MITTER'S

Law of Identification and Discovery

Fifth Edition
1981

LAW BOOK COMPANY

V. MITTER S

LAW OF IDENTIFICATION AND DISCOVERY

(Being a lucid treatment of the subject dealing with all kinds of Identifications, e. g., Persons, known unknown and Dead, Photography, Finger-prints and Footprints, Handwriting, Firearms, Blood, Poisons, Incriminating property, etc., with useful appendices, viz., Identification of Prisoners Act, Extracts from Criminal Procedure Code, 1973 and Extracts from Evidence Act)

Thoroughly Revised
By
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Advocate

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PREFACE TO THE FIFTH EDITION

In *M. C. Sekharan and others* v. *State of Kerala*, reported in 1980 Cr.L.J. 31, their Lordships of the Kerala High Court, have drawn attention to the inherently weak character of the law of discovery as it stands and the gross abuse to which it may be put in the present conditions in which "trained dogs are useful to make recoveries of incriminating articles like murder weapons and dead bodies. After ascertaining through such dogs or otherwise the secret places where they are hidden, it is easy for the police to get them taken out from those places by the accused and then rely on them after making it appear that they were recoveries made on information given to them by the accused."

Their Lordships have aptly observed : "When there are such possibilities, is the discovery of the incriminating article sufficient to justify the admission of the information which otherwise would have stood inadmissible ? The provision in Section 27 of the Evidence Act which can without difficulty be misused by the police may have served the purpose of a colonial power to preserve a weak social structure and to keep the nation under subjugation and check. But is it necessary to retain that provision after the nation has become free, In dian Society has become strong enough to put away fear and can afford to give suspected persons treatment that is really generous and there is respect all round, for the dignity of man and human rights ?".

Despite the intense legislative activity since Independence, the major bulk of our law remains an inheritance from the colonial past and its various provisions are coming in for close scrutiny and sharp criticism by the Supreme Court and the High Courts. The period since the last edition of this well known treatise on the Law of Identification and Discovery in 1978 is memorable both for the huge volume of case-law which has turned out in this period as also for the care, the suspicion, the alert scrutiny, which has thrown into sharp relief the loop-holes and the lacunas in the law as it stands which cannot be conveniently laid aside as guide-lines for future legislation but have influenced and are likely to influence the legal or the judicial mind even during the transition till the existing law is repealed and replaced, by a new law.

Judicial pronouncements alert to the subversion of justice through legal formalities have taken a strict view of the law and recognised probabilities otherwise dismissed as conjectural or ineffective.

The present edition brings to light new dimensions of both law and scientific methods more significant than the popularity it has enjoyed in the past. These are the gains to the subject-matter and the extension of scope which each successive edition has brought with it. The process of the qualitative change initiated by the last edition with a detailed study of the scientific aspect, till then existing only as an apology by way of a fleeting reference, has been carried further and enriched with the spectrum of legal evaluations of that aspect.

The Law of Identification and Discovery is indispensable in the investigation and trial of criminal cases. Its significance is thereby not so restricted. The problems with which it deals arise also in civil cases. Falsification of

accounts, fabrication of evidence, forgery, the detection of identity behind anonymous letters, conspiracy, secretion of documents and things are matters not infrequently dealt with in civil cases, though legal procedures and evaluations in the two branches of litigation significantly differ while techniques and methods are identical.

The present is a thoroughly revised edition of the book. The treatment of the subject has been exhaustive, comparative and analytical and furnishes a critical insight into the subject. The synopsis has been enlarged and rearranged as required by the subject to facilitate reference. A copious Index, prepared with a meticulous regard to the different aspects dealt with and the new features introduced in the present revised edition, is intended to help in the precise location of the exact law and the points agitating lawyers, judges and investigating officers to whose scrutiny the present edition is entrusted with confidence in their appreciation of the enhanced utility of the revision which has been carried out with the utmost care.

New Year's Day, 1981 R. N. SAXENA

PREFACE TO THE FOURTH EDITION

The evaluation of identification evidence is perhaps one of the most difficult problems which confront a Judge—*In re Kamraj*) A. I. R. 1960 Mad. 125). Identification is vitally important for both the prosecution and the defence and their responsibilities are equally onerous. In *Bharat Singh* v. *State of U. P.* (A. I. R. 1972 S. C. 2478), there was a delay of about three months in holding the identification parade. The Supreme Court took a very stict view of the fact that no questions were asked of the investigating officer as to why and how the delay occurred and went to the length of observing that though it is true that the burden of establishing the guilt is on the prosecution, that theory cannot be carried so far as to hold that the prosecution must lead evidence to rebut all possible defences.

