

## A QUAGMIRE OF IDENTITY

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### ABSTRACT

*Test Identification Parade is a process that belongs to the phase of investigation in a case where the accused is a stranger to the witness. It is undertaken by a magistrate without any interference by the police personnel as soon as the accused is taken into custody. In Matru v. State of UP,<sup>2</sup> it was upheld that identification tests do not constitute substantive evidence and the identification can only be used as corroborative of the statement in Court.<sup>3</sup> However, it is neither possible to formulate a provision embodying the precise period within which a Test Identification Parade shall be duly completed for it would at most advantage the offenders who would be encouraged to conceal their identity to prolong arrests, or the exact number of witnesses who shall be able to identify the accused so as to culminate in conviction. Each case must be left to the wisdom of the judiciary.*

### INTRODUCTION

In 1895, Adolf Beck was convicted for extorting money under false pretence.<sup>4</sup> He was precisely identified by ten women.<sup>5</sup> In fact, Beck resembled Jonh Smith who was liable for the charges levied upon Beck.<sup>6</sup> The Paper on the 1<sup>st</sup> Workshop held on 15<sup>th</sup> September, 2015, at the District Court at Bhandara, analyzed that the error in the identification of the offender often results in the miscarriage of criminal justice.<sup>7</sup> Dr. Sarda too avers that great caution must be exercised with respect to those individuals who look alike and turns to forensic science for aid in order to protect the innocent in such a scenario.<sup>8</sup> As early as in 1977, the courts in England came out with certain guidelines to prevent unwarranted convictions for

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<sup>2</sup> (1971) 2 SCC 75.

<sup>3</sup> *Santokh Singh v. Izhar Hussain*, (1973) 2 SCC 406.

<sup>4</sup> Yvette Marie Tamsley, *Identification Parades: Upholding the Integrity of the Criminal Justice Process?* (Unpublished Ph.D. Thesis, Faculty of Law, The University of Birmingham).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> <http://mja.gov.in/Site/Upload/GR/1st%20LEGAL%20WORK%20SHOP%20PAPER%20SUMMARY%2015-09-2015%20-%201%20to%2021.pdf>

<sup>8</sup> Mukund Sarda, *Test Identification Parade: A Study In the light of Supreme Court Decision In Mulla's Case*, 8 AILD, 17-19 (2011).

cases that depended substantially upon the correctness of the identification of the accused. It was laid down that:<sup>9</sup>

“The judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken. Provided that the warning is in clear terms, no particular words need be used. Furthermore, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. If in any case, whether being dealt with summarily or on indictment, the prosecution have reason to believe that there is a material discrepancy between the description of the accused given to the police by the witness when first seen and his actual appearance, they should supply the accused or his legal advisers with particulars of the description the police were first given.”<sup>10</sup>

Where these guidelines were not followed, the conviction was likely to be quashed. The role of a witness in the criminal administration system is thus crucial and the court shall only convict the accused when the credibility of the witness is established.<sup>11</sup> This is primarily done by conducting a Test Identification Parade (TIP) which challenges the ability of the witness to recognize the accused from a given set of individuals.<sup>12</sup> The Supreme Court in *Ramkishan Mithanlal Sharma v. State of Bombay*,<sup>13</sup> has explored the concept TIP in the following words:

“These parades are held by the police in the course of their investigation for the purpose of enabling witnesses to identify the properties which are the subject-matter of the offence or to identify the persons who are concerned in the offence....The identifier may point out by his finger or touch the property or the person identified, may either nod his head or give his assent in answer

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<sup>9</sup> *R v. Turnbull*, [1977] QB 224.

<sup>10</sup> *Ibid.*

<sup>11</sup> The Criminal Rules of Practice and Circular Orders, 1990, <http://ecourts.gov.in/sites/default/files/crlrulescircularorders1990.pdf> (last updated 29.05.2016).

See also: Identification,

<http://police.pondicherry.gov.in/Police%20manual/Chapter%20PDF/CHAPTER%2038%20G%20Identification.pdf>

<sup>12</sup> *Ibid.*

<sup>13</sup> 1955 CriLJ 196.

to a question addressed to him in that behalf or may make signs or gestures which are tantamount to saying that the particular property identified was the subject-matter of the offence or the person identified was concerned in the offence. All these statements express or implied including the signs and gestures would amount to a communication of the fact of identification by the identifier to another person.”<sup>14</sup>

Similarly, elucidating the scope of TIP, Arijit Pasayat, J. in the eminent case of *Abdul Waheed Khan @ Waheed v. State of Andhra Pradesh*,<sup>15</sup> upheld that:

“The whole idea of a TIP is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye-witness of the crime.”<sup>16</sup>

