
TESTING YOUR MEMORY: A COMPARATIVE ANALYSIS OF TEST IDENTIFICATION PROCESS BETWEEN INDIA AND USA

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Introduction

Identification of an accused is a very important part of fulfilling the objectives of a legal system - which is to provide justice to all. The courts have to be sure that they do not convict an innocent person for a crime they did not commit. Identification of a person is done to prove to the court that they are the ones, who they have been alleged to be. The identification can occur by different methods like DNA testing, fingerprints, test identification parade, etc. The identification of a person can also be done by observing their voice, fingerprint, photographs, resemblance, and so forth. There can also be identification of properties that are important to the case at hand. The idea of conducting a test identification parade or TIP is to help verify the witness's claim that they saw the culprit at the crime scene. This process helps us to distinguish the culprit from other people without another aid. This process helps the investigating agency be satisfied that the person who was arrested, is indeed one of the people who committed the offence. This also helps prove to the court that the accused is the offender on a prima facie look. This process is often held in cases of criminal nature and it helps to determine the innocence or guilt of a person. The parade has to occur during the investigation stage. The test identification parade occurs in the pre-trial stages of the investigation where the accused is in custody but the authorities are collecting material to use as evidence in trial in court to prosecute the accused. The process of conducting identification before trial benefits both parties which are the prosecution and accused. Comparing the process of accused identification between countries helps understand the shortcomings of a procedure. This paper aims to analyze the test identification process in India. It further aims to analyze the accused lineup process present in the United States of America. This paper shall conclude with a comparison between the two countries.

INDIA

Section 9 of the Indian Evidence Act¹ talks about facts necessary to explain or introduce relevant facts. These facts can be the date of the offence or the identity of the parties and so on. This section does not explicitly mention the test identification process but it makes the test identification process admissible in the court of law. This section is used along with Section 54A of the Criminal Procedure Code² which determines the procedure and the legality of the process. Section 54 A states when the identification of an accused is necessary, the court that has the jurisdiction can ask the officer in charge to direct the arrested to be made available to be identified by the witness as the court may deem fit. The test identification parade does not violate section 20(3)³ of the constitution which states that a person cannot be made a witness against himself. The accused is not giving a testimony of the facts and thus it does not come under s 20(3). This process is held when there is a first information report or FIR that is lodged but it is against an unknown person. Here doing a TIP helps prove the capability of the witness in identifying people who are unknown to them as the alleged offender. The Supreme Court in *Budhasen v State of UP*⁴ held that a TIP needs to have 2 folds which are- it should establish the identity of the accused and it should test the memory of the witness. These witnesses will be used as an identifying witness in court if they prove succinct at identification. A TIP becomes useful when the identity of the accused is disputed but the crime is undisputed.⁵ If the accused was caught red-handed committing the offence, then a TIP is not required.

This test is usually done in cases of dacoity and murder and under activities considered as an offence by the Maharashtra Control of Organized Crime Act. Cases that come under the Narcotic Drugs and Psychotropic Substances Act, 1985 do not hold TIP and consider it as immaterial. These cases require a person to be arrested in presence of a panch witness. A panch witness are 2 or more people who are independent and respectable. Therefore, the whole process of conducting a TIP becomes counterproductive. Another case where a TIP becomes useless is when the witness is acquainted with the accused and therefore their input can be questionable. It is paramount to the case that the identity of the accused does not become

¹ The Indian Evidence Act 1872, s 9.

² The Code of Criminal Procedure 1973, s 54.

³ The Constitution of India 1950, s 20.

⁴ *Budhasen V. State of U.P.*, AIR 1971 SCR (1) 564.

⁵ G. Prabhakar, 'CONDUCT OF TEST IDENTIFICATION PARADES FOR SUSPECTS AND PROPERTY RECOVERED DURING INVESTIGATION' (2018), Third Topic_1.pdf (ecourts.gov.in)

known to the witness beforehand. The witness has to be previously unknown to the accused. This will help increase the evidentiary value of the identification.

The court in *Daya Singh v State of Haryana*⁶ stated that if the witness evidence is found to be reliable, then it can be used to corroborate the case but not to prove guilt. A TIP is not a substantive piece of evidence under Indian Law which means that it cannot be used as a basis for conviction. The admissibility of this evidence depends on the trustworthiness of the witness. If the only piece of evidence present is the identification by the accused, then it is not likely to hold value to get a conviction. If there is a failure to conduct a TIP, then the identification done in court is not inadmissible. In the case of *Awadh Singh v State*⁷, the court had held that non-holding of TIP is not grounds to vitiate trial, but it is important to ascertain the credibility of a witness. The court in these cases is concerned about identification in front of the trial court and this failure or identification does not matter to the court if the witness is able to do an identification in court. It is instead used as a corroborative piece of evidence. The substantive part is the identification done by the witness in court. If the witness fails to identify the person during TIP it is not considered as a problem as long as they can identify them before the trial court.

