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JUSTICE

Evidence of Identity

Memorandum of Evidence
to
Lord Devlin's Committee

CHAIRMAN OF COMMITTEE
LEWIS HAWSER, Q.C.

LONDON
1974

50p

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EVIDENCE OF IDENTITY

INTRODUCTORY

1. The problems relating to identity cases have engaged the attention of JUSTICE for almost a decade. Although this memorandum is intended to supersede our previous memoranda on the subject, we set out a brief history of our representations and their effect.

2. The first memorandum was a brief report prepared by our Committee on Evidence under the chairmanship of the late Cyril Harvey, Q.C., and submitted to the Criminal Law Revision Committee in May, 1966. This called attention to some of the main dangers inherent in existing procedures as revealed in cases brought to our notice. No action was taken and there followed a series of cases in which, after a suspect had been committed for trial after being identified by up to as many as six witnesses, or actually convicted, the real culprit had been discovered or had confessed. In 1969, therefore, we prepared and submitted to the then Home Secretary, Mr. James Callaghan, a fuller and more detailed memorandum to which we attached accounts of seven cases in which there had been serious irregularities and strong reasons for believing that there had been miscarriages of justice. In this memorandum we urged that, if the Criminal Law Revision Committee was over-burdened with other matters, a special committee should be set up as a matter of urgency to consider the whole problem of evidence of identification, including the rules for the holding of identity parades.

3. In the outcome, the Home Secretary issued new rules for the holding of identity parades which covered most of the points raised in the JUSTICE memorandum. If these had been given the force of law and strictly observed, many subsequent cases of wrong identification would have been avoided. But this was not done. The new rules merely carried a warning to the effect that if they were not observed the trial judge might make an adverse comment to the jury. In our experience all this has made very little difference and the flow of serious complaints relating to identity cases has continued.

4. The Criminal Law Revision Committee eventually produced its own proposals in June 1972. These were contained in paragraphs 196–203 of its Eleventh Report and were made the subject of critical comment in paragraphs 23–32 of the JUSTICE memorandum on the Eleventh Report, which was submitted and published in November, 1972.

5. The Criminal Law Revision Committee had plainly given very careful consideration to many of the dangers inherent in evidence of identification and regarded 'mistaken identification' as by far the greatest cause of actual and possible wrong conviction. Its conclusions and recommendations were however disappointing and in our view quite inadequate. The only practical proposal, which had been recommended by JUSTICE, was that witnesses should be asked to write down or dictate, as soon as

possible after the event, descriptions of the persons they had seen; and that copies should be supplied to the defence. But this was to be covered only by an administrative direction. For any failure to observe this direction, as for all the others, there was to be no effective sanction, and the only safeguard proposed was that there should be a general warning by the judge in unspecified terms.

6. The Dougherty case revealed even greater dangers than had been foreseen in the last JUSTICE memorandum. We do not propose to examine this case in detail, since the defects in procedures were fully described by our Chairman, Lord Gardiner, in the House of Lords on 27th March 1974 and all the papers in the case, including the report of the Northumberland Police, will have been made available to you. It is sufficient to mention that:

(a) no identity parade was held;
(b) unbeknown to Dougherty, and presumably to his solicitors, the two identifying witnesses saw him at the committal proceedings;
(c) they were sitting in the same waiting room at the court of trial, so he alleged, when his name was called;
(d) they were able to watch through a glass window when he left the dock to sit among the waiting jurors, thus wholly vitiating their subsequent identification of him in court.

7. In all the circumstances we think that the most useful thing we can do is to set out afresh what safeguards appear to be required and then to consider what sanctions are required to enforce them. Before doing so, however, it is necessary to distinguish between three different categories of identification.

Formal identification

8. The first category is the formal identification needed to complete the chain of evidence and about which there is no dispute. For example, a police officer who has stopped a driver for a traffic offence, or interviewed him when he comes to court. This kind of identification plainly requires no safeguards. In our view these should not be regarded as identification cases at all.

Identification by recognition

9. The second category is identification of a suspect by a witness who knows him well and recognizes him – identifying him either by name or by the position he occupies. We have in mind the manager of a factory who sees one of his employees making off after a break-in, or a householder who sees his window cleaner running away with the silver candlesticks. In such situations, the holding of an identity parade would clearly

have no value. It is perhaps unfortunate that such examples are used as an argument against compulsory parades and a requirement of corroboration, since all would agree that to some extent they fall into a special category. Even so, there are cases in this category which, as experience shows, still need to be treated with caution. It happens to everybody from time to time that they think they see a friend in the street and later find out they were mistaken.

Identification of previously unknown persons

10. The third and main category is identification of suspects hitherto completely unknown to any of the witnesses, and it is in this area that strictly enforced safeguards are most required.

IDENTITY PARADES

Conduct of parades

11. We regard the Home Office directions for the holding of parades as satisfactory if they are strictly enforced, but in our view stricter precautions ought to be taken to ensure that witnesses are given no opportunity of seeing a suspect before he is introduced to a parade. Examples of irregularities brought to the notice of JUSTICE include:

(a) a witness seeing a suspect arrive in a police car, or being brought into the station;
(b) a witness being accidentally taken into the room where the suspect was waiting;
(c) witnesses casually being able to watch a parade through a window.

The elimination of such irregularities must largely rest with the police, but it would help if the accused's solicitor was present at the police station during the preparations for the parade as well as during the parade itself. We also take the view that, when any such serious irregularity is found to have occurred, the evidence of identification resulting therefrom should not be admissible under any circumstances. Any breach of the rules covering the actual parade should render the evidence inadmissible unless the circumstances are proved by the prosecution to have been such as not to have caused any risk of injustice or prejudice to the defence. The judge, if ruling against the defence on such an issue, should be required to give reasons and his decision should be appealable.

Right to require the holding of a parade

12. We take the view that both the police and the suspect should have the right to require the holding of an identity parade. The right of the police should depend upon the conditions set out in paragraph 13 being observed. The right of the suspect should depend on his making the request within a reasonable time – say within seven days after arrest

or after the discovery of a potential identifying witness has been made known to him or his defending solicitor. It is important that this right should cover all known witnesses to the event. In the case of Walters (see accompanying memorandum), he should have been able to insist on being put on parades for the three railwaymen as soon as their statements had been tendered. He was very sure that they would have failed to pick him out.