The scope of identification, needed alike in civil and criminal matters, is much wider than the lay conception about it. Its methods and technique, growing apace, unfolding vast potentialities, have become much refined with our present state of scientific knowledge and technological development.

Identification with scientific aids is on surer lines today than it was thirty or even twenty years before. Identification by finger-prints is now considered absolutely reliable but controversy goes on about the true value of other forms of such identification, notably handwriting.

Courts, with their cautious and conservative approach, alert, and rightly so, to the error of sophistication, have shown both reluctance and respect for the evidence of scientific experts.

Even otherwise, they have approached evidence of identification free from any superimposition by science as a weak type of evidence taking into account the elusive human element, the frailties of observation and memory.

Identification, linked with search and 'discovery' as the next stage thereafter, differs from the latter in that while there are statutory provisions regulating the manner of search or defining the circumstances in which information to the police by person in custody leading to discovery may be admissible, there is no statutory provision for identification. The rules framed for identification parades, for seizure and sealing of articles and their identification to ensure fairness, to provide for justice and equity, have not been framed within the frams-work of any statute, and are, as such, and at best, rules of prudence, rather than of law, with all their sanctity.

Precedents or Judicial pronouncements in these circumstances have been quite prolific and divergent, running a zig-zag course. The Law of Identification and Discovery is a growth entirely from case-law, the varying character whereof imposes upon lawyers and Judges the need for vigilance and discrimination.

The present revised edition of this commentary is a study in depth of the multiple problems with which identification bristles with ranging from Constitution complications, the claim of the accused against being forced to

attend and identification parade or being forced to give his finger-impressions or specimen handwriting as a violation of his fundamental right to protection against testimonial compulsion, his claim, as of right in the self-same vein, to disguise himself, his demand for identificaiion challenging arrest at the time and place and in the manner alleged by the prosecution, the adverse inference against the prosecution for not holding test identification when claimed by the accused, to such matters as the evaluation of mistakes in identification, delay in holding it, the opportunities for showing the accused or his photograph to the witness before identification, identification of things, of handwriting and finger-prints, of typing characteristics of firearms and ammunition, of bones and hair and other allied ballistic and medico-legal problems.

The whole text has been subjected to a close and careful scrutiny involving amongst other aspects, incorporation of up-to-date case-law, the deletion of cases overruled or redundant with more recent and elaborate case-law. The subject heading, the treatment of the subject, the case-law thereon have been so arranged and dealt with as to give a comprehensive comparative and critical insight into the subject with a copious Index for easy and quick reference. The treatment of finger-prints, handwriting and firearms in the previous edition has been replaced with a comprehensive study supplemented with photographic illustrations. The revising author hopes with confidence that lawyers, Judges and investigating officers will find in the present revised edition a lucid and comprehensive treatment, a practical approach, over all a major improvement, both qualitative and quantitative, upon the previous editions.

M. L. CHANDAK

25*th March*, 1978 *Advocate*

PREFACE TO THE THIRD EDITION

The title 'Law of Identification and Discovery' has proved popular and a third edition has been called for in a decade.

The third edition retains the features of the preceding ones. The exposition of the relevant law has been brought up-to-date, and as a result, the present edition contains about fifty additional pages. There are valuable Appendices. At the end is an Index, exhaustive and well-planned, enabling the busy reader to obtain quickly reference in any point of interest to him.

It is hoped that the third edition will continue to deserve the patronage of the Bench, the Bar and the public.

Ist October, 1966 V. MITTER

PREFACE TO THE SECOND EDITION

The evidence of identification figures a good deal in both civil and criminal cases, Identity of persons, living or dead, known or unknown, of things, of handwriting, of finger impressions and footprints, of photographs, of firearms, of blood marks, poisons, hair, etc., play their part in establishing the guilt or innocence of the accused and in proof or disproof of the case of the parties in civil matters. In this respect there is both an evidence of fact and an expert evidence. Closely related with identification is the subject of discovery, the former being a process applied to the latter. Identification and Discovery, therefore, form an important subject for independent study.

Realising the importance of the subject, the author ventured to place before the learned reader the first edition of the work some five years back. The quick recognition of the usefulness of the work not only by the Bench and the Bar but also by other sections of the concerned public has greatly encouraged the author to embark on this second edition.

