adverse inference from the failure of the accused to call evidence to support an alibi. The adverse inference presumably is that there is no alibi and that the accused was not in another place and the identification was not mistaken. But no comment by the charging judge is permitted.

This rule will no doubt be re-examined in the light of sections 11(c) and (d) of the Charter. But, even before the Charter, the rule lay heavily on some judges. Indeed, there are two quite respectable, widely held, and diametrically opposed views on the matter. These arise from differing views about the notion of the presumption of innocence. One can cite by way of example no less than Chief Justice Laskin on the one hand and Chief Justice Freedman on the other.

First, Freedman, C.J.M.[8]

> "An accused person is not bound to take the stand. If, in the exercise of his right, he does not take the stand he should not then face the adverse judgment of the tribunal of fact for not having made himself a witness.

> What is involved here is a matter of basic principle, namely, the presumption of innocence. An accused does not have to establish his innocence. He starts with a presumption of it in his favour. The onus of proving guilt rests upon the prosecution from the beginning to the end of the case. The prosecution cannot invoke the accused's non-testifying as an element in the discharge of that onus."

Consider this reply from Laskin, C.J.C.[9]

> In a more refined sense, the presumption of innocence gives an accused the initial benefit of a right of silence and the ultimate benefit (after the Crown's evidence is in and as well any evidence tendered on behalf of the accused) of any reasonable doubt: see Coffin v. U.S. (1895) 156 U.S. 432 at 452.
>
> What I have termed the initial benefit of a right of silence may be lost when evidence is adduced by the Crown which calls for a reply. This does not mean that the reply must necessarily be by the accused himself. However, if he alone can make it, he is competent to do so as a witness in his own behalf; and I see nothing in this that destroys the presumption of innocence. It would be strange, indeed, if the presumption of innocence was viewed as entitling an accused to make any answer to the evidence against him without accepting the consequences and the possible finding if guilt against him."

Of course, the latter school can claim Authority. Again this year, the Supreme Court of Canada in Shelley[10] affirmed what it said in Appleby: a statutory presumption in the face of no Crown evidence of guilt offends the presumption of innocence; but if there is a requirement in the law that there be some Crown evidence before an inference is drawn against the accused, the presumption of innocence is not offended. The Shelley - Appleby rule deals with statutory presumptions or inferences. But the same reason would apply to the rule in Vezeau: no inference of guilt can be drawn from the failure of the accused to testify unless there is first some Crown evidence.

It is one thing to say that there can be no inference if there is no Crown case. But it is quite another to suggest, as the British Columbia Court of Appeal has recently suggested in Patrick[11], that the Crown case must be convincing beyond a reasonable doubt. If this is the rule, the whole issue evaporates: an inference drawn after guilt is found is only an extra coat of icing on the cake. The Shelley - Appleby reasoning does not demand such a view.

In circumstantial cases, no inference is to be drawn unless the Crown case is strong.[12] But in a circumstantial case, the Crown case is not inculpatory unless an explanation of the circumstances which inculpates the accused is more likely than an explanation which exculpates him. In this sense, the case must be strong.

This reasoning does not apply where there is direct evidence of guilt, such as a positive identification by an eyewitness. Yet one could easily classify such an identification as "weak" because it is, for example, only a dock identification. Perhaps direct evidence of guilt which a trial judge feels confident in describing as weak should also not provoke an adverse inference from silence because this also is too close to interfering with the presumption of innocence. But it must be said that no such limitation was invoked by the Supreme Court of Canada in R. v. Corbett.[13] In the end, I suggest that the rule was adequately expressed more than 150 years ago by Lord Tenterden in R. v. Burdett[14] when he said:

> "In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular

> case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous conscience and judgment of twelve men, conversant with the affairs and business of life, and who know, that, where reasonable doubt is entertained, it is their duty to acquit; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtilty [sic] and refinement."

II

Yet another occasion for inference and comment arises when the defence calls alibi evidence. The customary formulation is that:

> . . . it is a misdirection to suggest to the jury that they may infer that the story ultimately told in court is false because, had it been true, it would naturally have been raised earlier, but it is on the other hand legitimate to direct that the failure to raise it earlier may be considered in assessing the weight to be attached to it.[14a]

In other words, the jury cannot infer guilt from lateness but may decide not to credit the alibi on account of lateness. I question the logic of this. If failure to co-operate with the police is not a sign of guilt, why is it a sign of untruthfulness? If one can be unco-operative and innocent, why cannot one also be unco-operative and truthful?

