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CRIMINAL EVIDENCE

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ence is admitted as a matter of practice. Whether those objections are valid or not, there are practical reasons for admitting the evidence, namely:

- (a) the delay between an identification parade and trial may cause a witness to forget whom he has identified at the parade;
- (b) the possibility that a defendant may change his appearance²⁰ and
- (c) the defence will have the opportunity of cross-examining the identifying witness as to the truth and accuracy of his identification; thus, the chief mischief against which the hearsay rule is aimed will not be present.²¹

16-43

In *McCay*²² a witness attended an identification parade. The participants in the parade were numbered. The witness, looking at the parade from a separate room through a two-way mirror, identified the defendant by reference to his number. At the trial the witness said that he attended the parade and made an identification, but could not remember the number. A police inspector was allowed to give evidence of the number to which the witness had referred at the parade. The Court of Appeal held that the inspector's evidence was admissible as part of the *res gestae* (see § 9-37, above) and also because the procedure adopted at the parade was sanctioned by Code D and, as a result, there was statutory authority in sections 66 and 67(11) of the Police and Criminal Evidence Act 1984 for the words to be admitted.²³

16-44

In *Osborne and Virtue*²⁴ the Court of Appeal held that even if an identifying witness is not able to identify the defendant in court and does not recall the identification parade, another witness may give evidence that the identifying witness picked out the defendant on a parade.

This decision has been criticised on the grounds that: (a) it conflicts with the decision of the House of Lords in *Christie*; and (b) it involves the admission of hearsay evidence as a result of which the defence has no opportunity of cross-examining the person who made the identification.²⁵

It is submitted that these criticisms are valid. The Court said in *Osborne and Virtue* of *Christie* that "this can be got from the speeches: that evidence of identification other than identification in the witness box is admissible."²⁶ However, *Christie* does not support this wide proposition. As has been seen, the evidence of the identifying witness and the other witnesses in *Christie* was admitted to confirm the identification of the defendant in court. In *Osborne and Virtue* there was no identification in court. The

²⁰ *Osborne and Virtue*, above, at 690.

²¹ D.F. Libling, "Evidence of Past Identification" [1977] Crim.L.R. 268, 277.

²² [1990] 1 W.L.R. 645.

²³ Code D provides that a witness (in the procedure adopted in this case) should make an identification by indicating the number of the person concerned (para. 15 of Annex A).

²⁴ [1973] 1 Q.B. 678.

²⁵ *Phipson on Evidence* (14th ed., 1990), para. 15-10; Libling, *op. cit.*

²⁶ Above, at 690.

evidence therefore could not be admissible under the principle stated in *Christie*.

The situation where the identifying witness cannot recall the identification parade is to be contrasted with the situation considered in § 16-42 where the witness could remember making an identification. In those circumstances the identifying witness can be cross-examined about his identification.

In the situation considered in this paragraph, the identification is established by the hearsay evidence of another witness with the result that:

- (a) the jury is deprived of the opportunity of hearing and observing the identifying witness giving evidence about the identification; and
- (b) the defence is deprived of the opportunity of cross-examining the identifying witness.

These circumstances are not consistent with the principle that the defendant should have a fair trial. It is therefore submitted that *Osborne and Virtue* should not be followed and that if a witness cannot identify the defendant in court and cannot recall making an earlier identification, no other evidence as to that identification should be admitted.

4. THE USE OF PHOTOGRAPHS FOR IDENTIFICATION

Two rules governing the use of photographs must be distinguished, namely: 16-46

- (1) The police may show a witness photographs in order to identify a suspect.²⁷
- (2) Once a man has been arrested, and there is therefore an opportunity that he can be identified in person, photographs should not be shown to witnesses before an identification parade.²⁸

The distinction is that when the police are looking for a culprit, the showing of photographs to witnesses may be essential; indeed, it may be the only way in which the culprit can be identified. Once, however, a man has been arrested and is to be put on an identification parade, it would be dangerous to allow the witnesses to see photographs since they may identify the man in the photograph rather than the man whom they saw committing the offence.

When the police show photographs to a witness in order that the witness can identify a suspect, considerations of fairness must be borne in mind.