Right to a solicitor

13. A suspect should be entitled, as of right, to the presence of a solicitor or solicitor's clerk at a parade and at the preliminaries to it, and the police should be under a duty to inform him of this right. No evidence should be admissibile as to any identification at a parade unless this rule is adhered to. Since parades are almost invariably held during normal working hours, we cannot believe that any serious problems will arise in arranging for the presence of a solicitor or his clerk without undue delay. In the absence of a duty solicitor, every police station should have a list of solicitors available for call, and an attendance fee should be payable. We do not favour the idea of magistrates attending parades as it might involve them in the invidious task of giving evidence about the conduct of the parade.

Dock identification

14. We would completely rule out dock identifications save for the situations described in paragraphs 8 and 9 where there is no dispute, or where the witness has previously and positively identified the accused. They are particularly dangerous and obnoxious when a witness is brought into court who has previously failed to pick out a suspect on a parade and is invited, in effect, to explain why he did not pick him out before. If, because of the refusal of the prisoner or other valid reason, a parade has not been held, then the prosecution should notify the defence that a witness is to be invited to identify the accused in court and arrangements should be made for him to be seated in the body of the court with other people. If the accused is suitably dressed and seated inconspicuously, this procedure can be as fair as a parade.

Conspicuousness on parade

15. Complaints are frequently made that suspects are put on parade in a dishevelled condition or in old clothes after a night in the cells, or are the only persons on a parade with a particular physical characteristic, so that, in the words of the late Lord Parker, 'he stood out like a sore thumb'. At present the jury has no means of determining objectively the extent to which such a complaint is justified. We have previously recommended that, to overcome this difficulty, photographs of identification parades should

be taken and made available on request. The use of polaroid cameras would eliminate the risk of the photographs not coming out. This is done in some other jurisdictions and, we were told, by some police forces in Wales. The police have opposed general adoption of such a procedure on the grounds that members of the public who are asked to take part in parades are already reluctant to volunteer and would not stand for it. We ourselves can see no reason why volunteers should object, provided the reason was explained to them and they were assured that the photograph would be seen only by the lawyers in the case and by the judge or the jury on request, and subsequently destroyed.

Names and addresses

16. The names and addresses of all persons taking part in a parade should be supplied to the defence together with the photograph. We understand that a standard form exists for the purpose of recording this information but we do not know the extent to which the practice we have advocated is complied with. It frequently happens that there is a dispute about what happened at a parade between the police and the suspect or his solicitor, and both the police and the defence should have the right to call any member of the parade as a witness. We do not believe that members of the public would be deterred from consenting to stand on a parade to any greater extent than they are at present.

After-thoughts

17. It happens from time to time that, after a witness has failed to pick out anyone on a parade, he tells the Inspector in charge of the parade that he thought he recognised one of the men, but was not sure, or was frightened to touch him or point to him. In our view the introduction of such evidence is particularly dangerous and should not be allowed unless the solicitor is present and is party to all the conversations between the witness and the police officer. It featured in the case of Patrick Murphy whose conviction for murder was ultimately quashed by the Court of Appeal on a reference by the Home Secretary. Here it was even doubtful whether the witness was referring to the fifth man from the right or the fifth man from the left.

UNSATISFACTORY MEANS OF IDENTIFICATION

Chance encounters

18. It quite frequently happens that a suspect is identified and arrested as the result of a chance encounter with a witness who reports it to the police and leads them to him. We regard such identifications as highly dangerous although it is not easy to devise safeguards. The recommendation that descriptions should be recorded would lessen the danger of a faulty identification, as would our proposed requirement of corroboration.

Identification after pursuit

19. Identification and arrest after a pursuit or search can be even more dangerous, particularly if the suspect is lost sight of in the course of the pursuit. Typical cases are those in which a man is robbed in the street. The police arrive and are guided by the witness in the direction indicated by him. He sees and points to a man who looks like the thief who could well be, and sometimes is, a casual passer-by. This evidence should also require corroboration.

Confrontation

20. A not uncommon means of identification is for the police to take the witness into a room where the suspect is sitting and ask him, "Is this the man?" The reason normally given for this is that the suspect refused to go on a parade; but this is sometimes denied. In one case, the prisoner maintained that he had only refused to go on a parade until his solicitor could be present. In the case of Anthony Stock, which has been the subject of repeated representations to the Home Office, the police officer in charge of the case took the chief witness forty miles by car to Stock's house and asked him if this was the man as the door was opened. We take the view that such evidence by confrontation should not be allowed except where there has been a clear refusal to go on a parade and the suspect has had an opportunity of obtaining advice from a solicitor. It carries the additional danger that the witness is asked to make an instant decision which he cannot later retract.

Recognition by police officers

21. Evidence by police officers who have recognised old offenders raises special considerations. The situation itself indicates to the jury that the accused has some kind of record, and cross-examination can make this even more apparent. It also happens from time to time that, after a suspect has been identified and named by one of two police officers and committed for trial on their evidence, there is served a notice of additional evidence of a further officer or officers, who say they saw the accused on another occasion in suspicious circumstances, e.g. 'casing' the scene of the crime or in company with a co-accused, but did not trouble to report it or make a note of it at the time. We take the view that additional evidence of the latter variety should not be admissible unless the prosecution proves that there was no reasonably practical way of holding an identity parade for the officer concerned. As to the broader problem of police identification of known suspects we do not think that there is any simple solution. We take the view that the safer course would be for identity parades to be held in every case, leaving it to the accused's advisers to decide whether they should elicit in cross-examination that the accused was known to the police officer. Whilst there are obvious drawbacks whatever course is pursued, we think that something along these lines is preferable to an accused's record becoming known or suspected by a side wind.

PHOTOGRAPHS

22. We recognise that the detection of crime may sometimes require the use, as a preliminary to identification, of photographs of potential suspects. Clearly the use of photographs has inherent dangers. In particular, there is the danger that the witness may pick out the photograph of a person most like the person he has seen. At the subsequent identity parade the image of the photograph may be substituted in his mind for the image of the person he saw; and that person, of course, will be on the parade. Furthermore, any reference to photographs at a subsequent trial will usually indicate to a jury that the accused has a record.

23. We take the view that photographs should not be used in the identification process unless the circumstances clearly demand it and then only subject to the following safeguards:

(i) No witness should be asked to identify an alleged offender from photographs unless and until the witness has made a written statement giving a description of the alleged offender in accordance with the 'check list' referred to in paragraph 24.

