

NOTES AND COMMENTS

PROVINCIAE IUDEX (JUDGES, TEXTBOOKS AND EYEWITNESS IDENTIFICATIONS)

PAUL J TREDOUX

Research Student, Department of Public Law, University of Cape Town

COLIN G TREDOUX

*Junior Research Fellow and Research Student, Department of Psychology,
University of Cape Town*

1 *Introduction*

On automatic review, the Natal Provincial Division in *S v Ngcobo* 1986 (1) SA 905 (N) set aside the conviction of the accused on two counts of robbery. The charges arose out of two separate incidents in which a man had used a knife to subdue a passer-by, while two female accomplices had searched the victim's pockets for money. In each of these incidents the only evidence which incriminated the accused, who denied all knowledge of the incidents, was that of the victim, who claimed to be able to identify him. The court made it clear that it was extremely sceptical of the reliability of eyewitness identification testimony. Support for this attitude was found in an experiment reported in one of the leading texts on the topic, Elizabeth F Loftus's *Eyewitness Testimony* (Massachusetts: Harvard University Press 1981). It appears from the transcript of the judgment reported in the South African Law Reports that the experiment was considered by the court *mero motu*, without the benefit of expert evidence.

In this paper we contend that Didcott J (who delivered the judgment of the court) was not entitled to take cognizance of the results of the experiment without having had the benefit of expert evidence. This contention is based on the decision of the Appellate Division in *S v Collop* 1981 (1) SA 150 (A). We then proceed to demonstrate that *S v Ngcobo* clearly illustrates the wisdom of the approach to textbook evidence stipulated by *Collop*: the experiment in question is so fraught with difficulties that it cannot seriously be cited in support of the view that eyewitness testimony is unreliable. This we do by critically examining the experiment from a psychological perspective.

2 *Textbook evidence in South African law*

The status of textbook evidence in South African law was clearly spelt out by the Appellate Division in *S v Collop* 1981 (1) SA 150 (A):

'Although an expert witness may refer to textbooks and a doctor to medical treatises to refresh his memory, or to correct or confirm his opinion, such books are not evidence per se . . . ' (at 167B–C, per Diemont JA).

The opinions of academic writers are not admissible in their own right: they may be adopted by an expert witness and in this way become part of his testimony; but if the expert does not agree with a passage from a textbook which has been put to him, there is no evidence before the court on the matter in question (*R v Mofokeng & another* 1928 AD 132).

On a strict reading of the law, the court in *Ngcobo* should not have referred to Loftus's textbook. Perhaps it is arguable that the passage which Didcott J referred to was so convincing that any reasonable expert would have associated himself with it, and the court was entitled to consider it out of considerations of fairness to the accused. It is to this issue that we now turn.

3 *The experiment*

The experiment in question was reported by Elizabeth F Loftus in *Eyewitness Testimony*, but it was conducted by Robert Buckhout and its results were published in *Social Action and the Law* 1975 vol 2 and also in an article entitled 'Nearly 2,000 Witnesses Can be Wrong' in (1980) 16 (4) *Bulletin of the Psychonomic Society* 307–10. In the interest of accuracy we shall rely on Buckhout's account of the experiment—which does not quite coincide with Loftus's.

WNBC-TV in New York devoted a special five-minute segment of a news broadcast on 19 December 1974 to the problems of eyewitness testimony and recognition testing. A film of a staged crime, which involved a young man with a moustache knocking a young woman down and grabbing her purse before running off, was televised towards the end of the programme. Some two minutes later, a film of a line-up containing six men, each holding a number, was shown. The perpetrator was in position 2, sans moustache. The identification parade consisted of an overview of the whole line-up, and a close-up of each man. The members of the audience were asked to identify the perpetrator, and were given a number to dial with their answer: if they were convinced that the offender was not in the line-up, they were to say so.

The results of the experiment are summarized in the following table. The percentages refer to the percentage of subjects who chose the line-up member standing in the position indicated in the left column.

<i>Line-up position:</i>	<i>Percentage</i>
1	14,7
2 (Correct answer)	14,1
3	10,1
4	13,0
5	14,3
6	6,6
Absent from line-up	25,0

The results of the experiment show that witnesses were unable in general to identify the offender correctly. That 14,1 per cent of the witnesses did is not an exception to this statement, as this proportion of correct identifications is equivalent to what would be expected by chance. (With respect, Didcott J makes the mistaken observation that this proportion is less than would be expected at the level of chance, which he is accredited in the reported case as estimating at 14,3 per cent—the statistical reasoning here is fallacious and deserves no comment.)

4 *From the psychologist's vantage point*

In this section of the paper we provide an analysis of the experiment cited by Didcott J. The analysis, we suggest, shows not only that the experiment does not support the conclusions that Didcott J draws from it, but also that expert evidence—which was required for admissibility in terms of the rule laid down in *S v Collop* 1981 (1) SA 150 (A)—would have made this quite clear to the court.