Procedure

The procedure to conduct a TIP is multi-layered. The Magistrate's permission has to be sought by the officer-in-charge before a TIP can be conducted. It is then conducted in jail premises by a non-area magistrate who chooses the panch witnesses. There are 6 dummy people selected by the jail authorities to keep the lineup of people mixed and these dummy people will have physical similarities to each other. There can be no police presence when the process is being conducted. The witness has to touch the accused to identify him. The magistrate then prepares a report which is given to the court. In ordinary situations, there cannot be more than 2 accused present and 12 dummies. There needs to be a wall between the accused and the witness before the procedure has begun to keep the TIP precise and effective. In the Indian regulations for TIP, police officers are not allowed to be present during the identification parade. The reason for this prohibition is that due to the presence of a police officer, the identification becomes a statement under S 162 of the CrPC⁸. This means that the identification cannot be used in court

⁶ *Daya Singh v State of Haryana* AIR 2014 (3) SCT 211 (P&H).

⁷ *Awadh Singh v State* AIR 1954 (2) BLJR 23.

⁸ The Code of Criminal Procedure 1973, s 162.

and becomes inadmissible evidence. This identification should be done as soon as the arrest has occurred. This helps satisfy the investigating officer that the investigation is moving in a positive route. This sentiment was echoed in the case of *Hasib v State of Bihar*⁹. The court here also justified its opinion by stating that early identification also reduces the chances of the witness's memory from fading due to a lapse of time between offence and identification. The burden of proving guilt is on the prosecution and therefore they are given these benefits when it comes to the procedure. The person is asked to come and stand for identification. They can be asked to reveal scars or marks on their body to increase the chances of a correct identification. An accused can dispute his identity and then this process becomes really important for the prosecution's case in a criminal trial. They will have to prove that it was indeed the accused at the crime scene. This process helps the investigation officer narrow their search and save resources.

The court in *Daya Singh v State of Haryana*¹⁰ also stated that the accused can refuse to do the test but only with sufficient cause or reason. This reason could be that their identity has been leaked or the prosecution lawyer was pointing at the accused. An accused cannot demand a TIP by claiming it as a matter of their right but their demand cannot be turned down by the prosecution as this refusal can be cause to test the veracity of the witness in court.¹¹ If on the other hand, the accused refuses to participate in the process, then the Magistrate can be asked to direct the accused to comply using S 54 of the Criminal Procedure Code. There is also another identification done in courtrooms known as dock identification and here the witness is looking at the suspect for the first time.¹² Here the judge will ask the witness if the accused is present in the courtroom. The accused can be present anywhere in the court.

United States of America

There is sufficient knowledge about the proceedings that occur in the United States of America during identification due to representation in American television shows and movies. There is also a scene from the American television show '*Brooklyn Nine Nine*'¹³ which shows the lineup process and this scene has become a part of popular culture. The process of identifying the accused in the United States of America is called as an accused lineup or police lineup. This

⁹ *Hasib v State of Bihar* AIR 1972 SC 283.

¹⁰ *Daya Singh v State of Haryana* AIR 2014 (3) SCT 211 (P&H).

¹¹ *Awadh Singh v State* AIR 1954 (2) BLJR 23.

¹² *Daya Singh v State of Haryana* AIR 2014 (3) SCT 211 (P&H).

¹³ *Brooklyn Nine-Nine*, Fox Studios.

process occurs after a suspect has been apprehended but before the trial. The lineup is a very formal procedure where the suspect is in custody and is placed in a group of people whose physical appearance is similar to the suspect and the eyewitness is asked to identify who they show at the scene of crime. This witness can be a victim of the crime or a passerby etc. The lineup showcased cannot include people who are drastically different from each other i.e., having different races, heights, and so forth. The courts in the USA realized what powerful tool eyewitness testimony is and therefore decided to have strict guidelines around lineups. This process is different from the procedure of show-up which entails the witness being shown a single suspect to verify the ability of the eyewitness at identifying people.

The identification can occur through an in-person lineup or photo lineups of 6 or more photographs. There can be 2 types of lineup processes which are sequential or simultaneous lineup. The simultaneous lineup is where all the people are in the lineup at the same time while in sequential lineup, the witness is presented with people or photos one by one. There is also a double-blind sequential lineup method that is used where neither the witness nor the individual conducting lineup is aware of the identity of the accused. This is done to further lower the chances of bias being present in the conduct of the process. There was also a research project called “The Innocence Project” that was started by Gary Wells, a well-known American psychologist. The study conducted in this project showed that double-blind sequential lineups have led to a decrease in misidentification and there is no decrease in probability of the correct suspect being identified.¹⁴ There is another variation of the sequential lineup which is the sequential lineup laps where the witness is repeatedly shown the accused after the first round. This is done to increase the chances of identification being accurate. During the process, the investigators may prompt the individuals in the lineup to say phrases that will help the witness be sure about the identity of the accused. These people are also asked to dress in similar attire as the suspect did during the commission of the offence.

