

A Fair Hearing? The Use of Voice Identification Parades in Criminal Investigations in England and Wales

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This article reviews the current state of the law in relation to the use of voice identification parades to test the evidence of a witness who purports to recognise a witness by voice alone. Such procedures exist but are not used consistently by police forces, with some forces having decided as a matter of policy not to use them. Although such procedures are challenging and are more difficult than video identification procedures, the failure to conduct such a parade is a matter which should be properly taken into account in assessing the admissibility of a witness's evidence.

Introduction

The fallibility of voice recognition has been acknowledged since Biblical times.¹ Despite this, the evidence of a witness who purports to recognise a defendant through knowledge of his or her voice can, of itself, be decisive of guilt or innocence in a criminal trial. The Court of Appeal, being mindful of such risks, has directed that such cases be approached with caution, requiring trial judges to scrutinise evidence and direct juries carefully. There remains, however, a lack of clarity about the extent of the obligation on the investigating authorities to conduct a voice identification procedure to support (or undermine) a prosecution where a witness claims either to be able to recognise the voice they have heard, or where in the circumstances of the case, they may be able to do so. This uncertainty is due, in part, to the relatively recent progress that has been made in developing a voice identification procedure (voice parade), which is forensically robust, coupled with the comparatively small number of cases in which the issue arises. The Court of Appeal have approached the question of voice parades with caution: not interfering with their use when presented by the Crown² but, in *Gummerson*, stopping short of imposing a duty upon the police to conduct them.³ This is an approach which differs from that which has developed in cases of disputed eye

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¹ In Genesis 27, Jacob is able to deceive his blind father Isaac, into believing he is talking to his other son, Esau.

² *Hersey* [1998] Crim. L.R. 281 CA.

³ *Gummerson* [1999] Crim. L.R. 680 CA.

witness identification, where a failure to conduct an identification procedure is usually regarded as a breach of Code of Practice D to the Police and Criminal Evidence Act 1984⁴ (PACE).⁵ In 2003, the Macfarlane guidelines for best practice in voice parades were approved by the Home Office and circulated to police forces and prosecuting authorities with an indication that it was hoped that they would ultimately be incorporated within Code of Practice D to the PACE.⁶ Subsequent iterations of the Code of Practice have incorporated references to voice parades but have not expressly provided for a procedure under which they should be performed. As a result, as this paper will demonstrate, police forces in England and Wales approach the question of whether or not to conduct a voice identification in different ways; some forces deploying them on occasion and others making a policy decision not to do so. This is unsatisfactory: there needs to be a consistent approach and this article's approach addresses how the trial process should deal with this.

Identification evidence

The inherent problem of identification evidence was crystallised by Lord Devlin in his *Report to the Secretary of State for the Home Department of the Departmental Committee of Evidence of Identification in Criminal Cases*:

“There is no story to be dissected, just a simple assertion to be accepted or rejected. If the witness thinks he has a good memory for faces, when in fact he has a poor one, there is no way of detecting the failing.”⁷

Eye witness evidence is however notoriously unreliable, and the knowledge that a mistaken witness may confidently identify and thus convict, an innocent person has served to shape the approach of the criminal justice system in this area. The case of *Turnbull*⁸ has, for more than 40 years, directed the courts in the approach they must follow in cases of contested eye witness identification. *Turnbull* requires judges to remove cases from the consideration of a jury where the witness's view is “fleeting or otherwise unsatisfactory.” This recognises that, in certain circumstances, the quality of an identification may be such that the prosecution cannot prove that the risk of mistake may be excluded. In withdrawing a case from a jury, seldom, if ever, is the trial judge making a finding that the witness is wrong; simply that inherent in the circumstances of the identification are factors which are apt to introduce the possibility of mistake.

Within the wider class of identification cases are those cases where the witness purports to recognise the defendant by voice rather than by sight. I shall refer to these witnesses hereafter as “ear witnesses”. There may be a number of reasons for this; the witness may have observed an individual wearing a mask,⁹ the witness may be identifying a voice they have heard on a telephone¹⁰ or the witness may

⁴ Home Office Circular 057/2003, Guidance on the use of voice identification parades.

⁵ *Forbes* [2001] 1 A.C. 473; [2001] 1 Cr. App. R. 31 (p.430).

⁶ Home Office Circular 057/2003, Advice on the use of voice identification procedures.

⁷ Rt Hon Lord Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee of Evidence of Identification in Criminal Cases* (HMSO, 1976), para.1.24.

⁸ *Turnbull* [1977] Q.B. 224; (1976) 63 Cr. App. R. 132.

⁹ As in *Devlin* unreported 14 March 1997 CA.

