

Mistakes in Personal Identification Attempts

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The following study is meant to present the most frequent mistakes (dangers) of identity parades (line-up, recognition) and their possible consequences, such as for instance the worst outcome: justizmord, (miscarriage of justice). The author analyses sources of criminal tactical and criminal technical major errors through real international and Hungarian homicide cases and suggests legislative changes "de lege ferenda" as well as preventive methods and tactics for law enforcers and criminalists as well.

Keywords: errors, false identification, investigation, miscarriage of justice, justizmord, prevention, suggestions

Introduction

The above title was intentionally chosen and deliberately used instead of *identity parade* which is known by the Criminal Procedure Code (Act XC of 2017). The reason is well confirmed in a seven-year long research, concluding that this denomination (used in criminal procedure law and also in criminalistics) is misleading or even manipulative. The Hungarian phrase used for identity parades almost presses the victim to choose someone from the people lined-up (or presented objects, sounds, etc.), by all means. The term suggests that this is a strong expectation from the side of the police; victims may feel urged to choose by all means.

Constraint to meet the expectations can lead to serious errors such as justizmord (worst case scenario), or erroneous verdicts (miscarriage of justice).

Dangers of identity parades (line-up) based on American researches

This point of view is based partially on personal researches on the one hand and on international analysis on the other hand. In the USA various examinations were conducted in order to discover typical causes behind justizmord cases. Three of them will be introduced below; the inference drawn in all cases is similar: identity parades are highly (negatively) positioned.

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As a result of the first examination, a difference between direct and indirect reasons has been identified.²

Indirect reasons are:

- the pressure of public opinion
- belonging to a minority often charged as culprit (e.g. Afro-American, Indian, Irish origin, in some cases religious affiliation)
- cross-questioning in Anglo-Saxon procedure, which not necessarily clarifies the facts of different cases but aims to enforce one's will and defeat the other party
- police prejudgement

As direct reasons, the following ones should be mentioned:

- improper identity parades as most common cases
- police investigation mistakes (for instance mistakes in identity checks, in inspection, manipulations, residual contamination [cross- or carry-over-contamination]), evidence, damaging uniqueness points)
- trespassing police investigation
- mistakes made by prosecutors (such as missing evidence exclusion)
- unfounded, professionally incorrect experts' opinion
- wrongful witness statements and reports of other culprits, prison agents, informants
- wrongful, weak work performance of the defending attorney
- false confessions
- false indirect evidences

The second research deals with 205 cases, according to their results, the reasons are the following:³

- | | |
|---------------------------------------|-------|
| • witness misidentification | 52.3% |
| • false testimony | 11% |
| • officials' negligence | 9.9% |
| • forced confession | 8.4% |
| • "framing" | 4.2% |
| • false testimony by a police officer | 2.6% |
| • expert's error | 1.6% |

Lastly, in the third research 86 cases were analysed and marked the following causative factors of miscarriages of justice:⁴

- | | |
|------------------------------------|-----|
| • misidentification by a witness | 71% |
| • errors in forensic science tests | 63% |
| • police errors | 44% |

² HACK 2011: 43; BADÓ-BÓKA 2003.

³ HUFF et al. 1996: 62.

⁴ SAKS-KOEHLER 2005: 892.

- prosecution errors 28%
- false/erroneous expert opinions 27%
- dishonest informers 19%
- incompetent defence counsels 19%
- false witness testimony 17%
- false confession 17%

Forensic errors: the weaknesses of identification methods in Hungary

Criminal investigation errors can be grouped in several ways.

A) According to the inner division of forensic sciences:

- criminal tactics (inspection, “first strike”, hot evidence, securing scenes, blocking scenes, identity parade, proof attempt, interrogating, errors of using secret devices, perseverant version perception, stating wrong versions, lack of defence checking, exaggerated evaluation of written past records, not recognising deadlocks, improper investigation management)
- forensic technology (improper search and recording of evidence and residues, crossing and contamination of evidence), custody of chain infringement, evidence lost, misused traps, etc.)
- methodological (inappropriate computer confiscation, missing to collect bank statements and so on, there may be endless inadequate procedural steps, given that every offence may induce new groups of mistakes)

B) Error groups according to the (hypothetical) pyramid of criminalistics:

- general mistakes connected to the seven questions of criminalistics (lost time, delays, missing to check databases)
- mistakes connected to evidence (finding evidence, missing to record it, damaging evidence, losing it, pollutant detriment, improper identification)
- mistakes connected to residues (for instance missing to search for micro- or sub-micro contamination, improper identification)
- mistakes connected to testimonies (false confessions, false testimonies, false recognition, improper setting of proof attempts)
- documents (experts’ opinion mistakes, undetected falsehood of documents, inappropriate declaration of falsehood)

C) Critical (danger) scale levels:

- level of “justizmord” (especially dangerous, the most dangerous category): for example mistakes in identity parades, witnesses’ erroneous statements, false confessions, manipulated testimonies, experts’ erroneous opinions, unreasonable crossing of evidences and residues)
- dangerous (no impeachment can be applied): mistakes in proof attempts (negative proof is of higher value, for instance a person being erroneously excluded)

search errors (significant evidence is not found, corpses are not accurately recorded, loss of documents, mistakes of the “first strike”, wrongful exclusion based on polygraph analysis, wrongful identification of scent using dogs (wrongful tracking of scents)

- less dangerous (with minor relevance): mistakes in confrontation, meaningless usage of polygraph analysis
- D) From the perpetrator or presumed perpetrator’s point of view mistakes can be:
- favourable to perpetrators or presumed perpetrators: wrongful exclusion of polygraph, wrongful exclusion of evidence, residues or handwriting based on expert’s opinion, witnesses’ errors
 - unfavourable to perpetrators or the presumed perpetrators: wrongful allegation based on polygraph analysis, evidence, residues or handwriting, errors of witnesses, false confessions
- E) Based on visibility of errors:
- open errors (listed in the groups above)
 - secret errors (those that can appear during management of secret devices, forces, and methods, either within the legal frames or misuse of intelligence-gathering methods, for instance: missing licenses, overstepping the object or subject of the act, inaccurate informants’ report)
- F) Mistakes according to the place where it was committed:
- during the investigation part (it is the most common, especially in criminal procedure methods, where – despite the legislative body’s intention – the emphasis is on this part in practice (i.e. the Hungarian one)
 - intermediate, (prosecutor’s) part (in some criminal procedures, prosecutors can also conduct investigative or forensic operations like interrogation, inspection, evidentiary procedure [reconstruction], organising identity parades)
 - court stage (where forensic steps may appear, i.e. interrogation tactics)

Mistakes in recognition, errors in specific cases

It might not be pointless to analyse mistakes made in certain national and international cases (the so-called “anatomic horses”) which can be found in legal bibliographies. Based on these cases, pivotal observations (the “Achilles-heels”) including the weaknesses of recognition methods can be defined.

Alfred Dreyfus’ lawsuit: At the beginning, proceedings against him were based on a written expert’s opinion, which was not known neither to the charged nor the court, then in the open procedure, two other less prominent writing expert gave their – erroneous – incriminating opinion. On top of these, Alfonse Bertillion also gave a wrong writing expert’s opinion. During the procedure, it was revealed that a different officer had possibly drafted the document, but finally this affirmation was not verified.

Prosecution perseveringly stuck to charging the 35-year old Dreyfus, based on which he was cashiered of his rank and sentenced to life imprisonment. After several appeals and 5 years of imprisonment on Devil's Island, he was granted presidential exoneration in 1889, he was fully rehabilitated, and even his titles were bestowed. In 1906 he was able to rejoin the French army again.

Nicola Sacco and Bartolomeo Vanzetti, Italian trade union officials were suspected and then accused of armed robbery, based on four entirely faulty opinions given by four (totally incompetent) so called weapon experts who examined the weapons and projectiles. In addition a handful of incorrectly executed identity parades and the mistakes made by witnesses that actually meant the core of the procedure. Finally the revision of alibi provided by other witnesses was missed or ignored. Likewise, information supplied by the "underworld" about other perpetrators were neglected as well. It was only in 1977 when the governor of Massachusetts State admitted that the previous court proceedings were incorrect, and it did not comply with the rules.⁵

János K. in 1957 made repeatedly false confessions regarding homicides in Martfü (Hungarian town), stating that he had committed them. However, his confessions differed and then he withdrew them. This last phrase is not used anymore in current Hungarian legislation due to the Miranda-rules. Once, in one on-the-spot questioning he even showed the police how he attacked and killed a woman who was riding home on her bicycle from her workplace. Other witnesses came into sight who falsely stated that they had seen him close to the crime scene. Between 1962 and 1967 five more similar crimes were committed in the area. The perpetrator of these crimes, Péter K. was identified in 1967, and finally was found guilty of the murders in 1957 as well. The conviction was primarily based on his exceedingly detailed, revealing confession.

