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The identity parade – through the eyes of the defence counsel

Abstract: A few Hungarian cases of justice miscarriage demonstrate that the identity parade (*line up*) method in the criminal procedure could be a "dangerous act", because the witnesses sometimes give false testimonies, make wrong choices, the authority sometimes fails the recognition process, and lastly the "result" could be a "justizmord". Based on scientific research, the present study reveals the most frequent criminal procedural and criminalistic wrongdoings. It also focuses on preventing legal and criminal tactical possibilities and suggestions. It can be read mostly from the defence counsel's point of view. The author declares the lawyers' legal and factual tasks in this field, especially for preventing wrongful sentences. This is the duty of all legal representatives (detectives, prosecutors, judges) as well.

Keywords: criminal procedure, identity parade, line up method, miscarriage of justice, justizmord, criminalistics, criminaltactics, defence counsel, false witness testimony, failure of authority

1. The hazards of identity parade

Ede Kaiser, who had a far from spotless criminal record, was sentenced by court to life imprisonment for the massacre in Mór (town) on 9 May 2002. In the case where witnesses testified during the interrogation, shortly after the brutal homicide, they said the male perpetrator seen at the bank door had been "remarkably tall". In the second or third round of the investigation, the suspected Ede Kaiser grew to 178 cm tall. According to official data, the average Hungarian man is 177 cm tall. That is exactly how tall I am myself. Nobody has ever told me that I am remarkably tall. We can safely say to our 178 cm compatriots, including Kaiser: it is not subjective to think, "wow, how tall he is". The question is: how did the

four eyewitnesses arrive at their testimony in the courtroom, in which one of the attackers had already been firmly identified as Ede Kaiser sitting on the defendants' bench? This completely realistic, practical question was asked by the defence lawyer of the accused, Antal Dezső, in his rightly "famous" defence speech. It is presented in detail in Mihály Tóth's volume entitled *Híres magyar perbeszédek* (Famous Hungarian Closing Speeches).[1]

These questions bring us to our main topic, the dissection of the identity parade, which is the Achilles point of many criminal proceedings. Both international and domestic research shows that we are dealing with a very dangerous investigative act.

Why is it dangerous? Because, if the executing authority makes any mistake, if the recognizing witness is wrong, it can have terrible consequences of miscarriage of justice. In the states where death penalty exists, it can be literally life-threatening. It does not take much courage to say: Ede Kaiser would not be walking around today if the capital punishment were in force in our country. The four witnesses were certainly wrong: somebody else was standing at the door. It was Róbert Weiszdorn, who is indeed strikingly tall with his 193 centimetres, and was also sentenced to life imprisonment by the court. It took place later, in 2007, mostly thanks to the most credible police officer: coincidence (the weapons of crime that provided the real clue had been found buried in the woods by a treasure hunter, who has not been rewarded for it to this day. Not even through litigation).

The recognition problem is not new and it is still valid. I give two examples of the former and one of the latter:

1. The murder case of János K. in Martfű (town) from 1957, with repeated false confessions of the falsely accused suspect, and in addition, false confessional witnesses, who saw him in the vicinity of the crime scene. Between 1962 and 1967, there were five more similar crimes in the area, the perpetrator of which, Peter K., was identified in 1967, and at the same time it was proved that he had committed the 1957 case – mainly on the basis of his very detailed confession.[2]
2. In the 1983 homicide case of János M. in Szolnok County, among many other forensic errors – which was also cited and challenged by

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[1] Defence speech of Antal Dezső in defence of Kaiser Ede, accused in the massacre of Mór. In: *Híres magyar perbeszédek*. Ed. M. Tóth. Budapest–Pécs 2013, pp. 334–368. Also included in: P. Hack: *Az igazságszolgáltatás kudarcai*. In: *A Magyar Büntetőjogi Társaság Jubileumi Tanulmánykötete*. Ed. C. Fenyvesi. Budapest–Debrecen–Pécs 2011, pp. 36–37; together with L. Kovács: *A Mór megtette*. Budapest 2009, p. 370.