(ii) If there is more than one witness and it is nevertheless decided to use photographs as a preliminary aid to identification, only one witness in the first place should be asked to select from photographs. That witness should be enjoined not to discuss what has happened with any other potential witness. Only if the first witness to the event fails to pick out a suspect from the photographs should they be shown to a second witness and so on. Only witnesses who have not been shown photographs should be asked to pick out the suspect on a parade.

(iii) Not less than twelve photographs should be shown to a witness. In no case should a witness be shown a single photograph and asked "Is this the man?"

(iv) The witnesses should be attended by an officer independent of the investigation while considering photographs, and no officer should be permitted to influence the witness in any way.

(v) Police photographs are in black and white, and can be misleading in respect of the colour of hair, eyes and of complexion. A police photograph is accompanied by descriptions and the witness should be invited to consider that description in the light of the one he has himself already given. Any substantial discrepancy could and should then lead to the

elimination of the suspect picked out. We think it desirable that in the future police photographs should be taken in colour. Whatever drawbacks colour reproductions may present, the advantages over black and white or sepia prints are obvious.

(vi) A record of the photographs actually considered should be kept and made available to the defence, who should also be provided with any observations made by the witness in relation to the photographs.

(vii) In no circumstances should a witness (except by leave of the judge at the trial) be shown the photograph again after making the initial selection.

(viii) Where a single witness has made a selection by photograph he should be told in express terms before going on to a subsequent parade that the object is not to identify the person in the photograph but the person (if any) who they feel sure is the person involved in the alleged crime. He should also be told not to assume that the person in the photograph is present on the parade.

(x) No reference to selection by photographs should be made at the trial unless with the consent of the defence.

AVAILABILITY OF MATERIAL TO THE DEFENCE

Descriptions

24. At present it happens far too frequently that identifications are affirmed and successfully pressed in court where the description of the accused bears little or no resemblance to the description originally given by the witness. Indeed, there have been cases where an identification has been accepted by the jury where the witness at first said he would not be able to recognize the culprit again. We fully endorse the suggestion made by the Criminal Law Revision Committee that at the earliest possible moment witnesses should be asked to provide and sign full descriptions of the alleged offender, and that copies of these should be supplied to the defence. Failure to observe this requirement should render the evidence inadmissible. We think it would be a great advantage for the police to devise and use a comprehensive identification check list, covering physical characteristics and clothing. Such a list would yield valuable positive, neutral and negative evidence. It would have the advantage of ensuring consistent practice and would avoid unnecessary wrangling about what was or was not put to witnesses. The frequent cry of "nobody asked me" is one we can all do without.

Negative identification

25. It frequently happens that the sum total of negative identification outweighs the positive identification on which an accused is charged and possibly convicted. The defence is often not fully aware of it and judges in their directions to the jury frequently fail to attach sufficient importance to it. We take the view that it should be the duty of the prosecution to provide the defence with:

(a) the check lists duly completed;
(b) descriptions by witnesses who have not been asked to identify a suspect;
(c) the statements of witnesses who have failed to pick out the suspect and/or picked out members of the public;
(d) names and addresses of witnesses who in the view of the suspect would have helped to clear him, but were not approached by the police to provide statements.

Failure to observe these requirements should render any positive evidence of identification inadmissible.

26. In general we take the view that all material relating to the above matters should be admissible in evidence for the defence if so desired, provided the spirit of the hearsay rule properly understood (which it often is not) is not violated.

NOTICE OF ALIBI

27. Evidence of identification is so frequently countered by evidence of an alibi that it is desirable to look at the working of existing procedures. A provision requiring a notice of alibi to be given in advance of a trial was included in the Criminal Justice Act 1967. This followed a recommendation made by JUSTICE to the Criminal Law Revision Committee in July 1966 in a memorandum entitled "Advance Notice of Special Defences".

The rules contained in our recommendation were as follows:

Rule 1: Not later than 72 hours before the start of the trial the accused must supply the prosecution with concise particulars in writing of the nature of his defence or defences.

Without prejudice to the generality of the foregoing, the particulars must state, where the defence is an alibi, where the accused was at the material time.

Rule 2: The accused must furnish the prosecution with a list of the names and addresses of his witnesses not later than 72 hours before the start of the trial. This list shall not be mentioned during the trial either by the judge or by Counsel.

Rule 3: The prosecution shall have no right to interview any defence witness so notified except in the presence of the accused's solicitor, unless this requirement is waived by the accused's solicitor.

The primary object of our recommendation was to prevent the prosecution being taken by surprise and to enable to police to make enquiries about the named witnesses and discover whether they had criminal records. It was not intended to present the police with an opportunity of approaching them before the trial.

28. Our suggested Rule 3 above was not included in the Bill when it was put before Parliament, but an assurance was given during the Committee Stage of the Bill that the police would be instructed publicly that the defence should be informed of any intention by the prosecution to interview defence witnesses. (House of Commons, Standing Committee A, Official Report, 1 February, 1967, C.219). This should have achieved the same purpose as our suggested rule. We do not know if this undertaking was carried out or what instructions, if any, were given: but a considerable number of cases have been brought to our notice (e.g. Dougherty) in which the police are not observing either the spirit or letter of the undertaking. On receiving the names and addresses from the solicitor or from the defendant, they are going straight to the witnesses, questioning them, and inviting them to make statements. This has caused difficulty and resentment.

29. If and when alibi witnesses are interviewed first by the police and make statements to them, some defence solicitors feel severely handicapped in that they doubt the propriety of approaching the witnesses themselves. If they decide to do so, they may find that the witnesses decline to make any further statements on the grounds that they have already made one to the police.

30. It would also appear that some trial judges are unaware of the undertaking given. In two cases brought to our notice, alibi witnesses had, as they were entitled to do, refused to make statements when approached by the police. The judge invoked this refusal against the accused by saying in terms, "you may think, members of the jury, that if these witnesses are telling the truth they would have agreed to make statements to the police when they were asked to do so".

31. A considerable degree of responsibility for what is happening does, however, appear to rest with defence solicitors. We are told by good and conscientious solicitors that, when they give the names of alibi witnesses to the police, they invite them to come and interview witnesses at their office and that this invitation is normally accepted. The trouble we have described arises when, because of inefficiency or some other reason, solicitors do not take this initiative.