Dénes P. was sentenced to six years imprisonment in Heves County due to an assault causing death after a grievous bodily harm and a robbery in 1994. The sentence was based on his handwritten confession and false statements of a witness. Besides these, a scent identification of police dogs also proved that he was present at the crime scene, though this happened earlier than the crime was committed. He spent two and a half years in prison before it was revealed that someone else committed this crime and was proved to be liable for it.

Ede K. was convicted by court to life sentence after several years; he was charged for committing a crime, which caused eight people's death in 2002 at Mór (Hungarian town). The decision was based on wrong identity parades, witnesses at fault, missed checks of the charged persons' defence and on perseveringly sticking to one and only version of the authorities. However, later it was revealed that the real perpetrators were checked on the same day they committed the crime. The police stopped and checked them during a road block, and though the guns and stolen goods were there, the police failed to find them.

⁵ WALL 1965: 93–94.

János M. was implicated in a manslaughter case in Szolnok County, where false witness statements were taken into consideration without revising; inaccurate and incomplete reports of search warrants, confiscations, criminal records and pictures, erroneous choice of witnesses during investigations, manipulated identity parades, delayed alibi checks of the charged. Moreover the victim's spleen was not retained and this made the later blood analysis impossible.

The Sz. siblings were in custody for six months for a bank robbery, which was committed by Attila A., also known as the "whiskey robber", because there were false witness statements and incorrect scent identifications done with police dogs.

In László V.'s manslaughter case (Tolna County, 1991) several reports missed, other contained false confessions, after some "talks" with the authorities, false witness statements from family members arose and a videotape that served as incriminating evidence, only because culpable words said by the suspect were recorded on it. Result of polygraph analysis were ignored (this also can be considered as a perseverant circumstance).

Krisztián B. from Pécs (Hungarian city) came into the focus of the police in connection with an indecent exposure offence because he appeared wearing a hood on a footage taken in the suburbs. According to his later statement, he was jogging as a workout in the evening of 17 October when he got stopped by police. On 21 October (on the day after the events of 20 October) his registered photo alongside with three other photos was shown to a cashier lady, who witnessed the offence committed by a person in a hood at Tettye (northern part of the city). The woman in her twenties recognised the suspect by 70%. Following this, during a photo identity parade the suspect's forehead was hidden and after this the woman was 80% sure it was him, because of his pointy chin, his eyes and his glasses. Next time the videotape of the charged in the hood (only this tape) was shown to an eyewitness who identified him by 100%. The police failed to organise any real identity parades (with possibilities of choice) instead the man on the footage was charged based on the previous dubious evidence. Although the charged consequently underlined his innocence, during the confrontation, the cashier identified his voice as well. The investigation closed without any result and the proof attempt and digital data proved that it was absolutely impossible for the charged to be present on the crime spot when the offence was committed, so finally he was acquitted.

Identity parades, potential basis of the most dangerous outcome

As the above American and Hungarian cases show, identity parades, line-ups (based on vision or voice techniques) are the main source of errors affecting the outcome of criminal procedures. The level of danger rises due to mistakes made at the beginning of procedures that can then spiral through the whole proceeding, wiping away other possibly contradictory evidences that sometimes could be favourable to the suspect.

This attitude becomes extremely strong, hindering the defence and making it difficult to treat the case in a regular way and only mistakes made by the witness are considered. Proving it is critical in theory and almost impossible in practice.

There seem to be a two-fold problem behind erroneous line-ups. Legal or forensic mistakes, manipulations caused by legal authorities on the one hand, mistakes of witnesses (wrongful observations, photos) on the other. Moreover, the combinations of these may appear in the same time (parallel). (The following part will not deal with mistakes of witnesses and their causes as this does not cover the purpose of this study.)