²⁷ *Dwyer* [1925] 2 K.B. 799; *Kitchen* [1994] Crim.L.R. 684.

²⁸ *Dwyer*, above. See § 16-53, below, for Code D2.18.

Therefore, the witness should be shown a number of photographs of different people (one of whom is the accused) rather than one or two photographs only.²⁹ This makes a photographic identification of the defendant by the witness more effective as evidence.³⁰

If a witness has been shown a photograph of the accused, this fact should be disclosed to the defence.³¹ The defence may then wish this fact to be brought out at the trial.

Until recently, it had been held that there was a rule that the prosecution could not lead evidence of identification of the defendant from a photograph. This was because it was felt that the jury would infer from the existence of the photographs that the defendant had a criminal record, such photographs usually being taken in a police station. Thus, the Court of Criminal Appeal held that an irregularity had occurred in *Wright*,³² where a prosecution witness volunteered that he had seen a photograph of the defendant in the "rogues' gallery" at New Scotland Yard. Similarly, in *Lamb*,³³ the prosecution produced in court a sheet of prison photographs of a number of men including the defendants; the jury, when then in retirement, asked to see "mug-shots" of the defendants. The Court of Appeal held the production of the photographs to have been an irregularity. Only if the defence was in some way taking unfair advantage of the rule could the photographic identification be referred to. In *Bleakley*,³⁴ the witness, who was a shopkeeper, identified the defendant first from a photograph and then at an identification parade. The evening before the parade the defendant came to the witness's shop and tried to speak to him. At the trial the defence suggested that the witness had identified the defendant at the parade because of the defendant's visit to the shop. The trial judge allowed evidence to be given of the identification by photograph by the witness, and the Court of Appeal held that he was right to have done so.

However, in *Allen*,³⁵ when both *Lamb* and *Bleakley* were applied, the Court of Appeal held that there was no rule that the prosecution could not

²⁹ *Dwyer*, above.

³⁰ "The object of showing a group of photographs to a witness is to test his ability to pick out the photograph, if it is there, of the person whom the witness had said that he has seen previously on a specified occasion": Report of the Departmental Committee on Evidence of Identification, Cmnd.338 (1976), para. 5.91.

³¹ *Lamb* (1980) 71 Cr.App.R. 198. Para. 7 of Annex D of the Code provides that where a witness attending an identification parade had previously been shown photographs or photofit, identikit or similar pictures, the suspect and his solicitor must be informed of this fact before an identification parade. In *Wright* [1994] Crim.L.R. 131 an identifying witness contributed to the making of an identikit. The defence were not informed of this fact until the closing stages of the trial. However, the Court of Appeal held that there had been no breach of code because para. 7 does not apply to a person responsible for making an identikit. The Court pointed out that the theme of the code was that the suspect should be protected from a person who, having seen a photograph before the parade, tended to identify the person in the photograph rather than the person who committed the crime. On the other hand, in the instant case the witness, having contributed to the making of the identikit, would be identifying his own identification.

³² (1934) 25 Cr.App.R. 35.

³³ Above.

³⁴ [1993] Crim.L.R. 203.

³⁵ [1996] Crim.L.R. 426.

lead evidence of previous photographic identifications unless the defence took unfair advantage of the rule: there were a number of circumstances in which such evidence could be led before the jury. But it is submitted that the overriding criterion must be that of fairness.

If it does emerge in evidence that the police showed a witness photographs of a defendant, it is a matter for the discretion of the judge whether to direct the jury that it must not be prejudiced because the police had a photograph of the defendant.³⁶ It may make matters worse if such a warning is given, as the jury may not realise that the photograph results from a criminal record. It may be better to make no remark at all.³⁷

The judge has a discretion to exclude evidence of identification if there is an irregularity in the use of photographs, although any such irregularity need not necessarily lead to exclusion of the evidence or, if admitted, the quashing of any subsequent conviction. The question of exclusion arose in *Maynard*.³⁸ A witness in that case identified two defendants by photograph. No identification parade took place. The admissibility of the evidence of identification was contested in a trial within a trial which lasted two-and-a-half days. It was contended by the defence that the evidence of identification by photograph was inadmissible because it had not been followed by an identification parade. The judge admitted the evidence. The Court of Appeal held that the evidence was admissible. While identification by photograph not followed by an identification parade may be very weak identification, its weight was a matter for the jury. The Court said: "We would only interfere with the learned judge's exercise of his discretion after a long argument and a trial within a trial if we thought that in some relevant respect the learned judge had exercised his discretion upon some erroneous principle."³⁹