32. The cure for this unsatisfactory state of affairs is clear. Rule 3 of our earlier recommendations set out in paragraph 27 above has to be strictly enforced. A great deal of resentment and misunderstanding could be avoided by this simple provision. A time limit would prevent

any unreasonable delay or obstruction of the police by the solicitor. Strict instructions need to be given to the police; and judges and solicitors should be made aware of the undertaking given when the Bill was introduced.

33. It is the duty of the prosecution in our system to adduce (during the presentation of the *prosecution's* case) the evidence it relies upon to prove the defendant's guilt and the evidence available to rebut the issues raised by the defence, e.g. alibi or self defence. If the prosecution has taken a statement from an alibi witness which does not support the alibi, we think it is wrong for the prosecution to wait until the witness is called for the defence and then produce the inconsistent statement. There is no property in a witness and our view is that if a person named in the alibi notice does not support the defence then that person's evidence should be capable of being called by the prosecution and be subject to cross examination in the usual way. The position is not one which will confuse the jury if it is explained to them. Above all, this procedure will avoid the criticism that the witness was "got at" by the police and the defence is rendered unable to deal with the matter by way of cross-examination because the rules prevent a party from cross-examining his own witness except in usual circumstances.

34. Genuine difficulties and quite different situations arise when a suspect gives the police an alibi when he is first questioned, in the expectation that he will thus escape being charged. The question is what obligation then rests on the police. If they do not check the alibi at the earliest possible moment they may well charge a man too hastily and wrongly and later find it difficult to withdraw the charge. If on the other hand they go straight to the witnesses, this creates the danger which we have been describing in previous paragraphs. Our view is that that problem can only be solved by strictly enforcing the right of any suspect to have a solicitor present when he is questioned by the police. It would then be up to the solicitor to discuss with the police whether or not the alibi witnesses should be immediately interviewed. If, owing to the force of circumstances, a statement is taken from an alibi witness by a police officer without the defence solicitor being present, the statement should include a formula to the effect that the witness should make a further statement to the defence on request or that the original statement should be made available to the defence.

35. We do not think that the defence ought ever to be obliged to call any witnesses whether referred to in an alibi notice or not. Sometimes there are very good reasons why the defence chooses not to rely on a witness, e.g. the view is formed that the person will make a bad impression because of instability of one kind or another. In these circumstances we think the defence ought to be required to indicate to the prosecution at the earliest reasonable time its decision not to call that witness. The prosecution would then have the right to decide for itself

whether to call the witness or not.

CORROBORATION

36. The Committee of Inquiry which reported on the case of Adolf Beck in 1904 appears (p.vii) to have taken a firm and unqualified view on the need for corroboration. Beck was identified by many witnesses and the Committee said "Evidence as to identity based on personal impression, is, unless supported by other facts, an unsafe basis for the verdict of a jury." This view appears to have been largely ignored. The Court of Criminal Appeal was set up as the result of the Adolf Beck case, but inexplicably corroboration of evidence of identity has never been made a requirement of law and the Court of Appeal has consistently upheld verdicts based on the evidence of one witness, often of an unsatisfactory nature.

37. In their book "Wrongful Imprisonment", which includes a thoughtful study of the problem of identification evidence irregularities and examples of proved error, Ruth Brandon and Christie Davies suggest that judges, juries and lawyers alike all attach too much weight to evidence of identification and that the reason for this state of affairs is that "we all rely continually in our everyday lives on our ability to identify other people and to remember the statements they make to us."

38. Our own view is that in general evidence of identification is so inherently unreliable that corroboration by evidence of another kind is desirable in the majority of cases. Experience shows that the vast majority of miscarriages of justice have occurred through the acceptance of uncorroborated identification. We recognise, however, the difficulty in devising a formula which is fair both the prosecution and the defence. There are circumstances, such as the recognition by a witness of a man with whom he is closely associated and whom he has had adequate opportunity to observe and identify, in which common sense seems to dictate that no corroboration should be required. There are other circumstances in which the evidence of three or more identifying witnesses can by no means be considered conclusive of guilt. In such circumstances a great deal must depend on the manner in which the identification procedures have been carried out.

39. There is much to be said for the view that the problem of corroboration in simple cases of so-called formal identification has bedevilled the serious consideration that deserves to be given in *true identity issue* cases to a general rule of law requiring corroboration. We beg leave to doubt the reality of the problems which it is said would arise if the corroboration rule were to be applied to all cases. It seems strange that there should be resistance to additional safety precautions in a criminal trial. Although it is recognised that in some simple and straightforward situations the requirement of corroborating evidence might seem excessive

we feel that such a rule in *true identity issue* cases would not create any undue difficulty or inconvenience. A number of examples of what are said to be cases where corroboration would be unnecessary or excessive are given; but the most often quoted instances relate to motor car cases. It is objected that cases of motorists who need to be formally identified in driving situations will create problems. But would they? We think it would be a rare case indeed where, if identity was truly in issue and if (as we propose in paragraph 45) advance notice of the issue was served on the prosecution, there would be any difficulty in proving an accused's connection with the vehicle, for examples by reference to the registration records. There is a statutory power to require the identity of the driver to be disclosed. And if the accused objected that he was not the driver and there was no corroboration of the identification evidence, why should he be convicted simply on the evidence of visual identification? What of the case where a person well known to the witness is alleged to have been committing the offence? If identification is truly in issue why should not the prosecution be required to adduce some corroboration? As we remarked earlier, there are few of us who have not been mistaken in thinking we have seen a friend or relative when in truth that person had a perfect alibi for the time and place.

40. For these reasons we recommend that, whenever identity is truly in issue, no conviction should be permitted in law unless there is corroborative evidence of a different kind linking the accused with the offence. This, we believe, would, with the other safeguards we have outlined, provide the best additional safeguard against a wrong conviction. This recommendation goes further than the Scottish rule, which requires corroboration when there is only one witness to identity, but not when there are two. We take the view that the evidence of one witness to identity should not corroborate that of another.

41. We recognise of course that any system, however well devised and however well operated, will produce anomalies and occasional abuse, and have been much exercised about alternative solutions to the problem of corroboration. If the strict rule suggested above is found unacceptable, it could be modified to allow the prosecution to make a submission to the judge in the absence of the jury that the evidence of identification was of such a reliable nature that it should be allowed to go to the jury with a direction that it did not require corroboration. If the judge so decided, he would have to give his reasons and given the jury a warning of the danger of conviction without corroboration and direct their attention to any factors which would make the evidence fall short of certainty. The way the trial judge exercised his discretion should be appealable.

