The Impact of Social Media on Identification Procedures

Simon Gledhill & Gemma Noble look at a number of cases considered in the recent judgment of Phillips and Phillips [2020] EWCA Crim 126

As the use of social media becomes ever more common in criminal cases involving identification procedures, we examine the recent case of R v Phillips and Phillips (31st January 2020). The judgment considers the impact of an informal social media recognition of a suspect occurring prior to completion of a formal identification procedure governed by Code D of the PACE Codes of Practice.

The Court of Appeal acknowledged that "the particular problems posed by prior identifications on social media is that at a subsequent formal identification parade the witness will identify the person in the photograph, to which the witness may have been directed, and not the person who committed the relevant offence. The risk is heightened where a person is directed to a photograph. This is because the witness may be influenced to believe that the person in the photograph is the person who committed the offence, rather like the effect of seeing a person in the dock and being asked whether they recognise the person who committed the offence in court."

Police and Criminal Evidence Act 1984 Codes of Practice

Paragraph 3F of Code D itself states: *"The admissibility and value of identification evidence obtained when carrying out the procedure under paragraph 3.2 may be compromised if: (a) before a person is identified, the eye-witness attention is specifically drawn to that person; or (b) the suspect's identity becomes known before the procedure."*

An overview of the issue in the Court of Appeal

This issue has come before the Court of Appeal in 3 different ways since 2011:

- ***R v McCullogh*** [2009] EWCA Crim 2179 (20th May 2011) where an appeal was brought by the defence on the basis that identification evidence should have been excluded pursuant to section 78 PACE,
- ***R v Alexander [2013] 1 Cr.App.R. 26*** where an appeal was brought against a refusal by the trial judge to stay the prosecution as an abuse of the Court's process, and;
- ***R v LT [2019] 4 WLR 51*** where an appeal was brought by the prosecution against a decision to exclude identification evidence (treated as a terminatory ruling)

In all of these cases the Court of Appeal have been very clear that a jury is best placed to decide the weight to be attached to identification evidence even where the Code D process is, on the face of it, inherently undermined by an informal social media identification. However, the directions that a trial judge gives to a jury where that occurs are critical as to whether any conviction that follows is safe.

R v McCullogh [2009] EWCA Crim 2179

This was a robbery case where the suspect was initially identified by Police officers viewing footage of a location near to the offence but not showing the offence itself. The witness in that case was informed by a third party that the offence was the kind that would be committed by the Defendant. The Defendant and witness did not know one another, but the comment by the third party caused the witness to find the Defendant on Facebook and identify him as his attacker. The witness informed the police of this and then went on to identify the Defendant at an identification procedure. The witness refused to reveal the identity of the third party or the Facebook account which had been used to find the Defendant's photograph.

As such, the photograph or photographs used to identify the Defendant initially were not before the jury. The Court of Appeal described the social media identification as: *"far from ideal."* However, the Court of Appeal ruled that this was a matter to be considered in deciding what weight should be attached to the identification. This included a consideration of the impact on the weight to be attached to the evidence as a consequence of the witness's unwillingness to reveal anything further about the social media identification. These were not matters that were relevant to admissibility.

R v Alexander [2013] 1 Cr.App.R. 26

The defence did not argue for the exclusion of identification evidence as a consequence of a social media identification but did argue for a stay of the case on the basis the police had failed to adequately investigate that social media identification. The case concerned a robbery and a witness who undertook, of his own volition, research on social media to try and identify his attackers. He made identifications from photographs found on social media but then waited a month before informing the police of his own research. The police took a statement from witness about his social media identification and were shown the photographs used to make the identification, however, the officers did not retain any notes or copies of the photographs and as a consequence the photographs were not available for the trial. The trial Judge and the Court of Appeal were very critical of the officer's conduct and accepted there had been serious failings in the investigation.

The Court of Appeal observed in cases where there has been a social media identification: *"it is incumbent upon the police and the prosecutor to take steps to obtain, in as much detail as possible, evidence in relation to the initial identification. For example, it would be prudent to obtain the available images that were looked at and a statement in relation to what happened"* and recommended a guideline be drafted for this purpose. However, the Court did not find that this amounted to an abuse of the Court's process; nor did the Court accept criticisms of the directions given to the jury by the trial judge. The defence argued three specific directions should have been given in these circumstances:

- The Judge should have directed that an identification on social media was quite different from an identification through a VIPER or other identification parade. It was always possible in an informal identification that things were said or done so that the identification was not one which was unprompted by the witness but one where others had helped the witness reach the identification.
- Secondly, it was suggested that the Judge should have warned the jury that the photographs on social media that the witness had seen might have displayed the defendant in a light that was unfavourable, and having seen him in an unfavourable pose, that had triggered his recollection and therefore he had reached an identification on the wrong basis.
- Third, the Judge should have explicitly warned the jury that there was the enormous disadvantage that they did not know which photograph had been the first the witness had seen.