The admission of evidence of identification by photograph may be justified by the defendant's conduct. In *Byrne and Trump*,⁴⁰ a witness was shown photographs by the police six days after a robbery. He picked out B as a participant in the robbery. He did not pick out B at an identification parade held two days later. B had altered his appearance from that in the photograph. The prosecution was allowed to adduce evidence of B's picking out the photo. The Court of Appeal held that this course was justified in order to defeat B's attempt to avoid being identified.

The Code of Practice lays down rules for the use of photographs. The Code provides that:

³⁶ *Lawrenson* [1961] Crim.L.R. 398.

³⁷ *Wright* (1934) 24 Cr.App.R. 35, cf. *Harrison* (1978) 68 Cr.App.R. 99 (a case in which the Court of Appeal said that a comment should have been made by the judge).

³⁸ (1979) 69 Cr.App.R. 309, 314-316.

³⁹ At 315. In *Governor of Pentonville Prison, ex p. Voets* [1986] 1 W.L.R. 470, 473, the Divisional Court said that photographs from police files were admissible to prove identity subject to the judge's discretion to exclude them.

⁴⁰ [1987] Crim.L.R. 689.

- (a) photographs must be shown in accordance with Annex D to the Code.⁴¹
- (b) photographs should not be shown if there is a suspect whose identity is known to the police and who is available to stand on a parade or participate in a group identification.⁴²
- (c) once the witness has made an identification from photographs, other witnesses should not be shown photographs but should attend an identification parade.⁴³ If sometimes happens, as in *Lamb*,⁴⁴ that more than one suspect falls to be identified. In that case, subsequent witnesses will have to see the photographs in an attempt to identify other suspects. If this is done, the photographs of the original suspect (once identified by any witness) should be removed from the album⁴⁵;
- (d) a witness who has made a firm identification by photograph should always be asked to attend an identification parade unless it is unnecessary or impracticable for some other reason.⁴⁶

5. ADMISSIBILITY OF PHOTOFITS AND SKETCHES ^{reasonably necessary}

16-54 There was doubt for some time as to whether photofit pictures were admissible or not.⁴⁷ Although occasionally admitted, it was thought that they fell foul of the rule against consistent statements. However, in *Cook*⁴⁸ the Court of Appeal held that photofits are admissible since they are not statements but (with photographs and sketches) in a class of evidence of their own. The Court said that neither the rule against hearsay nor the rule against consistent statements applied. The Court described the production of a sketch or photofit as a graphic representation of the witness's memory and, as such, another form of the camera at work.

The decision in *Cook* has been criticised as owing more to practical considerations than to logical consistency.⁴⁹ If so, it would seem right that practical considerations should prevail over technical rules. In assessing the accuracy of an identification the jury should have access to all relevant

⁴¹ Para. D. 2.18.

⁴² *Ibid.*

⁴³ Annex D, para. 5.

⁴⁴ (1980) 71 Cr.App.R. 198, cited at § 16-48.

⁴⁵ *Lamb*, above, at 201, 202.

⁴⁶ Annex D, para. 5.

⁴⁷ See the contrasting decisions of *Okorudu* [1982] Crim.L.R. 747 (in which a photofit was admitted in a trial at Inner London Crown Court) and *O'Brien* [1982] Crim.L.R. 746 (in which a photofit was excluded in a trial at the Central Criminal Court).

⁴⁸ (1987) 84 Cr.App.R. 369. *Cook* was followed by the Court of Appeal in *Constantinou* (1990) 91 Cr.App.R. 74.