Specific mistakes in identification procedures

According to researches, legal bibliography and real daily experience on the one hand and based on erroneous modi described in the cases above on the other hand, below follows a list with the main reasons of incorrect enforcement, which may differ from procedural requirements.

- relevant data of the given case are not properly revised, and in addition, the need for identification procedure is not questioned appropriately, therefore there is no clear decision about the type of procedure that should be used (connected to the situation with the given circumstances or not, bringing into play original objects or applying data carriers)
- missing the interrogation of witnesses (victims) or in some cases of suspects, overlooking the examination of revealing circumstances (for instance time, season, distance, duration, other movements and actions, emotional effects)
- failing to clarify characteristics of the subject (person or object) that would increase chances of accurate identification
- interrogated persons' willingness of participating in the identification procedure is not clarified and likewise, there is no checking of any obstacles or barring circumstances that would lead to rejection of evidence (furthermore no evidence should be excluded)
- failing to check perceptiveness of the witness (sensory or other disabilities), for instance: examination during an attempt to prove (in János M.'s case, the proof attempt was completed with witnesses who stated different versions, and only afterwards could be proven that in the given circumstances it was impossible for the witness to see the face of the suspect or even to determine the gender of the person)
- missing to accurately plan in advance the personal and material conditions of the identification procedure (need of possible official witnesses, attorney of the witness, defence attorney, presence of the involved people, use of target location, technical recording options)

- identity parades regarding given situations are not executed in similar circumstances
- disorderly conduct of people present during execution is not banned (not stopped)
- psychological protection of the witness (victim) is not taken into consideration, in several cases, the suspect can see the recogniser (French windows with a one-sided view are not always used)
- too many people, objects, documents, sounds, data carriers, animals, plants, flavours, smells presented for identification (more than five)
- corpses or a part of them are shown in multiple forms, while only a single form is recommended
- the identifying witness had previously seen a picture of the person “he has to identify” (for instance in János M. and Ede K’s cases, the witnesses later chose the same persons they had previously seen in the pictures shown to them)
- potential charged or charged person stands somehow out and is different from the others in the same line (could be clothes, hairstyle, hair colour, height, facial hair, beard, moustache, age, body shape)
- the identity parade connected to the situation is not executed in similar circumstances of detection (in János M’s case, distance between the line and the person was inappropriate and illumination was problematic)
- when there are several identifying witnesses, it is a mistake not to separate them from each other before and during identification
- inadequate number of persons (or objects, animals, plants, photos) in line-ups organised for identification (in the Dreyfus case, he was the only one lined up for witnesses)
- a single photo of the person aimed to be recognised is shown to the witness (no other pictures are presented)
- sometimes an extremely large picture is used (overly different from the others)
- in some cases, the photo preferred by the authorities is shown exceedingly slowly and for a long time
- the group of people chosen for the identity parade are completely different from each other regarding their characteristics (the overall “picture” is completely mixed concerning height, body shape, age)
- sometimes authorities make incorrect use of suggestions, manipulation, persuading the identifying witness to choose the subject indicated (in a harsher way: making a confirmatory, praising comment about it)
- circumstances under which persons or objects in question were perceived
- identification is organised in confrontation phase
- long delays for completing procedures (witnesses’ memories would fade)
- incorrect, incomplete, erroneous reports and recordings of execution and statements of identifiers
- uncertain choices, statements being recorded as valid and successful in reports

- similarities are valued in percentages (for instance witness' identification of the perpetrator by 80%) (based on my experience, there is identification or not, it is meaningless to express similarities or percentage of similarities)

Suggestions to amend the regulations and criminal tactics

It should be noted that according to my thirty years' observations, not under any condition of criminal procedure was a witness warned or instructed by authorities that there is no need to choose from people (objects, sounds, photos, recordings) in question by any means. It might happen that the possible perpetrator *is not* among the shown ones. (Conversely, this warning is mandatory in the American procedure.)⁶

A requirement stating that identification should be organised in identical (or comparably similar) detection conditions as the original ones is also missing.

The research leads me to state that the above key sentences should be included "de lege ferenda" in Section 5 of paragraph 210 in the Hungarian Criminal Procedure Code in force (which gets wider and wider nowadays anyway).

