

Public Lecture

Eyewitnesses in Criminal Trials: Lessons from the Miscarriage of Justice in Canada and Japan¹⁾

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Introduction

This paper deals with witness testimony (a statement of criminal identification by an eyewitness) which is one of the most important issues to consider when we think about the problem of wrongful convictions and the miscarriage of justice in criminal trials. This issue of witness testimony concerns the fields of both psychology and law, particularly criminal law.

“Building a case based on an incorrect criminal identification statement – generally

known as witness testimony – is problematic in two ways. First, it tends to create false charges, and second, it may also result in a failure to arrest the actual criminal.” This is a quotation from a sentencing decision of the Osaka District Court in 2004.

This reasoning can be applied to all cases of wrongful conviction, which result in the punishment of innocent defendants, as well as a failure to arrest the actual criminal. The question that must be asked is, “why would a witness testify incorrectly? Does this happen frequently? And are witness testimonies

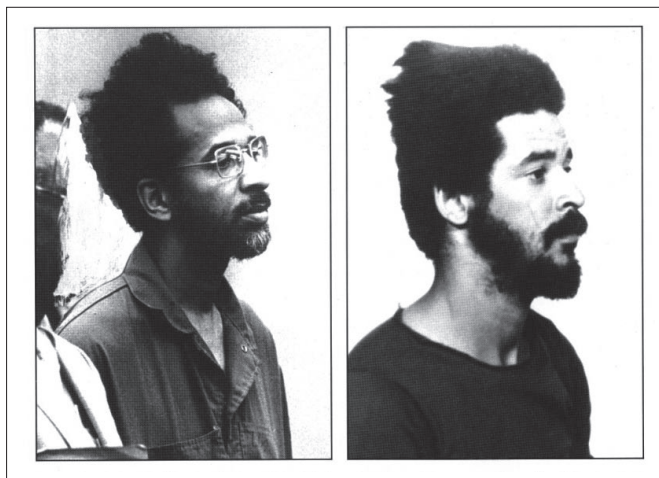


Figure 1 Source: Martin Yant, “Presumed Guilty: When Innocent People Are Wrongly Convicted” (1991)

1) This paper was based on my draft of Ritsumeikan Saturday Public Lecture Series in 2005, originally published in Ritsumeikan Journal of Human Sciences, No. 13, 117-131 (2007).

always so uncertain?”

The two pictures in Figure 1 are from a case outside Japan. Let us suppose that we are at a scene of a crime and saw the man in the picture on the left. As a witness we inform the police that “I saw the criminal.” Then, if the man in the picture on the right shows up in front of us, would we not say that he is the criminal?

The man on the right, William Barnard Jackson, was convicted of having raped two women, and served 5 years in prison based on incorrect witness testimonies. The name of the man on the left is Edward Jackson, and he was the actual perpetrator of the crime of which William was wrongfully convicted. Although these men share the same family name and look somewhat alike, they are two different people. In this case, because the real rapist was found, William Jackson was saved. However, many cases of wrongful conviction continue to occur where innocent people are imprisoned, or even executed, as a result of incorrect witness testimony.

The purpose of this paper is, firstly, to point out the danger of witness testimony in criminal trials. That is, the potential for incorrect witness testimony to lead to cases of wrongful conviction. Secondly, this paper will investigate the process through which witnesses form their testimonies, and the factors that prevent the formation of reliable testimonies. Following this, a scheme to evaluate the reliability of witness testimonies will be briefly discussed. Cases of wrongful conviction from outside Japan will also be studied, as well as considering current

Japanese cases in which defendants have sought to undermine the credibility of witness testimonies as a way of achieving not-guilty verdicts. Finally, some ways to prevent the problems associated with relying on witness testimonies will be suggested.

1. The Uncertainty of Witness Testimonies

Let us suppose a case in which a person says that they have seen someone committing a crime. The initial questions that must be asked are whether this witness has really seen the criminal, and whether they are telling the truth. Firstly, the possibility exists that this witness says they have seen the criminal, although they actually have not (false statement). It is also possible that such a false witness statements might slip into the witnesses’ testimony at trial. Secondly, even if the witness has actually seen someone committing a crime, their statement identifying the criminal as X may or may not be true. It is possible that the real criminal may actually be Y, notwithstanding that the witness genuinely believed that X committed the crime. By being asked something like “X is the one who did it, didn’t they?”, the witness might simply reply, “Oh, yes” (false recognition). Generally speaking, issues of false recognition, such as the latter case, receive more attention when the reliability of witness testimonies is considered. However, there are also cases such as the first example of false statement where the witness says, or is pressured into saying, that they have seen the criminal when, in fact, this is not true.