¹⁰ As in *Karsten v Wood Green Crown Court* [2014] EWHC 2900 (Admin).

simply not have seen the face of their assailant.¹¹ Although the number of cases which turn on pure voice identification are much rarer than those which turn on visual identification, the consequences for the defendant convicted on such evidence remain the same and the fact that such evidence presents a much greater risk of mistake serves as no mitigation against a sentence following a conviction.

Considerable research has been conducted by those working within the field of speech science who have sought to identify those factors which have a bearing on the ability (or otherwise) of a listener to accurately identify a voice where the witness has no other clues to the speaker's identity.¹² Many of these factors accord with that which might be anticipated (familiarity with speaker,¹³ duration of contested speech, period of time between hearing the known speaker and the unseen voice),¹⁴ but some perhaps run contrary to expectation. To give an example of one such, apparently counter intuitive, principle there is some evidence that a covering to the mouth may distort the sound quality of the voice, but there is no correlation between the thickness of the material of the covering and the extent of the distortion.¹⁵ Of particular significance in the context of many trials, is the lack of correlation between witness confidence and accuracy, with a witness who asserts confidence in the accuracy of his or her identification being no more likely to be accurate than a witnesses who is less certain (notwithstanding the more persuasive effect that the former may have on a jury).¹⁶ To compound the complexity in assessing the evidence of an ear witness, is the difficulty that a lay person faces in being able to provide a description of voice in a manner which provides an accurate set of criteria to scrutinise. Whereas an eye witness could be expected to be able to list a number of physical features against which the accuracy of a subsequent identification could be measured, an ear witness may often only be expected to identify gender, pitch and accent.¹⁷ An ear witness may provide a description of a voice which appears to match that of a suspect, not because he or she has accurately identified the suspect, but because of the paucity of points which demonstrate inconsistency. The first description given by a witness of a suspect is often of paramount importance to a defence advocate in seeking to challenge the veracity of that evidence through later inconsistency, and without such inconsistencies, will be hampered in his or her ability to properly test the evidence (a fact recognised in the recording and disclosure obligations mandated in PACE Code of Practice D, 3:1).

The challenges of lay voice recognition have been recognised by the Court of Appeal which has, in a series of authorities, reminded judges of the need to adopt and adapt the *Turnbull* guidelines according to the facts of the case. The most

¹¹ As in *Robinson* [2005] EWCA Crim 1940; [2006] 1 Cr. App. R. 13 (p.221).

¹² A summary of the research in this area is presented in Bull, and Clifford, "Earwitness Testimony" in Heaton-Armstrong, Shepherd and Wolchover (eds), *Analysing Witness Testimony* (Oxford University Press, 1999).

¹³ H. Hollien, W. Majewski and E.T. Doherty "Perceptual identification of voices under normal, stress and disguise speaking conditions" (1982) 10 *Journal of Phonetics* 139.

¹⁴ See, for example J. Kerstholt et al. "Earwitnesses: Effects of Speech Duration, Retention Interval and Acoustic Environment" (2004) 18 *Appl. Cognit. Psychol.* 327.

¹⁵ C. Llamas, P. Harrison, D. Donnelly and D. Watt, "Effects of different types of face coverings on speech acoustics and intelligibility" (2014), http://www.researchgate.net/publication/237289463_EFFECTS_OF_DIFFERENT_TYPES_OF_FACE_COVERINGS_ON_SPEECH_ACOUSTICS_AND_INTELLIGIBILITY [Accessed 27 October 2016].

¹⁶ R. Godfrey and S. Clark, "Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value" (2010) 34 *Law Hum. Behav.* 241.

¹⁷ A.D. Yarmey, "Earwitness Speaker Identification" (1995) 1. *Psych. Pub. Pol. And L.* 792 and discussed in D. Ormerod, "Sounds Familiar" [2001] *Crim. L.R.* 565.

detailed review of the problems and analysis of the approach to be taken is found in the case of *Flynn*¹⁸ where it was accepted (per Gage LJ) that:

“The ability of a lay listener correctly to identify voices is subject to a number of variables. There is at present little research about the effect of variability but the following factors are relevant:

- (i) the quality of the recording of the disputed voice or voices;
- (ii) the gap in time between the listener hearing the known voice and his attempt to recognise the disputed voice;
- (iii) the ability of the individual lay listener to identify voices in general. Research shows that the ability of an individual to identify voices varies from person to person.
- (iv) the nature and duration of the speech which is sought to be identified is important. Obviously, some voices are more distinctive than others and the longer the sample of speech the better the prospect of identification.
- (v) the greater the familiarity of the listener with the known voice the better his or her chance of accurately identifying a disputed voice.

However, research shows that a confident recognition by a lay listener of a familiar voice may nevertheless be wrong.”