42. The advantage of this modification is that it would eliminate the objection that apparently clear cases could not be pursued unless there was other evidence of another kind. The objection to such a rule is that

the trial judge would be required to enter into the arena of fact in an unsatisfactory way. He has, however, to do this in several spheres already e.g. in ruling on a confession allegedly obtained improperly. Provided the judge firmly emphasises the warning on the dangers of convicting without corroboration, we believe the objection would be overcome. More difficult, however, is the case of the joint trial where different yardsticks might have to be used to measure the 'reliable nature' or otherwise of the evidence against one or more of the defendants. One member of our committee postulated the problem in the following way, and we reproduce it as an illustration:

> A, B and C are charged with robbery with violence.
>
> A is identified by five witnesses;
> B is identified by three witnesses (but on the parade two others picked out someone else);
> C is identified by only one witness, but there is evidence capable of amounting to corroboration.
>
> Submissions on the basis of the rule could well lead to a direction that:
>
> A's case should continue because the evidence is judged to be reliable:
> B's case should stop because the evidence is not reliable and there is no corroboration:
> C's case, although only one witness identifies him, should continue because there is potential corroboration.
>
> The judge then has to explain all this to the jury and, however tactfully he does it, there is the danger that A will be prejudiced by reason of the fact that the judge thinks five witnesses represent a case strong enough to convict on without the necessity to find corroboration and where in fact there is none.
>
> When explaining C's case to the jury the judge can hardly fail to re-inforce the case against A when explaining to the jury why corroboration is needed in the case of C.

43. The application of the alternative rule recommended in paragraph 41 above to cases tried summarily in magistrates' courts should present no difficulties. It is true that magistrates may find themselves first having to decide on the issue of reliability, a question of fact, and if so satisfied, continue to hear the case in toto. But this is not an unusual situation confronting magistrates in their dual role of judge and jury, and indeed they are often faced with similar situations in dealing with uncorroborated evidence of accomplices or having to decide as a preliminary issue whether a statement of a defendant is admissible when it is alleged that the statement was improperly obtained.

Statutory warning

44. Quite apart from the question of corroboration it should be the statutory duty of the judge to bring to the attention of the jury, with a warning, all relevant factors relating to the evidence of identification including (insofar as they may be applicable) the following:

(a) time of day;
(b) lighting conditions;
(c) length of time of the identifier's observation;
(d) the general circumstances of the identification – such as a crowded street;
(e) differences in witnesses' descriptions as between each other and as compared with the accused;
(f) failure by other persons to identify;
(g) the danger of identification after pursuit;
(h) the risks inherent in confrontation identification even though the defence has consented to it.

Notice of disputed identification

45. It seems to us that the defence of alibi so often involves a true issue of identity that the Notice of Alibi procedure should be extended. We think that a *"Notice of Disputed Identification"* should be required to be given in advance of every trial where identity is in issue. We propose as follows:

(a) a person appearing in court on any charge should be informed that if he disputes that he is the person who was involved in the matter complained of he should say so at once.
(b) A Summons should be stamped with the legend "if you intend to dispute that you are the person who was involved in the matter complained of you must notify the informant/Clerk of the Court within 7 days".
(c) In indictment cases the defendant should be required to give notice to the above effect and in terms similar to the alibi notice procedure at present in force.

THE COURT OF APPEAL

46. Experience shows that identity cases are more prone to error than almost any other. It is significant that there have been a number of instances of wrong convictions which have eluded detection by the Court of Appeal. Some of them, in which appeals were later allowed or free pardons given, should have been recognised as unsafe or unsatisfactory at a much earlier stage in the appeal process. We think the Court of Appeal should be much more ready to consider fresh evidence in identity cases.

We accept that it often happens that a conscious decision (for what seem to be very good reasons at the time of the trial) is made not to call all the available evidence at the trial. In such cases, unless there has been some manifest or demonstrable error relating to that decision, it would not be desirable for the Court of Appeal to interfere. On the other hand the fresh evidence is not infrequently fresh in the sense that due to error or incompetence by the accused's advisers it was not possible to call the witnesses at the trial. The Court of Appeal should be more ready to consider the new material in such situations. It should also use its power to order a new trial more frequently than it does at present. We are further convinced that the approach of trial judges and their vigilance in upholding the procedural safeguards involved is directly conditioned by the attitude of the Court of Appeal. Breaches of the rules should, therefore, be the subject of clear and outspoken criticism whenever it seems to be justified.

SUMMARY OF RECOMMENDATIONS

1. The existing Home Office directives for the conduct of identification parades should be statutory and strictly enforced. Stricter precautions should be taken to ensure that witnesses are given no opportunity of seeing a suspect before he is introduced to a parade. Failure to observe this precaution should render the evidence inadmissible in any circumstances. (para 11)

2. Breach of the general rules relating to the holding of identification parades should render the resultant evidence inadmissible unless the circumstances are proved by the prosecution to have been such as not have caused any risk of injusitce or prejudice to the defence. (para 11)

3. The suspect should have the right to be put on an identification parade and to have his solicitor or solicitor's clerk present provided he makes his request within a reasonable time. This right should cover all parades and all known potential witnesses. (paras 13 and 14)

4. The police should have the right to require a suspect to go on a parade. If he refuses, or for any other valid reason a parade cannot be held, the prosecution should notify the defence of their intention to have him identified in court and arrangements should be made for him to be seated inconspicuously in the body of the court. (paras 12 and 14)

5. The names and addresses of all persons taking part in a parade should be supplied to the defence. (para 16)

6. Photographs of identification parades should be taken and made available to the defence. (para 15)

7. Dock identification of suspects previously unidentified by a witness should not be allowed. (para 14)

8. Evidence of "after-thoughts" of witnesses who have attended on parades should not be admissible unless the accused's solicitor is party to them. (para 17)

9. Evidence of identification arising from a chance encounter or a pursuit should be treated with special care. (para 18)

10. Evidence of identification by confrontation should not be allowed unless there has been a clear refusal to go on a parade and the suspect had had the opportunity of obtaining the advice of a solicitor. (para 19)

11. Police officers who recognise suspects should be required to pick them out at an identity parade and only give evidence to this effect. (para 21)

12. Special precautions should be taken to ensure that so far as is

possible witnesses should not identify a suspect because they have seen his photograph and retained the image of the man in the photograph. Our recommendations are set out in paras 22 and 23.

