

Identification: Investigation, Trial and Scientific Evidence

Paul Bogan, QC, and Andrew Roberts

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Book review by Sally Ramage, editor, *The Criminal Lawyer*

The authors of this successful book (published again in July 2011) are Paul Bogan QC and Andrew Roberts, senior lecturer in law at Warwick University. The author Paul Bogan QC is a criminal law defence barrister with special interest in fraud and murder cases, a special brain that can deal with factual complexity, a property of both fraud and murder cases. Paul Brogan can boast of the reported cases: (i) *R v Houlden*; (ii) *R v McGuigan and Cameron*; (iii) *R v Forsyth*; (iv) *R v Schulman*; (v) *R v Leighton* and (vi) *Kirk Gordon v The Queen*.

The author Andrew Roberts is a senior lecturer in law at Warwick University. Apart from this book published by Jordan Publishing, Andrew Roberts has had more than ten articles published in English law journals: *Vathek's Journal of Evidence and Proof* (2010); *Vathek's International Journal Of Evidence And Proof* (2003) and (2002); *Vathek's Journal of Criminal Law* (2003); *Sweet & Maxwell's Criminal Law Review* (2009); (2008) and (2002); *OUP's Law and Psychology: Current Legal Issues* (2006); *Blackwell's Modern Law Review* (2008); *Ashgate* (2008); *Sweet & Maxwell's European Human Rights Law Review* (2005); *Sweet & Maxwell's Criminal Law Review* (2003); *Blackwell's Modern Law Review* (2008); and *Blackwell's Modern Law Review* (2008). Books that Andrew Roberts has contributed to are as follows: (1) J. Hodgson and A. Roberts (2010) 'Criminal Process and Prosecution' in *Oxford Handbook of Empirical Legal Research*, Editors: P. Cane and H. Kritzer, Oxford: Oxford University Press; (2) A. Roberts and D. Ormerod (2006) 'The Admissibility of Expert Evidence', in *Witness Testimony: Psychological, Investigative and Evidential Perspectives*, Editors: Shepherd E, Wolchover D, Heaton-Armstrong A, Gudjonsson G, OUP; and (3) Roberts, A. and Ormerod, D. (2008) 'Identification in court', in *Psychology and law: bridging the gap*, Editors: Canter, D. and Zukauskienė, R. Aldershot, England; Burlington, VT: Ashgate.

English identification evidence

Identification is the only English law book dealing exclusively with English identification evidence. This second edition includes the developments in the law, brought about by new technology, and especially advances in CCTV cameras, relevant to visual identification and including new techniques for facial mapping. There have been extensive amendments to the Police and Criminal Evidence Act 1984 and its Codes of Practice. The Criminal Justice Act is still being grappled with in the courts and the authors Bogan and Roberts address the topics of hearsay and the topic of bad character, a thorny subject that suffers from a dearth in writing on the matter. The recent major criminal justice statutes are very important in terms of fingerprints, and DNA evidence. As with all of Jordan's criminal law books, they are written for criminal justice practitioners, and are the most valuable sets of information necessary to mount a thorough defence and for prosecutors to double check and make airtight.

Content

The 18 chapters in this book deal with the PACE Code D; visual identification procedures and application; the Identification Officer, his notice to the suspect and resulting procedure; the several visual identification procedures; body marks, photographs and samples; vulnerable suspects; voice identification procedure; the court trial; the admissibility and exclusion of evidence; the Turnbull guidelines; jury directions; DNA profiling; fingerprint and skin impression evidence; human image comparison; handwriting; voice recognition; and dog tracking. As to dog tracking evidence, which is deemed to be scientific but is highly controversial, the dogs used are usually trained and licensed. Such evidence is now considered to be admissible, if the dog handler can establish certain facts. As to dog tracking evidence, which is deemed to be scientific but is highly controversial, the dogs used are usually trained and certified and licensed. Such evidence is now considered to be admissible, if the dog handler can establish that he himself can vouch for his canine friend. (See *R v Pieterston and Holloway*.¹ Previously, There had been no authority hitherto in English law as to the admissibility of evidence concerning a tracker dog. There were a number of authorities from other jurisdictions including *R v Te Whiu* and *Buckton*² where it was held that a person giving evidence of a tracker dog's actions must not express his

¹ [1995] 2 Cr App R 11.