4.1 *Loftus's account*

As we have already pointed out, Loftus's account differs from Buckhout's in several respects. In psychological research the dangers attendant upon failing to consult primary sources are well known and are aptly demonstrated to us in this particular case by Didcott J's pronouncement (following Loftus) that the experiment 'illustrate[s] most vividly how grave and pervasive the danger . . . [of mistaken identification is] . . . , how fallible human powers of observation and recollection [are]' (at 906).

Buckhout, the psychologist who planned and conducted the experiment, however, attaches little significance to the level of misidentification in the experiment. He says:

'There are obvious limitations to the study. . . . We therefore do not make too much of the overall poor recognition performance of the witnesses. . . .' (at 309 of his article).

Loftus's account of the experiment is technically incorrect in several details, and her interpretation of the implications that the experiment has for legal matters differs radically from Buckhout's. This incongruency is not surprising to anyone familiar with the eyewitness research literature, because Loftus has been pulled up on

several occasions in recent years within the discipline for similar 'oversights' and unsupportable interpretations of eyewitness research. Rogers W Elliott remonstrates with Loftus on just this point ('On the Reliability of Eyewitness Testimony: A Retrospective Review' (1985) 57 *Psychological Reports* 219–26), as do Michael McCloskey and Howard Egeth ('Eyewitness Identification: What Can a Psychologist Tell a Jury?' (1983) 38 *American Psychologist* 550–63).

Quite clearly Loftus makes more of the results of the experiment than Buckhout did. By relying on Loftus's interpretation, the court in *S v Ngcobo* makes the same errors—albeit inadvertently. In the next section of this paper we shall substantiate Buckhout's evaluation of the experiment and draw attention to weaknesses of the experiment that make its application to legal matters questionable.

4.2 *Critical evaluation*

When psychologists evaluate experiments they usually take two types of factors into consideration: factors which affect the *internal validity* of the experiment (that is, features of the experimental procedure or structure that render the results produced unreliable or artefactual), and factors which affect the *external validity* of the experiment (that is, which affect its applicability outside of the confines of the (laboratory) situation that it was produced in). We shall consider the experiment in question in terms of both sets of criteria.

4.2.1 *Internal validity*

Buckhout, as we indicated above, draws attention to a number of internal weaknesses of the experiment; particularly the (unavoidably) poor quality of the visual representation (a television screen image) and the biased sample of mock witnesses used in the study (that is, only a small number of the total number of witnesses responded, and that they responded clearly distinguishes them from the rest of the witnesses—psychologists have long known that volunteer subjects are prone to an inclination to confirm the hypothesis under investigation (see Martin Orne 'On the Social Psychology of the Psychological Experiment (1962) 17 *American Psychologist* 776–83)).

A more fundamental problem, however, is the failure of the experiment to replicate its results satisfactorily. Buckhout reports that when the same recorded scenario was shown to a film audience, but where the line-up was shown *twice*, subjects correctly identified the perpetrator at a level both greater than would be expected by chance and greater than was recorded in the television presentation. A minor methodological alteration (and an important one: witnesses have all the time in the world to point out the offender in real identification parades) thus substantially affected the results of the experiment.

In experimental psychology, failure to replicate findings is said to show that the findings of the experiment are unreliable, and that they consequently have no claim on any kind of validity, inside or outside the experimental setting—the results are effectively useless. This fundamental failing of Buckhout's experiment would not have escaped the notice of an expert witness, which again underscores the necessity for informed criticism before facts attested to by the authors of textbooks are admitted as evidence.

4.2.2 *External validity*

Didcott J clearly regarded the high rate of identification of innocent foils by the witnesses as alarming: 'the results of the experiment were chilling' (at 907). In experimental psychology, though, the production of a 'high' or 'low' error rate by an experiment is always considered alongside a number of important methodological and theoretical considerations: a high error rate cannot be considered on its own, as a single atomic fact.

The first point which should be noted is the fact that error rates in eyewitness experiments can be varied by the experimenter. Error rates can be as high or as low as the experimenter wants them to be. 'Accuracy' often needs to be treated by experimenters as a variable that is to be manipulated in the experiment, and the conditions under which the witnessing occurs are thus often purposefully manipulated to produce error rates of a particular magnitude. Thus, in an experiment reported by R C Lindsay, G L Wells and C Rumpel in 'Can People Detect Eyewitness Identification Accuracy Within and Across Situations' (1981) 66 *Journal of Applied Psychology* 79–89, viewing conditions were altered so that three experimental conditions of varying accuracy were created (74 per cent, 50 per cent, 33 per cent) in order to estimate what effects these rates would have on the extent to which jury members believe witnesses.