The Court of Appeal found there was no need to give the first of these directions as there was no sufficient evidential basis to suggest anything was said at the time of the social media identification. Insofar as the second direction is concerned, that the Judge was correct not to highlight what might have been material prejudicial to the Defendant, and insofar as the third direction was concerned, it was unnecessary as the jury were aware they did not have the photograph. The trial Judge had directed the jury as to the disadvantage the Defendants had been caused by the absence of evidence relating to the social media identification and that was considered to be sufficient.

R v LT [2019] 4 WLR 51

This case considered the first of the directions sought in Alexander. In this case, the trial judge did rule that both the formal identification procedure and the preceding social media identification were inadmissible. The primary basis for this decision was a finding, following a voir dire, of a significant risk the social media identification had been influenced by third parties, who had shown an image of the Defendant found on social media to the witness. Those third parties had refused to co-operate with the investigation; however, the social media images of the Defendant were available to the jury to view.
The Court of Appeal overturned the ruling on the basis there was an insufficient evidential basis for the Judge to have reached the conclusion that she did. However, in relation to a direction to be given if comments are made by third parties at the time of a social media identification, the Court in LT stated it was implicit in the ruling in Alexander that such a direction should be given if there an evidential basis to do so. The Court ruled that such a direction would have addressed the concern in the present case that led to the Judge incorrectly excluding the evidence.

Considerations in Phillips and Phillips [2020] EWCA Crim 126

All of these judgments were referred to in the ruling given in January 2020 in the case of *Phillips and Phillips*. This appeal concerned an unsuccessful section 78 argument of the type raised in the case of McCullough. In this case, which concerned a stabbing during a fight outside of a public house, 3 eyewitnesses to the fight were all shown a social media image of the Defendant by a third party before attending formal identification procedures. The trial judge, before each of the eye witnesses had completed their evidence, asked them specifically to confirm if the person they identified in the identification procedure was the man they had seen at the time of the stabbing or simply the man they had seen in the social media image and went on to refer to those answers in his summing up to the jury. All three gave evidence the man they identified was the man they had seen at the time of the stabbing.
The Court of Appeal emphasised that it is important where evidence of social media identification is given to a jury, they must be provided with directions that identify the weakness in the identification, and the specific weakness caused by the social media identification; i.e. that the identification may simply be of the person seen on social media rather than the actual offender.

Practical considerations

The following principles can therefore be derived from these cases when a social media identification has taken place:

1) There is a particular importance in the police obtaining as much evidence as is possible in relation to the initial social media identification;

2) That social media identifications are admissible, but a jury should have as much evidence in relation to them as is possible;

3) Careful directions will need to be given to the jury about the specific weakness that is caused by a social media identification being made prior to a formal identification procedure; and

4) Where appropriate, a separate direction will be needed where a social media identification may have been influenced by comments made by a third party.

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Government sets its sights on the Gambling Industry

By Richard Littler QC and Ian Whitehurst
barristers at Exchange Chambers.

The gambling industry is seen as an easy target for the Government as it looks to raise funds for HM Treasury in the aftermath of COVID-19.
New measures could see regulator base fines on a company's turnover.

Commentary from Richard Littler QC and Ian Whitehurst:

The political narrative in the United Kingdom continues to be set firmly against the gambling industry which has once more been illustrated with the imposition of a series of regulatory fines imposed by the Gambling Commission against Ladbrokes Coral (£5.9 million), Betway (£11.6 million) and most recently against Caesars Entertainment (£13 million).

The principal causes behind the proactive regulatory interventions are based in part on societal concerns relating to the perceived adverse impact of gambling on our society, in particular the impact on the more vulnerable sections as well as the potential for organised crime groups [OCGs] to launder the proceeds of criminal activity both nationally and internationally due to insufficient anti money laundering regulations being in place.

The latter concern can be demonstrated by an example from the criminal courts where one leading member of an OCG involved in the supply of £30 million pounds worth of cocaine laundered a total of £250,000 through two gambling organisations before he was banned from using their online services.

These present political concerns reflect the stated licensing objectives of the Commission which are enshrined in statute in the Gambling Act 2005 and which can be summarised as follows:

- preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime
- ensuring that gambling is conducted in a fair and open way
- protecting children and other vulnerable people from being harmed or exploited by gambling

The obvious point to state is that if these were identified