Section 54 A of the Code of Criminal Procedure,<sup>17</sup> inserted in 2005 authorizes the courts to direct a TIP at the request of the prosecution. In *Vaikuntam Chandrappa v. State of Andhra Pradesh*,<sup>18</sup> a TIP was carried out with the accused being intermixed with thirty nine others. The prosecution witness successfully identified three out of the seven suspects.<sup>19</sup> It was argued that this identification of the witness was unreliable and could not be used as corroboration to the presence of the accused at the time of the incident.<sup>20</sup> It was also contended that the witness wrongly identified six others leading the court to believe that the positive identification of the accused was by mere chance.<sup>21</sup> The evidence was thus rejected

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<sup>14</sup> *Ibid.*

<sup>15</sup> Appeal (crl.) 917-920 of 2002, Decided on 27.08.2002.

<sup>16</sup> *Ibid.*

<sup>17</sup> The Code of Criminal Procedure, 1973, section 54A states that:

Where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the Court, having jurisdiction, may on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the Court may deem fit.

<sup>18</sup> AIR 1960 SC 1340.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

and the accused was given benefit of doubt.<sup>22</sup> The following are a set of guidelines that may be considered while holding a TIP:<sup>23</sup>

1. TIP shall be held without delay
2. The accused person shall be concealed from the witness. His photographs shall not be published in the print media or exhibited before the TIP takes place.
3. The proceedings shall be solely conducted and supervised by a Judicial Magistrate without the interference of the police personnel. In the absence of the Magistrate, TIP shall be conducted by two respectable persons from the locality not known to the accused.
4. The accused shall be made to stand in line with others of similar height, built and age.
5. Thereafter, the suspects assembled together shall be shown to the witnesses by turn and the witness shall be asked to identify the accused from the lot.
6. The accused along with the others shall be shuffled from time to time.
7. A complete record of the identifying process shall be maintained in the Case Diary.<sup>24</sup>
8. No witness shall be allowed to communicate or confer with the other witnesses.
9. The jailor shall prohibit any change in the appearance of the accused and he shall be in the same attire he was in at time of his arrest.
10. If the witness is injured, the Investigating Officer shall obtain in writing from the medical attendant that he is fit to identify the accused.
11. The accused may at times be identified by photograph.<sup>25</sup> A TIP shall be undertaken once this accused is apprehended.
12. A certificate signed by the magistrate stating that he took necessary precautions shall be mandatory.

Pivoting upon the evidentiary value of TIP, the court in *Amitsingh Bhikamsing Thakur v. State of Maharashtra*,<sup>26</sup> proclaimed that the facts that establish the identity of an accused are

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Supra* note 8.

<sup>24</sup> The Investigating Officer consequently is required to make a detailed note of the witness's account such as the description, the amount of light at the time, the number of occasions where in he saw the accused, his conduct, the distance between him and the accused and the duration for which the accused was within his sight.

<sup>25</sup> It was held in *Laxmi Raj Shetty v. State of Tamil Nadu*, AIR 1988 SC 1274, that "in the world as a whole today, the identification by photographs is the only method generally used by the Interpol and other crime detecting agencies for identification of criminals engaged in drug trafficking, narcotics and other economic offences as also in other international crimes. Such identification must take the place of a test identification."

<sup>26</sup> Criminal Appeal No. 13 of 2007 (Arising out of SLP (Crl.) No. 1114 of 2006), Decided on 05.01.2007.

relevant under section 9 the Indian Evidence Act, 1872.<sup>27</sup> However, any statement made as to the recollection of the accused for the first time at the trial stage is of an essentially weak character. Therefore, the TIP strengthens the authenticity of this evidence. In *Ram Nath Mahto v. State of Bihar*,<sup>28</sup> the Supreme Court upheld the conviction of the appellant even when the witness while deposing in Court did not identify the accused out of fear, though he had identified him in the TIP. The Court here relied upon the evidence of the Magistrate, who had conducted the TIP.<sup>29</sup> In *Suresh Chandra Bahri v. State of Bihar*,<sup>30</sup> it was declared that TIP acquires enormous significance especially when the accused is not previously known to the witness since it assures the investigative organ that the investigation is moving forward in the right direction.<sup>31</sup> It further corroborates the evidence given in court at the time of trial. Hence, TIP's are most efficient when the witness is not related to nor does he personally know any of the assailants prior to the incident taking place.