⁴⁹ Munday, "Photofit pictures and the Law of Evidence" 151 J.P.N. 83. See also commentary by Prof. J.C. Smith [1987] Crim.L.R. 403.

information. In this connection the witness's impression in the form of a photofit made soon after the event in question is vital. As such, it should not be withheld from the jury.⁵⁰

The government has also approved a computer-based system known as "electronic facial identification" (E-FIT). In this system a computer is programmed with numerous facial features taken from photographs. The operator uses this program to make a picture of the suspect on a video screen. Technology is thus used to assist the operator in drawing the picture. This would appear to make no difference to the admissibility of the picture. If a picture produced by photofit is admissible, so, it would appear, is a picture produced by means of E-FIT.

At the time of writing there has been no reported case in which the Court of Appeal has given general guidance as to how a jury should be directed in relation to the significance of photofit evidence. In *Constantinou*,⁵¹ the Court of Appeal held that the judge had correctly directed the jury in telling them (a) that no witness had identified the appellant, (b) that witnesses had given descriptions and produced a photofit which the jury may think were consistent with the defendant, but (c) "it does not go further than that." The Court said that it was not necessary to supplement this direction with a "Turnbull" warning. Accordingly, it would appear appropriate to remind a jury that (a) the production of a photofit does not amount to an identification, but (b) its significance is to show the witness's impression of the offender made soon after the offence.

16-57 It is submitted that the same principles apply to sketches made on the instructions of a witness soon after the event. As has been seen, the Court of Appeal in *Cook*⁵² put them in the same category of evidence as photofits. The question of the admissibility of a sketch was considered in *Smith* (*Percy*).⁵³ In that case a witness had seen a man near the house where a woman was murdered; and at her direction a police officer made a sketch. The sketch was admitted in evidence. The defendant's appeal on the ground that the admission of the sketch involved hearsay was dismissed. The Court said that the witness using her memory had directed the sketching hand of the officer and it was her sketch made through the officer's hand.

6. OTHER FORMS OF IDENTIFICATION

A. IDENTIFICATION BY FINGERPRINTS

16-58 Identification is often made by means of fingerprints. In a typical case, a police officer goes to the scene of a crime and finds fingerprints (or palm prints) there. The fingerprints are compared by an expert with those of the

⁵⁰ See *Okorudu* and *Munday*, *op. cit.*

⁵¹ (1990) 91 Cr.App.R. 74.

⁵² Above.

⁵³ [1976] Crim.L.R. 511.

defendant. The expert gives evidence that having compared the two sets of prints his opinion is that the fingerprints at the scene were made by the defendant. Since experts usually demand a very high level of correspondence between the two sets (16 similar ridge characteristics is normally quoted), such evidence is very convincing proof of identity. If the evidence is disputed, it will be a matter for the jury to decide whether the identification is correct or not.⁵⁴

Even if there is no other evidence of identity (as is often the case in offences such as burglary) the evidence may well be sufficient to convict the defendant. The Court of Criminal Appeal has dismissed appeals made on the ground that identity was established by fingerprints alone.⁵⁵ It does not, of course, follow that by establishing the defendant's presence at a certain place by means of fingerprints that the prosecution will establish the offence charged. Thus, in *Court*,⁵⁶ the defendant was convicted of receiving a stolen motor car. His fingerprints had been found on the rear view mirror of the car. The Court of Criminal Appeal held that this was insufficient evidence of his possession of the car. It may well, however, in certain circumstances be sufficient evidence of taking the car without consent, or driving or being carried in it.

B. IDENTIFICATION BY DNA

16-59 A defendant may be identified by the technique of DNA profiling, the analysis of the material of which chromosomes are made. This technique has been used successfully for forensic purposes for a number of years.⁵⁷ However, problems have arisen concerning the complexity of the evidence, and the weight to be attached to it. This led the Court of Appeal in *Gordon*⁵⁸ to say that it did not doubt the validity and value of DNA evidence, but the effect of the evidence in the instant case was to raise arguable questions as to whether the match probabilities could be sustained. Lord Taylor C.J. commented that figures running into millions exert a strong influence on a jury. The Court heard additional expert evidence and ordered a retrial. In *Deen*,⁵⁹ Lord Taylor C.J. warned of the dangers of the "prosecutor's fallacy" in relation to DNA evidence, i.e. confusing the answers to the following questions: (1) what is the probability that a person would match the DNA from the crime sample if he is innocent?; (2) what is the probability of his being innocent given that he matches the DNA profile from the crime

⁵⁴ See Campbell, "Fingerprints: A Review" [1985] Crim.L.R. 195 for a discussion of identification by means of fingerprints.