13. Witnesses should be asked to provide and sign full descriptions of the persons they have seen and copies should be supplied to the defence. The police should devise and use a comprehensive check list. (para 24)

14. Full particulars of statements made by witnesses who have failed or have not been asked to identify the suspect should be supplied to the defence. (para 25)

15. The police should be required to observe the undertaking given by the Law Officers that they should not interview alibi witnesses without giving advance notice to the defence. (para 32)

16. If alibi information is given to the police by the suspect when he is first questioned, his solicitor should be consulted before the witnesses are interviewed. (para 34)

17 There should be a statutory requirement of corroboration for all disputed evidence of identification, at least in cases where the accused is not known to the witnesses. If this absolute rule is unacceptable, it could be modified by allowing the prosecution to submit that the evidence was so reliable that it could go to the jury without the requirement of corroboration but with a statutory warning. (paras 40 and 41)

18. The judge should be required to give a statutory warning in all cases of disputed identification and this should cover all the prescribed factors relevant to the evidence given. (para 43)

19 Defendants contesting identification should be required to give advance warning in terms similar to those relating to Notice of Alibi. (para 44)

20. The Court of Appeal should adopt an attitude of greater readiness to entertain appeals on questions of fact, and to hear fresh evidence. It must lead the way in the strict enforcement of the prescribed safeguards in all cases involving evidence of identification. (para 46)

APPENDIX

This Memorandum of Evidence was accompanied by detailed analyses of a number of disturbing cases prepared by the Secretary of JUSTICE and designed to illustrate various irregularities in identification procedures which can and do take place.

Brief summaries of five of these cases are here set out in such a way as to highlight the nature of the identification evidence, its relation to any other evidence and the manner in which it was dealt with by the courts.

R. v. Michael Hunt

1. On the 25th July, 1968, at Hertford Assizes, Michael Hunt was found guilty of armed robbery and sentenced to 12 years imprisonment. The robbery took place near Watford Junction. A security van carrying wages was ambushed and attacked. Ammonia was used and the gang, said to be four or five men, got away with £6,000.

2. Hunt lived in Edgware and was known to be a member of a local gang of shop thieves. Someone telephoned the Watford police and gave them his name and those of his associates. They were all taken into custody and put on identification parades for 14 witnesses to the robbery. Out of the four, Hunt alone was picked out by one witness and subsequently charged.

3. The woman who picked out Hunt was plainly an unreliable witness. In the Magistrates' Court she said that three of the men were wearing balaclava helmets. At the trial she said there was only one. When questioned at the trial about the parade, she insisted that she had picked out Hunt straight away. Two police officers then gave evidence and said that she had walked up and down the line more than once before pointing to Hunt. She was recalled and said that she had been taken on two parades that day and must have got them mixed up.

4. In his summing-up the trial judge made no mention at all of the thirteen witnesses who had failed to identify Hunt. On the contrary:

(a) he belittled the attempt of Hunt's counsel to raise "the unfortunate spectacle of Adolf Beck", saying that the twelve women who identified him were all women of loose morals, that this all happened 61 years ago and things were different now;

(b) he was equally scornful of the views of Professor Glanville Williams "who does not know all that much about what happens in court".

(c) he told the jury not to attach too much importance to any difference between what the witness said at the

Magistrates' Court and what she had said at the trial, or between the police account of what took place at the identification parade and her own account – when these differences were in fact very important.

5. The only other evidence against Hunt was a 'doodle' sketch found by the police on the margin of an old magazine in his home. The police claimed that it was identical with the lay-out of the roads and railway line in the area of the attack. When it was shown to Hunt at his trial, he told his counsel that it had been added to since the police showed it to him at his flat; but it was not seriously challenged. Investigation has since shown that it bears little resemblance to the scene of the attack and the Scotland Yard Forensic Laboratory has admitted that it was drawn in two different inks and probably in three stages.

6. In the course of the night before the robbery, Hunt and his associates had broken into a shop in Edgware and stolen some television sets. In the morning they had met together to plan their disposal. Unbeknown to them, they had been kept under observation by the Regional Crime Squad who had tailed the van and recovered the television sets. A woman officer of the Squad admitted seeing them leave the house of one of them at midday but said she had not observed the time of entry. Hunt and two of his associates were charged with this offence, pleaded guilty, and were sentenced to six months imprisonment before Hunt came to trial for the robbery.

7. This fact was his obvious defence and should have secured his acquittal. It was most unlikely that he would have gone thieving a few television sets just before joining an armed robbery for high stakes. But he was strongly advised by his lawyers not to disclose this conviction and not to give evidence. In his application for leave to appeal he decided to tell the whole story, but the Court said it was too late.

8. While he was on remand in Brixton he was given the names of the gang who had committed the robbery. They were passed to the officer in charge of the case but the men were never questioned or put on identity parades. One of them bears a strong resemblance to Hunt and it is common knowledge in the criminal world that this gang, now serving sentences for other similar robberies, was responsible. Hunt has served 6 years of his sentence, but has been refused parole.

R. v John Evans

1. On the 27th February 1970, at Chester City Sessions, John Evans was found guilty of stealing a bronze impeller from the Corporation Sewage Works. He was sentenced to twelve months imprisonment, and suspended sentences totalling thirty months were brought into effect to run concurrently.

2. On the 29th August 1969 a van with four men in it had been seen parked in the works. A Mr.E saw one man carrying the impeller towards it, and another man walk along the side of the car. A Mr.R saw two men from the car entering the pump house. They also testified to seeing a van come into the works on the 16th September. Evans admitted having been one of the men in it, saying he had gone there to see about a job.

3. Evans was picked up on the 22nd September and questioned about the theft of the impeller. He refused to say anything or to go on an identification parade until his solicitor arrived. The police refused to wait but brought Mr.E into the room and asked him if he had seen Evans before. He said he was one of the men he had seen on the 16th September, which was not disputed, but at the committal proceedings he further identified Evans as the man he had seen walking beside the car on the 29th August. Mr.R was then brought in and said Evans was one of the men he had seen entering the pump house.

4. When Evans was picked up and identified he was wearing a beard, and both witnesses told the police that the man they saw had a beard. One had described it as "a bushy beard". This of itself completely devalued their evidence, because at the confrontations they recognised a beard rather than a man. But it further so happened that on the 28th August Evans had been interviewed by two police officers about a motoring offence. They were sub-poenaed to appear in the Magistrates' Court, and both testified that on that day Evans had been clean-shaven.

