

C O U R T D E C I S I O N S

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EYEWITNESS IDENTIFICATION EVIDENCE: PHOTO LINEUPS — COMMENTARY ON THE POLISH SUPREME COURT RULING OF 14 MARCH 2019, V KK 11/19 (APPROVING)

Thesis 1: A lineup is a procedure of a dual nature – forensic and legal. Hence, its probative value should be assessed with due consideration of the procedural law provisions and – what seems of even greater importance – established forensic as well as psychological knowledge.

Thesis 2: There should be no doubt that, in accordance with the principle *lege non distinguente*, the provisions of Article 173 of the Polish Code of Criminal Procedure (hereinafter: CCP) applies to both types of lineups – *i.e.* live lineups and photo lineups – however, the nature of the latter requires a slightly different, a bit more flexible interpretation of the said provisions.

Thesis 3: Neither § 6(1) of the Polish regulation on lineups nor any other binding act prohibits presenting photographs of suspects which might be colloquially described as ‘old ones’. The wording of the said provision focuses only on ensuring that the appearance of the suspect in the photograph does not differ from the appearance of that person at the time of the alleged offence. If this condition is met, nothing prevents police officers from presenting the suspect’s photo taken even well before the incident underlying the case. Nevertheless, it appears that such a practice should be applied as a last resort because of the natural processes that take place in the human body and result in changes in appearance – a photograph taken long enough ago might not accurately reflect how the person looks now, increasing the possibility of eyewitness identification errors.

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Thesis 4: There is no automatic mechanism between an improperly conducted lineup and exclusion of eyewitness identification evidence as inadmissible at trial – any shortcomings of the lineup procedure should, however, be thoroughly analysed by the court in the context of the directives of Article 7 of the Polish CCP.

In the ruling under discussion, the Supreme Court² dealt with some of the problematic aspects of the Polish photo lineup identification procedure. The position expressed by the Supreme Court in the ruling, in general, does not raise objections and deserves approval. It seems reasonable, however, to make a few relevant remarks on the issue of assessing the probative value of eyewitness identification evidence. It is a well-acknowledged fact that improperly conducted photo lineups (also known as photo arrays) and live lineups³ are infamously one of the major factors contributing to miscarriages of justice⁴. For this reason, the findings of legal as well as psychological research concerning lineup procedures should be of particular interest to both scholars and practitioners of the judiciary, the prosecution and law enforcement agencies. The commentary additionally briefly discusses the most important of them.

Facts of the case

The District Court in P. found M.P. guilty of two offenses under Article 278(1) in connection with Article 91(1) of the Polish Criminal Code⁵ (theft). Among the most incriminating pieces of evidence against M.P. was the fact that during the pretrial photo lineup, two victims separately picked out her photograph (*i.e.*, the mugshot taken *n.b.* 12 years before the incident underlying the case). M.P. appealed against that judgment on the grounds that a serious error had been committed in assessing the photo lineup identification evidence. The court of appeal, however, upheld the first-instance judgment. M.P. then lodged a cassation appeal to the Supreme

² Ruling of the Supreme Court of 14 March 2019, V KK 11/19, LEX No 2634075.

³ The research regarding lineups conducted in Poland has shown that, unfortunately, most of them suffer from a number of shortcomings – for a discussion and analysis of this, see: Wójcikiewicz J, Kryminalistyczna problematyka okazania osób. Warsaw, 1988, pp. 184–204; Gruza E, Okazanie. Problematyka kryminalistyczna. Toruń, 1995, pp. 149–181.

⁴ See: Wójcikiewicz J, Temida nad mikroskopem. Toruń, 2009, p. 226; Turvey B.E, Cooley C.M, Miscarriages of Justice. Actual Innocence, Forensic Evidence, and the Law. Oxford, 2014, p. 20; Findley K.A, Adversarial Inquisitions: Rethinking the Search for the Truth. *New York Law School Law Review*, 2011/12, Vol. 56, p. 919; Norris R.J *et al.*, Preventing Wrongful Convictions: An Analysis of State Investigation Reforms. *Criminal Justice Policy Review*. 2019, Vol. 30 (4), p. 600.