⁵⁵ *Castleton* (1909) 3 Cr.App.R. 74; *Bacon* (1915) 11 Cr.App.R. 90.

⁵⁶ (1960) 44 Cr.App.R. 242.

⁵⁷ In Kelly, Rankin and Wink, "Method and Applications of DNA Fingerprinting" [1987] Crim.L.R. 105, 110 it is claimed that the technique makes positive identification "virtually certain". It must be doubted whether in the light of subsequent cases such a claim would be made now (see below). However, the evidence clearly has a very high probative value.

⁵⁸ [1995] 1 Cr.App.R. 290.

⁵⁹ *The Times*, January 10, 1994.

sample? The fallacy consists in giving the answer to the first question as the answer to the second: for an example, see § 16-60, below.⁶⁰

Similarly, in *Adams*⁶¹ the defence at trial were allowed to adduce evidence of Bayes Theorem (a formula giving a numerical probability to pieces of evidence) in connection with the statistical evaluation of the DNA profile. The Court of Appeal doubted whether evidence of the Theorem was admissible because it trespassed on an area exclusively within the jury's province, namely the way in which they evaluated the relationship between one piece of evidence and another. The Court also said such evidence (or any similar statistical method of analysis) plunged the jury into inappropriate and unnecessary realms of theory and complexity deflecting them from their proper tasks: it was not appropriate for use in jury trials. This view was reinforced in *Adams No. 2*⁶² (an appeal from the retrial in *Adams*). In *Adams* (No. 2) the Court of Appeal said that (in the absence of special features) expert evidence such as that of Bayes Theorem should not be admitted since such evidence was a recipe for confusion, misunderstanding and misjudgment: the instant case was properly approached on conventional lines and the jury would not have been assisted by reference to a complex approach which they were unlikely to understand or apply accurately, and which would distract them from consideration of the real issues.

A further danger has been identified in relation to the calling of DNA evidence, i.e. that of the expert scientific witness usurping the function of the jury by giving an opinion as to the strength of the DNA evidence (a matter which should be left to the jury). Thus in *Doherty and Adams*⁶³ scientists had been allowed to comment on the high degree of probability that the defendant had left the crime stain. Indeed, in *Adams* (one of the two similar cases considered by the Court of Appeal) a scientist agreed in answer to a leading question that he was sure it was the defendant. The Court said that all the scientist should do is give evidence of the match in the DNA between the crime stain and the defendant; of his calculation of the frequency with which such matching DNA characteristics are likely to be found in the population at large (the "common occurrence ratio"); and, if appropriate, how many people with the same characteristics are likely to be found in the United Kingdom (or some relevant sub-group).

"If one person in a million has a DNA profile which matches that obtained from the crime stain and the suspect has such a profile, then the suspect will be one of perhaps 26 men in the U.K. who share that characteristic. If no fact about the defendant is known other than that he was in the United Kingdom at the time of the crime the DNA evidence tells us no more than that there is a statistical probability that he was the criminal of 1 in 26. The significance of the DNA evidence will depend critically upon

⁶⁰ For a full discussion, see Balding and Donnelly, "The Prosecutor's Fallacy and DNA Evidence" [1994] Crim.L.R. 711.

⁶¹ [1996] 2 Cr.App.R. 467.

⁶² [1998] 1 Cr.App.R. 377.

⁶³ [1997] 1 Cr.App.R. 369.

what else is known about the suspect."⁶⁴ (The prosecutor's fallacy is to say in the above example that there is a million to one probability that the defendant is guilty.) The true position is this: it is for the jury to decide on all the evidence whether they are sure that it was the defendant who left the crime stain rather than one of the other men with the same DNA profile. The Court in *Doherty and Adams*⁶⁵ said that the following procedure should be followed in relation to DNA evidence.