² [1964] NZLR 748.

opinion about what the dog was thinking at the material time. This decision, *R v Pieterston and Holloway*, (1994) *The Times*, 11 November should set a precedent for any future dog tracking evidential issue.

Eyewitness evidence

A groundbreaking field study of eyewitness identification procedures has found that line-up reforms supported by the Innocence Project are more accurate than methods used by most law enforcement agencies (in the United States). A preliminary report of a field study released on 19 September 2011 found that double blind sequential line-ups (where the administering officer does not know which person is the suspect, and the witness views one person or photograph at a time) produce fewer mistaken identifications than line-up procedures that present all of the suspect photographs at once, or simultaneously. Specifically, the report found that double blind sequential line-ups as administered by police departments across the country resulted in the same number of suspect picks but fewer 'filler' (non suspect) picks than double blind simultaneous line-ups. The study was conducted by the American Judicature Society, in collaboration with the Innocence Project, the Police Foundation and the Centre for Problem-Oriented Policing. The conclusion is that sequential line-ups are more accurate.

Specific Denials

A guilty suspect knows exactly what he did, or did not do during the commission of his crime. Consider an employee who smoked marijuana in the parking lot on breaks during work hours. To avoid lying to the investigator's question, the employee may deny only a portion of the question. For example

Q: "Did you use any marijuana during work hours?"

R "I never smoked any dope in the building during work hours!"

Because specific denials are truthful statements, they can mislead an investigator into believing a guilty person. An investigator needs to listen very literally to what a suspect is saying within his response, in particular, listening for what the suspect is not denying.

Identification evidence

Visual identification is dealt with in Chapter 3. Valid eyewitness identifications are crucial to solving crimes and convicting criminals. Nowhere more so than in criminal cases does the legal system rely on the testimony of eyewitnesses. The evidence eyewitnesses provide can be tremendously helpful in developing leads, identifying criminals, and exonerating the innocent. Protocols and procedures are necessary and must be followed to the letter. Studies have found that even the most experienced officer can inadvertently give subconscious hints to the witness to identify the suspect. This can result in false identification. Therefore applying the protocol brings identification evidence in line with other evidence. For example, doctors who are conducting medical research never know whether their patient is receiving the new experimental drug or a placebo. This way they can never be accused of influencing the results. All recommended procedures identify practices that will produce more reliable and accurate eyewitness evidence while improving or eliminating practices that can undermine eyewitness reliability and accuracy. The difficult reality of obtaining such evidence in cases of murder and when very young children are relied on was no more felt than in the Rachel Nichols murder case. A twenty year old young woman was found stabbed 40 times in Wimbledon Common, London and the murder occurred in front of her two year old son, Alex. Although he was able to tell them something about the murder of his mother, police had always known that such evidence could not be used in court, although the law does not impose a minimum age for a child witness. A child of any age may be called as a witness in any criminal case provided that the child is possessed of sufficient intelligence to justify the reception of his or her evidence and understands the duty of speaking the truth. Contrary to this are several cases where it was deemed undesirable for a young child to give evidence.³The child needed to be counselled by a child psychiatrist, Dr Harris- Hendrix. Chapter 14 deals with fingerprint and other skin impression evidence. Of interest are ear and other prints as evidence (at p. 14.35). Even ear prints have been used as evidence. In *R v Kempster*⁴ the prosecution introduced ear prints, which they claimed, were from Kempster. On appeal of his conviction for burglary and attempted burglary the ear print was only capable of providing a reliable match where there was a truly precise match between the prints In *R v Dallagher*⁵ the conviction was quashed on appeal.

³ See *R v Wallwork*, 42 Crim App R 153, 160 CCA. See also *R v Ormerod and Wright*, 90 Crim App R 91, CA.

⁴ [2008] EWCA Crim 975

⁵ [2002]