The two following academic studies from outside Japan illustrate how false witness testimonies can lead to wrongful convictions in criminal cases. The first study was lead by Ronald Huff, a professor at Ohio State University in 1996 (Huff et. al., 1996). Huff studied 205 known cases of wrongful conviction and categorized each case according to the major factor which caused the wrongful conviction. Huff's results illustrate that, in 100 of the 205 cases, false

Type of error	number	percentage
Erring eyewitness	100	48.8
False testimony	21	10.2
Error of law enforcement	19	9.3
Pure error	16	7.8
Coerced confession	16	7.8
Frame up	8	3.9
False testimony by law enforcemet	5	2.4
Erring witness of police	3	1.5
Malpractice in trial	3	1.5
Other malpractice	14	6.8
Total	205	100.0

Figure 2 Source: Huff, R., Rattner, A. & Sagarin, E. (1996) Convicted But Innocent: Wrongly Conviction and Public Policy

Type of error	number	ratio
Erring eyewitness	52/62	83.8
Erring blood test	32/62	51.6
Malpractice of police	31/62	50.0
Malpractice of prosecutor	26/62	41.9
False science evidence	21/62	33.8
Hair analysys	18/62	29.0
Fragile defense	17/62	27.4
False testimony	15/62	24.1
False snich	15/62	24.1
False confession	15/62	24.1

Figure 3 Source: Scheck, B., Neufeld, P. & Dwyer, J. (2000) Actual Innocence.

witness testimony was the major cause of wrongful conviction (see Figure 2 and 3). That is almost half the cases of wrongful convictions were due to false witness testimonies. The second study into the prevalence of false witness testimonies in cases of wrongful conviction was done by Barry Scheck (Scheck, 2000). Scheck studied 62 cases of wrongful conviction and isolated various factors which may have lead to the wrongful conviction in each case. Scheck then listed the factors causing miscarriages of justice from the most to the least frequently occurring. The study revealed that false witness testimonies were involved in 52 of the 62 cases (see Figure 3) or 83.3% of the cases, which far exceeds the other factors causing wrongful conviction. In addition to the research done by Huff and Scheck, many other studies into wrongful convictions around the world demonstrate that miscarriages of justice are often caused by false witness testimonies.²⁾

2. Witness Testimony and Wrongful Convictions

Witness testimonies can be categorized into two basic types. In the first category, the witness is the surviving victim, and the typical testimony is, "this person attacked me." Therefore, this cannot include murder

2) In Japan, there are so many advanced researches in this field. Itsukushima, Naka & Hara (Ed.), Psychology of Eyewitness (Kitaohji Shobou, 2003); Watanabe (Sup.), Ichinose, Itsukushima, Naka & Hamada (Eds.), Research into Eyewitness Testimony (Kitaohji Shobou, 2001); Niwayama (Sup.), Identification Witnessing, Law and Science (Sinzansha, 2000).

cases. The other type of testimony is by a third party witness who is not related to the victim. There are several factors leading to false recognition which are common to both witness types, which will be considered in the following section. The overarching question that must be asked is *how do trials fail to obtain accurate witness testimonies?*

First, the human characteristics of a witness must be considered. The age, intelligence, occupation and, in the case of trials which involve people of different racial backgrounds, the race of the witness, can be major factors leading to wrongful convictions. Second, the physical characteristics, such as the physical appearance, sex, and race of the person being identified, are also relevant. Furthermore, the conditions under which the person was witnessed committing a crime are also considered to affect the reliability of witness testimonies. This includes the visibility of the incident; how long the incident was witnessed for; the time of the day and year; the attentiveness of the witness; the involvement of a weapon; the seriousness of the crime; whether the witness suffered psychological stress; the existence of violence; whether the witness had consumed alcohol; whether the person is of the same sex as the witness; the length of the intervening period between the time the incident was witnessed and the time of testimony; and whether or not the witness has had a similar experience to that of the victim. However, because of a lack of space and the need for greater expertise in psychology, these factors cannot be considered in depth in this paper.

How then are witness testimonies obtained by

the police? If the criminal is an acquaintance of the witness, the witness is able to simply name the criminal. However, if the criminal was not known by the witness, the key issue will be the process through which the witness identifies the criminal. The use of "line-up" is the method most commonly taken. The police make a group of people which includes the suspect "line-up", and request that the witness to identify the criminal. Another common method uses photographs for identification. Photographs of the suspect and other parties not related to the incident are shown to the witness in order for them to identify the suspect. The police also occasionally use a method of composite photographs and drawing. These various methods are used to obtain witness testimonies, and in the process, three major problems tend to occur.

First, the reliability of the actual memory of the witness – that is, what might happen in the witnesses' process of remembering the incident. Second, the process by which the witness recalls the incident – that is, what might happen when the witness delivers the memories to the investigating authority and the way in which this is recorded by the investigators. Third, the risk of false testimony also arises – that is, the possibility of the witness testifying something they did not actually witness, or deliberately making false accusations against someone else. Therefore, the reliability of the witnesses' memory, the investigating authority's recording of the testimonies, and the sincerity of the witnesses' intentions must be examined thoroughly in order to evaluate the overall credibility of a witnesses' testimony. When

we hear media reports that “the criminal was witnessed,” we tend to assume that because “there is a witness, the case is already settled.” However, we need to remember that witness testimonies cannot automatically be treated as grounds for the conviction of a crime. We should always remember that, despite the huge impact of the words, “I saw the criminal”, there is a high risk of witness testimonies causing wrongful convictions.

3. Cases in Japan and Canada

(1) The Sophonow Case (Canada)

a. Outline of the Facts

In this section, several cases from both in and outside Japan will be examined. The first case that will be considered is the Sophonow Case in Canada, which stirred a significant amount of discussions about problems in witness testimonies. This incident involved the murder of a female employee at a donut shop in Winnipeg, in Manitoba Province, 1981. There was more than one eyewitness testimony available to the police right from the beginning of the investigation into this crime. Based on a composite drawing made from these witness testimonies, Mr. Sophonow was arrested. Mr. Sophonow lived in Vancouver and was not a resident of Winnipeg. However, he happened to be in Winnipeg to see his ex-wife and children at the time of the incident. Witnesses all agreed that the suspect was tall, wore a cowboy hat and glasses, and had a moustache, all of which corresponded to the appearance of Mr. Sophonow (see Figure 4).