⁵ Act of 6 June 1997 – The Criminal Code, consolidated text, Dz.U. [Journal of Laws] of 2019, item 1950 as amended.

Court, alleging a violation of the procedural provisions that affected the content of the judgment, namely:

1. Article 78 in connection with Article 45(1) of the Constitution of Poland⁶ in connection with Article 433(1 and 2) of the⁷ due to the lack of a thorough examination of the case within the limits of the appeal and the objections put forward. The applicant claimed that the appellate court had found that two victims had undoubtedly identified M.P. after having been presented two of her photographs – an old one, *i.e.*, taken 12 years before the event underlying the case and a current one, which, in the opinion of the appellate court, strengthened the conviction that the identification had been certain and unambiguous – while the up-to-date photo of M.P. had not been shown to the victims at all (although it had been on file);
2. § 6(1) of the Regulation of the Minister of Justice of 2 June 2003 on the technical conditions for the performance of the lineups (hereinafter ‘the regulation on lineups’)⁸ by the unfounded statement that its provisions are not applicable to photo lineups and, as a result, cannot be used as a model for the appeal control. In the applicant’s view, that had resulted in the recognition of the legality of the presentation of the photograph taken 12 years before the event underlying the case, in which M.P.’s facial appearance was significantly different from her facial appearance at the time covered by the indictment.

While analysing the above, it is difficult not to notice that the applicant’s intention was to prove that the photo lineup was improperly conducted – *i.e.*, contrary to both the legal requirements and the basic principles of forensic science – and therefore its outcome should be excluded from the evidence. Nonetheless, the Supreme Court rejected the applicant’s arguments and dismissed the cassation appeal as being manifestly unfounded.

Photo lineup as a complex procedure of a dual nature — forensic and legal

The basic purpose of a lineup in criminal investigation is to gather evidence regarding whether the suspect in the lineup is the actual perpetrator⁹. It can be simplistically described as a process whereby the witness compares the presented lineup members to a memorial image of a

⁶ The Constitution of the Republic of Poland of 2 April 1997, Dz.U. No. 78, item 483, Dz.U., 1997, No. 78, item 483 as amended.

⁷ Act of 6 June 1997 – the Code of Criminal Procedure, consolidated text, Dz.U., 2020, item 30 as amended.

⁸ Regulation of the Minister of Justice of 2 June 2003 on the technical conditions for the performance of lineups, Dz.U., 2003, No. 104, item 981.

⁹ Lindsay R.C.L, Ross D.F, Read J.D, Togli M.P (Eds), *The Handbook of Eye-witness Psychology: Volume II: Memory of People*. New York, 2014, p. 220.

previously viewed stimulus (*i.e.*, the perpetrator)¹⁰. Bearing this definition in mind, it seems clear that a lineup is actually a procedure of a dual nature – forensic and legal¹¹. Hence, its probative value should each time be assessed both from the perspective of forensic science and procedural regulations – in the case of the Polish law, provisions of Article 173 of the CCP are crucial in this respect. It is worth noting that, according to the said article, a presentation¹² is a special form of questioning in the Polish legal system¹³. The issue in question is also the main subject of the aforementioned regulation on lineups as well as – comparably important from a practical standpoint – § 84–86 of the guidelines No. 3 of the Police Commander in Chief of 30 August 2017 on the performance of certain investigative activities by police officers¹⁴ (hereinafter ‘guidelines No. 3’).

In the commented ruling, the Supreme Court stated that: *‘The display of the photo array was necessary to rightly direct the proceedings, because the perpetrators left the crime scene. [...] Presenting photographs to eyewitnesses is one of the methods of establishing the perpetrator’s identity. It is useful as long as it is not possible to organise a live lineup, and aims to narrow down the list of possible suspects. Showing a photograph of the suspect may be justified, inter alia, by the adopted investigative tactics, especially when he/she is in hiding’*. Formulating the above statement, consistent with the past case law¹⁵, the Supreme Court emphasised the fact that the photo array identification procedure, apart from its evidentiary

¹⁰ Valentine T, Davis J.P (Eds), *Forensic Facial Identification: Theory and Practice of Identification from Eyewitnesses, Composites and CCTV*. Chichester, West Sussex 2015, p. 193.