The final paragraph of the judgment stresses the need for a “very careful direction to the jury, warning it of the danger of mistake in such cases”. Commenting on *Flynn*, Roberts noted that:

“It might strike some as rather odd then that, while procedures for procuring visual identification evidence from witnesses are the subject of an elaborate regulatory framework, no similar scheme exists in respect of voice identification evidence.”¹⁹

Whether a witness possesses the ability to accurately recognise a voice is a matter determined by an individual’s cognitive processes in encoding material in their aural memory and this is something which varies greatly from individual to individual. Where a defendant disputes an identification it is for the prosecution to prove that the witness can be relied upon, and to do so it needs to be able to demonstrate the witness’s ability to identify voices accurately. In eye witness identification cases such evidence is routinely provided by video identifications and such corroboration must be desirable in every case where the consequences are a criminal conviction.

Identification procedures in England and Wales

Flynn and St John does not address the question of whether a voice parade should be conducted in cases where the accuracy of an ear witness’s identification is challenged. To answer this question it is necessary to consider the position in law in relation to visual identification procedures and then the evolution of the voice parade.

¹⁸ *Flynn* [2008] EWCA Crim 970; [2008] 2 Cr. App. R. 20 (p.226).

¹⁹ A. Roberts, “Case Comment Evidence: Identification Voice Recognition” [2008] Crim. L.R. 799.

Identification procedures are an established part of the criminal investigation process. Since 1986 their deployment and operation has been governed by Code of Practice D, issued by the Secretary of State, pursuant to PACE s.66.²⁰ These codes have seen a number of revisions over time with the current version coming into force on 7 March 2011.²¹ The 2011 version of Code D states that identification procedures are

“designed to:

- test the witness’ ability to identify the suspect as the person they saw on a previous occasion.
- provide safeguards against mistaken identification.”²²

The detail that follows in the Code of Practice provides regulation on when and how identification procedures should take place, providing safeguards designed ensure the integrity of the evidence which may result from them. Where there has been a breach of the Code of Practice, it is for a judge to assess whether the evidence obtained in consequence of that breach should be excluded pursuant to s.78 of PACE based upon the overall fairness of the proceedings. Where it has been established that there has been a breach of one of the Codes of Practice which relates to identification, the trial judge should first decide whether the evidence should be excluded and, if it is not, the jury should be directed to consider the fact that there has been a breach, how that breach arose and whether that breach would cause them to have doubts about the safety of the identification.²³ Failure to give such a direction may, of itself, render a conviction unsafe.²⁴

There was for some time, dispute as to the extent to which officers were compelled to conduct an identification procedure. The position was settled by The House of Lords in *Forbes* (insofar as eye witnesses are concerned) in relation to the Code of Practice D as it existed from 1995 which, at para.2.3, stated:

“Whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents unless paragraphs 2.4 or 2.7 or 2.10 apply. A parade may also be held if the officer in charge of the investigation considers that it would be useful, and the suspect consents.”

In *Forbes* it was argued, on behalf of the Crown, that where a defendant had already been picked out on the street by a witness who identified him as the perpetrator of a robbery, there was no breach of Code of Practice D as the procedure would have served no useful purpose. Lord Bingham, giving the judgment of the court concluded otherwise, stating that:

“(1) Code D is intended to be an intensely practical document, giving police officers clear instructions on the approach that they should follow in specified circumstances. It is not old-fashioned literalism but sound interpretation to read the Code as meaning what it says.

²⁰ Police and Criminal Evidence Act 1984 s.66.

²¹ Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes A, B, and D) Order 2011 (SI 2011/412).

²² Code of Practice D para.1.2.

²³ *Forbes* [2001] 1 A.C. 473; [2001] 1 Cr. App. R. 31 (p.430) at [27].

²⁴ See for example *Gojra* [2010] EWCA Crim 1939; [2011] Crim. L.R. 311.

- (2) Paragraph 2.3 was revised in 1995 to provide that an identification parade shall be held (if the suspect consents, and unless the exceptions apply) *whenever* a suspect disputes an identification. This imposes a mandatory obligation on the police. There is no warrant for reading additional conditions into this simple text.
- ...
- (4) We cannot accept that the mandatory obligation to hold an identification parade under paragraph 2.3 does not apply if there has previously been a ‘fully satisfactory’ or ‘actual and complete’ or ‘unequivocal’ identification of the suspect by the relevant witness. Such an approach in our opinion subverts the clear intention of the code. First, it replaces an apparently hard-edged mandatory obligation by an obviously difficult judgmental decision. Such decisions are bound to lead to challenges in the courts and resulting appeals. Second, it entrusts that decision to a police officer whose primary concern will (perfectly properly) be to promote the investigation and prosecution of crime rather than to protect the interests of the suspect ... Third, this approach overlooks the important fact that grave miscarriages of justice have in the past resulted from identifications which were ‘fully satisfactory’, ‘actual and complete’ and ‘unequivocal’ but proved to be wholly wrong. It is against such identifications, as well as against uncertain and equivocal identifications, that paragraph 2.3 is intended to offer protection to the suspect.”