5. Despite this evidence Evans was committed for trial and a submission that the case should not go to the jury was rejected. He was so confident of proving his innocence that, although he had an alibi and had given it to the police and to his solicitor, he had made no attempt to get his witnesses to court. For the same reason, the two police officers had only been conditionally bound over, their brief statements were read.

6. Evans' failure to produce alibi witnesses provoked fierce criticism on the part of the prosecution and the judge. At one point he was driven to say, "if you can believe I grew a beard overnight I should be in the Guinness Book of Records and not here".

In the course of his summing up the Recorder went to considerable lengths to reconcile the conflict of evidence by suggesting that Evans might have had a stubble, but not a proper beard.

Evans did in fact call one witness, a man called Callaghan who had already pleaded guilty to the theft of the impeller, but said that his companion on that occasion was not Evans.

Evans was given to leave to appeal. The Court was plainly worried by the conflict of evidence but in the end refused to concede that there was a lurking doubt.

R. v. Conlin and Jones

1. On 11th November, 1971 at Lancaster Assizes David Conlin and Robert Jones were found guilty of robbery and sentenced to 5 years and 6 years imprisonment respectively. The victim was Mr.P, a farmer who lived on his own. He told the police that at around dawn (which was then 5am) he had been woken up by two intruders with cloth masks over their faces. One had a shotgun and the other shone a torch in his face. They tied his hands, took £160, ransacked the house and left. A police officer who arrived at the house at 7.15pm was told by Mr.P that the break-in had taken place two hours earlier. Acting on the information of an alleged accomplice, the police arrested Conlin and Jones, and they were subsequently identified by Mr.P as the two robbers.

2. Mr.P described the two men to the police thus:–
"One was in his twenties, about 5'7", thickset, heavy build, darkish curly hair with a white cover over his face with eye slots. He had a Southern Irish accent. The other was a smallish man, slim build, 5'2", dark hair, long at the back, thin face and with a North Country accent, probably Scottish or Newcastle." There was no doubt about these descriptions. They were recorded in the depositions and had been issued to the Press by the police in an appeal for witnesses. Conlin and Jones were then aged 35 and 34 respectively and both about 5'10".

3. Conlin's identification was brought about in a curious way. He was brought up on remand at Blackburn Magistrates' Court and was sitting at the back of the court handcuffed to a police officer. By pure coincidence, Mr.P came to the court on the same morning in connection with a motoring summons. He spotted Conlin and later told the police that he was one of the burglars – a remarkable achievement when he had only seen them in the half-light of dawn with cloth masks over their faces.

4. Jones was picked out on an identification parade. Five police officers gave sworn evidence that all the other persons on the parade were of the same age and build as Jones. Before the end of the trial, the defence managed to trace and bring one of them to court, and he turned out to be a student, 6'2" with long hair. Conlin subsequently wrote to the others and received replies from five of them. The oldest was 24 and two were only 18.

5. Defence counsel cross-examined Mr.P about the descriptions of the burglars he had originally given to the police, but he maintained his certainty that Conlin and Jones were the two men. The prosecution, however, was plainly worried and obtained permission from the judge for the Inspector in charge of the case to be recalled. He told the court that, whatever descriptions Mr.P may have given in his statement, he had told him privately, when he went to the house that morning, that

the men were well built, had Scottish accents, were 30 – 35 years of age and were both 5'9" or 5'10" in height and one was more thickset than the other.

6. The Inspector had made no note of any such descriptions. They did not appear in any notice of additional evidence. He had not told his Sergeant about them and had approved of the descriptions in Mr.P's statement being given to the press. Clearly this was inadmissible hearsay. Mr.P was not recalled to confirm it.

7. In his summing-up the trial judge made no mention of these doubt-raising factors. On the contrary he virtually commended the Inspector's evidence in these terms:
"So apparently he gave two different descriptions of the men, but the first description was the one I have just read to you, which he gave orally, if you believe the Inspector, to him. The other, because he said it, or because he does not express himself properly, or for some reason because he changed his mind, got into his statement."

8. To help the jury overcome their difficulties about the cloth masks the judge suggested that some peculiar effect of the half-light might hav enabled Mr.P to see the shape of the men's features through the masks. Throughout his summing-up he expressed no real concern about the many disturbing aspects of the identification evidence and gave no kind of warning to the jury.

9. Conlin and Jones admitted that they had been in Mr.P's village the previous night. They claimed that they had gone there with a friend on a private mission, had quarrelled with him and made off. Two police officers had seen them crossing a field at 3am. They had stolen a car and driven 30 miles to Skipton, where two prosecution witnesses, a station foreman and a British Road Transport driver, had talked to them at 5am and 5.15am respectively. Thus, according to the prosecution's own evidence, they were in two places 35 miles apart at precisely the same time. The trial judge did not mention this evidence in his summing-up. Conlin and Jones were found guilty by the jury of conspiracy and burglary after a retirement of 35 minutes.

10. Both men were advised by counsel that there were no grounds of appeal, but Conlin's solicitor was uneasy and drafted some grounds for him. Jones joined in, but the applications were refused by the Single Judge who ordered them to lose 30 days – the penalty for a frivolous application. Conlin wrote to JUSTICE. Full grounds were drafted setting out all the irregularities in the evidence of identification and the defects in the summing-up, and the application was argued by counsel before the Full Court. The Court, however, found nothing wrong and refused the application. To overcome the time dilemma, on of the judges suggested that the complainant had been wrong about the time and had mistaken moonlight for dawn.

R. v. Thomas Naughton

1. Tom Naughton was found guilty of robbery at Lewes Crown Court on 26th July, 1973. He was charged together with two other men, Kevin Buckley and Charles Trotter, and they were all sentenced to ten years imprisonment.

2. Three men had entered a house and stolen £6,000 value of jewellery and other property. When Mrs.E, the householder, opened the door to them, they followed her into the kitchen, closed in on her, pulled her to the ground and put a cloth over her face. One of them squirted a chemical in her face. They forced her to give them her diamond ring and threatened her with a knife to give them her keys. They then bound her up, stuffed material into her mouth and made off. She managed to free herself and drive to the local police station.