¹¹ See: Gruza E, Okazanie..., *op.cit.*, p. 9; ruling of the Supreme Court of 12 August 2005, IV KK 117/05, OSNKW 2006, No. 3, item 25; the judgement of the Court of Appeals in Białystok of 17 September 2015, II AKa 147/15, LEX No. 1934430.

¹² Presentation (pol. ‘okazanie’) is the Polish legal term for lineups; it seems to be slightly broader than its English counterpart.

¹³ Despite the unambiguous wording of Article 173(1) of the CCP in the subject matter, its interpretation raises disputes – for more on this, see: Gaberle A, *Dowody w sądowym procesie karnym. Teoria i praktyka*. Warsaw, 2010, p. 163; classification of lineups as a special form of questioning in the CCP is the subject of criticism in the forensic literature – see: Wójcikiewicz J, *Ekspertyza okazania*, [in:] Kała M, Wilk D, Wójcikiewicz J (Eds), *Ekspertyza sądowa. Zagadnienia wybrane*. Warsaw, 2017, p. 958.

¹⁴ Guidelines No. 3 of the National Police Chief of 30 August 2017 on the performance of certain investigative activities by police officers, Dz.U. of the National Police Headquarters of 2017, item 59.

¹⁵ See:, *inter alia*, the judgement of the Court of Appeals in Cracow of 12 July 2002, II AKa 124/02, LEX No. 57035; ruling of the Supreme Court of 4 May 2005, II KK 473/04, LEX No. 149649; ruling of the Supreme Court of 12 August 2005, IV KK 117/05, OSNKW 2006, No 3, item. 25; the judgement of the Court of Appeals in Cracow of 25 October 2007, II AKa 111/07, LEX No. 360137; the judgement of the Supreme Court of 10 July 2008, II KK 26/08, LEX No. 449027; the judgement of the Court of Appeals in Katowice of 26 October 2012, II AKa 415/12, LEX No. 1285048.

significance, also has investigative significance¹⁶ and is generally related to the initial stage of the criminal proceedings (see § 85 of guidelines No. 3). There should be no doubt that, in accordance with the principle *lege non distinguente*, the provisions of Article 173 of the CCP applies to both types of lineups – *i.e.* live lineups and photo lineups – however, the nature of the latter requires a slightly different, a bit more flexible interpretation of the said provisions. Thus, a photo lineup ought to be conducted in a way precluding suggestion [see Article 173(1) of the CCP], be organised in a way that the photo of the suspect is placed among the photos of at least three other look-alike individuals [see Article 173(3) of the CCP] and be consistent with further, more specific requirements which derive from the regulation on lineups, including – as was rightly noticed by the Supreme Court – the ones set out in § 6(1) of the said regulation. It must be highlighted that, although the purely linguistic interpretation of the discussed provision (*‘the authority conducting the identification procedure should ensure that the appearance of the person presented does not differ from their appearance during the event which is the subject of the proceedings’*) might, at first sight, suggest that it concerns only a presentation of a person in the strict sense of the distinction used in Article 173(1) of the CCP (*i.e.* live lineup), its purposive interpretation leaves no doubt that the provision applies to photo lineups as well. Presentation of a photograph, as was once pointed out by Wincenty Grzeszczyk, after all, is an activity aimed at identifying the person shown in it, not at identifying the object in the form of a photograph *per se*¹⁷.

It should also be noted that neither § 6(1) of the Polish regulation on lineups nor any other binding act prohibits presenting photographs of suspects which might be colloquially described as ‘old ones’. The wording of the said provision focuses only on ensuring that the appearance of the suspect in the photograph does not differ from the appearance of that person at the time of the alleged offence. If this condition is met, nothing prevents police officers from presenting the suspect’s photo taken even well before the incident underlying the case (*e.g.* 12 years before the event, as in the case of M.P.). Nevertheless, it appears that such a practice should be applied as a last resort because of the natural processes that take place in the human

¹⁶ Following the definition by T. Hanausek, detection should be understood as ‘all activities (search, disclosure, identification) of law enforcement agencies aimed at disclosing an incident identified as a criminal offence at a given stage of proceedings, and at obtaining information enabling a hypothesis to be formed regarding the person remaining in a legally relevant causal relationship with this incident, followed by the determination of data concerning that person [...] and as a result this person’s detention, and the collection of preliminary materials that substantiate the hypothesis of this person’s perpetration to an extent that justifies the commencement of proving’ – Hanausek T, *Zarys kryminalistycznej teorii wykrywania. Część I. Pojęcie i przedmiot wykrywania sprawców przestępstw*. Warsaw, 1978, p. 45.