Figure 4

In the year after Mr. Sophonow was arrested, a jury trial was held in which the jury could not reach a verdict. However, Mr. Sophonow was found guilty at his second trial. Mr. Sophonow appealed and the guilty verdict was overturned. Following this, the Prosecutor won another guilty verdict at Mr. Sophonow's third trial. In 1986, however, the Appeal Court again quashed the verdict, and the appeal by the Prosecutor to the Supreme Court was dismissed. The case finally ended after the Supreme Court refused to allow a fourth trial. The case, however, went unsolved. As for Mr. Sophonow, although the guilty verdict was overturned, this did not mean that his innocence was formally recognized by the law. After his trials, Mr. Sophonow appealed for his innocence to be recognized. Finally in 2000, the State Attorney General issued a statement declaring Mr. Sophonow innocent and announced the establishment of a Commission of Inquiry to review the case. In 2001, the Commission published its report and Canadian society finally learned how this miscarriage of justice occurred. The following considerations are based on the Royal Commission's report.³⁾

First, we need to consider the reason why Mr. Sophonow was found guilty in his second and third trials. From the early stage of this case, there was a witness, Mr. Doerksen, who claimed that he saw a suspicious man leaving the doughnut shop. Mr. Doerksen followed him, and saw him throw something from the bridge into a river (police later found a glove in the river that was supposed to have been thrown by the offender). Mr. Doerksen said that he wrestled with the man and tried to catch him, but that the man escaped.

Mr. Black and Mr. Cheng testified in the second trial. They were not eyewitnesses but shared a cell with Mr. Sophonow in the police jail when he was taken into custody after the arrest. They both testified that Mr. Sophonow confessed that "I did it". However, the testimony of these men turned out to be very problematic.

Mr. McQuade and Mr. Martin, who testified in the third trial, were also former cellmates of Mr. Sophonow. They also testified that they heard Mr. Sophonow say "I was involved in the incident." What kind of problems did these witnesses present?

First of all, Mr. Doerksen, who said he witnessed the offender, did not report it to the police right after the incident, even though he knew there had been a murder. After he reported it, although he was not able to identify Mr. Sophonow through photograph identification in the police station, he pointed

to Mr. Sophonow at the trial, saying "I have no doubt about it." Mr. Doerksen also provided witness testimony at the second and the third trials, with his statement reaching higher degrees certainty at each trial.

There were many problems with the testimonies made by the men who shared the same jail cell with Mr. Sophonow. Mr. Cheng was Hong Kong Chinese and was about to be deported back to his country. However, in return for his testimony, he was freed on bail and not deported, and left the country voluntarily (thus enabling him to enter Canada again). In Mr. McQuade's case, the prosecutor dropped the charges against him in return for his testimony. Mr. Martin had a criminal record of perjury, having given false testimony at a trial in a different province. Prosecutors relied on testimonies with credibility problems in order to have Mr. Sophonow found guilty. There were various other problems in these mistrials, but these witness testimonies and the question of the credibility of the prison informants particularly drew the attention of the Commission of Inquiry.

b. Advice Given by the Commission of Inquiry

The Report, published in 2001 by the Commission of Inquiry concerning the Sophonow case, offered various recommendations about how to improve the Canadian criminal justice system. The following two points are especially notable. The first recommendation concerns the method of police interrogation. The Report advises that police investigators use audio and visual recordings of interviews with suspects and

3) See, <http://www.gov.mb.ca/justice/publications/sophonow/recommendations/english.html> and Ibusuki, "Visual Recording of Suspect Interview and Eyewitness Testimony in Canada" *Kikan-Keijibengo* vol. 38 p.144 (2004).

witnesses. In particular, the report offers detailed procedures about how to acquire eyewitness testimonies, how to conduct line-ups and how to evaluate witness testimonies. These recommendations are discussed in more detail below.

Concerning line-up procedures, the Report advises that a neutral police officer, who is not involved in the investigation of the case, conduct the line-ups. When investigators who are involved in the case conduct a line-up, it is more likely that they will make some kind of indication to the witness about which person they want the witness to point out. To eliminate such risks, the report advises a neutral officer who is not involved in the case conduct line-ups. Secondly, the Report also recommends that the officer should not tell the witness whether the real suspect is actually lining up in front of the witness or not. The Report says that this is very important because it is common for a witness to feel strong pressure at the sight of the line-up. When the witness feels that they *must* choose someone in the group, it is highly possible that they will pick someone in the line-up even if they are not sure that this person committed the crime. Consequently, the Report suggests that police clearly state to the witness that it is okay to say, “I do not recognize anyone here.” By knowing that there is that option, the witness feels that it is acceptable to say “I don’t know” or “I don’t think the suspect is here” when they are not sure whether the suspect is included in the line-up. In the case that the suspect is not the actual offender, the actual offender must be elsewhere. This method is therefore necessary

to increase the chance of discovering the actual offender. Also, the Commission suggests that all conversations that take place between the witness and police during the line-up should be recorded. This makes it possible to later check if any improper suggestions or indications were given to the witnesses. The fourth point made in the report is that it is not acceptable to conduct a line-up with only a small number of persons lining up in the group – each line-up should contain a minimum of ten persons. However, in Japan, we do not conduct line-ups at all. Instead, we have what is called a “solo facial recognition session”, where only one suspect is shown to the witness. In this respect, Japan is far behind some countries in attempting to ensure the reliability of witness testimonies. Despite Canada’s overall high standard of criminal justice, the Commission was able to make several important recommendations.