The court accepted that there may be circumstances where conducting a procedure would be futile, but anticipated that these cases would be exceptional. The judgment in *Forbes* led to a revision in the language of subsequent editions of the Code of Practice to give a clearer voice to the mandatory obligations.²⁵

Forbes was confined to identity parade for eye witnesses and there has been very little by way of subsequent consideration of whether the police are compelled to conduct procedures in other types of cases. Assistance on this point can be found by examining the development of best practice in this field, alongside the historical redrafting of the Code of Practice to establish whether the approach in *Forbes* can be used to infer a mandatory obligation to conduct voice parades.

The development of voice parades

A recognition of the value in having a procedure by which voice identifications can be tested can be traced back to the Devlin report of 1976 which (noting the practice adopted in Sweden) observed that:

“There is at present no adequate procedure at all for testing the capacity to recognise the voice, and so far as we can ascertain there has been no scientific research into this question. Questions of voice identification arise rarely, but there is no saying when one will, and we recommend that research should

²⁵ This can be most clearly seen by the replacement of the word shall with the word “must” into the equivalent paragraph to that analysed in *Forbes* [2001] 1 A.C. 473; [2001] 1 Cr. App. R. 31 (p.430) at [3.12].

proceed as rapidly as possible into the practicability of voice identification parades, with the use of tape recorders or any other appropriate method, which among other things would have to take account of the dangers of disguising the voice and the extent of changes induced by stress.”

The issue was not properly grasped in the initial formulations of Code D, which made no acknowledgment of the need for a voice parade divorced from a visual procedure but instead conflated the two. In Annex A to the 1986 Code of Practice, para.17 read that:

“If a witness wishes to hear any parade member speak ... the identification officer shall first ask whether he can identify anyone on the basis of appearance only. When the request is to hear members of the parade, the witness shall be reminded that the participants in the parade have been selected on the basis of physical appearance only. Members of the parade may then be asked to comply with the witness’s request to hear them speak.”

This formulation survived the 1991 and 1995 revisions of the Code. Whilst the prohibition on the investigator raising the issue might seem to operate as a safeguard, this provision created a real risk of false identifications. The visual similarity of a suspect may create a preconception in the mind of the witness to such an extent that when they hear the voice they will make a positive identification due to lack of dissimilarity, rather than actual identification. The inherent danger of this approach is amply demonstrated by the Scottish case of Patrick Meehan where such a process (albeit tainted by witness contamination) formed part of a prosecution case which resulted in the wrongful conviction of an innocent man.²⁶

Three Court of Appeal judgments are of particular relevance in the history of voice parades. The first of these is *Deenik*, where part of the Crown’s case came from a police officer who had spoken to an individual called “Robert Lloyd” about a drugs importation on the telephone. The defendant was subsequently arrested and the officer, on overhearing him speak to the custody sergeant, identified him as the man she had spoken to.²⁷ The argument was advanced that the (1986 version) of Code D covered voice identifications and that the absence of a parade was a factor to be taken into account in considering whether to exclude the evidence. In refusing a renewed application for leave to appeal the court (McCullough J) stated that provisions of Code D were of “little, if any, assistance” in cases of voice recognition.

Attempts were made by some police forces to try and introduce voice parades on an ad hoc basis and a conviction was obtained with the support of one such method in the case of *Hersey*. *Hersey* concerned the armed robbery of a shop in Portsmouth by masked men. The shop-keeper alleged that he recognised the voice of one of the men as being a regular customer. A tape was compiled, consisting of a 10 second clip extracted from a previous police interview with the defendant and 11 recordings of volunteers uttering the same phrase. The shop-keeper identified the defendant’s voice as being that of the robber. An application to exclude the evidence of the parade was refused by the judge and the defendant was convicted. In dismissing his appeal the Court of Appeal (Swinton-Thomas LJ) stated they

²⁶ Ludovic Kennedy, *Thirty-six murders and two immoral earnings*, 2nd edn (Profile Books, 2003), p.118.

²⁷ *Deenik* [1992] Crim. L.R. 578.

could see no “valid reasons why ... the judge should not have admitted the evidence” and that “[i]t is often overlooked that identification parades may be as valuable to an accused as they are to the prosecution.” In commenting on *Hersey*, Ormerod cautioned that:

“All those involved in criminal trials would surely welcome a procedure for establishing the accuracy of a voice identification, but it is vital that the correct one is implemented.”²⁸

A subsequent attempt to extend *Hersey* to create an obligation on investigating authorities to conduct voice parades was rejected in the 1999 case of *Gummerson*. In this case, (where a drug dealer was beaten by four masked men, the voices of three of whom he claimed to recognise) no such procedure was held. The defence argued that para.2.3 of the 1995 edition of Code D created an obligation to conduct such a parade and cited the approval of the process in *Hersey*. The Court of Appeal (per Clarke LJ) were unimpressed with this argument, observing that *Hersey* had not touched upon Code D and commenting that the “Code D has no application here. It relates only to visual identification. We do not think that the draftsman of the Code had voice identification in mind”.