3. She was an accomplished artist and while she was in hospital she made sketches of all three men and handed them to the police. These sketches, and paintings she later made from them, were produced in evidence at the trial. In his summing-ip the trial judge made the following comments to the jury, "You will look at each of the drawings carefully and look in particular at the drawings of Naughton and his jowls. You may think that of the three drawings the one which may most readily be accepted as a drawing of Naughton is Exhibit 7. Exhibit 7 was not a drawing of Naughton.

4. Mrs.E identified Naughton as man No.2 who, she said, had come back and put a cushion under her head. The description she gave of him was "30 – 35 years, 5'8", thick set, rugged appearance, full faced, heavy chin, mousy blondish hair, straight, falling forward over forehead". Naughton's actual description is "26 years, 5'8", build proportionate to height (10st.4lbs), darkish brown hair, generally lying sideways, rosy complexion, brown eyes".

5. Someone had given the names of the robbers to the police, because two days after the robbery the police descended in force on a Public House where Buckley and Trotter were drinking, and arrested them. Naughton who knew one of them very slightly, was also there but not in their company. He was questioned and held for a short time until a senior officer said that he was not one of the wanted men. Eight days later he was detained for questioning on another matter and was eventually put on an identification parade at Brixton Prison, where Mrs.E picked him out, because of his stoop. On 5th May, however, before Naughton had been arrested, she had been introduced to three separate parades. At the first she picked out Trotter as Man No.1. At the second she picked out Buckley as Man No.3. At the third she picked out as Man No.2 someone who was not a suspect "because of the way his hair fell forward – although he did seem a little too tall". The man she picked out was 5'7" and Naughton is 5'8". She was told by the officer before she went on this parade that she was to pick someone out only if she was absolutely sure. She expressed doubts only after the parade, when she was told she had picked out the wrong man.

6. Naughton had a substantial alibi but his witnesses were not of good character and some highly prejudicial evidence was allowed to be introduced to discredit him. After the trial Buckley and Trotter, with whom he had not been allowed to communicate in any way until the last day of the trial, gave him a detailed account of the robbery and the name of Man No.2 who was a known police informer, and had been in the Public House when they were arrested.

7. Naughton applied for leave to appeal but his application was sent straight to the Full Court without warning and before he had submitted his full grounds; and was dismissed. His two co-accused have since made statements to the police that he had no part in the offence.

R. v. John Walters

1. On 21st September 1973 John Walters was convicted at the Central Criminal Court of two charges of indecent assault and one of actual bodily harm and given a total of four years imprisonment. He was found not guilty of attempted murder.

2. Miss A, a young girl of 19, complained that on 10th May 1973, just after 4pm, a man got into her compartment at Wimbledon Station. During the journey to Waterloo he exposed himself to her, tried to make her kiss him, assaulted her manually and orally and very nearly strangled her. As the train reached Waterloo he desisted, got off the train while it was still moving and disappeared into the crowd.

3. Suspicion fell on Walters. He had many previous convictions for indecent exposure, although he had been receiving treatment and had responded well. At the time he was employed as a clerk in a Ministry of Social Security local office. When he was questioned by the police, he gave stupid and parrying answers which increased their suspicions. He maintained that he had been at work all day, except when he went out for lunch. His trainee clerk first made a statement to this effect, but she later retracted it and other colleagues said they could not remember him being there in the afternoon. For some unexplained reason, no investigation was made into his claim that his presence could be established by documentary evidence and knowledge of incidents that had occurred.

4. Miss A described the man as: 5'7" – 5'8": well built: brown hair, collar length, slightly curly but cut short: small blue-grey eyes: large hands: short nails: about 25: wearing blue jeans and a blue jacket of the same material: wearing glasses – the lenses looked thick.

5. He was seen on the platform by three railway employees:
   (a) a porter saw him get in and out of the Hampton Court train and then change to the Waterloo train when it came in. His description was:– 30/35: 5'7" – 5'8" : square dark-rimmed glasses: wearing light blue jeans and top to match.
   (b) the guard saw him walk down the train and jump into a coach as it moved off. His description was:– young: 5'9": dark hair: medium build: wearing blue trousers and a short waist blue jacket.
   (c) the driver saw him waiting on the platform. His description was:– young, about 20: wearing blue overall trousers and a jacket of more striking blue.

6. Walters was asked to go on an identification parade and agreed. He said he asked "shouldn't a solicitor be present?", but the police denied this.

7. He claimed that while he was sitting in a room at Waterloo Station a woman police constable brought Miss A into it by accident and that after this a chair was put under the handle of the door. This also was denied by the police.

8. Since Walters wore spectacles, he asked that the other men on the parade should wear them as well. They were all given standard N.H.S. thin-rimmed spectacles, whereas his were dark brown with a clear plastic lower rim.

9. His identification by Miss A was a very hesitant one. She stared at him for 4 or 5 minutes and then shook her head. She asked to see him without glasses and, according to Walters, the officer said, "Mr, Walters, will you please remove your glasses?" She continued staring and shaking her head until the officer said, "Is it or isn't it?" and eventually she said, "I think so". At the trial she admitted having said that she did not know, but gave a somewhat different account of events and maintained that she had been sure it was him all the time.

10. There were three serious discrepancies between her description of the attacker and Walters:
   (a) she said he was 5'7" – 5'8", whereas Walters is 6'.
   (b) she said his hair was collar length and over his ears, whereas it was established at the trial that Walters' hair was always short and neatly cut.
   (c) she said he had large hands and short nails, whereas Walters' hands are small for a man.

11. None of the three railwaymen were asked to attend the identification parade, although one of them had said he was sure he would be able to recognise the man again. Furthermore, none of them were called to give evidence at the trial. Their statements were merely read. They

were wholly in Walters' favour as regards his height and the colour of his clothes. They all had a good view of him but the judge invited the jury to consider whether "their impression of the clothing as he was hopping into a compartment could be relied upon or whether they only caught a fleeting glimpse". In a later reference to them he said, "Well, that was the three railwaymen, and ask yourselves really how much they could have seen".

12. Their description of the man's clothing was of vital importance because it demolished some forensic evidence which was put forward by the prosecution. They all said, as Miss A had done, that the man had blue trousers. The police could not find any blue jeans, but they found an old pair of blue-green corduroys and a blue cord jacket. These were taken and sent for forensic tests and some matching fibres were found between them and Miss A's clothes.

13. Walters sent in voluminous grounds of appeal and requests to call some new witnesses. He had no advice or help and his application was refused.

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