The Commission also made the following five suggestions concerning the use of “photo line-ups”, which use portraits to allow witnesses to identify the suspect. First, at least ten portraits of photos need to be shown to the witness. Second, the whole procedure of showing the photos should be videotaped. Third, as in regular line-ups, an officer who is not familiar with the case should conduct the photo line-ups. Fourth, each portrait should be presented one by one, and not all together at one time. And finally, witnesses should be warned that the incorrect identification of the suspect could lead to a wrongful conviction.

The Commission also provided advice concerning the trial process. It recommended that the trial judge inform the jury the

following factors. First, that eyewitness identification involves inherent risks. Second, even when the witness seems to be sure of their testimony, the accuracy of the testimony cannot be measured by the degree of the witnesses' apparent confidence. Third, the trial judge should show the jury the data illustrating that the vast majority of wrongful convictions of innocent people have arisen as the result of faulty eyewitness identifications. Fourth, during the course of police investigation, where a vague testimony turns into a definite statement, the reasons behind this change need to be considered. In its conclusion, the Report advises the attendance of eyewitness specialists at criminal trials.

c. Summary

As was stated at the beginning of this paper, the vast majority of wrongful convictions are caused by incorrect witness testimonies, which has been proven through demonstrative research. This is especially relevant to Japan because of the introduction of a system of mixed jury trials in 2009, where citizens will be involved in the judgment of guilt or innocence of defendants with professional judges. We therefore need to consider the advice of the Commission of Inquiry of the *Sophonow Case* in order to improve the system of criminal justice in Japan. It will also be necessary for trial judges to warn lay judges that witness testimonies have frailties, and that witness certainty and the credibility of testimony are two different matters.

Along with what has been introduced at the beginning of this paper concerning the various factors that affect the formulation of

witness testimony, it also has been reported that the degree of a witnesses' certainty increases due to various factors, such as information acquired after the incident and the suggestions made by others. For example, a witness in the *Sophonow Case*, Mr. Doerksen, gave more detailed and certain witness testimonies as the trials continued. Such changes in testimony should be carefully examined. Indeed, at the *Sophonow* trial, the defense lawyer asked to summon a world-renowned American expert on witness testimony, Elizabeth Loftus, but the court did not allow it⁴⁾. The types of problems experts can point out differ from case to case, but it was obvious that the court should have listened to the opinions of such experts in this case.

(2) The Truscott Case (Canada)

a. Course of the Case

Another case that is worthwhile discussing is one that recently had a huge impact on Canadian society. This murder case is called the *Truscott Case* in which the Canadian Justice Ministry allowed a new trial in October 2004. The actual incident took place 50 years earlier, on June 11, 1959, in the small agricultural community of Clinton, approximately 300km west of Toronto, Ontario. Lynne Harper, a twelve year old girl, went missing and her body was found in the woods two days later. Mr. Steven Truscott,

4) See, Elizabeth Loftus, *Eyewitness Testimony*, Harvard University Press (February 1, 1996); Elizabeth Loftus and Katherine Ketcham, *Witness for the Defense: The Accused, the Eyewitness and the Expert Who Puts Memory on Trial* (St. Martin's Griffin, July 15, 1992).

then fourteen years old, was supposed to be the last person to have seen her. Lynne asked him to give her a ride on his bicycle to the nearby woods, in which they parted. On this basis, Mr. Truscott was arrested. Canadian media frequently describes this as the most famous pair ride on a bicycle in Canadian history.⁵⁾

Right from the beginning, Mr. Truscott consistently protested his innocence and never once made a confession. In September 1959, however, he was tried as an adult, even though he was only fourteen. At the time, Canada still had the death penalty, and he was sentenced to death. This sentence was later commuted to life imprisonment and, after being a model prisoner for ten years, he was paroled in 1969 and established a new life under a different name. There was a nationwide movement advocating his innocence from the time of his trial, though it is said that his local community was in a state of turmoil, since violent crime was so unfamiliar to the peaceful and quiet agricultural areas of Canada in 1959.

