

Mandatory or
Discretionary?

The Decision to Conduct
Identification Procedures

Discretion

- Decision-maker has (a degree of) freedom to choose between various courses of action (inaction).
- Rational exercise of discretion requires:
 - Identification of purpose for which conferred;
 - Only matters rationally related to purpose to be taken into account;
 - No account to be taken of matters not rationally related to purpose.

The purpose of Identification Procedures?

- Investigative: to test a hypothesis about the suspect (*G. Wells*)
- Evidential:
 - To generate evidence which enables more accurate determination innocence/guilt;
 - To generate probative identification evidence for both prosecution and defence (*R v Nicholson*)

Nature of Prescriptive Rules

Code D, 1995, paragraph 2.3

“Whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents and it is practicable to arrange one.”

R v Popat [1998] 2 Cr App R 208.

- ‘always necessary to have regard to the purposes of Code D in interpreting, *applying* it, and assessing situations which are not expressly covered by it’
- if informal identification made by witness of satisfactory quality, purposes of Code fulfilled, holding parade would serve ‘no useful purpose’

R v Forbes (CA) [1999] 1 Cr App R 31

- Para D2.3 mandatory. *Whenever* a suspect disputed identification parade must be held (provided the suspect consented and that it would be practicable).
- If D2.3 imposed duty to hold parade where there seemed no point in one, it was for those responsible for drafting/revising Code, to consider whether D2.3 might be amended.

R v Forbes (HL) [2001] 1 All ER 686

Disapproved of approach in *Popat* on who main grounds:

- replaced hard-edged obligation with difficult judgmental decision;
- primary concern of police - to promote the investigation and prosecution of crime rather than protect interests of suspect.

R v Forbes (HIL) [2001] 1 All ER 686

Lord Bingham: ‘para D2.3 imposes mandatory obligation on police to hold parade *whenever* suspect disputed identification - no warrant for reading additional conditions into the simple text’

However...

R v Forbes (HL) [2001] 1 All ER 686

“We agree with the Court of Appeal in *R v Popat* that paragraph 2.3 should not be construed to cover all possible situations.”

R v Forbes (HL) [2001] 1 All ER 686

- If witness makes it plain to police that he cannot identify the culprit
 - If witness may be able to identify clothing worn by a culprit, but not the culprit himself;
 - If a case is one of pure recognition of someone well-known to eyewitness
- probably futile to arrange parade.

R v Forbes (HL) [2001] 1 All ER 686

“But save in cases such as these, *or other exceptional circumstances*, the effect of the Code was clear and required a parade to be conducted.”

Paragraph D3.12

Whenever:

- a.) a witness has identified a suspect or purported to identify them prior to [a video identification, identification parade or group identification] having been held; or
 - b.) there is a witness, who expresses an ability to identify the suspect, or where there is a reasonable chance of the witness being able to do so, and they have not been given an opportunity to identify the suspect in [a video identification, identification parade or group identification];
- and the suspect disputes being the person the witness claims to have seen, **an identification procedure shall be held unless it is not practicable or it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence.**