[2] See more details: G. Katona: *A bűnüldözés fél évszázada*. Budapest, pp. 193–195; together with L. Kovács: *A Mór megtette*. Budapest 2009, pp. 248–255.

his defence counsel – there were presentations of influenced recognition, the unprofessionalism and illegality of which was finally established by the court (for example, the defendant/accused was taken in slippers to the line-members who arrived from outside the building with shoes on, and the witnesses had seen him in handcuffs in the police corridor before the recognition. During the data collection, the investigators only showed the potential witnesses a photo of János M., and then the personal recognition was conducted with these persons).[3]

3. I would like to highlight a recent case: Krisztián B. came to the attention of the investigators in a criminal case of indecent exposure in Pécs (city), where he himself appeared in one of the video recordings made in the suburb called Kertváros (Garden city), wearing a hooded sweatshirt. He later claimed he had just been running and training there, on the evening of 17 October 2015, when he had been stopped and identified by the police. On 21 October (the day after the act on the 20th), a picture of his data (ID) card was also presented, along with three other photographs to the cashier, who had spotted the indecent act of an unknown hooded perpetrator at Tettye (north part of the city). The twenty-year-old woman recognized the later suspect "70%". Subsequently, those presenting the recognition covered the suspect's forehead in his photograph, by which time she had already recognized him with "80%" certainty because of his "pointed chin, eyes, and glasses". After this, a video image of the loaded hoodie was shown (as the only one) to the eyewitness, who at the time had already "100%" recognized the indecent. The authority no longer made a line-up (selection) for personal recognition, but suspected the young man in the photo (video). The suspect, who was immediately and later consistently denied and defended on the merits, was even confronted by the ticket seller on the same day, who at the time thought he "recognized" the young man sitting in front of him (again in denial) in the otherwise unsuccessful investigation act in his merit. Later, an attempt by defence counsel and official evidence, as well as digital data, showed that the suspect cannot have been physically present at the crime scene, and the investigation against him was terminated.[4]

It is not only Hungarian law enforcement and the judiciary that are struggling with the recognition problem. I will only briefly point out that according to American research and the results of the innocent project,

[3] See further details: G. Katona: *Még egyszer Magda János bűnügyéről*. "Belügyi Szemle" 1986, no. 8, pp. 96–104.

[4] More from this author: *A felismerésre bemutatás és a digitális adatok jelentősége egy szeméremsértő bűncselekmény tükrében*. "Belügyi Szemle" 2016, no. 9, pp. 119–129.

miscarriages of justice (wrongful sentence, wrongful conviction) are most often traced back to false recognition (identity parade, line up).[5] As a lesson, I will show the other direct reasons:

a) misrepresentations of the identity parade as the most common cases;[6]
b) police investigation errors (e.g. verification, inspection errors, influences; residual contamination /cross- or carry-over, -contamination/ traces, destruction of individual points);
c) violations of police and investigative legislation;
d) prosecution errors[7] (such as failure to exclude evidence);
e) errors of expert opinions (unfounded, professionally incorrect);[8]
f) erroneous testimonies and reports of other offenders, prison agents, informants;
g) faulty, weak defence counsel activity;
h) false confession;
i) false circumstantial evidence.[9]

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[5] For more details, see the sources below: P. Hack: *Az igazságszolgáltatás kudarcai*…, p. 43; A. Badó, J. Bóka: *Ártatlanul halálra ítéltek*. Budapest 2003; also: Innocence Project. http://www.innocenceproject.org [accessed: 30.07.2021].

[6] In Spinney's study 75% of the line-up presentations were wrong. L. Spinney: *Line-ups on trial*. "Nature" 2008, no. 453. 7179. 442–444. Another U.S. study found that eyewitness errors were involved in 77% of cases that resulted in a miscarriage of justice. See: J. Collins, J. Jarvis: *The wrongful conviction of forensic science*. Crime Lab Report. San Diego 2008. http://www.crimelabreport.com/library/pdf/wrongful_conviction.pdf [accessed: 30.07.2021].

[7] In the English (Welsh) literature, we also encounter the case of "prosecutor's fallacy", which is based on an incorrect assessment of the evidence (probability). It also has a counterpart, namely the informal "defence fallacy", where the defence erroneously assesses (in favour of the accused) the probability of the evidence, failing to review all of the evidence. *Handbook of forensic science*. Eds. J. Fraser, R. Williams. Cullompton 2009, pp. 627 and 638.

[8] In one U.S. case, the assigned graphologist claimed the author of an incriminating letter was "French, middle-class, and young". When the person was called to the witness stand, it turned out to be an Armenian father, who had been born in England and had had an American school-aged son and was far over fifty. See about this misconception: A. Hall: *A bűnüldözés nagy pillanatai*. Budapest 2005, p 114.