This appears to represent the last attempt to invite the Court of Appeal to give guidance on these types of procedures. The position was reviewed by Ormerod in 2001 who identified those factors which needed to be addressed with care in conducting a voice identification parade including the choice of foils, the number of speakers, whether the parade was live or recorded, the duration of the sample and choice of words to be spoken. He concluded that:

“It is, therefore, incumbent on English law to formulate appropriate safeguards and procedures to ensure that an efficient and reliable system is established for pre-trial and trial uses of voice identification evidence.

It has been demonstrated that this could be achieved with relative ease. A major element in ensuring an adequate procedure lies in the police and advocates having a sufficient understanding of the strengths and weaknesses of the evidence.”²⁹

The absence of clear, evidence-based guidelines was rectified shortly after this article. In 2001, DS John MacFarlane of the Metropolitan Police investigated the death by arson of a woman in a flat.³⁰ One of the witnesses against the accused was his tenant who claimed to have overheard the defendant commissioning the fire. This conversation was denied by the defendant. DS MacFarlane worked with Francis Nolan, Professor of Phonetics at the University of Cambridge, to produce a series of guidelines which (through a combination of adoption of the procedural safeguards embodied in PACE and best practice in linguistic analysis) eliminated any risk that the suspect might be given undue prominence in the parade. The process requires the oversight of a suitably qualified expert who ensures that the voices used as foils were appropriate both in terms of content and quality (the foils being collated from excerpts of previous interviews) and encourages the use of

²⁸ *Hersey* [1998] Crim. L.R. 281 CA.

²⁹ Ormerod, “Sounds Familiar” [2001] Crim. L.R. 565.

³⁰ F. Nolan, “A recent voice parade” (2007) 10(2) *International Journal of Speech Language and the Law* 277.

“dummy runs” of the parade on volunteers unconnected with the case, to ensure the recording is not possessed of qualities which subconsciously draw the witness’s attention to the suspect. Clear warnings were given to investigating officers not to conduct a parade with live stooges and to ensure that the evidence was only treated as corroborative rather than determinative. In the case in question, the witness successfully identified the defendant as being the person he had overheard planning the crime. The Crown sought to call Professor Nolan at trial to give evidence as to how the parade was conducted and the results of it and, despite opposition from the defence, were permitted to do so. Following the failure of a submission of no case to answer, the defendant changed his account, accepting that it was his voice that the witness had heard but disputing the context of the words spoken. He was subsequently convicted. With the benefit of this admission there can be confidence both that the witness was accurate and the parade demonstrated this; what is unclear is whether, without such admission, a jury would have been persuaded of that fact.

In reviewing the case, Nolan noted that there was scope for improvement in the future through the assessment of perceptual similarity of the voices used in the parade and greater use of a phonetic expert to extract the initial description. In conclusion he commented that:

“[C]ommissioning a voice parade should not be undertaken lightly. The well-known constraints of voice memory already place a serious limit on the weight which can be attached to a positive identification, and, as those who have prepared a voice parade will be aware, it is very difficult to achieve a voice parade whose fairness cannot be called into question for one reason or another. The cost-benefit ratio is likely to be favourable only in rather few cases.”

Notwithstanding these concerns, the Home Office approved the approach and on 5 December 2003 produced a circular, based upon the guidelines, which was distributed to criminal investigation and prosecuting agencies. The preamble to the circular includes the following observations:

- “1. Further consideration has been given to the scope for developing voice identification procedures for use by police forces in England & Wales. Currently, Code D, paragraph 1.2, of the Codes of Practice under PACE allows for such procedures to be used, but does not specify which procedures must be followed.
2. This work to develop reliable procedures for voice identification, which may ultimately go forward for inclusion in Code D of the PACE Codes of Practice is on-going in consultation with relevant stakeholders. However, as there will continue to be cases from time to time where the police may wish to use such procedures, this Circular seeks to offer advice to forces through an example of good practice.
- ...
4. The Home Secretary has agreed that slightly amended procedures can be promulgated to forces, as an example of good practice, which

have been tried and tested in the Courts and can be safely applied in similar, relevant circumstances.