16-61

(i) *The expert's evidence*

The prosecution scientist should adduce evidence of the DNA comparisons together with his calculations of the "random occurrence ratio". Also, the scientist should say, if appropriate, how many people with matching characteristics are likely to be found in the U.K. population. The scientist should not be asked (and should not use language to suggest) his opinion as to the likelihood that it is the defendant who left the crime stain.

(ii) *Disclosure*

The prosecution should disclose to the defence sufficient details as to how the calculations have been carried out to allow the defence to scrutinise the basis of the calculations. The Forensic Sciences Service should make available to the defence expert, if requested, the databases upon which the calculations have been based.⁶⁶

(iii) *Summing-up* ^{stain}

The judge should explain to the jury the relevance of the "random occurrence ratio" and draw attention to the extraneous evidence which provides the context which gives the ratio its significance. The judge should also draw attention to the evidence which conflicts with the conclusion that the defendant is responsible for the crime stain. The following direction (tailored to the circumstances of the particular case) may be appropriate:

"[I]f you accept the scientific evidence called by the Crown, this indicates that there are probably only four or five males in the United Kingdom from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics."⁶⁷

⁶⁴ *Doherty and Adams*, above, at 373.

⁶⁵ Above, at 374-375.

⁶⁶ See § 20-10, below, for general discussion concerning disclosure.

⁶⁷ *Doherty and Adams*, above, at 375.

C. POSSESSION OF INCRIMINATING ARTICLES AS EVIDENCE OF IDENTITY

16-62

There may be occasions when the possession of incriminating articles will support an identification. Two cases illustrate the proposition.

1. In *Thompson*,⁶⁸ the defendant had been charged with gross indecency with two boys. The boys said that after committing the offences the defendant made an appointment to meet them at a public lavatory three days later. The police were informed. When the defendant kept the appointment one of the boys pointed him out. Powder puffs and indecent photographs were found in the defendant's possession. These articles had not been used in the offences. The House of Lords, however, held that the evidence of the accused's possession of such articles had been rightly admitted since it supported the identification of the accused by the witnesses: possession of these articles tended to show that the defendant was a homosexual, and so it was less likely that the identification was mistaken.

2. In *Reading*,⁶⁹ (lorries had been hijacked) A driver identified the defendant as one of the men involved. Evidence was given that when the defendant's house was searched, a police-type uniform, walkie-talkie and number plates were found. There was no evidence that any of these articles had been used in the robberies. Shoes and stockings of a type carried by one of the hijacked lorries were also found. The Court of Appeal followed *Thompson* and held that this evidence had rightly been admitted. Although the articles had not been used in the perpetration of offences, evidence of the defendant's possession of them tended to negative the possibility of mistaken identification. The possession of articles in *Reading* showed a criminal disposition. Therefore, the identification was less likely to be mistaken.

D. VOICE IDENTIFICATION

16-63

A suspect may be identified by means of his voice. In *Hersey*⁷⁰ the defendant was charged with robbery. The offence involved the robbery of a shop by two men in balaclavas. The shopkeeper thought that he could identify the voice of one of the robbers as being that of a customer. The police arranged a voice identification parade at which the defendant and eleven volunteers read out a passage from a previous unrelated interview with the defendant: the shopkeeper identified the defendant's voice (although two other witnesses failed to do so). At trial the defence submitted that the evidence relating to the parade should be excluded under section 78 of the Police and Criminal Evidence Act 1984, and called an expert to give evidence on

⁶⁸ [1918] A.C. 221. The House of Lords in *DPP v. Boardman* [1975] A.C. 421 rejected the notion expressed by Lord Sumner in *Thompson* that homosexual offences were in a special category of their own. However, the rejection of that notion would not necessarily prevent evidence similar to that adduced in *Thompson* being admitted today, provided that its probative value outweighed its prejudicial effect: § 6-07 *et seq.*, above.

⁶⁹ (1966) 50 Cr.App.R. 98.