Therefore, this first amendment suggestion reflects my choice of title. It is rather an identification attempt, terminology that should be reflected in the Criminal Procedure Code wording as well showing the importance of attempt notion, similarly to the attempt to prove.

Regarding criminal tactics, new ecological identification methods should be taken into consideration. Difference between the above and conventional methods is that in these procedures witnesses and charged ones are driven in a – more or less coincidental – natural environment. In such cases, target persons to be identified are asked to be in a place where several other people are present, for instance in a department store on a busy street. There, the witness is accompanied with the intention of trying to identify and select the culprit seen earlier. The fact that comparison people are not chosen purposefully is usually compensated by the large number and diversity of those present. However, authorities may equally add people chosen for comparison. The advantage of this method is the unstrained, relaxed atmosphere compared to conventional identity parades. The chances of target persons standing out from the group – due to their inner struggles or the unintentional attention of other "filler" participants – is minimal.⁷

Another tactical procedure suggestion meant to prevent manipulation that could be used in daily enforcement is the employment of new, so called "blind" enforcers, investigators instead of those who are familiar with the case. This would include law enforcement employees (of police, customs, prosecution) who are not informed, nor can foresee who the potential suspect might be, who the procedure is targeting.

⁶ KOLLÁR 2013.

⁷ LINDSAY-WELLS 1985; SCHÄFER 2001.

However, the line itself with the suspect is organised by criminalists familiar with the case, while their job stops here for a while, they step out of proceedings. Detectives free from influence step in; nevertheless they will be required to share information with the identifier. These “blind” enforcers should not be acquainted with the case nor with the participants. They are meant to carry out the procedure in a proper, formal, strict, influence-free way – as there is no knowledge about whom, what or why to focus on a certain person or circumstance. The report containing the “result” is then handed over to the forensics. Since there is no data on antecedents, it is not difficult for the “blind intruder” to comply with the recommendation of not revealing anything to recognisers, neither confirmation nor weakening, neither verbally, nor with gestures or any kind of metacommunication.⁸

Finally, let me list a few forensic tactical suggestions that might increase chances of getting decent evidence:

- Identification of unknown corpses may be supported by a previously conducted “corpse-toilet”, which would prepare damaged, incomplete bodies or body parts to make them recognisable, completing them with special stuffing materials. A modern and high-quality version of this is face reconstruction, which can be combined with the identity parades in order to identify a person.
- Persons conducting identification must aim for the least possible communication during line-ups. Instructions must be short, understandable, and precise.
- It could have tactical relevance the precisely mentioned and correctly recorded way the identifier recognised the person committing the crime from those lined-up. Pointing with his finger, saying it out loud, being confident, certain or, on the contrary, insecure, uncertain could be relevant.
- In case of uncertain or problematic identification, there is no point in putting the suspect among other participants and repeating the procedure, instead a “blind” test would be recommended. In a blind test, the suspect is not included in the first row of the identity parade (which comprises only innocent people), and witnesses are asked to identify from those.
- Identification attempts must be concluded in the shortest time possible, because as time passes, probability of success decreases, identifying witnesses become uncertain, perpetrators may change, in many cases they deliberately make changes on themselves.
- Previous checking that none of the people in the line can be acquainted with the identifier (usually with the victim) is essential.
- The recorded report – over the form and content provisions imposed by the criminal procedure – should reflect accurately and in authentic way the completion/performance of the tactical requirements stated above, and also the questions and comments of participants. In case of identifying people, the report

⁸ KATONA 1986.

should also include whether the identified person has freely chosen the place in the line or not.

- Drawing a crime scene is rarely needed in identity parades. It is more reasonable for objects to be drawn by identifiers during a previous hearing, especially if the witness cannot describe with words the general and special traits of the object.
- Use of modern devices (for instance recording a video, using a digital camera) instead of taking a plain photo is highly recommended, especially when identification happens based on (partially) functional traits (such as walking, running, speaking or sounds).⁹

Final consideration

Let me add a personal conclusion. It would be highly appreciated if professionally well prepared, conscientious people, law enforcement employees, criminalists would consider and follow the procedure and forensic rules as well as the suggestions stated above, and would not make terminal mistakes that might lead to erroneous identification or furthermore to judicial “justizmord” (miscarriage of justice) in the future.

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⁹ FENYVESI 2023.