Not only do eyewitness experiments manipulate the rate of identification accuracy, but the point has frequently been made that eyewitness experiments purposefully produce low accuracy rates (McCloskey & Egeth *op cit*). On the one hand, this is a technical necessity, because in order to assess what effects variables of interest (for example, illumination of the event, relative violence of the event) have on accuracy rates, substantial variation in the accuracy rate of the witnesses is required. (If all witnesses were accurate, then it would be senseless to ask whether the illumination of the event affected recognition ability.) On the other hand, psychologists may wish to demonstrate to their colleagues and to legal professionals that eyewitness reports are inherently unreliable and that expert evidence (from psychologists) is required legal assistance in identification cases, and thus self-fulfil the hypothesis that identification accuracy is inherently low by structuring the experiment so that low accuracy

rates are obtained. Buckhout's experiment may well be an example of this type of situation. The experiment was staged in front of a television audience during a presentation that discussed the problems of eyewitness identification, and there was thus an implicit demand that the experiment yield a low accuracy rate: he would certainly have looked silly, and the false impression would have been created that eyewitness testimony is unproblematic, if the witnesses had been accurate. Support for this can be found in the conspicuous difficulty of the witnessing task: the manner in which the offender was dressed (in a leather jacket, so as to conceal his upper body build; with a hat to cover his hair; and with a moustache to disguise his face). Furthermore, as if the task was not difficult enough as it was, the viewers were allowed only a fleeting glimpse of the perpetrator (one second or 3,5 seconds, depending on which account you prefer). The significance of the fact that the line-up was shown to witnesses only once, for a very brief period, has already been discussed. Although the low accuracy rate produced in Buckhout's experiment cannot be directly attributed to the demand situation that the experiment constituted, the factors outlined above can hardly be regarded as conducive to witness accuracy, and this must affect the credibility of the experiment adversely.

The point really is that the low rate of correct identifications in eyewitness experiments cannot be taken to show an inherent feature of eyewitness reports (which is what Didcott J takes it to show), for the rate of identification may be manipulated as the experimenter wishes, often for good experimental reasons.

Didcott J uses the results of Buckhout's experiment to support the proposition that eyewitness identifications encountered by the court are inherently unreliable. But a blanket proposition of this form is untenable. There need be nothing common to different eyewitness situations, except that they involve the report of someone who claims to have perceived the event of interest to the court with his own senses. Yet a legion of factors affects the ability of witnesses to perceive and recognize accurately. The opportunity that the witness had for an unobstructed observation, and the illumination of the event in question, are two of the factors that the courts and psychological research have both identified. That so many factors affect witnessing ability renders the task of drawing conclusions from a particular study to apply to all real-world eyewitness cases impossible. The best that can be done is to estimate the extent to which the facts of a particular eyewitness event may affect a witness's ability in the light of similar experimental scenarios. Even this is unsatisfactory from a scientific point of view, as small differences between experimental and real-life scenarios may render the scenarios incomparable. Indeed, the whole prospect of estimating the extent to which experimental findings apply to particular real-life scenarios is

unsatisfactory. This point is made by Gary Wells in his seminal and frequently cited paper, 'Applied Eyewitness Testimony Research: System Variables and Estimator Variables' (1978) 36 *Journal of Personality and Social Psychology* 1546–57, and he suggests that psychological research could be used much more fruitfully to examine procedural issues (for example, identification parade procedures).

5 Conclusion

From this analysis we can conclude that Buckhout's experiment suffers from weaknesses that render both its internal and external validity questionable. The failure of the experiment to reproduce its results satisfactorily renders its internal validity unacceptable, and the questionable generalizability of the results makes its application to situations that the court may face dubious. It is our opinion that these weaknesses are obvious enough to have drawn comment from an expert witness, had such a witness testified in the case.

In a recent article published in this journal, 'Eyewitness Evidence and Psychology' (1987) 104 *SALJ* 297, by A St Q Skeen, the author discusses *Ngcobo* in the following terms:

'Leaving aside the question whether Didcott J was entitled to take note of the findings of the experiment without hearing expert evidence, we get from the experiment a glimpse of how properly conducted experiments with a high internal validity may, in respect of psychological matters pertaining to eyewitness testimony, assist judicial determinations' (at 299).

We submit that this assessment of the decision of the court in *S v Ngcobo* 1986 (1) SA 905 (N) is at best only partially correct. (From the psychological discussion above, it's clearly wrong on one count: it's not internal validity that makes experiments applicable to cases, but external validity.) It is not possible to overlook the inadmissibility of the experiment any more than it is possible to overlook its deficiencies.

This case graphically illustrates the pitfalls inherent in textbook evidence, and emphasizes the necessity for favourable expert evidence before the writings of academics are admitted as evidence.

USURPATION OF TITLE—A NOTE ON VOET COMMENTARIUS AD PANDECTAS 41.2.13

LAURETTE BARNARD
Senior Lecturer in Law, University of South Africa

It is well known that the distinction between the various categories of persons holding or possessing property may, in certain instances, be of considerable significance. In this regard one need merely think