[9] C.R. Huff, A. Rattner, E. Sagarin: *Convicted but innocent. Wrongful conviction and public policy*. Thousand Oaks 1966. The third study processed 205 specific cases: the misidentification by a witness accounted for 52.3%. In the fourth study, 86 cases were reviewed and among the causative factors of miscarriages of justice, 71% of misidentification by a witness was issued. See about this: M.J. Saks, J.J. Koehler: *The coming paradigm shift in forensic identification*. "Science" 2005, no. 309, p. 892.; J. Wójcikiewicz: *Forensics and justice*. Toruń 2009, pp. 201–235; and Idem: *On the benefits to Polish law of a comparative analysis of identification parades*. "Comparative Review" 2013, vol. 15.

2. Forensic and procedural weaknesses of the identity parade[10]

What are the reasons for the misconceptions? I am not keeping it secret, that is why in the present study I present the (error) answer line so that I can then suggest some kind of "antidote", "counter-ammunition" to the target audience of the defence counsel and secondly to the (recognizing) witnesses' lawyer (as depicted from the list – I admit – many points in which the defender does not really have a say, or an opportunity for improvement, so this message is not really for them).

1. There is a lack of careful study of the case data, deciding whether recognition is needed and which type should be prepared (e.g. situational or non-situational, using original objects or media data storage).
2. Failure to examine the witness (victim) or, less frequently, the suspect in advance and, in particular, to examine the circumstances of the perception (time, season, distance, duration, other movements and activities, emotional effects, etc.).
3. There is a lack of clarification as to what characteristics the target person or target object has and by which the recognizing person would identify them.[11]
4. It is not clear whether the interviewee has a willingness to cooperate or whether there is an obstacle to the recognition, whether there is an exclusionary circumstance that would fundamentally call into question its use as evidence (there should be no excluded evidence).

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[10] For the non-Hungarian speaking readers (e. g. Polish legal experts) I show the main procedural rules of identity parade in Criminal Procedure Act 2017. XC.: Identity Parade. Section 210. (1) The court or the prosecutor shall order and perform a presentation for identification, if this is required to identify a person or an object. The defendant or the witness shall be shown at least three persons or objects for identification. In the absence of other means of identification, the defendant or the witness may be presented a photo or other audio or video records of the person or object. (2) Prior to the presentation for identification, the person to make the identification shall be questioned in detail concerning the conditions of noticing the given person or object, his relationship with the person or the object, and the known distinguishing marks thereof. (3) In the event of presentation of persons, individuals not involved in the case and not known by the person to make the identification shall be lined up, who have the same main distinguishing marks – thus, especially, same gender, similar age, built, complexion, personal hygiene level and clothing – as the given person. In the case of objects, the object to be identified shall be placed among similar objects. The positioning of the given persons or objects within the group may not be significantly different than the that of the others or conspicuous. (4) Even if there are several persons making the identification, the presentation shall take place separately, in the absence of the others. (5) If required for the protection of the witness, the presentation for identification shall take place under conditions preventing the person presented from identifying or noticing the witness. In the event of an order to handle the personal data of the witness confidentially, this shall be ensured during the presentation for identification as well.

[11] See further details: *A személyleírás*. Ed. C.L. Anti. Budapest 2017.

5. Failure to check the witness's perceptivity (sensory or other disabilities), e.g. examination experiment (In the case of János M., cited above, one of the recognizing witnesses who made different testimonies was only subjected to an ex post facto attempt to prove that he cannot have seen the face of the accused in the circumstances and visibility he had told, not even his gender could have been recognized with certainty).
6. The personal and material conditions of the recognition are not (carefully) planned in advance (e.g. the presence of possible official witnesses, witness's lawyer, defence counsel, interested parties, use of destination, technical recording possibilities).
7. Demonstration for situational recognition is not performed under the same perceptual conditions.
8. Those present are allowed (not stopped) disorder during execution.
9. Putting aside the witness's (victim's) mercy (protection, freedom from conflict) so that the person to be recognized sees the recognizer (e.g. through a non-French mirror, the so-called *one-way viewing*).
10. Too many recognizable persons, objects, documents, sounds, media, animals, plants, flavours, odours (e.g. more than five).
11. A corpse or part of a corpse is shown in plural, although the individual is recommended.
12. The recognizing witness has already been presented in advance with a single photograph (later one of them in the line) of the person to be "recognized".
13. The potential suspect (or already accused) stands out, differs significantly from the other members of the line in clothing, hairstyle, hair colour, height, coat (beard, moustache, etc.), age, physique.
14. Demonstration for situational recognition is not performed under the same perceptual conditions (in the case of János M. there was not enough distance and light conditions).
15. In the case of several recognizing witnesses, they were not separated before and during recognition.
16. There are not enough people (or object, animal, plant, photo) in the selection (e.g. in the lawsuit of the famous justice lord Alfred Dreyfus, only the captain was shown to the witnesses).
17. If a photo is presented for recognition, only a picture of the person to be identified is presented (no more are shown).
18. The photographs are too large, substantially different from the other pictures.
19. The photograph of the person adjusted to the investigative (investigators) version is shown more slowly, for a longer time.