The United States Supreme Court has held that a suspect has to be granted counsel at the post-indictment lineup as it has been characterized as a critical stage.¹⁵ The right to counsel has been granted to the suspect under the Sixth Amendment of the US Constitution¹⁶. If a suspect is denied this right of counsel, then the lineup becomes inadmissible and this was stated in the

¹⁴ Cates, P. 'Sequential lineups are more accurate, according to ground-breaking report in eyewitness identification procedures', The Innocence Project: <http://www.innocenceproject.org>

¹⁵ *Gilbert v. California*, 388 U.S. 263 (1967).

¹⁶ The United States Constitution 1787, 6th amendment.

case of *Gilbert v California*.¹⁷ The subsequent identification done in court also becomes inadmissible unless the prosecution can prove that the identification was not based on the lineup that was done before trial. This right does not arise when there is a photo lineup though. The need to have legal counsel present during the process is to prevent biased or improper procedures from being conducted. Another reason to have a counsel present is to prevent mistakes from occurring that may not be discovered otherwise and thus will not be rectified at the trial stage.

Another right that has been provided to a suspect is to be free from the suggestive identification process. If there was pressure from the police on the witness, then it is considered as a suggestive identification proceeding and the lineup can be suppressed from being considered as evidence. The lineup process also needs to be recorded as a video unless it is impractical. This is a requirement that has to be fulfilled. The federal jury in the USA can order a person to participate in a lineup and this order will come within the powers granted to them. The line-up is a separate investigation proceeding and does not come under the general jury proceedings.¹⁸ This procedure is preferred by the courts compared to an individual confrontation. The case of *Schmerber v California*¹⁹ held that the fifth amendment provided in the US Constitution²⁰ does not apply to line-up proceedings. The fifth amendment provides the right to not be made a witness in own's case. This provision helps people from having to testify against themselves.

Comparison

American legal system and the Indian legal system do not have a lot of similarities but both the countries have provisions that prescribe a process of a witness identifying the accused. In India, the accused in custody does not have any right of counsel during the lineup but in the United States, the suspect has to be granted counsel. This right has been enshrined in their constitution. Legal protection of suspects is the top priority. Both countries also have a provision to order suspects to participate in the identification process and they have to comply with this order. Another difference between the two countries is that in the United States, the lineup becomes inadmissible when there is no counsel and the in-court identification also becomes inadmissible in this case. But in India, the identification done in court is not affected by the inconsistent

¹⁷ *Gilbert v. California*, 388 U.S. 263 (1967).

¹⁸ "Power to Order Lineup—Right to Counsel", Department of Justice Archives, 239. Power to Order Lineup—Right to Counsel | JM | Department of Justice

¹⁹ *Schmerber v. California*, 384 U.S. 757.

²⁰ The United States Constitution 1787, 5th amendment.

procedure that was followed in the pre-trial identification proceedings. The value of a TIP is significantly less when it comes to India. In India, there is no provision to have a photo lineup that can be done instead of a physical lineup. Meanwhile, in the USA, there can be different types of identification processes that can be done. The variety of identification methods ensures the best result possible. In the American system, the police officers are the ones conducting the procedure while in India, the police officers are prohibited from being present during the process. The prohibition is to ensure a bias-free proceeding. These are just some of the differences that are seen on a face-value comparison of both country's processes. But similar to the Indian system of identification, the American system also requires the witness to not be visible to the people in the physical lineup. There is usually a one-way mirror between the witness and the individual and the perpetrator. Thus, the protection of witnesses is considered a top priority in both countries. Both countries have provisions in their laws that prohibit self-incrimination. But they do not include being present in a lineup as a part of self-incrimination.

Conclusion

The process of using memory as evidence to prosecute a person is a faulty process. The legal system's dependency on human memory is not an effective method. A human has many flaws and the human memory often is fragile and suppresses traumatic experiences. Therefore, there are going to be chances of wrong identification due to confusion on the part of the witness. The witness needs to be a hundred percent sure that it was the person alleged who committed the offence. The witness may feel pressure to choose someone in the lineup. They may choose the individual based on comparison with the other individuals present in the lineup rather than on their memory. But it is a good thing that the Indian legal system only considers the results of a test identification process as corroborative and not substantial. The United States of America on the other hand places unwarranted importance on this process and considers it an integral part of the pre-trial process. This causes a dependency on memory that should not be placed. The process of test identification or lineup is not necessarily a useless pursuit as it helps prove that the suspect may have been seen near the crime scene. But there is a lot of other pieces of evidence that can be used by the prosecution to help their case that is not as unreliable. To conclude, by a comparison of the processes in the USA and India, the shortcomings of both countries' laws have come into the spotlight.