⁷⁰ [1998] Crim.L.R. 281.

the voir dire. The expert gave evidence about the readings, the pitch of the voices, and the effect of stress on pitch. The judge in the exercise of his discretion refused to exclude the evidence; and the Court of Appeal held that he was right to have done so. The Court said that one of the purposes of the parade was to give the witness the opportunity to test his identification, and to give the defendant the opportunity to have the evidence excluded: the police must do the best they can with regard to the arrangements for the parade and a judge would exclude the evidence if he considered it unfair.⁷¹ If the evidence is admitted the judge must direct the jury of the risk of a mistaken identification, following the *Turnbull* guidelines (suitably adapted and tailored for voice identification) and dealing with the strengths and weaknesses of the case.⁷²

E. MISCELLANEOUS CASES

16-64

- (a) A defendant may be identified by his handwriting on the evidence of an expert.
- (b) The analysis of bloodstains may assist in identifying a suspect by means of bloodgrouping tests.
- (c) A witness may identify an acquaintance by means of a video tape: see §§ 2-38 *et seq.*, above.

(d) Photographs taken by a security camera at the time that an offence (e.g. a bank robbery) is committed are admissible to prove the identity of the offender: see § 2-14, above.

16-65

- (e) In the 1950s evidence was admitted at first instance that a police dog tracked the defendant from the scene of an arson to a shelter where he was found.⁷³ There was, until recently, no authority of an appellate court that such evidence was admissible to establish identity.⁷⁴ Such evidence has been admitted in New Zealand, provided that the qualifications of the dog-handler and his dog have been established.⁷⁵ The Court of Appeal of New Zealand has said that if the evidence is admitted the judge must draw the jury's attention (a) to the nature of the conclusions which they are asked to draw and (b) to the risks of relying on material which has not been the subject of cross-examination.⁷⁶

The Court of Appeal has now held that tracker dog evidence is admissible provided that there is evidence that the dog is properly

⁷¹ For a call for greater safeguards before evidence is admitted in these circumstances, see commentary at [1998] Crim.L.R. 282.

⁷² *Hersey*, above. For the *Turnbull* guidelines, see § 16-03, above.

⁷³ *Webb* [1954] Crim.L.R. 49.

⁷⁴ For a discussion of the admissibility of such evidence in other jurisdictions, see McCormack, "The Admissibility of Tracker Dog Evidence" [1985] Crim.L.R. 202.

⁷⁵ *Lindsay* [1970] 1 N.Z.L.R. 1002.

⁷⁶ *McCarthy* [1976] 1 N.Z.L.R. 472.

trained and reliable.⁷⁷ The Court stressed that before such evidence was admitted, a proper foundation had to be laid by evidence in detail establishing the reliability of the dog to be able to follow a scent by reason of its training and experience. The Court also said that the judge must direct the jury to consider the evidence with care and circumspection as the dog might not be reliable and could not be cross-examined. (More recently, the Court of Appeal reiterated this guidance and said that the judge should expressly direct the jury that they should look with circumspection at the evidence.⁷⁸)

- (f) In *Allen and others v. Ireland*⁷⁹ the Divisional Court held that a magistrate could take judicial notice of the ordinary processes of arrest, charge and bail to raise a prima facie case that the person

surrendering to bail was the same person who had been arrested, charged and bailed. In that case about 250 football supporters were arrested under section 5 of the Public Order Act 1936 in Euston Road. They were charged at various police stations and bailed. The 11 defendants surrendered to their bail at the magistrates' court. A submission that there was no evidence identifying the defendants as part of the group in Euston Road was rejected by the court for the reason mentioned above.

- (g) Similar fact evidence may be admissible to identify the defendant as the person responsible for committing the offence charged: § 6-16, above. However, it is doubtful whether it is permissible to prove identity by the technique known as "psychological profiling". Thus, in a trial at the Central Criminal Court, Ognall J. said that there were considerable dangers in admitting such evidence as proof of identity.⁸⁰ This was because (a) such evidence might tend to show propensity and nothing more and (b) it was doubtful whether the evidence was expert evidence.

⁷⁷ *Pieterston and Hollaway* [1995] 2 Cr.App.R. 11.

⁷⁸ *Sykes* [1997] Crim.L.R. 752.

⁷⁹ [1984] 79 Cr.App.R. 206.

⁸⁰ *Stagg*, September 14, 1994, unreported, *Archbold News*, Issue 9, November 4, 1994.