5. The purpose of this Circular therefore, is to offer forces an example of good practice for advice and guidance. The procedures set out here are not mandatory, but it is recommended they be followed closely, as appropriate in the circumstances, where a voice identification parade is to be held by the force.³¹

In 2005, Code of Practice D was amended. The reference to asking participants in identification parades to speak was removed (in part, as a result of the traditional physical identity parade having largely been superseded by video identification procedures). The code now contained the following paragraph:

“While this Code concentrates on visual identification procedures, it does not preclude the police making use of aural identification procedures such as a “voice identification parade”, where they judge that appropriate.”

This wording remains at para.1.2 of the most recent (2011) edition of the Code.

Use of voice parades by police forces

There has, since 2003 been guidance on how to conduct voice identification parades and since 2005, approval of their use as part of the criminal investigation process. But to what extent are they used and do police forces approach them consistently? In order to examine this, every police force in England and Wales was asked, via a Freedom of Information request, how many voice identification parades they had conducted in accordance with the Macfarlane guidelines between 2005 and 2015.³²

Of the 43 forces asked, only four indicated that they had used the procedure.³³ A further four indicated that they had considered using parades in specific cases but it was ultimately deemed not to be appropriate or necessary or that they would consider using them if the circumstances arose.³⁴ The majority of forces (21) simply indicated that they either had conducted no voice identifications or held no data to suggest that they had been conducted. Of these 21 forces, one³⁵ does have on its public website, an identification procedures policy which provides detailed guidance on voice identification procedures including the guidance:

“A voice identification procedure must be conducted in accordance with the spirit of Code D of PACE. This may be done by an expert comparing the voice of an offender taped during the commission of an offence (e.g. an extortion demand) with, for example, a taped interview by adapting the confrontation procedure. Consideration could also be given to a person who

³¹ Home Office Circular 057/2003, Advice on the use of voice procedures.

³² Via a request made on 18 November 2015.

³³ Greater Manchester (1), Metropolitan (4), Merseyside (“more than 0, fewer than 3”), Leicestershire (2 + 1 outside the time frame enquired about).

³⁴ Cambridgeshire, Derbyshire, Surrey and West Mercia.

³⁵ Thames Valley.

knows the suspect's voice very well (e.g. a family member, close friend) listening to the offenders voice on audio tape."³⁶

Another five forces indicated that they did not store data on either voice or video identifications in a retrievable format. Perhaps the most significant finding was that seven police forces responded indicating that, as a matter of force policy, they did not undertake voice parades.³⁷ Only one of these police forces expanded upon the reason for this, citing a lack of equipment.³⁸ One of the forces expressed it in terms of being a "service" that they "do not provide".³⁹ The remaining five forces⁴⁰ responded with words to the effect of "we do not undertake this process". In the absence of additional evidence, no conclusions can be drawn as to whether or not those 26 forces who either had no information, or no information in a retrievable format had not conducted parades due to similar policy decisions or simply because no necessity has arisen; similarly in those police force areas where a policy decision has been made not to conduct voice parades, there is no evidence that cases have arisen where it would have been appropriate to do so. However even in those police forces which had conducted such procedures, the decision to request such a procedure is made by an individual officer in the case or CPS reviewing lawyer, and there is no way of ascertaining that such decisions are made consistently at an individual level.

It is however apparent that there is an inconsistency between police forces in respect of the use of parades which potentially bears upon the trial process.

A duty to hold a parade?

So what duty is there (if any) upon the police to conduct voice parades? If the case against an accused turns wholly or largely on aural recognition the outcome of a voice identification parade will, almost always, be of benefit to the case of one the parties. If it is positive it will allow to the Crown to demonstrate the ability of their witness to recognise the defendant's voice in controlled conditions: if it unsuccessful it will corroborate a defendant's assertion of innocence. Only the police have the necessary resources to conduct such parades and, with time being a crucial factor in ensuring the integrity of any process, the investigating authorities will be uniquely placed to retain this evidence at the earliest opportunity and if parades are not carried out timeously their evidential value will be depleted.

There is a compelling argument that since 2005, Code D has, through the inclusion of a reference to voice parades, required police officers to be proactive in their use. Prior to the amendment of the Code of Practice in 2005, there was no dispute as to the potential admissibility of such procedures, nor to the fact that care needed to be taken in conducting them (indeed the Code takes matters no further forward in this latter respect). Had the 2005 version of the Code of Practice D remained silent on the point, the position would have remained as per *Hersey* and *Gummerson*, their use being permitted where appropriate but with them

³⁶ Thames Valley Police, Identification Procedures, http://www.thamesvalley.police.uk/identification_procedures_update_01_07_14.pdf [Accessed 27 October 2016].

³⁷ Two forces refused to answer the request.

³⁸ Gwent.

³⁹ Bedfordshire.