There follows a "textbook" charge, taken from R. v Mahoney:

> In considering the weight to be given to that alibi evidence, you may take into account that he did not tell the police at the earliest possibile opportunity that he was somewhere else when the offence is alleged to have been committed so they would have an opportunity of checking that alibi. He is not obliged to disclose his alibi at the earliest possible moment to the authorities. But in considering the truthfulness of the story told in the trial, you may, if you see fit, take his delay in telling the law where he had been into account.[15]

I question the emphasized portions of the charge. Surely they are, as I suggest, illogical. Of course, that may be a matter of indifference if the life of the law is not logic!

The more important thing is that they are off the mark: I suggest that what goes to credit is not the suggestion of recent revelation but of recent concoction. If I am right, the credit issue turns not on the earlier silence but the present explanation for that silence. Did he indeed assert his rights? Or had he merely not yet invented his story?

Let us explore this idea. There are three ways by which the jury might hear an alibi: from a Crown witness, from the testimony of the accused, and from the testimony of a defence witness other than the accused.

Except in the most unusual case, an alibi heard from a Crown witness is not less credible for being late if lateness is tied to Crown surprise. Why should the accused suffer if the Crown is surprised by its own witnesses? Lateness should not go against credit unless there is some reason to suggest recent concoction.

If, on the other hand, the alibi comes from a defence witness (other than the accused), his failure promptly to go to the police

can be the subject of adverse comment and inference as to credit: unlike the accused, he did not have a right to silence in the face of an accusation because he was not accused. One can assume that a good citizen would come forward. The failure to do so could come before the jury in the course of cross-examination or by rebuttal. It is evidence of itself of recent concoction.

But the fact that the defence did not notify the Crown surely does not affect the credit of such a witness. Indeed, in Mahoney the charge quoted was criticized by Brooke, J.A. as possibly misleading of the jury just because the alibi was offered principally by a witness other than the accused and the failure of the accused to come forward earlier could not affect the credit of the other witness.

Lastly, when the accused testifies, yet another dimension arises. Mere lateness should not be the subject of adverse comment or inference as to credit or guilt. But, in cross-examination, recent concoction of the alibi can be suggested. In that context, his earlier opportunities to offer his story may be put to him and his explanation for his silence heard and weighed by the jury.[16] His answers may affect his credibility. Comment explanatory of this is not forbidden. But the adverse inference as to credit arises not from lateness but from his unsatisfying explanation for lateness. The proof of the pudding is that the lateness problem evaporates if he offers a compelling explanation for it.

The conclusion I offer is that there is no textbook charge, and

that there need not be any illogical exemption, for late alibis, to the general rule that one should not, simpliciter, draw an adverse inference from pre-trial silence even as to credit. That inference (and comment) obtains which is appropriate to the circumstances of the case at bar.

III

Nevertheless, even where he may expose himself to adverse comment, the difficulty remains that an accused might well decide to risk it - especially when he is permitted without criticism to say that he remained silent on the advice of counsel.[17] The result is trial by ambush.

The alibi provisions in the draft Uniform Evidence Act presumably are directed to this problem. These are appended. They are significantly different from the rules in force in the United Kingdom since 1967[18]. One key difference is that the English rules render inadmissible alibi evidence which is not properly notified.[19]. The draft Canadian law as a general rule, does not.[20] But the Court of Appeal in the U.K. has said that a refusal to admit would be "rare indeed"[21]. Faced with this judicial reaction, the Canadian drafters apparently made a virtue of the inevitable.

S.88(1) does add a rule against admissibility in trials where there has been a preliminary inquiry. The curious effect is that a late alibi would be admissible in a summary trial, but not

otherwise[22]. As a result one can fairly predict that the Canadian courts will be even less likely to invoke the Canadian rule than the English do their rule.

One would think that there is no hesitation about adverse comment on late alibis in the event of the breach of the notice rule in the U.K. But this does not appear to be the case. The English courts continue to be hesitant in deference to the right of silence[23].

The Canadian draft again seems to have taken this into account and provides ". . . where a party fails to comply . . . , the court and any party adverse in interest may comment on the weight to be given to the evidence of that party in relation to the alibi"[24]. If it is enacted, the Canadian courts surely will be invited to say that the comment permitted includes a suggestion that the failure to comply is a sign of guilt. If so, this is a momentous change in the law. When such a change was proposed in the United Kingdom in 1972 there was a storm of protest.[25]. Again, the Charter will bear on the issue.

One should not conclude that the English notice rule is a failure because the courts there hesitate to enforce it either by refusing to admit late alibis or applying adverse comment on them. Upon informal enquiry among bench and bar in the U.K., I am told that, while often late or otherwise deficient, some notice of alibi is usually given. The Crown has, therefore, at least some chance at preparation of rebuttal. And the paucity of cases on the new sections indicates that there have been no significant problems of interpretation.