In 1997, Mr. Truscott, who had been living quietly, suddenly applied for a new trial of his long forgotten case. From the late 1980s, new trials were held for various wrongful convictions in Canada, and many defendants were exonerated. Acquittals in old cases were rapidly piling up, including those of Donald Marshall,⁶⁾ Guy Paul Moran,⁷⁾ and Milgaard.⁸⁾ In the wake of these new trial results, Mr. Truscott visited a lawyer who handled new

trials and decided to apply for one. In Canada, there is a non-profit organization (NPO) called Association in the Defense of the Wrongly Convicted (AIDWYC)⁹⁾, which works for the wrongly convicted¹⁰⁾. AIDWYC reinvestigated the Truscott case and compiled a large report, and even suggested a highly probable perpetrator of the crime. In addition to that, in 2001, a non-fiction writer Julian Sher published a book, based on the Truscott case, which became a best-seller in Canada (Sher, 2001). These incidents reactivated the movement for Truscott's new trial, and in 2002, the Justice Ministry established an investigative commission. (In Japan, new trials are conducted only after filing a claim in court, which then determines whether the new trial will occur, but in Canada, it is determined by the Justice Ministry). In August 2004, the investigative commission's report was submitted — this report has not been released to the public — and concluded that it was appropriate to have a new trial. After reviewing this report, a new trial was scheduled for June 2006 at the Court of Appeal in Ontario and finally Mr. Truscott was found not guilty by the court.¹¹⁾

5) For Truscott Case generally, see <http://www.cbc.ca/news/background/truscott/> and <http://www.cbc.ca/fifth/truscott/index.html>.

6) See, Michael Harris, *Justice Denied: The Law Versus Donald Marshall* (Macmillan of Canada, 1986).

7) See, <http://www.attorneygeneral.jus.gov.ca/english/about/pubs/morin/> and K. Makin, *Redrum: The Innocent* (1992).

8) See, <http://www.milgaardinquiry.ca/> and C. Karp & C. Rosner, *When Justice Fails: The Milgaard Story* (1991).

9) See, <http://www.Aidwyc.org/>.

10) See, B. Anderson & D. Anderson, *Manufacturing Guilt: Wrongful Convictions in Canada* (1998).

11) The detail of the decision by the Ontario Court of Appeal is here. <http://www.ontariocourts.on.ca/decisions/2007/august/2007ONCA0575.pdf>.

b. Outline of the Facts

The victim, Lynne Harper's body was found in the woods shown in Figure 5. The school where the victim and the accused attended is shown beneath this. There is a road from the woods that goes directly to a national road. It was near this school where Mr. Truscott was asked by the victim to give her a lift on his bicycle, and they headed north on this road. On the way, many children were playing around the bridge, and many of them witnessed the two on the bicycle heading towards the national road. According to the testimony of Mr. Truscott, he let the victim get off the bicycle near the national road and went home alone. There were many witnesses who stated that he arrived home alone.

A boy named Butch George, however, testified that, "I saw the two going into the woods." It is necessary to note that this testimony came out after the victim's body was found in the woods. Regarding the witness Butch George, one of his classmates described him as "the worst liar I have ever met." Even Butch's homeroom teacher said, "it is hard to deal with him since he constantly changes what he says." There was another testimony from a ten year old boy named Philip Burns. He testified, "I'm not sure who they were, but I saw two people go into the woods." However, in the statement he gave to the police on June 18, (the case broke on June 11), which was later made public (Figure 6), he made no such claim. In his statement, he said, "I met the Gaudette girl...I met Butch George...I walked on home and never met anyone else." The boys' statements were made soon after the incident.

While there were a variety of factors which caused Truscott to be convicted, the key evidence was the testimonies of these witnesses which were unfavorable to the accused. Furthermore, it is thought that their testimonies may have been about something they did not actually see. In other words, it is highly possible that these are false testimonies. There were testimonies both favorable and unfavorable to the police/prosecutor, and some testimonies conflict with other testimonies, but the majority of testimonies support Mr. Truscott's innocence. Many of the children who were playing by the river stated, "Two people crossed the bridge together but only one person came back on the bicycle," which backs up the testimony of Mr. Truscott.

It has also been pointed out that the police were probably not careful enough in their use of witness testimonies. For example, the boys' guardians were not present when the witness statements were given, nor did police record the witness interviews. Although the credibility of the witnesses who testified in accordance with police expectations was questionable, police ignored this. That is to say, even though these witnesses changed their initial testimonies, or gave testimonies that clearly conflicted with what actually happened, the police only believed the testimonies that were favorable to their case against Mr. Truscott. Psychologists often point out that when a witness is a child, they tend to be highly susceptible to manipulation. Children have a strong desire to live up to expectations of the investigators, and thus make statements which they believe will

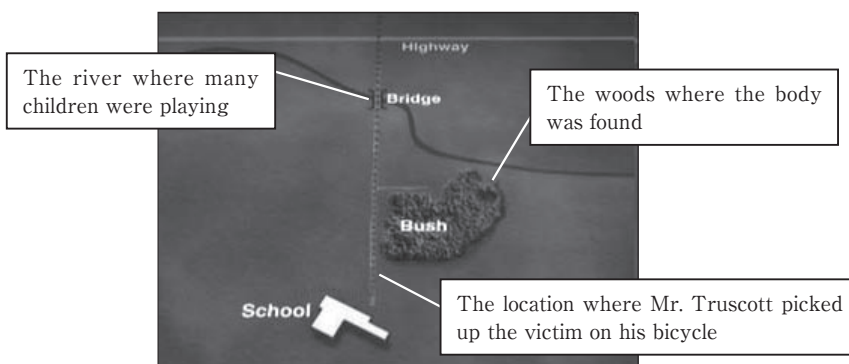


Figure 5 Area around the crime scene of Truscott case

R.C.A.F. Station, Clinton
June 13th, 1959

Quebec

Statement of Philip Burns, 9 Winnipeg Road. P.B.