¹⁷ Grzeszczyk W, *Glosa do postanowienia SN z dnia 12 sierpnia 2005, IV KK 117/05. Orzecznictwo Sądów Polskich*, 2006, No. 11, item 129.

body and result in changes in appearance. These changes, depending on various factors, e.g. one's age, may be noticeable in varying degrees (for instance, a child's face generally changes much faster than a face of an adult), but they affect everyone. As a consequence, a photograph taken long enough ago might not accurately reflect what the person looks like now, increasing the possibility of eyewitness identification errors. Fortunately, this issue is rationally addressed by § 85(5) of guidelines No. 3, which states that a photo array should contain a photograph of the suspect taken around the time when the witness is believed to have seen the perpetrator. It is worthy of note that, according to recent studies, photos of the suspect should not be more than a year old¹⁸, although this is only a general guideline which may be difficult or even impossible to fulfill in many cases. On the whole, it seems reasonable to argue that the less up-to-date the photo of the suspect, the more carefully the court should assess the identification evidence. The courts adjudicating in M.P.'s case seem to have successfully tackled this task by thoroughly analyzing facial features of M.P. Another thing is that the content of the commented ruling is, unfortunately, insufficient to determine whether the more current photo of M.P. was indeed on file before presenting the photo array to the witnesses. If it was, then the presentation of M.P.'s twelve-year-old photo instead of the up-to-date one should be considered as a significant police error¹⁹.

The Supreme Court also rightly stressed that: *'Regardless of whether the photo lineup was conducted more or less properly, the courts of both instances had to assess its outcome in accordance with the principle of the unfettered evaluation of evidence'*²⁰. In other words, there is no automatic mechanism between an improperly conducted lineup and exclusion of eyewitness identification evidence as inadmissible at trial – any shortcomings of the lineup procedure should, however, be thoroughly analysed by the court in the context of the directives of Article 7 of the CCP. This view is undoubtedly correct, especially if we take into account the fact that a significant percentage of the conducted lineups suffer from a number of shortcomings (see footnote 3). However, it is important to emphasise that owing to the nature of a lineup procedure, the probative value of its results should be assessed with due consideration of the procedural law provisions and – what seems of even greater importance – established

¹⁸ Witbeck B, *Eyewitness Identifications: Recommendations to the Third Circuit*. *Southern California Law Review*, 2018, Vol. 91, Issue 3, p. 547.

¹⁹ Wells G.L *et al.*, *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*. *Law and Human Behavior*, 2020, Vol. 44, No. 1, p. 20.

²⁰ The Supreme Court had taken a similar position before – see: the judgement of the Supreme Court of 18 July 2013, III KK 92/13, OSNKW 2013, No. 11, item 98, with a gloss of approval by J. Wójcikiewicz, *Glosa do wyroku Sądu Najwyższego z 9 lipca 2019r., III KK 92/13, Palestra*, 2014, No. 3–4, pp. 204–208); see also: the judgement of the Court of Appeals in Katowice of 26 October 2012, II AKa 415/12, LEX No. 1285048; the judgement of the Court of Appeals in Wrocław of 30 December 2014, II AKa 399/14, LEX No. 1657128.

forensic as well as psychological knowledge. Unfortunately, the latter issue has as yet been only partially stipulated in the binding Polish legal acts. In comparison to the world-leading regulations, *e.g.* the recently enacted comprehensive and well-drafted § 54-1p of the Connecticut General Statutes²¹, this is clearly an unsatisfactory situation and possibly not sufficient to prevent erroneous identifications that can send innocent people to prison. In other words, the Polish law remains too vague in this respect, offering almost no guidance on how to conduct photo lineups in accordance with the up-to-date scientific knowledge, and needs to be reformed (for instance, by amending the regulation on lineups of 2 June 2003 or guidelines No. 3). The reform should implement a comprehensive set of scientifically-based standards and requirements to more accurately protect suspects and reduce the likelihood of misidentifications. The following three of the various recommendations proposed in the relevant literature²² seem to be crucial, and ought to be implemented in the first place:

- lineups should be conducted using a double-blind procedure (*i.e.*, the lineup administrator and the witness are unaware of who the suspect is). Many studies have shown that the use of this kind of procedure significantly decreases the probability of misidentification. It has been proven that lineup administrators, when they know who the suspect is, can unintentionally and unconsciously give some nonverbal cues (pointing, nodding, shaking head, *etc.*) to eyewitnesses, which can affect their decision-making process²³;
- eyewitnesses, prior to being shown a lineup, should be instructed, *inter alia*, that (1) the photo of the perpetrator may or may not be displayed; (2) the lineup administrator does not know which person is the suspect and which persons are fillers (*see above*); (3) the persons in a photo lineup may not look exactly as they did on the date of the offense; (4) it is as important to exclude innocent persons as it is to identify the perpetrator; (5) the investigation will continue even if no identification is made²⁴. The instructions should be standardised, unbiased and, what

²¹ Murphy K.A, *Guilty at First Sight: Legislation to Prevent the Misidentification of Innocent Persons in Illinois*. *Valparaiso University Law Review*, 2019, Vol. 53, No. 3, pp. 736–738; for more on reforms of line-ups and photo arrays procedures in the USA, *see also*: Findley K.A, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*. *Missouri Law Review*, 2016, Vol. 81, pp. 377–451.

²² The recommendations formulated by Wells *et al.* deserve particular attention. The original version of the recommendations was published in 1998; the revised and updated version came out in 2020 – G. L. Wells *et al.*, *Policy...*, pp. 3–36; G. L. Wells *et al.*, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*. *Law and Human Behavior*, 1998, Vol. 22, No. 6, pp. 603–647; another significant recent study on the issue is the report of the National Research Council – National Research Council, *Identifying the culprit: Assessing eyewitness identification*, Washington D.C., 2014.

²³ Wells G.L *et al.*, *Policy...*, *op. cit.*, pp. 14–17.

²⁴ Wells G.L *et al.*, *Policy...*, *op. cit.*, pp. 20–21; Norris R.J *et al.*, *Preventing...*, *op. cit.*, p. 601; Murphy K.A, *Guilty...*, *op. cit.*, p. 438; U.S. Department of Justice,

is of great importance, prepared in accessible language – forms introduced a few years ago in the State of New York are a good example in this respect²⁵. Keith A. Findley, an expert in wrongful convictions, points out that such instructions reduce the likelihood of misidentifications in perpetrator-absent lineups, but have little effect on reducing identifications when the perpetrator is present in the lineup. Without them, eyewitnesses may feel some kind of pressure to select one of the displayed photos, even when they are not fully convinced²⁶;

- eyewitnesses, prior to being shown a lineup, should be interviewed to give their descriptions of the perpetrator (distinguishing features, hair, complexion, *etc.*). Immediately after selecting one of the displayed photos, the eyewitness should describe his/her level of confidence about the identification – preferably using his/her own words²⁷. The eyewitness's statement should be recorded verbatim before receiving any postidentification feedback from the lineup administrator²⁸. Finally, the eyewitness ought to be obliged to explain by what characteristic features he/she has identified the perpetrator. It is worth emphasising that a similar obligation can be found in some foreign regulations, for instance, in Article 193(2 and 7) of the Russian Code of Criminal Procedure²⁹. In the ruling under discussion, the Supreme Court briefly referred to that issue, noting that the current Polish procedural regulations do not place such an obligation on eyewitnesses. It goes without saying that this dangerous approach of the Polish lawmakers should be changed at the earliest opportunity. As far as the assessment of the evidence is concerned, such details are of substantial importance to determine the reliability of the identification. Thus, in practice, despite the lack of a legal obligation, it is vital to elicit what features of the individual triggered the recognition.