B. EYEWITNESS IDENTIFICATION

There is no such branch of the law. Identification is just another fact-issue and the eyewitness is just another narrative witness.[26] The problem, of course, is his reliability, which, is a problem of weight for the jury. But the jurisprudence indicates doubt about the reliability of the jury's capacity to deal with this kind of evidence.

There are two sources of attack on the reliability of the eyewitness: judicial experience and controlled studies. Of the former, the Devlin Report is the leading authority.[27] As for the latter, a leading North American student is Doctor Elizabeth Loftus, whose recent book, Eyewitness Testimony[28], has received wide recognition. I append a summary of the factors which, according to the research, affects the reliability of the eyewitness.

Jurors are not to be told the results of such studies because this would offend the ultimate issue rule. S.40 of the draft Act might broaden the test, but to date most Canadian courts to date accept this robust English view:[29]

> ". . . An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."[30]

Clement, J.A.,[31] in a similar vein, criticized expert opinions about the reactions of an "ordinary" person:

> ". . . what is involved is the intuitive perception of human nature which judges, and I include appellate judges, are by common law deemed to be capable without the assistance of opinion evidence."

For now, the best we can offer is a version of the trickle-down effect:[32]

> "The conclusions which social scientists have reached in the field of identification, and particularly in the field of human behaviour, will always have their impact on the public at large from which juries are taken, as the information is disseminated and might eventually lead to legislation; it may also find its way, as it has in the past, in Judges' charges, . . ."

Some studies test the thesis that jurors are credulous. Certainly, it would be inappropriate to put before a jury evidence that other jurors erred. But evidence about eyewitness error, if it tells us something new and dramatic, would be receivable.[33].

While we keep our distance from the scientists, we have from judicial experience become sceptical about eyewitnesses and the credulity of jurors. The Devlin Report said:

> It is only in exceptional cases that identification evidence is by itself sufficiently reliable to exclude a reasonable doubt about guilt.

To give effect to this, it recommended:

1. A general warning to the jury;
2. A rule to prevent conviction where there is only a dock identification.
3. A careful review of the supportive evidence, if any;

I will attempt to review the present state of these rules in law of Canada today.

1. The General Warning

The general warning comes from an Irish case[34]. Many judges say something like this:

> In the history of our law not many people have been wrongly convicted; but on those occasions where somebody has been wrongly convicted, it is usually because of mistaken reliance on an eyewitness identification. However honestly offered, such evidence might always be mistaken.

The Supreme Court of Canada, in Vetrovec[35] speaks approvingly of a short, sharp warning about potentially unreliable evidence.

The Ontario Court of Appeal, in Olbey[36] had said that a general warning is not bad. In Spatola[37] it said that the warning is mandatory where the identification evidence is "offset either by evidence of a contrary nature or by evidence of a failure or inability of another witness equally in a position to see the alleged offender to make an identification." I conclude that in Ontario a general warning is essential where there is any evidence inconsistent with the identification (as for example an alibi) or where there is a witness (as there almost always is) who might but did not support the identification; in short, almost in every case.

The British Columbia Court of Appeal in McCallum[38] said that no formula of words is essential so long as it is made abundantly clear to the jury that they must scrutinize the evidence of identification with the greatest care and they must not convict unless satisfied beyond reasonable doubt. The Alberta Court of Appeal has said that the general warning is never out of place.[39]

2. Directed Verdict

The Devlin Report suggested that an unsupported, untested, dock identification not be admissible. To date, no Canadian court has suggested that such evidence is a sufficient mix of weakness and prejudice to invoke the limited exclusionary rule conceded in Wray [40]. However, the Alberta Court of Appeal has done the next best thing: it approved a directed verdict where there was untested dock identification and the supporting evidence was very weak[41]. But, cases of dock identification alone continue to be left with juries, who convict without interference[42].

3. Review of supportive evidence

The Devlin Report said that the judge should tell the jury:

> ". . . the circumstances, if any, which they might regard as exceptional and the evidence, if any, which they might regard as supporting the identification . . . "

This is sometimes expressed only as preferred practice[43]. It is unlikely that an acquittal should be overturned for failure to do it.

In Vetrovec, the Supreme Court of Canada has issued general instructions on the appropriate charge to a jury about supportive and contradictory evidence. Vetrovec is an accomplice case, but the following observations by Dickson, J. on behalf of the unanimous full Court seem applicable also to charges on eyewitness evidence. He says:

> Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to

> attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support. The idea implied in those words may, however, in an appropriate case, be effectively and efficiently transmitted to the mind of the trier of fact. This may entail some illustration from the evidence of the particular case of the type of evidence, documentary or testimonial, which might be drawn upon by the juror in confirmation of the witness's testimony or some important part thereof. I do not wish to be taken as saying that such illustration must be carried to exhaustion. However, there is, in some circumstances, particularly in lengthy trials, the need for helpful direction on the question of sifting the evidence where guilt or innocence might, and probably will turn on the acceptance or rejection, belief or disbelief, of the evidence of one or more witnesses.