20. The members of the group selected for recognition differ significantly in their characteristics (too mixed according to the "picture", height, physique, age, etc.).
21. The member of the authority uses suggestion, influence, incorrect instruction in the direction of the recognizing witness, suggests the person to be selected (in a harsher way: makes a confirmatory, praiseworthy remark).
22. It is not checked in advance and there is a recognizable acquaintance among the people in the line.
23. Executed with undue delay (witnesses' memories fade).
24. They do not perform a so-called blind trial, in which only persons above all suspicions stand in line. This can be used to filter out a pompous person, who wants to make a choice at all costs (he/she becomes incredible).
25. Recognition is performed in the context of confrontation.[12]
26. Incorrect, incomplete, faulty record or video recording of the conduct and statements of the recognizers.
27. Uncertain selection is assessed as effective, definite recognition (consistency) in the protocol (see, for example, the case of B. Krisztián, cited above).
28. Percent similarity is determined in the report (e.g. the perpetrator was recognized by the witness "80%"). From my standpoint, there is either identification or not, it is meaningless, and at the same time dangerous, to talk about similarity or similarity percentages.
29. I would like to emphasize in particular that in the last thirty years I have not even accidentally seen an official warning ("education") of a recognizing witness in a criminal file: "you do not necessarily have to choose between the persons in question (objects, sounds, images, recordings) and the perpetrator (the object to be recognized) may not be present, and it is not a duty of choice" (which is mandatory in American practice,[13] and which I proclaim as a *de lege ferenda* proposal – to extend Section 210 of the Criminal Procedure Act of Hungary [2017. XC. Act]). Also missing from the proposal is the statement that "it is necessary to retain recognition, preferably in the original circumstances of perception" (this is also a copyright *de lege ferenda* proposal).

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[12] See more details: M. Tóth: *A szembesítések béklyójában*. "Jogtudományi Közlöny" 1984, no. 3, pp. 139–145; and *Feloldható-e a béklyó?* "Jogtudományi Közlöny" 1984, no. 5, pp. 282–287; and C. Fenyvesi: *Szembesítés. Szemtől szemben a bűnügyekben*. Budapest–Pécs 2008.

[13] See further details: B. Kollár: *A felismerésre bemutatás elmélete és gyakorlata Amerikában*. "Belügyi Szemle" 2013, no. 10, pp. 113–116.

30. The Hungarian Criminal Procedure Law Act (2017. XC.) institutional use of addresses is also incorrect. In fact, it is much more an attempt at recognition. The experiment at a possible selection should also be conveyed in the text of the law, the institutional designation (similar to the proving experiment). The word "identity" itself suggests to the recognizer that s/he must choose here at this moment from the set-up (persons, objects, pictures, photos, etc.).
31. Investigative authorities (investigators) can often perseveringly stick to a single version. As an increased danger of monoversion thinking, the investigation focuses only on certain individuals, and fearfully only the data that burdens them remains on the sieve, making the valuable data fall out (see the above-cited monoversion investigation of the massacre from Mór, the fatal result of the data funnel narrowing).

3. The possibilities and tasks of a defence counsel

Beyond legislative incompetence, it is impossible to provide guidance to any defence counsel (witness attorney, victim's legal representative) who may be present (or absent) in any life situation. As a guideline, some recommendations for practitioners are as follows:

1. Efforts should be made to have the defence counsel present at the recognition. If they are present from the beginning, they need to put it on record (say it verbally) that the person to be recognized does not necessarily have to make a choice because the perpetrator may not be among them (especially if this is not done by the authority in charge of the evidentiary act).
2. If s/he hears from the recognizing witness that one of the enumerators is "similar" to the perpetrator, confirm on the record by noting that the recognizer spoke of similarity and not true identity.
3. Note their objection, if the recognizer determines a percentage – at least at the end, before closing the record.
4. Make a record of any substantial discrepancies in the description and circumstances provided by the recognizer (for example, next to the bearded person there are four people without beards; there is only one blonde among four brunettes, or there is only one poorly dressed among well-dressed men, etc.).
5. Note in the report the uncertainty of the recognizer or possible visual and hearing impairment. If you deem it necessary, propose an experiment to prove the real capabilities of the recognizer.