I am 10 years old and Grade 5. I remember when Lynn Harper went missing, it would be Tuesday night, June 9th. I didn't have my supper before I left home and went swimming that night down at the swimming hole. When I was walking home from swimming I met the Gaudette girl on the county road, I was at the top of the hill, and she was right near the corner of the bush where the fence is, the closest side to the station. She asked if I saw Steve and Lynn, but I hadn't. I walked on and I met Butch George, he was riding down the road towards the river and he got off his bike as he came up to me and asked me if I saw Steve or Lynn, and I said I never saw them, but that I saw Jocelyne going down the road. He didn't say any more, but continued towards the river. I walked on home and never met anyone else. When I got home my brother Mike was there. I looked at the clock when I got home because I ~~wasn't~~ hadn't had my supper and I thought it was around 8 o'clock, but it was just 7.30. I walked from the bridge alone all the way home, Chris Higgins had his bike and went ahead of me because his mother and father would be worried. (Didn't understand taking of oath)

WITNESS: H.D. Graham SIGNED: Philip Burns
June 14/59

Mrs. Margaret Burns, Philip's mother, said Michael told her Philip didn't get home until 7.30.

Figure 6 Philip Burns gave a statement, "I walked on home and never met anyone else".

make them happy.¹²⁾ In the book by Sher, which is mentioned above, there is a chapter which has the romantic title of “The Fantasies of Children.” In this chapter, the author discusses how the false views of children resulted in a horrible, wrongful conviction.

(3) Osaka Telephone Club case*

* “*Telephone club*” is an adult-entertainment establishment that provides male customers with facilities to receive telephone calls from female customers and enjoy conversation with them. Male customers pay for the use of the facilities and female customers pay for the cost of the phone call.

a. Outline of the Facts

So far, two cases from Canada have been discussed, which represent different types of wrongful convictions. In the *Sophonow Case*, the witness might actually have seen the suspect, but the problem was in the process of witness identification. In the *Truscott Case*, the witnesses said they saw the suspect, but might have claimed to have seen something they did not actually see. Therefore the problem was with the making of false statements. The next case to be discussed is a recent case at a lower court in Osaka, the second largest city in Japan, in which the defendant was found not guilty. The problems in this case were with suspect identification. In that sense, it belongs to the same type of case as the *Sophonow Case*. The witness definitely saw the suspect, but the credibility of the identification was questionable and, as

a result, the suspect was found not guilty.¹³⁾

On August 23, 2003, around 3 o’clock in the morning, an incident took place in which a man was repeatedly beaten on the face by a woman whom he had become acquainted with through the telephone club service in Osaka. The victim, Y, was contacted by the police four months later, on December 23, and was told, “We have the woman who might have assaulted you, so please come to the station.” Through a one-way mirror, the victim saw the suspect X in the inquiry room (first facial recognition session). At that time he stated that X might be the one who assaulted him. On January 8, 2004, the police arranged Y to see the suspect X in side view as she was walking in the hallway (second facial recognition session). Y was also given a chance to see X by the door as X was being questioned (third facial recognition session). This time Y said, “I am sure that it was her,” and X was arrested and prosecuted, but found not guilty.

The Osaka District Court proposed the following three points be used in order to evaluate the credibility of Y’s witness testimony (suspect identification testimony). First, whether or not the observation conditions and maintenance of police records were satisfactory; the nature of the conditions under which Y observed X; and the reliability of Y’s memory given that four months had passed since the time of the incident to the time where Y identified X as the criminal.

12) See, John Doris (Ed.), *The Suggestibility of Children’s Recollections* (1991).

13) Judgment by Osaka District Court, 9th April 2004, Hanrei Times vol. 1153 p.296.

Second, whether or not the identifying procedure in which Y said X was the offender was appropriately conducted. Third, whether or not the identification was provided with certainty.

b. Method to Examine Suspect Identification Testimony

As for the conditions of observation, regarding the first proposal, Y had spent two to three hours with X from their initial meeting until the assault, which is a positive factor that makes the observation seem reliable. In other words, Y's testimony was more reliable than the testimony of a person who only saw the crime scene for a very short time, or saw it in the dark. In terms of the distance between the observant and the observed, Y saw X from relatively nearby. On the other hand, the following negative factors make the testimony seem unreliable. The two people involved did not know each other before the day of the incident, Y has poor eyesight, and at the time of the incident, he was not wearing glasses and was heavily drunk. It was also considered to be a negative factor that the first facial recognition session was held four months after the incident. Regarding the second point about the identifying procedure used by the police, it was strongly pointed out by the court as a negative factor that the hearing held by the investigating authority right after the incident occurred on August 23 was highly insufficient. Amazingly, the investigating authority did not take a proper record of Y's statement about his memory of his assailant. Moreover, the police were accused of having superficially

conducted the investigation from its initial stages, in which they did not check for fingerprints left on various items of the hotel room that the suspect might have touched, although it was obvious that she had been in the room. It was also pointed out that police officers had quite suggestively lead the witness in the facial recognition sessions after December. The court pointed out that only a solo facial identification session was conducted with Y, who never had a chance to point out the suspect from a group of people.