What is supportive and what is not depends, of course, on the case at bar.[44] I will comment in detail on three interesting areas: lineups, late alibis, and hypnosis.

(a) Line-ups

The principal means of support for an identification of a stranger is to put the capacity to identify of the eyewitness to some sort of test. The line-up cases boil down to this: how effective and therefore compelling was the test?[45]

The charging judge must, I suggest, now point out to the jury any weakness in the testing procedure[46]. This would include the absence of some reasonable step, as for example a photograph of the line-up. He should warn them of the danger of suggestion, intended or not. He perhaps also should point out to them that the line-up

is the only appropriate testing method after the accused is in custody[47]. Moreover, I suggest that he must warn them that all subsequent tests - and evidence - are only as good as the original test because, presumably, the witness - now acting in the comfort of knowledge that he was right the first time - will now identify, not the criminal, but the person previously seen[48]. Indeed, the British Columbia Court of Appeal recently approved the admission of a line-up identification even when the witness could not afterwards make a dock identification.[49]

(b) Alibi and Identification

When does the lack of an alibi or a bad alibi support identification. I would summarize the rules as follows:

(i) An alibi is given in evidence but is not believed. This cannot support identification and the jury must be so charged.[50]

(ii) An alibi is given in evidence and in cross-examination the accused acknowledges not having offered it at the first available opportunity. An adverse inference goes only to credit. Again, it cannot be evidence to support identity.

(iii) An alibi is not given in evidence by the accused. An inference adverse to him may be drawn.[51] As I have already noted, the inference presumably is that the accused was not in another place and that the eyewitness identification was not mistaken. Therefore it is support, although not necessarily conclusive.[52]

(iv) An alibi is given in evidence and the Crown proves it to be false beyond a reasonable doubt. The Crown thereby has demonstrated consciousness of guilt by key evasions. This supports the identification, and the jury may be so charged.[53]

(c) Hypnosis

The most recent means by which the Crown seeks to support the credit of an eyewitness is by an hypnotic test. Here, the witness is put in a hypnotic state and, during this episode, asked again about the events in question. It is said that the witness will often recall much more detail, and damning detail. After the episode, the witness then remembers this detail. Of course, when the witness gives evidence the Court soon learns of the episode. Indeed, the Crown itself probably should lead evidence of it. And, in order to demonstrate that this episode should support, and not weaken, the credibility of the witness, it is necessary for the Crown to lead evidence to establish that memory can be enhanced during hypnosis, and that there were no improper suggestions. No doubt a trial judge would prefer a *voir dire* before the evidence of any expert as to the significance of hypnosis, or of the episode, reaches the jury. But it is not inconceivable that such evidence could reach the jury to assist them in attempting to decide whether or not to believe a recollection enhanced by hypnosis.[54]

In a recent American case, *Greer*,[55] additional and compelling identification particulars were obtained under hypnosis. Before

hypnosis, the two young victims were able only to give a general description of the assailant. In separate hypnotic sessions, they have detailed descriptions from which a composite drawing was made. Later, both were able to identify their attacker in a line-up. We will no doubt see more of this sort of evidence.

FOOTNOTES

1. Prepared by The Honourable R.P. Kerans, J.A. for 1982 C.I.A.J. Evidence Seminar for Trial Judges. I acknowledge assistance from earlier papers by The Honourable C. Dubin, J.A. for Alberta District Court Seminar (1976) and The Honourable D.C. McDonald, J. for Alberta Branch, Canadian Bar Association (1977). I also acknowledge the assistance of Richard Ireland and David Stilwell, Students At Law, in the preparation of these notes.

2. See p.7-10 of the minutes of the meeting of June 24-25 1981. The conference received a report from a select committee.

3. See the cases noted at page 178 in R. v. Robertson (1975) 29 C.R.N.S. 141 (Ontario Court of Appeal).

4. R. v. Roteliuk [1936] 1 W.W.R. 278 (Sask. Court of Appeal). I question whether a distinction ought not to be made between testimony at the preliminary hearing and a statement made in response to the invitation made pursuant to s.469(1) C.C.C. In Roteliuk, the trial judge asked the witness if the accused had failed to "testify" at the preliminary hearing.