Last, but not least, it seems reasonable to briefly present a textbook example of how an improperly conducted photo lineup can directly lead to a wrongful conviction – the case of Marvin Anderson, who was convicted in 1982 of a rape. The following description of the case comes from Brandon L. Garrett's comprehensive study of miscarriages of justice.

Memorandum for heads of department law enforcement components all department prosecutors. *Electronic source*: <http://www.justice.gov/file/923201/download>, *accessed*: 15 July 2020.

²⁵ Criminal Justice Service, Identification Procedures: Photo Arrays and Line-ups Model Policy and Identification Procedures Protocol and Forms. *Electronic source*: http://www.criminaljustice.ny.gov/pio/press_releases/ID-Procedures-Protocol-Model-Policy-Forms.pdf, *accessed*: 15 July 2020.

²⁶ Findley K.A, *Implementing...*, *op. cit.*, p. 390.

²⁷ Criminal Justice Service, *Identification...*, *op. cit.*

²⁸ See: Wells G.L *et al.*, *Policy...*, *op. cit.*, pp. 20–23; Thompson S.G, *Judicial Blindness to Eyewitness Misidentification*. *Marquette Law Review*, 2009, Vol. 93, Issue 2, p. 640.

²⁹ А. И Бастрыкин, *Комментарий к Уголовно-процессуальному кодексу Российской Федерации*, Moscow 2008, pp. 442–443.

On February 17, 1982, a young woman was brutally raped in Ashland, a small town in Virginia. The victim told police that she could never forget the rapist's face as long as she lived. She described him as a black, short-haired man of medium height with a thin mustache. The attacker had told the victim that he had dated a white girl before. The investigating officer knew of only one black man in town who lived with a white woman – M. Anderson. His appearance roughly corresponded to the description given by the victim. The police did not have his photo on file, hence the investigators obtained a photograph of M. Anderson from his employer. In the photo array presented to the victim, M. Anderson's photograph was the only color one, and also unlike the others, it had an employee number on it. The victim picked out M. Anderson's photograph. The live lineup took place within an hour of the photo lineup, and M. Anderson was the only person who was included in both lineups. He was picked again. At trial, the defense sought to exclude the eyewitness identification evidence, but the judge admitted it, which eventually led to the conviction of M. Anderson – he was sentenced to 210 years' imprisonment. In 2001, as a result of the efforts by the *Innocence Project*³⁰ and DNA testing, he was exonerated. The same DNA test results not only led to M. Anderson's exoneration, but also revealed the identity of the actual perpetrator: John Otis Lincoln – a man whose photo was also included in the original photo lineup, but was not picked out³¹. However, given the suggestive way in which the lineups were conducted, this should not come as a surprise.

Learning about the flaws in the criminal justice system which have led to wrongful convictions is an important part of ensuring greater accuracy of that system in the future. The lessons that can be gleaned here are priceless, and we cannot afford to ignore them. As far as photo lineups are concerned, M. Anderson's case gives an important lesson that miscarriages of justice might be just around the corner if we do not pay proper attention to guarantee appropriate standards of criminal proceedings. Undoubtedly, administrators of lineups, along with prosecutors and judges should bear that case in mind.

³⁰ The Innocence Project is an American non-profit organisation which provides free legal services to the wrongfully convicted and makes efforts to improve justice systems. *Electronic source*: <http://www.innocenceproject.org>, accessed: 15 July 2020.

³¹ Garrett B. L, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*. Cambridge, Massachusetts, 2011, pp. 57–58, and the literature cited there; Stenzel C, *Eyewitness Misidentification: A Mistake That Blinds Investigations, Sways Juries, and Locks Innocent People Behind Bars*, *Creighton Law Review*, 2017, Vol. 50, Issue 3, pp. 518–520.

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Summary: In the commented ruling, the Supreme Court considered some of the problematic aspects of the Polish photo lineup procedure, stating that improprieties in organising or conducting identification procedures do not necessarily render eyewitness identification evidence inadmissible. This commentary discusses the assessment of the probative value of identification evidence, as well as critically analyses the current laws regarding photo lineup practices in Poland. Finally, the commentary argues that significant and research-based changes in the Polish legal standards for eyewitness identification are necessary to prevent potential miscarriages of justice, briefly discussing the most urgent of them.