6. In the case of execution of demonstrations related to situation recognition, notice that it does not meet the requirements of criminal tactics and criminal procedural law, propose a presentation for on-site recognition (if necessary, also exercise your right to complain, bring it to the attention of the prosecutor's office supervising or directing the reconnaissance or investigation).
7. If you notice any subjective or objective recognizable influence (detailed in paragraphs 7–22 of the previous list of errors), you should comment immediately and, if necessary, make a complaint. If you notice all of this in retrospect (for example, it is clearly shown in the record or your client tells you about the circumstances), you should still live with the case's improvement and the possibility of legal remedy (they can't be left without mention).
8. You must do the same if the execution is professionally flawed for any other reason (for example, it is done in the framework of confrontation, if the recording or video making is incomplete or distorted [see error points 23–27]).
9. Agreeing with the recommendation of Géza Katona, in the case of uncertain or anxious recognition of a person, there is no need to repeat the same person in a different group, instead a blank test is desirable. This should be proposed by the defence counsel. In the case of a blind test, in the first round of the identity parade, the (potential) suspect is not included in the group and that is how they ask to identify the witness.[14]
10. It can be a bold motion by the defence counsel, the so-called novelty: initiating an ecological recognition method. In essence, it differs from the traditional procedure in that the witness is guided – more or less randomly – alongside the defendant in the natural environment. In this case, the target person will be asked to be in a place where more than one person is present, e.g. in a department store or on a crowded street. There, the witness is accompanied with the intent of trying to recognize, select the perpetrator s/he has seen before. The fact that the persons to be compared are not chosen in a targeted manner is usually offset by the large number and variety of those present. It is also possible that authorities put selected people for comparison among by-passers. The advantage of this method is that it is unstrained, less biased than the classical identity parade, and decreases the risk that – the target person's internal tension or, the involuntary

[14] G. Katona: *Valós vagy valótlan?* Budapest 1990, pp. 143–169.

attention of – the persons selected for comparison stands out from the group ("cotton wool").[15]

11. Nor would it be a crime against the devil, if the defence lawyer would propose a pre-influence (filtering) method, already existing abroad, in which instead of forensic criminals familiar with the case, they would use so-called "blind" executors, who have not dealt with the matter so far. These are law enforcement officers (police, customs investigators, prosecutors) who do not know the identity of the (potential) suspect in the case, in a word, they do not even know in their subconscious to whom the version is directed. The line itself is created by forensicists who know the suspect and the case. But their role here stops for the time being, and they leave the process. It is then taken over by the caseworker, who must also communicate this fact to the recognizer. I mean that s/he is just doing the recognition and not does not know the case, or the participants either. After all this, s/he conducts the experiment– in a measured, distant way, without being influenced, as s/he does not even know, does not even guess who-whereof-why influence should be focused. The experiment of recognition is organized and recorded according to the tactical-technical recommendations. S/he then passes on the report containing the "result" to the original investigators. With no history of data, it is not difficult to fulfil the "pop-up" recommendation that s/he should not reveal anything to recognizers, neither affirmation nor denial, neither verbally, with gesture, nor with any kind of meta communication.

4. Future perspectives

I can only hope that this study has highlighted the empirical fact that evidence results must be treated with caution (doubt), by all discerning law enforcement practitioners – investigators, prosecutors, lawyers, and ultimately judges – who seek to avoid miscarriages of justice, while performing identity parade and evaluating its outcome as evidence.

Separate studies and even volume sets have been written in the scientific and practical world about why the best-intentioned and unaffiliated witnesses (also) are so often mistaken. So, unfortunately, with-

[15] See further details: R.C.L. Lindsay, G.L. Wells: *Improving eyewitness identification from lineups: Simultaneous versus sequential lineup presentation*. "Journal of Applied Psychology" 1985, no. 70 (3), pp. 556–564; A.M. Levi: *Some facts lawyers need to know about the police lineup*. "Criminal Law Quaterly" 2002, no. 46; A. Schäfer: *Sequenzielle Video-Gegenüberstellungen*. "Kriminalistik" 2001, no. 12, pp. 797–798.

out application errors, there are too many mistakes. For this reason, forensic technical methods (which show more objectivity), such as facial recognition based on electronic data, digital identification, and the phenotypology of the DNA content of material remains etc., occupies a more prominent position in the forensic vision than uncertain personal evidence.

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