The present edition has been thoroughly revised in the light of the recent judicial pronouncements of which there has been a fairly good crop during the intervening period. All obsolete matter has been weeded out. Judicial conflicts have been independently commented upon. The author has not spared to make his own suggestions wherever found necessary. The original lucid style of the commentary under suitable headings and sub-headings has been retained. The statutory provisions bearing on particular matters have been referred to and critically commented upon. A useful addition to the Appendices is the inclusion of certain provisions of the Evidence Act, 1872 (I of 1872) that have a direct bearing on the subjects discussed in the commentary.

The author hopes that the present edition will continue to earn the approbation of the discerning public.

10*th September*, 1961 V. MITTER

PREFACE TO THE FIRST EDITION

The book deals with two different subjects, Identification and Discovery, but the learned reader will appreciate that in actual practice both the subjects are closely inter-related. In fact, Discovery has no meaning unless there is proper Identification about it and hence the two subjects have been taken up together.

The present book is not a big volume, but the writing of it has given me much anxious thinking. The present-day mode of Identification, which is carried on by putting the accused in jail, and holding the Identification Parade, is nothing but farcical. The police have all opportunities to show up their man before the Indentification Parade is held, and they never fail to utilize the opportunities that come in their way. It is useless to expect honesty from the police in this respect and still the Courts in our country count by the number of correct identifications in basing their conviction of the accused. The Courts must be very strict in scrutinizing the evidence of identification, and particularly if a witness to identification has been proved false in one respect, he should not be at all believed or acted upon.

The discovery portion has been dealt with at length. My efforts have been to deal with the subject in a concise and understandable manner. Discovery is also a matter where the police plays its own game, and the Courts have to be vigilant and appreciative of the difficulties of the accused. There is no lack of case-law on Discovery, but the practical application of it is the thing that matters. The book has been moulded solely on that basis, and it is hoped the practical utility of it will be appreciated by the learned readers.

10*th November*, 1956 V. MITTER

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Law of Identification and Discovery

PART I
IDENTIFICATION

CHAPTER I
IDENTIFICATION

Meaning of Identification.—The term 'identification' means the proving that a person, subject or article before the Court is the very same that he or it is alleged, charged or reputed to be: and the word 'identity' may be termed as, to become the same; to establish the identity of; to make to be the same; to prove the same with something described, claimed or asserted. Identification is almost always a matter of opinion or belief.[1]

The evidence of identification figures a good deal in both criminal and civil matters. Identity of persons, living or dead, known or unknown, of things, of handwriting, of finger impressions and footprints of photographs, of firearms, of blood marks, poisons, hair, etc., play their part in establishing the guilt or innocence of the accused, and in proof or disproof of the case of the parties in civil matters. In this respect there is both an evidence of fact and an expert evidence. Evidence of fact consists of evidence of persons who have seen the object before, and who compare this object with the object at the trail. That is a question of one's belief, of one's memory, as if it were a fact within one's knowledge. The expert witness has to merely state his opinion on the point on which he is called upon to give his evidence. But he cannot go on and assert his mere opinion or belief as if it were a fact within his knowledge. In this respect an expert witness is in a different position from a direct witness of fact. The value of ordinary or non-expert oral evidence mainly rests on the credibility of the witness—his inclination or capacity for telling the truth; the value of expert evidence rests on the skill of the witness—the extent of his competency for forming a reliable opinion.[2]

So in identification we have two sorts of evidence, the evidence of fact and the expert evidence. One is a question of observance and the other of

