

THE CRIMINAL LAW REFORM COMMITTEE

**Report on the question of whether
an accused person under arrest
should be required to attend an
identification parade**

**PRESENTED TO THE MINISTER OF JUSTICE
SEPTEMBER 1972**

R E P O R T

of

THE CRIMINAL LAW REFORM COMMITTEE

THE QUESTION OF WHETHER AN ACCUSED PERSON UNDER ARREST SHOULD BE REQUIRED TO ATTEND AN IDENTIFICATION PARADE

There are no provisions in New Zealand law relating to the attendance of an accused person at an identification parade. If he attends he does so voluntarily. It was the Committee's view that in deciding whether there should be given power to compel an accused person under arrest to attend an identification parade there were several important issues to be considered. The first such issue is that of self-incrimination.

Although incriminating statements made by an accused person may be admitted in evidence at his trial, at the pre-trial stage an accused person is to some degree protected against self-incrimination by the Judges' Rules. Inherent in the Rules is the principle that an accused person has the right to silence. He cannot be compelled to speak either before or after arrest. However, neither the pre-trial nor the trial rules against self-incrimination appear, on the face of them, to extend beyond the spoken word. Although several members of the Committee agreed with the comment of Professor Glanville Williams who has suggested in various articles that placing a suspect on a parade could violate the rule against self-incrimination, such law as there is indicates that an identification parade would not infringe the rule. These cases, mainly coming from the U.S.A. and beginning with Holt v. U.S. 218 U.S.245

(1950), in discussing the meaning of the privilege against self-incrimination in the 5th Amendment to the Constitution of the United States of America, held that all that was protected under that Amendment was testimonial evidence and not, as the American Supreme Court made clear in U.S. v. Wade U.S.263(1967), physical evidence. This clearly removed evidence gained from identification parades from the protective ambit of the 5th Amendment. Police v. Daily [1966] N.Z.L.R. 1048 is a New Zealand case which makes it clear that physical evidence is not excluded, even though obtained from the accused without his consent. However, since we have reached a firm view that an accused ought not to be compelled to attend an identification parade and on the basis of other factors which we discuss below, we do not think it necessary to deal further with the issue of self-incrimination.

Writing in the 1963 Criminal Law Review, Professor Glanville Williams and Mr Hammelmann said:

"It is a matter of grave concern in the administration of the criminal law when mistaken evidence of identification leads to the arrest and conviction of innocent persons. In this country, public attention was first drawn to the seriousness of the problem by the calamitous happenings in the cases of Beck, Slater and Major Sheppard."

We consider that this problem, the possibility of wrongful identification, is an important factor in the question of compulsion in identification parades.

It was pointed out by the Australian High Court in Craig (1933) 49 C.L.R.429 at p.446 that a witness who says "the prisoner is the man who

drove the car", while appearing to affirm a simple proposition, is really saying -

1. That he observed the driver.
2. That the observation became impressed upon his mind.
3. That he still retains the original impression.
4. That such impression has not been affected, altered or replaced, by published portraits of the prisoner;
and
5. That the resemblance between the original impression and the prisoner is sufficient to base a judgment not of resemblance but of identity.

As Professor Williams and Mr Hammelmann point out in the Law Review article, to which we have referred:

"Although evidence of identity based on identification parades is preferable to mere confrontation before or at the trial, it is in fact not as reliable as it may at first sight be taken to be. ...[I]t contains numerous sources of error, some of them hidden, which may profoundly vitiate its seemingly conclusive result."

We consider that a person should not be compelled to expose himself to such risks though he may well do so voluntarily and, indeed, frequently does. We would add that we do not wish the points made above to be understood as giving the impression that we view identification parades as at present held with disfavour.

The Committee also considered various other issues such as the question of a right to Counsel

at identification parades, the reliability or otherwise of eye witness evidence, the difficulties that may arise where a suspect has highly distinctive characteristics, and certain evidential questions e.g. the possibility of introducing a rule similar to the rules as to corroboration.

Another major factor studied related to possible difficulties arising from any attempt to enforce a compulsory attendance at an identification parade. The accused could not, of course, be physically restrained in a parade, and the only remaining sanctions are those of imprisonment or a fine, coupled perhaps with a judicial power to comment on the accused's failure to attend the parade.

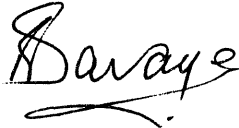
In the light of these factors we have formed the clear view that an accused person ought not to be compelled to attend an identification parade. The question we were asked to consider and report upon related specifically to the position of an accused after arrest. In our view the reasons against compulsion in this matter apply equally, if not more strongly, to an accused after an arrest as they do to him before arrest. There is also the added factor discussed below.

Once a person is arrested and charged it is to be assumed that the police consider they have sufficient evidence to establish a prima facie case against him. However, if he has refused to attend an identification parade and can be compelled to attend one after arrest they may feel tempted, when confident of the result, to arrest when there is insufficient evidence and rely upon obtaining the additional evidence from the parade. We consider

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the risk of such a situation should be avoided.

For and on behalf of the Committee

A handwritten signature in cursive script, appearing to read 'Savage', with a horizontal flourish underneath.

Chairman

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Mr R.C. Savage, Q.C. Chairman
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