5. See R. v. Sullivan (1967) 51 Cr.App.R. 102 at 105 where Salmon, L.J. says that one cannot charge a jury that "...if he were innocent, it is likely he would have answered the question...".

6. See Robertson (supra), page 179.

7. R. v. Vezeau (1976) 28 C.C.C. (2d) 81 at 88. For the English view see R. v. Mutch [1973] 1 All E.R. 178 (C.A.). There may be a difference now between the Canadian and English law.

8. See R. v. Chambers and Obirek (1980) 54 C.C.C. (2d) 569 at 571.

9. R. v. Appleby (1971) 3 C.C.C (2d) 354 at 365.

10. R. v. Shelley (1981) 59 C.C.C. (2d) 292.

11. R. v. Patrick (1982) 63 C.C.C. (2d) 1, which relies in turn on Kolnberger v. R. [1969] S.C.R. 213. But, there, Martland, J. quite explicitly says (562) that he will not apply the rule in Burdett to "a case to which s.134 C.C.C. applies". The case therefore has very limited

application. The Patrick decision was upheld by the Supreme Court of Canada in oral reasons given June 19, 1982. My information is that they agreed with the reasons of Seaton, J.A. But his ratio in Patrick is that the trial judge in fact drew no inference. His discussion, therefore, of what inference is permissible was obiter, and the Supreme Court of Canada did not necessarily agree with it.

12. See Ratushny, Self-Incrimination in the Canadian Criminal Process, Carswell, Toronto 1979.

13. (1973) 14 C.C.C. (2d) 385.

14. (1820) 4 B. & Ald. 95 at p.161, 106 E.R. 873 at p.898.

14a Alibi, R.N. Gooderson, Heinemann, 1977 p.47.

15. This was the charge in R. v. Mahoney, (1979) 11 C.R. (3d) 64 but a special set of facts led the Court of Appeal to criticize it. But it denied a new trial because the evidence was overwhelming and was upheld in this respect by the Supreme Court of Canada (May 31, 1982).

A puzzling aspect of the case is that Mr. Mahoney did not assert his right to silence in the face of the police caution. He talked to the police, but failed to mention his alibi. Is he now to be protected from adverse comment? For examples of approved comment on pretrial silence, see Russell v. The King (1936) 67 C.C.C. 28 (S.C.C.); see also R. v. Dawson (1981) 7 W.C.B. 83 (Ontario Court of Appeal).

16. I suggest that one may put to him the warning offered at the preliminary pursuant to s.469(1)(m) C.C.C., and ask him why he did not reply. See R. v. Beach (1909) 2 Cr.App.R. 189.

17. R. v. Trevarthen (1913) 8 Cr.App.R. 97

18. The Criminal Justice Act, 1967, section 11. Many American States have a similar rule.

19. See s.11(1) "On a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless before the end of the prescribed period he gives notice of particulars of the alibi."

20. See section 86. But see S.88(1).

21. Widgery, L.J. in R. v. Lewis (1968) 53 Cr.App.R. 76 at 80. See also R. v. Cooper (1979) 69 Cr.App.R. 229, where a refusal to extend the deadline for the giving of notice was criticized.

22. This problem does not arise in the U.K. because the election of trial by magistrate is unknown there.

23. See Lewis, supra.

24. Section 84(1) and section 87.

25. Gooderson, op cit. p.245.

26. The scope of this paper does not include new developments about circumstantial evidence of identification. But consider the common problem in summary conviction matters of the ccused who is apprehended in the course of a crime by a policeman who cannot at trial be certain of a dock identification. Is there an issue of identity? The criminal was apprehended. Did the criminal become the accused? And, if the criminal was given an appearance notice or was arrested, is that not presumed so by operation of law? This proolem has been approached in a variety of ways: See R. v. Hughes (1981) 6 W.C.B. 16 (B.C. County Court); R. V. Lang (1981) 5 W.C.B. 19 (B.C. County Court); R. v. Howe (1982) 7 W.C.B. 4 (B.C. County Court); R. v. Smith (1981) 5 W.C.B. 178 (B.C.S.C.); R. v. Lawless (1981) 6 W.C.B. 316 (P.E.I.S.C.): R. v. Unger (1981) 6 W.C.B. 476. See also R. v. Kamdeitz (1977) W.C.B. 476, and R. v. Chandra (1975) 29 C.C.C. (2d) 570 (B.C. Court of Appeal).

27. The report to the Secretary of State for the Home Department from the Departmental Committee on Evidence of Identification in Criminal Cases. Chairman: The Right Honourable Lord Devlin. Report filed April 26, 1976. London: Her Majesty's Stationery Office. See also: Glanville-Williams, The Proof of Guilt, 1955. (A Hamlyn lecture.)