1. Corpus Juris, Vol. 37, p. 237.
2. Emperor v. Sahdev, 5 Cr LJ 220 :

competency. Evidence of fact is a question of one's impression and the opportunity of forming any such impression. If one has known a person from before, the opportunity is all the time there, and the fact of recognition from former knowledge confines the question of identity merely to the credibility that may be attached to the evidence of the witness. But if it is a case of seeing a stranger, the fact of identity becomes a hazardous matter and it has been well said that even if the veracity of the witness is above all suspicion, the evidence of identity based on personal impression should be approached with considerable caution.[1] Much really depends upon the opportunity the witness had of forming his impression; and for how long the perception lasted and in what circumstances. The memory of the witness may be faulty. The tricks of the memory, its conscious and unconscious activity also warp the vision of the man. A witness may have been able to form his own impression about the object, but still if he were to compare that impression of his with others who too had seen it, his own impression will get mixed up with what others tell him, and so viable is the mind of man that in the end one can very well adopt other's impressions and consider that impression to have been truly formed and would swear about it in all earnestness. Again, calm minds view a thing better than emotionally stirred persons.[2] Dr Hans Gross, in his book on Criminal Investigation, relates an incident where he himself was present. It was the scene of an execution at which the executioner for one reason or another wore gloves. After the execution the author asked four officials who were present about the colour of the executioner's gloves, three replied respectively, black, grey, white, while the fourth stoutly maintained that the executioner wore no gloves at all. Yet all four were in close proximity to the scaffold; each replied without hesitation, and all four were perfectly confident that they made no mistake. Thus excitement, or fear or terror subvert the mind but there is another explanation also. The mind may be all the time riveted on the object or the incident that impresses one most, and thus a close detachment will follow in his observing other matters even though these happen simultaneously. Suppose a number of persons have forcibly got hold of a woman and are taking her away. The mind of the witness may be riveted on the woman herself, her plight at the moment, her shrieks, the way the men are dragging her away, and all the time the conscious mind may be revolving between all these matters. The thought may occur to the mind whether it should rescue the woman or not, the danger attached in attempting any such rescue and after all, the woman may be the lawfully wedded wife of one of such persons. As the mind revolves about such matters, and one remains in an indecisive mood, the men escape with the woman and get out of sight. If asked to identify any such persons later on, the witness may miserably fail in the attempt. His mind having been totally absorbed in the woman herself and her plight, the mind had no opportunity to form any impression about their identity. Again take the case of a person who has seen a man come out of a house and has looked at him just as one is in the habit of glancing at any passerby. If that man later on turns out to be the thief and the person who had seen him coming out of the house is asked to identify him, it is quite possible, rather probable, that he would fail in the attempt. Here although the fact was observed, the matter being of no significance at the time, the mind could very well fail to get the impression or get only a faint impression.

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1. Gajadhar v. Emperor, 1932 Oudh 99 : 9 OWN 32 : 33 Cr LJ 381 : 137 IC 79 : 7 Luck 552 ; Sukhveer Singh and others v. State of Rajasthan, 1978 Cr LR (Raj) 581 (586) : 1978 Raj LW 239 : 1978 WLN 291.
2. Sukhveer Singh and others, v. State of Rajasthan (Supra).

In the case of observance of fact we have also to take into account the capacity and the capability of the witness to observe the fact. His habits, his inclinations and his prejudices too cannot be ruled out. The question of eyesight is there; whether a witness has a normal eyesight or is short-sighted or longsighted. Some witnesses are colour-blind and others moon-blind. The nature of the man, how he reasons out the grasp of his senses or draws its conclusions from the way the things have appeared to him, all make a difference. An intelligent and a quick grasp will always be more reliable than the perception of a dull mind. Similarly, the grasp of an inquisitive or trained mind will make a difference. The grasp of a woman about an ornament is more sure than that of a man. It is the instinct in the woman or her natural bent of mind for such a thing that is responsible for such a difference. It is the interest that one feels for a sort of thing that helps the identification of it. If the mind does not feel interested in a certain thing, he cannot have the requisite appreciation of it and as such his perception of it will be less marked than that of a person who feels otherwise. The training of the mind too plays its roll in such matters. A person with an artistic bent of mind will readily pick up the distinguishing marks in a painting or a piece of sculpture and if asked to identify it later on will do it with an ease, but a person who has no such bent of mind or has no training for the same will easily forget what he had seen of a certain piece of art and will fail to identify it at a later occasion. These are thus all matters that make a difference and make the fact of observance so very unsure at times.

As, against this observance of fact and the factors involved, identification with the help of an expert evidence depends, as already stated, on the competency, both of the witness and the methods adopted. The impression that the finger-print or the footprint leaves behind, the examination of handwriting, of blood-marks, etc., all react to this question of competency. Here also the training of the mind and the learning of the man are matters that have their own value. Science is making a huge progress these days in every direction and naturally therefore the scientific aid to identification is on more sure lines today than it was thirty or even twenty years before. Finger-print is one science that is considered now to be absolute as an aid to identification, but of other expert aid, as handwriting, etc., much controversy still goes on about its true values and with that we have also to consider that the expert evidence suffers from one main drawback and that is the prejudices and the preconceived notions of the human mind. The expert witness, howsoever impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the party which calls him He is there to support the case of his own party and such is the nature of the human mind that the greater the opposition, the more grows the impulse to support one's views and thus the expert is unconsciously led to become a partisan. Prejudice, they say, feeds on the opposition that it meets, and it has also been said that experts are proverbially, though unwittingly, biased in favour of the party which calls them as well as ever ready to regard harmless facts as confirmation of preconceived theories. Human minds work in such a way that reasons can be multiplied both in favour as well as against a certain hypothesis and the expert is not immune from such weakness of the mind. When considering the expert evidence, the Courts have, therefore, to keep in mind the limitations of the expert evidence.