Regarding the certainty of identification, it was seen as a problem that Y's testimony became firmer and firmer, as he proceeded from the first, second and the third recognition sessions to the trial. At the trial, Y testified affirmatively that "there is no doubt" about his memory. However, Judge Sugita, who was the presiding judge in the court, warned that the degree of certainty and the reliability of identification testimony should be judged separately. Finally, he stated that the accuracy of the observation itself is highly questionable and that the witness testimony became gradually more concrete and detailed as time passed, and that such a peculiar development cannot be considered to have occurred without the influence of the police strongly leading the witnesses' responses to their questions.

The court's indication that there is no significant relationship between the degree of certainty of a witnesses' identification of a criminal is not confined to a single judgment in this particular case. It has been clearly demonstrated in books by the aforementioned Professor Elizabeth Loftus, an expert on

information from the victim	age	height	figure	hair	face	eye	chin	mouth	way of talking	clothes
time of the incident	○	○	○	○						
first identification	○	○	○		○	○	○			
first identification 2					○	○		○		
second/third identification	○	○	○		○	○	○	○	○	
trial				○						○

Figure 7 Emergence of Identification Data in the Suspect Identification Statement given by the victim in the *Osaka Telephone Club Case*

eyewitness testimonies, how fragile the memory of witnesses can be. Professor Loftus discusses in depth the degree of certainty of the witnesses' memory.¹⁴⁾

In other words, a witness feels at ease to say, "I knew my identification was right," when they know that other people are thinking the same. The witnesses' degree of certainty increased not as a result of confidence in their own memory, but due to suggestions from other sources. Professor Loftus points out there can be creativity in the "strength" of such testimony. Professor Loftus's observation has been supported by various experimental research and actual cases.

c. Changes in Suspect Identification Statements

In this section, we will see how the witnesses' degree of certainty increased in relation to the suspect identification statement in the Osaka Telephone Club case by studying the details of this change (See Figure 7).

In a statement at the time of the incident, the victim only mentioned the attacker's age, height, figure, and hair. At the first facial identification session, however, he referred even to her facial characteristics, such as her eyes and jaw. Furthermore, in the second and the third facial identification sessions, the victim started to describe the attacker in detail and mentioned the features of her mouth and the way she talks. At the trial, he started to talk about the clothes she was wearing on the day of the incident. It certainly is possible that sometimes something triggers our memory, and makes us recall things that we could not otherwise immediately recall. In this case, Y's statement became more and more detailed as the different solo witness identification sessions progressed. Suspect identification statements that change over time like this lead to a strong suspicion of the intentional leading of witness statements by the police, or that the statement is false.

(4) Cases with Problematic Suspect Identification Testimonies

The *Osaka Telephone Club Case* is not an exceptional case. Recent cases in Japan in

14) See, Loftus (1996 & 1992).

which the credibility of witness testimonies (suspect identification testimonies) was rejected will now be discussed. On November 13, 2003, a housewife whose car allegedly ran over a motorcyclist was acquitted based on the doubtful testimony of a witness at Tokyo District Court. On December 9, 2003, a man who was prosecuted for indecent exposure was acquitted due to doubtful witness testimony at Naha District Court. On March 24, 2004, Chiba District Court ordered Chiba Prefecture pay 2.5 million yen in compensation to a boy with a previous record of arson who did not receive punishment (the same as an acquittal in adult cases) due to the vagueness of witness testimonies. On July 13, 2004, after the Prosecutor appealed in the Naha case mentioned above, the Naha branch of the Fukuoka High Court held the District Court decision rejecting the credibility of the witness testimony.

As it is shown above, just from newspaper reports, we can see that unreliable suspect identification testimonies are the basis of frequent acquittals. However, we should not forget that there have still been many wrongful convictions as the result of incorrect witness testimonies.

One example of this is the well-known Tokushima Radio Merchant Case (*Tokushima Case*) in which the wife of the victim, Ms. Shigeko Fuji, was prosecuted after being accused of stabbing her husband to death while he was sleeping in the same room as her.¹⁵⁾ In

this case, two young live-in male employees testified that Ms. Fuji murdered her husband. From the beginning of the investigation, investigators' opinions were divided as to whether the perpetrator had lived within the house or not, but eventually it was determined that the crime was an inside job and Ms. Fuji was prosecuted and convicted. Ms. Fuji appealed once to the Supreme Court, but then abandoned the appeal and served her sentence. After being released from prison, she appealed for new trial. She died, however, before the matter was clarified, but relatives of Ms. Fuji nonetheless continued her appeal for a new trial appeal. This in itself made this case very peculiar, as it was the first time that a new trial had allowed an acquittal after the person who filed the appeal had died. Some years later, the two boys who testified confessed that they had given false statements in court, which made it a typical false testimony case. They were pressured to say that they had seen the murderer although they did not actually see anything.

There are many cases in which witnesses may have seen somebody commit the crime, but are actually making a wrong identification (false recognition testimony type). An example of this is the *Fukawa Case*, a murder-robbery that occurred in Mito in 1967, for which there is currently an appeal for a new trial appeal.¹⁶⁾ In 1978, final confirmation of the defendant's guilt was made by the Court, and in 2005, an appeal for a new trial was

15) For Tokushima case, see Judgment by Tokushima District Court 9th July 1985, Hanrei Jiho vol. 1157 p.3 and Ken Kaiko, *Katasumi no meiro* (A maze in a corner) (Mainichi Shin-bun Sha, 1976).