28. Eyewitness Testimony, Harvard University Press, 1979.

29. R. v. Audy (No.2) (1977) 34 C.C.C. (2d) 231. See also R. v. Low (1980) 23 B.C.L.R. 207 (B.C. County Court), and R. v. Martel [1980] 5 W.W.R. 577 (B.C.S.C.), and R. v. Rajput (Alberta Queen's Bench, Dea, J., unreported November 13, 1981. See also: The Use of Eyewitness Identification Evidence in Criminal Trials, Starkman, (1978-9) 21 Cr. L.Q. 361.

30. R. v. Turner [1975] 1 All E.R. 70 at 74.

31. R. v. Clark [1975] 2 W.W.R. 385 at 402.

32. Audy, supra, p.235.

33. Audy, supra, p.236.

34. People v. Casey No. 2 (1963) I.R. 33 at p.39.

35 R. v. Vetrovec et al, published May 31, 1982.

36. R. v. Olbey (1970) 4 C.C.C. (2d) 103.

37. R. v. Spatola [1970] 4 C.C.C. 241 at 248. This is similar to the English rule. See R. v. Long (1973) 57 Cr.App.R 871 (Court of Appeal).

38. R. v. McCallum (1971) 4 C.C.C. (2d) 116.

39. R. v. Lin & Lin (1979) 13 A.R. 597 at 600-602. See also: R. v. Bryzgorni (Alberta Court of Appeal, unreported, March 19, 1982).

40. R. v. Wray [1970] 4 C.C.C. 1.

41. R. v. Duhamel (1981) 56 C.C.C. (2d) 46. But see R. v. Shand (1980) 4 W.C.B. 443. The Court in Duhamel followed the English Court of Appeal in R. v. turnbull (1973) 3 All E.R. 549 and distinguished the decision of the ,Supreme Court of Canada in U.S.A. v. Sheppard (1976) 30 C.C.C. (2d) 424 on the grounds that the Court there said only that a prima facie case includes one the trial judge happens not to believe; it did not decide that a prima facie case included one so weak as to be incapable of belief by any reasonable person

42. See, for example, R. v. Hutton (1981) 5 W.C.B. 268 (N.S.C.A.) and, in the United Kingdom, R. v. Caird et al. (1970) Crim. Law Reports 656. Of course, such verdicts are also often upset as unsafe. See for example, R. v. Browne et al (1951) 99 C.C.C. 141.

43. R. v. Blackmore (1970) 2 C.C.C. (2d) 397 (Ont. Court of Appeal).

44. For some examples of supportive evidence see R. v. Boland (1977) 33 C.C.C. (2d) 211 - statements by accused; Re Depagie and The Queen (1975) 27 C.C.C. 456 - statements to others by witnesses; R. v. Glyn (1971) 15 C.R.N.S. 343 -

the accused proven to be a homosexual; R. v. Marcoux (1976) 1 S.C.R. 763 - accused refused to join the line-up; R. v. Roy (1981) 6 W.C.B. 470 (Quebec Court of Appeal) - the name of the accused was found on papers at the scene; R. v. Lussier (1981) 5 W.C.B. 294 (Ontario Court of Appeal) - evidence of accomplice accepted. The Alberta Queen's Bench expressed hesitation to consider hair similarity as supportive evidence: see R. v. Nesbitt (1981) 5 W.C.B. 56. In Chartier v. A-G Quebec (1979) 48 C.C.C. (2d) 34 at 52, the Supreme Court said that an uncertain identification by another witness is not supportive. The trademark type similar fact is not support unless in the similar fact situation there is a positive identification. See Sweitzer, S.C.C. unrep., June 23, 1982.

45. For detailed study, see Identification Parades, Glanville-Williams, 1963 Crim. L.R. 479. The Failure of Identification Procedures, 1974 New L.J. 1174. Identification in Practice. 1976 New L.J. 950. I append as Appendix C some questions prepared for the Alberta police in 1977 by The Honourable D.C. McDonald, J. I would add this: should we not learn from scientific experience and demand double blind tests?

46. See R. v. Sutton [1970] 3 C.C.C. 152 at 163-4 (Ontario Court of Appeal). Se also R. v. Blackmore [1971] 2 O.R. 21; R. v. Haworth (1971) 1 C.C.C. (2d) 546. For the English rule, see R. v. Long (1973) 57 Cr.App.R. 871. Of course, this rule also follows from the fact that the Court of Appeal will upset a conviction and enter an acquittal in the face of bad line-up evidence. See, for example, Babb and Nepton, cited in footnote 48.