CHAPTER II

IDENTIFICATION, ITS OBJECT, DEFECTS AND PROCEDURE, ETC.

SYNOPSIS

1. Matters to be considered.— An honest witness who says, "The prisoner is the man who drove the car", whilst appearing to affirm a simple, clear and impressive proposition, is really asserting : (1) that he observed the

driver, (2) that the observation became impressed upon his mind, (3) that he still retains the original impression, (4) that such impression has not been affected, altered or replaced, by published portraits of the prisoner, and (5) that the resemblance between the original impression and the prisoner is sufficient to base a judgment, not of resemblance but of identity.

It therefore becomes necessary to pay attention to the following circumstances: (1) Whether the witness was a stranger to the driver of the car; (2) whether the driver had any special peculiarities which, at the time, impressed themselves upon the witness; (3) the length of time which elapsed when the witness first saw the prisoner and when he first described him or the time when he first identified him: (4) the description of the driver given by the witness before seeing the prisoner; and (5) the circumstances under which the prisoner was first seen and identified by the witness as the driver.[1]

The question of eyesight is there, whether a witness has a normal sight or is short-sighted or long-sighted. Some witnesses are colour blind and others moon-blind.[2] All these matters and more have to be considered when the case of a person hangs on the identification of a witness to whom that person is a complete stranger. If mistakes are possible in the recognition of a person whom one knows from before, there is no end to such mistakes when the identity of a stranger is involved. Of all evidence of fact, evidence about the identification of a stranger is perhaps the most elusive and the Courts are generally agreed that the evidence of identification of a stranger based on a personal impression should be approached with considerable caution.[3] The evaluation of identification evidence is perhaps one of the most difficult problems which confront a Judge when one remembers the extent of human fallibility and the fragility of memory and the tricks played by one's senses.[4] In *Din Dayal* v. *Emperor*,[5] it was held that at best identification evidence by itself is a very unsafe basis for conviction, and in *State of V. P.* v. *Munni Dhimar*,[6] it was held that so far as the identification of persons is concerned, it is a very weak type of evidence, the value of which is easily destroyed if there is any suspicion that the conduct of the investigating agency was not absolutely above board. Identifications made at night, during the occurence, such as dacoity, when blows are struck and people terrorized, are regarded generally, of very little value, often unreliable ,[7] and in a case in *Biram Sardar* v. *Emperor*,[8] their Lordships of the Bombay High Court held that experience shows that evidence of identification of those taking part in dacoities at night is apt to be unreliable facts may differ from case to case and the view so held cannot be made absolute. In a case before the Rajasthan High Court it was contended that when dacoity is committed and guns are fired by the dacoits, people become panicky and they cannot be expected to clearly identify the dacoits. It may be said that it depends on the circumstances of each case and the courage of individuals. It may be true in some cases that some people

1. Evatt and Metiernan, JJ., in Craig v. The King, 49 CLR 429 at p. 446 ; *see* also State v. Manka, 1960 MPLJ 299 : 1960 JLJ 356.
2. Sukhveer Singh and others, v. State of Rajasthan 1978 Cr LR(Raj) 581 (586) : 1978 Raj LW 239 : 1978 WLN 291.
3. *See* Ramzani v. Emperor, 1929 Sind 149 : 30 Cr LJ 456 ; Gajadhar v. Emperor, 1932 Oudh 99 : 33 Cr LJ 381 ; Emperor v. Maqbool Ahmad, 1932 Oudh 317 : 83 Cr LJ 920 ; Emperor v. Arjan. 1927 Cal 820 : 28 Cr LJ 874 ; Chanan Singh v. Emperor, 1933 Lah 299 : 35 Cr LJ 610; Sukhveer Singh and others v. State of Rajasthan 1978 Cr LR (Raj) 581 (586) : 1978 Raj LW 239 : 1978 WLN 291.
4. *In re* Kamraj, 1960 Mad 125.
5. 1924 Oudh 295 (2) : 25 Cr LJ 1125 : 31 IC 949.
6. 1954 VP 42 : 1954 Cr LJ 1819.
7. Emperor v. Arjan, 1927 Cal 820 : 28 Cr LJ 874 : Sukhveer Singh and others v. State of Rajasthan 1978 Cr LR (Raj) 581 (586) : 1978 Raj LW 239 : 1978 WNL 291.
8. 1941 Bom 146.