## INSTANCES THAT RENDER TIP UNNECESSARY

The necessity of a TIP depends on the facts and circumstances of the case and the accused cannot therefore, claim it as a matter of right.<sup>32</sup> There is no provision in the Code of Criminal Procedure, 1973 entitling the accused to demand that an identification parade should be held at or before the inquiry or trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court. This rule of prudence, however, is subject to exceptions, wherein the requirement of a TIP can be done away with. Some of these instances have been outlined below:

### 1. WHERE THE ACCUSED IS KNOWN TO THE WITNESS

In *Jameel v. State of Maharashtra*,<sup>33</sup> S. B. Sinha, J pronounced that, "so far as the submission of the learned Counsel in regard to non-holding of the TIP of the appellant is concerned, we

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<sup>27</sup> The Indian Evidence Act, 1872, section 9 states that:

Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

<sup>28</sup> 1996 CriLJ 3585.

<sup>29</sup> *Ibid.*

<sup>30</sup> 1994 CriLJ 3271.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Supra* note 23.

<sup>33</sup> Criminal Appeal No. 173 of 2006, Decided on 16.01.2007.

are of the opinion that having regard to the fact that the appellant was known to the prosecutrix and her family members and she having identified him before lodging of the F.I.R., it would have been futile to hold a TIP.”<sup>34</sup> Likewise, in *Parkash Chand Sogani v. State of Rajasthan*,<sup>35</sup> it was held that, “the absence of test identification in all cases is not fatal and if the accused person is well-known by sight it would be waste of time to put him up for identification. Of course, if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case.”<sup>36</sup>

## 2. WHERE THERE IS INORDINATE DELAY IN HOLDING TIP

In *Mohd. Farooq Abdul Gafur v. State of Maharashtra*,<sup>37</sup> it was observed that since the TIP was held after fifty days of, it was rendered inadmissible in evidence.<sup>38</sup> Similarly, in *Soni v. State of UP*,<sup>39</sup> it was held that, “delay in holding the identification parade throws a doubt on the genuineness thereof apart from the fact that it is difficult that after lapse of such a long time the witnesses would be remembering the facial expressions of the appellant. If this evidence cannot be relied upon there is no other evidence which can sustain the conviction of the appellant.”<sup>40</sup> Moreover, in *Lal Singh v. State of UP*,<sup>41</sup> it was held that:

“Though it is desirable to hold the TIP at the earliest possible opportunity, no hard and fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probablising the possibility of the accused having been shown to the witnesses, the Court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the court has to consider the evidence in its entirety.”<sup>42</sup>

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<sup>34</sup> *Ibid.*

<sup>35</sup> Criminal Appeal No. 92 of 1956, Decided on 15.01.1957.

<sup>36</sup> *Ibid.*

<sup>37</sup> Criminal Appeal Nos. 85-86 and 91-94 of 2006, Decided on 06.08.2009.

<sup>38</sup> *Ibid.*

<sup>39</sup> (1982) 3 SCC 363.

<sup>40</sup> *Ibid.*

<sup>41</sup> (2003) 12 SCC 554.

<sup>42</sup> *Ibid.*

The delay in holding the TIP invariably leads to the inference that the witness may have been exposed to the accused rendering the TIP pointless. Substantiating the same, in *Brij Mohan v. State of Rajasthan*,<sup>43</sup> wherein the TIP was conducted after a period of three months, it was argued that with the passage of time, the memory of the witness starts to fade away and thus, the TIP should be held at the earliest possible stage.<sup>44</sup> Similarly, in *State of Andhra Pradesh v. Dr. M.V. Ramana Reddy*,<sup>45</sup> it was held that since the delay in holding the TIP was unexplained, it was not valid. The facts of the above mentioned case disclose that the TIP was conducted after almost four months of the occurrence of crime and no description of the accused was made out in the report lodged at the first instance. But while deposing before the Sessions Judge, the accused was described as a person who was tall with shallow complexion.<sup>46</sup> The Supreme Court held that if the witness had recollected those characteristics of the accused person at the time of the TIP, they would have certainly been documented then and consequently, the Apex Court found it unsafe to uphold conviction based upon the sole evidence of identification.<sup>47</sup>

However, the courts have also devised that in certain instances, the sizeable interval does not make the evidence ineffectual. This is particularly so in regard to cases of rape and other heinous crimes where the memory of the crime by the assailant is etched in the mind of the witness. Thus, in *Singh v. State of Haryana*,<sup>48</sup> the accused was arrested almost eight years after the commission of the crime and a subsequent TIP was conducted within six months of his detention. The Court believed that, “the fact that the injured witnesses had lost their son and daughter-in-law showed that there were reasons for an enduring impression of the identity on the mind and memory of the witnesses.”<sup>49</sup> On the same lines in *Anil Kumar v. State of UP*,<sup>50</sup> wherein the victim while under attack had a clear look at his assailants and his brother who came to his rescue ended up being killed in the brawl, the mother and father of the victim also having witnessed the incident, it was held that owing to these circumstances even when the TIP was held post forty seven days, the memory of the death of the brother and son would still be afresh.<sup>51</sup> The Supreme Court upheld the admissibility of such

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<sup>43</sup> (1994) 1 SCC 413.