⁴⁰ Humberside, West Midlands, City of London, Gloucestershire and South Yorkshire.

explicitly sitting outside the ambit of the Codes of Practice. If the design of the parade had been such as to render the process unfair, s.78 of PACE could still have operated to prevent the admission of the evidence without reference to a Code but there was no duty to even consider a parade.

The introduction of voice parades into Code D must therefore be doing more than simply advising best practice by bringing voice parades under the umbrella of the “intensely practical” Code D. Lord Bingham’s judgment in *Forbes* on the importance of Code D being treated as “meaning what it says” places a powerful interpretive obligation in favour of an objective review of the case unfettered by such external factors as force policy. Prior to *Forbes* the Court of Appeal noted in *Popat*⁴¹ that:

“[I]t is always necessary to have regard to the purposes of Code D both in interpreting and applying the Code and assessing situations which are not expressly covered by it. The overall purpose is one of adopting fair identification practices and adducing reliable identification evidence. Where insufficient regard is had to these purposes the discretion to exclude evidence under s.78 is likely to be exercised and convictions will be liable to be treated as unsafe.”

Even on the conservative interpretation of Code D in *Popat*, it was accepted that an assessment and review needed to be undertaken on the facts of the case to determine whether there were reasons which rendered an identity parade unnecessary. In *Gummerson*, part of the prosecution’s argument was based on the purposive approach in *Popat*, but the Court of Appeal never addressed this issue due to the Court’s outright rejection of the use of Code D at all. If as *Gummerson* suggests the absence of reference to voice parades is evidence of intention to exclude them from the ambit of Code D, their subsequent inclusion must be evidence that the draftsmen intended that they were embedded within the Code in both word and spirit. Indeed as the Court of Appeal as observed in *Gummerson*:

“As we see it, unless and until it is thought appropriate to draft a code for identification of this kind, the matter can properly be dealt with by the careful application of suitably adapted Turnbull guidelines.”

That “unless and until” came into being in 2005 when the new Code came into force. The Court of Appeal in *Gummerson* did not intend their judgment to cover future editions of the Code; their entire dismissal of the arguments raised was based on the existing Code’s silence on the point. This lacuna has now been filled and the judgment now has little foundation. If one follows *Gummerson* to its logical conclusion, the diligent legislative draftsman, having made reference to voice parades would, have explicitly distinguished their application from eye witness procedures.

It is right to acknowledge that there are much greater practical and resource implication in conducting voice identifications than there are with video identifications which mean they are not suited to every case. In order to conduct the process, identification officers need a recording of suitable quality and duration (at least 15 seconds worth of speech being required). The speaker must be speaking

⁴¹ *Popat* [1998] 2 Cr. App. R. 208; [1998] Crim. L.R. 825.

“normally” and care must be taken to ensure nothing in the text of the speech can assist in the identification. In certain circumstances a suitable sample can be extracted from the tape recorded interview, but where a suspect remains silent or answers “no comment” or where the questioning in interview is such that the responses are all obviously connected to the crime under investigation then there is nothing which can be used to build an identification parade. If a sample has been obtained, then foil samples need to be obtained from existing police interviews which are suitably proximate in terms of accent, tone, pitch and recording quality and whose content is equally subject neutral. This process is both time consuming and expensive, as the suitability of material needs supervising by a phonetic expert. Where a suspect in an investigation has an accent or dialect which is local to the police force conducting the inquiry, this increases the chances that a suitable number of foils can be located; where the suspects accent or dialect is of a group which is not as widely represented in the police area, it will prove more challenging. Some of these challenges could be overcome through pooling of resource and expertise across forces, but there will remain a number of cases where through no fault of the police, a fair voice parade cannot be conducted. This is however not a problem unique to voice parades and the language of the Code reflects this by softening the mandatory wording with the caveat of “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.” The practicability test is likely to be far easier to satisfy through objective evidence for voice parades than it is for video identifications and an investigating officer who has considered the use of the process and not proceeded with it because it is not possible need not fear criticism for having breached the Codes.

When para.1.2 of PACE is read as whole, it assumes that a decision to conduct a parade will be made by an officer exercising judgement as to whether or not it is appropriate to do so. This is a fact sensitive decision to be made on a case-by-case basis. Although Lord Bingham in *Forbes* was concerned about the exercise of discretion being vested in the hands of the investigating officer whose interests lie in the prosecution of an offender, there is a difference between a nebulous exercise of “discretion” in whether or not to conduct a procedure and an evidence based “judgment” as to whether it is appropriate or not based on an evaluation of the case.