47. R. v. Manegre, unreported, Alberta Court of Appeal, May 10, 1982.

48. R. v. Babb [1972] 1 W.W.R. 705 (B.C. Court of Appeal); R.v. Nepton (1971) 15 C.R.N.S. 145 (Quebec Court of Appeal).

49. R. v. Swanston (1982) 7 W.C.B. 184.

50. R. v. Clarke (1980) 48 C.C.C. (2d) 440 (N.S.C.A.); R. v. Davison et al. (1974) 20 C.C.C. (2d) 424 (Ont. C.A.).

51. R. v. Vezeau (1976) 28 C.C.C. (2d) 81 at 88.

52. Canada Evidence Act, section 4(5). There is no logical or historical reason why this injunction should apply to a judge sitting alone. See R. v. Binder (1948) 92 C.C.C. 20 (Ont. C.A.).

53. Mawaz Khan et al. v. R. [1966] 3 W.L.R. 1275 (P.C.). It is important to remember that not every lie by an accused in his alibi shows consciousness of guilt. See R. v. Rallo (1979) 44 C.C.C. (2d) 431 at 440.

54. See R. v. Zubot (Alberta Q.B. Hetherington, J., unreported October 19 & 23, 1981). She let the Crown experts testify about the effect generally of hypnosis and about the episode in question. The jury acquitted. See also R. v. Pitt (1967) 68 D.L.R. (2d) 513. R. v. K (1979) 10 C.R. (3d) 235. McIntyre v. Morgan et al (1980) 27 B.C.L.R. 101 (S.C.); R. v. Booher [1928] 4 D.L.R. 795. See also U.S. v. Adams 581 F(2d) 193; and People v. Modesto 59 Cal. (2d) 124. See also: Dilloff, "The Admissibility of Hypnotically Influenced Testimony" (1977) 4 Ohio North. L. Rev. 1.

55. State v. Greer 609 S.W. (2d) 423 (Missouri Court of Appeal 1980). See also: U.S. v. Awkard 597 F(2d) 667.

APPENDIX A

UNIFORM LAW CONFERENCE OF CANADA - UNIFORM EVIDENCE ACT

(pp. 24 - 25)

Alibi Evidence

Interpretation

83. In sections 84 to 88, "alibi evidence" means evidence tending to establish that an accused is not guilty of an offence with which he is charged on the ground that he was not present at the place where the offence is alleged to have been committed at the time it is alleged to have been committed.

Notice of alibi evidence

84. (1) An accused shall, at the first reasonable opportunity, give notice of alibi evidence in writing to the prosecutor or a law enforcement officer or authority acting in relation to the accused, indicating the whereabouts of the accused at the time the offence is alleged to have been committed and the names and addresses of the witnesses in support of the alibi.

Further notice

(2) Where changes occur in the names or addresses of the witnesses mentioned in a notice under subsection (1) or new witnesses are found, the accused shall, at the first reasonable opportunity, give further notice to any person to whom notice was originally given.

Notice by prosecutor

85. Where the prosecutor receives notice under section 84, he shall provide a copy of the notice to any co-accused and, after the alibi has been investigated, he shall, at the first reasonable opportunity, give notice in writing of the results of the investigation to the accused and any co-accused.

Adverse comment

86. Where a party fails to comply with section 84 or 85, the court and any party adverse in interest may comment on the weight to be given to the evidence of that party in relation to the alibi.

Determining the first reasonable opportunity

87. In determining when the first reasonable opportunity occurred for the purposes of

PREUVE D'ALIBI

Interprétation

83. Dans le présent titre, est une preuve d'alibi une preuve tendant à démontrer l'innocence de l'accusé pour le motif qu'il n'était pas présent sur les lieux de l'infraction reprochée au moment où il est allégué que cette infraction a été commise.

Avis d'alibi

84. L'accusé qui entend présenter une preuve d'alibi est tenu, à la première occasion convenable, d'en aviser par écrit le poursuivant, un agent chargé de l'exécution de la loi ou l'autorité qui s'occupe de son cas; l'avis indique l'endroit où se trouvait l'accusé au moment de l'infraction, les nom et adresse des témoins d'alibi.

Avis complémentaire

En cas de changement de nom ou d'adresse des témoins visés à l'avis prévu au premier alinéa ou en cas de découverte de nouveaux témoins, l'accusé est tenu, à la première occasion convenable, d'en aviser toute personne à laquelle il avait déjà donné avis.

Avis donner par le poursuivant

85. Le poursuivant, sur réception de l'avis prévu à l'article 84, est tenu d'en fournir une copie à tout coaccusé; après la conclusion de l'enquête sur l'alibi, il avise à la première occasion convenable l'accusé et tout coaccusé des résultats de celle-ci.