<sup>44</sup> *Ibid.*

<sup>45</sup> (1991) 4 SCC 536.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> 2001 (3) SCC 408.

<sup>49</sup> *Ibid.*

<sup>50</sup> (2003) 3SCC 569.

<sup>51</sup> *Ibid.*

evidence.<sup>52</sup> Occasionally, the crime itself creates a deep impression on the mind of the witness and remains with him throughout life. The testimony of such witness cannot not be disregarded as such.

### 3. WHERE THE WITNESS IS EXPOSED TO THE ACCUSED PRIOR TO TIP

In *Rajesh Govind Jagesha v. State of Maharashtra*,<sup>53</sup> the accused was apprehended on 20<sup>th</sup> January, 1993, while the TIP was held on 13<sup>th</sup> February, 1993. The accused at the time of the TIP was not sporting a beard and long hair as mentioned in the First Information Report and no other person included in the parade was donning the same. The witness identified the accused despite the change in his appearance. The Court could not consequently rule out the possibility of the witness having seen the accused before the TIP.<sup>54</sup>

### 4. WHERE TIP IS CONDUCTED BY THE POLICE

There is no bar to the TIP being conducted by the police, however, the evidentiary value of it will be largely affected and it would no longer be used to substantiate the testimony at the trial principally because any statement recorded by the Investigating Officer during the TIP shall be inadmissible in evidence.<sup>55</sup> It is for this reason that the TIP must be conducted by a Magistrate or Panchas<sup>56</sup> in adherence with section 164 of the Code of Criminal Procedure, 1973.<sup>57</sup>

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<sup>52</sup> *Ibid.*

<sup>53</sup> (1999) 8 SCC 428.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Supra* note 14, section 162(1) states that:

No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

<sup>56</sup> [http://mppolice.gov.in/PHQImages/GOPEnglish/gop\\_5-59.pdf](http://mppolice.gov.in/PHQImages/GOPEnglish/gop_5-59.pdf) (last updated 29.05.2016).

<sup>57</sup> *Supra* note 14, section 164 states that:

1. Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial: Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
2. The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate



5. Where the witness is unfit to identify his assailant.
6. Where the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration
7. Where the accused does not submit to TIP.<sup>58</sup>

## CONCLUSION

As may be deduced from the above, TIP primarily meant for investigative purposes, reassures the witness that the accused identified at the TIP is the same person who was spotted at the crime scene and satisfies the investigative agencies that the suspect under question is the same person that the witness had discerned on the day of the fatality. Further, the Supreme Court through P. Sathasivam, J. in *Mulla v. State of Uttar Pradesh*,<sup>59</sup> delineated the following principles that must be considered so as to make TIP truly meaningful:<sup>60</sup>

1. TIP should be conducted as early as possible
2. Any delay should be justified.
3. The authorities should make sure that the delay does not result in exposure of the accused which may lead to mistakes on the part of the witnesses.

Failure to hold a TIP would not make the evidence of identification inadmissible in court and the weight to be attached to such identification shall at best be left to the exclusive discretion

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shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

3. If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody.

4. Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-

“I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B. Magistrate”.

5. Any statement (other than a confession) made under sub- section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

6. The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

<sup>58</sup> In *Suraj Pal v. State of Haryana*, (1995) 2 SCC 64, it is clearly laid down that no one could be compelled to line up for the TIP and if the accused refused to submit for it, they do so at their own risk. The prosecution could not be blamed for not holding the TIP.

<sup>59</sup> Criminal Appeal No. 396 of 2008, Decided on 08.02.2010.

<sup>60</sup> *Ibid*.

of the judicial wing.<sup>61</sup> The judiciary has been particularly careful not to convict in most cases on the basis of the sole testimony of the witness. Nevertheless, there may be offences which by their very nature may be witnessed by a single witness only, one such being rape.<sup>62</sup> Here, the offender may be unknown to the victim and the case may depend solely on the identification by the victim, who is otherwise found to be truthful and reliable.<sup>63</sup> There is no justification in these cases that the judgment shall necessarily result in an acquittal because of a single identifying witness.<sup>64</sup> “Prudence therefore demands that these matters must be left to the wisdom of the courts which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification.”<sup>65</sup>

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<sup>61</sup> *Supra* note 23.

<sup>62</sup> *Pramod Mandal v. State of Bihar*, 2004 (13) SCC 150.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*