The language of the Code, when read in conjunction with *Forbes*, makes its primary purpose ensuring the safety of identification evidence and directing how that should be achieved. What is required of the police is not the production of voice identification parades in every case, many of which may ultimately be of no evidential value, but an open minded approach to the question of identification and an understanding of the techniques which may be deployed to ensure that its accuracy is tested and such an approach cannot exist where a police force has adopted a blanket exclusion on the use of a procedure—indeed it is difficult to see how such a policy could be consistent with the need to pay sufficient regard to the purposes of the Code. The point has yet to be argued in the Court of Appeal but were an investigating officer to concede in a case that but for a policy decision they would have conducted or considered conducting, a voice parade, it would be

perverse to ignore the recognition of their use in the Codes in considering the weight to be attached to the evidence.

The impact upon trial

How then, should these principles translate into the trial process? The first consideration is whether cases which turn on the admission of voice identification should proceed at all, given the high possibility of error. *Flynn*, whilst not prohibiting a prosecution proceeding on this basis anticipates that any case involving the prosecution adducing voice recognition evidence will involve a review of admissibility to ensure the probative value of the evidence outweighs its inherently prejudicial effect.⁴² Undoubtedly there will be situations where the level of familiarity that the ear witness has with the suspect is high and the opportunities to hear the disputed speech were good. In these circumstances a case may be left to the jury but with close judicial scrutiny and modified *Turnbull* directions. Where the prosecution cannot establish either of these two criteria and there is no other evidence the case cannot be safely left to a jury.

The more frequent scenario is the case where the voice identification is part of a tableau of evidence. Here the introduction of weak voice recognition evidence may corroborate or be corroborated by other evidence to create case which is greater than the sum of its parts. In *George* part of the evidence against the defendant in murder case came from a witness who heard a partially unseen gunman shout “you’re dead now”. He purported to recognise the voice as being the defendant who he had been at school with briefly some three years before. In evidence he admitted he thought the voice was George’s although he was not sure. The defence argued that the jury should be directed to disregard this evidence. The judge refused but did direct the jury to exercise great caution in considering this exercise. He directed the jury to treat gunshot residue present on the defendant’s clothing as being corroborative of the identification. This approach was upheld by the Court of Appeal in dismissing a renewed application for leave to appeal.⁴³ On a subsequent referral from the Criminal Cases Review Commission (following fresh evidence which called into doubt the safety of the residue evidence), the Court of Appeal, whilst not disagreeing with the approach taken by the trial judge, accepted that if the residue evidence was not satisfactory, the conviction could not be safe. In cases such as this, there should be close scrutiny of the quality of the voice recognition evidence in isolation before admitting it before the jury and a continuing assessment of both the evidence itself and any evidence which may corroborate it.⁴⁴

In any form of assessment of the admissibility of the evidence and subsequent directions to the jury, the presence or absence of a voice parade should be a factor to be taken into account. Where a positive identification has been made on a parade the jury should be entitled to receive evidence of how the parade was conducted and be directed that the parade may confirm the witness’s ability to identify the

⁴² The Court of Appeal in *Robinson* [2005] EWCA Crim 1940; [2006] 1 Cr. App. R. 13 (p.221) whilst using the language of admissibility of “admissibility” in relation to one defendant introducing such evidence against another is thought to have been doing more than applying a test of legal relevance—is the evidence such that a jury could rely on it—See Ormerod [2006] Crim L.R. 427.

⁴³ *Brown* [2004] EWCA Crim 1471.

⁴⁴ *George* [2014] EWCA Crim 2507; [2015] 1 Cr. App. R. 15 (p.183).

speaker, albeit with the additional warnings which would accompany such a direction. Positive identification on a voice parade should not however be used to render admissible ear witness evidence which would not meet the minimum criteria described in *Flynn*. Where a voice parade has been conducted and the ear witness has not identified a speaker that should be a factor which should weigh very heavily against the admission of that piece of evidence for the Crown, regardless of the strength of other evidence. In cases where a voice parade has not been carried out, consideration should be given as to why this is the case. Where it has not been done because of policy considerations or factors unrelated to the quality of the evidence that would be produced, these again should be powerful factors to be taken into account in considering whether the evidence is admissible. Where it can be demonstrated that a safe voice parade could not have been performed then less weight should attach to its absence—although the overall consideration should remain the quality of the identification. In every case where identification is disputed and no voice parade has taken place, its absence should be a weakness which the jury are directed to consider in their assessment of the evidence. Where the failure can be seen to be the result of the police failing to act in the spirit of Code D this direction may be couched in stronger terms appropriately tailored to the facts of the case.

In the 20 years since voice parades began to be adopted, whilst Code D has evolved to be more accommodating to their use little progress has been made in standardising their use across police forces. If miscarriages of justice are to be avoided, investigating officers, advocates and legislative draftsmen need to give serious consideration to the mechanisms by which identification evidence can be tested and address the consequences of a failure to do so. The robust procedures which exist to ensure that evidence which may be decisive in a trial is properly scrutinised deserve to be applied to all evidence of this type, regardless of the sensory organ under challenge.