Observations défavorables

86. Le tribunal et toute partie adverse qui y a intérêt peuvent faire des observations défavorables sur la force probante de la preuve d'alibi d'une partie qui ne se conforme pas aux articles 84 ou 85.

Détermination de la première occasion convenable

87. Pour déterminer à quel moment est survenu la première occasion convenable

section 84 or 85, the court shall consider all the circumstances and, in particular, with respect to an accused, shall consider when the accused became aware of the time and place of the alleged offence and when he retained or was provided with counsel.

visée à l'article 84, le tribunal tient compte de toutes les circonstances de l'espèce, notamment le moment où l'accusé a eu connaissance de la date et du lieu de l'infraction et s'il a retenu ou s'est vu fournir les services d'un avocat.

Proceedings by way of indictment

88. (1) In a criminal proceeding by way of indictment in which a preliminary inquiry is held, where the accused has not complied with section 84 and has failed to give notice of alibi evidence within seven days after being committed for trial, alibi evidence is not admissible on his behalf at the trial without the consent of the prosecution unless the court for cause shown orders otherwise and, on committing the accused for trial, the court shall warn him accordingly.

Procédure par voie de mise en accusation

88. Dans le cadre d'une instance criminelle par voie de mise en accusation durant laquelle est tenue une enquête préliminaire, faute par l'accusé de se conformer à l'article 84 et d'avoir donné l'avis qui y est prévu au plus tard le septième jour après qu'il a été cité à son procès, la preuve d'alibi en sa faveur est irrecevable au procès sans le consentement de la poursuite sauf ordre contraire du tribunal donné pour des motifs établis; le tribunal avertit l'accusé en conséquence quand celui-ci est cité à son procès.

Adverse comment where applicable

(2) Where alibi evidence is received under subsection (1), a comment in respect of that evidence may be made under the conditions and in the manner provided by section 86.

(Note - This section is for inclusion in the federal Act only.)

Observations défavorables

Des observations sur la preuve d'alibi reçue en vertu du présent article peuvent être faites de la manière prévue à l'article 86 et aux conditions qui y sont précisées.

(Remarque: Cet article apparaîtra uniquement dans la loi fédérale.)

Summary of Factors Affecting the

Unreliability of Eyewitness Identification

A. The Original Situation
   1. Insignificance of Events
   2. Shortness of Period of Observation
   3. Less than ideal observation conditions

B. The Observer
   1. Stress
   2. Physical Condition of the Observer
   3. Prior Conditioning and Experience
   4. Personal Biases
   5. Needs and Motives - Seeing what we want to see
   6. Desire to be a Part of History

C. Testing for Identification
   1. Length of Time From Event to Test
   2. Filling in Details Which Weren't There
   3. Unfair Test Construction
   4. Suggestions in the Test Situation
   5. Conformity
   6. Relation to Authority Figures
   7. Passing on a Theory: The Self-Fulfilling Prophecy

For further information, you may contact

Dr. Roger H. Barnsley
or Dr. J. Don Read

Department of Psychology
University of Lethbridge
Lethbridge, Alberta T1K 3M4

Also, the journal is available from the

Center for Responsive Psychology
Brooklyn College
Brooklyn, N. Y., 11210

This journal summarizes the current research regarding psychology and the law that is presently taking place.

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APPENDIX C

1. When you show a witness photographs while you are still investigating, if the witness identifies the criminal do you keep apart the photographs you have shown him so that the court may later compare them?

2. Do you show a witness photographs of a suspect who is already in custody?

3. When one witness has positively identified the criminal by a photograph, are other witnesses then shown the photograph?

4. Do you show a witness photographs of those whom they are about to be asked to identify at an identification parade?

5. Do you allow the suspect to have his solicitor present at the identification parade?

6. Is the suspect advised that he may have his solicitor or a friend present?

7. If the suspect's solicitor is unable or unwilling to attend the identification parade, are arrangements made to have an independent third person present, e.g. a bank manager or other reputable person?

8. Are identification parades photographed? or filmed by a motion picture camera?

9. Is care taken to ensure that the witness does not see the suspect before the parade takes place, e.g. arriving in a police car, or being brought from the cells, or through a glass door, or anything of that kind?

10. Are the names and addresses of all participants in a parade recorded? Is that information supplied to the defence solicitor?

11. When a witness gives a description of the criminal, is that description taken down and retained?

12. Before being shown a photograph or appearing at an identification parade, are witnesses(including police witnesses) required to make a written description of the criminal, drawing attention to salient and distinguishing features?

13. When a witness has identified a suspect from a composite photograph or sketch drawn by a police artist, what use is thereafter made of the composite photograph or sketch?