16) For Fukawa case, see <http://www.fureai.or.jp/~takuo/fukawajiken/> and Fukawa Defense Team, *Kuzureta Jihaku* (Spoiled Confession) (Gendai Jinbun Sha, 2007).

filed, which is currently under way. In this case, there was witness testimony that the defendant and others left the house of a murder scene at around 9 o'clock at night, seen from a location of about 100 meters away. Despite the low reliability of this testimony in regards to the time and distance from which the witness viewed the incident, the suspect was found guilty in the original verdict. (On September 21, 2005, the Tsuchiura branch of the Mito District Court finally decided to allow a new trial.¹⁷⁾ The Tokyo High Court confirmed the decision and the Supreme Court affirmed and the new trial will be held in 2010.)

The *Tomiyama Case* is also a murder case. It is an incident which involved a group of political extremists having inter-group strife, in which an activist was murdered, in the middle of the afternoon on a street in Tokyo. In this case, whether the testimony constituted a false recognition by the witness is currently in dispute¹⁸⁾. The defining feature of this case is that it occurred in the middle of the afternoon on a street in a big city and there were many witnesses. In the first trial, the judge ordered an acquittal, stating that the witness testimonies were not reliable. However, in the second trial, the judge's decision was reversed, which was confirmed in 1984. Currently, an appeal for a new trial has been filed. This incident was supposed to be witnessed under good conditions, but the witness testimonies nonetheless initially varied from each other, before becoming

gradually unified as the police investigation proceeded. Moreover, witnesses who noted and maintained a different profile of the criminal were not called during the trials as witnesses. This was a very biased way of using witness testimonies. It was due to this that the defendant was acquitted in the first trial, the court noting that the witness testimonies were not reliable.

There are some things we need to be careful about when knowing that "there are witnesses". First, there may be witnesses other than those testifying in court. Second, even if a witness is testifying in court, it is possible that they have initially given different identification information at the beginning of police investigations. The *Fukawa* and *Tomiyama* cases are notable examples of this which must be considered. As has been discussed, in the *Osaka Telephone Club Case*, statements which were made immediately after the incident were vague and indefinite but gradually became more detailed. The worst scenario is that witness testimony at trial is delivered with a high degree of certainty due to suggestions by the police, and is backed up by information known by the witness only in hindsight so as to create a very narrow version of the incident at trial.

This is related to the issue of "disclosure". Currently, in the Japanese trial system, prosecutors do not have any obligation to submit every piece of evidences to the court. In other words, the system allows for prosecutors to use only the evidence and information that are favorable to gaining a conviction. This is not limited to different witness testimonies, but also any evidence

17) For the summary, see <http://www.fureai.or.jp/~takuo/images/Ketteiyoushi.pdf> (in Japanese).

18) See, <http://www4.ocn.ne.jp/~tomiyama/index.htm>.

that is advantageous to the defendant, such as evidence supporting an alibi for the accused. Moral issues aside, the prosecutors are *legally* not obliged to submit all available information to the Court. A conviction might turn on witness statements given at the trial, but in fact, relying only witness statements is not sufficient to reach a just conviction.

The last case to be introduced here is from Shiga prefecture. It is a case of the murder and abandonment of a corpse that occurred in 1984 in the town of Hino. In the *Hino-cho Case*, the original judgment was confirmed in 2000 and is currently under appeal for a new trial at Otsu District Court. The female owner of a liquor shop in the town of Hino was murdered and her body was dumped on land then under development. A portable safe from the liquor shop was found in a mountainous area. This incident is not nationally well-known as the *Fukawa* or the *Tomiyama* case, but suffered from a few problems that have been noted. The suspect confessed during interrogation. The first trial threw out the confession, but still convicted the defendant based on circumstantial evidence. However, in a second trial in Osaka High Court, the ruling about the confession was reversed, with the Court declaring the confession to be reliable evidence and upholding his conviction.

One piece of circumstantial evidence was a statement in which the accused was seen by a witness around 7 p.m., the time of the crime, outside the liquor shop. The witness saw the suspect from inside a moving automobile. The witness is a young woman who lived in the neighborhood. She stated that as she was making a left turn at a crossroads, she saw

the suspect on her right although there was no light shining in the direction of the liquor shop. At that time, there were no street lights there and it was dark. The reliability of this witness is debatable. It may be true that she saw somebody, but it cannot be denied that it may have been a different person, or, even if it was the accused, she might have been confused about when she saw this, since the defendant had frequently been to this liquor shop, and parked his car nearby.

The second problem is that witnesses who originally supported the suspect's alibi later changed their testimonies. The man requesting appeal (the defendant) initially told investigators, "I was at X's house and drinking there." There were several people who confirmed this claim, but later, one retracted his statement, and said that the defendant did not visit the house. These testimonies were said to lack credibility, but in the trial it was held that an alibi had not been established.

4. Proper Handling of Witness Testimonies

So far in this paper, several cases from Canada and Japan have been examined, but many more cases exist in which the reliability of witness testimony has become a contentious issue. What can be done to prevent wrongful convictions caused by incorrect suspect identifications?

First, it is necessary to review the method for properly acquiring the witness statements and judging their reliability. As the Inquiry Commission for the *Sophonow Case* advised,

investigators must ensure the accuracy of witness statements. It is desirable that the investigating authority acquire and record witness information at the earliest opportunity after the incident. It is necessary for investigators to diligently record witness information in order to arrest criminals.

Second, in order to judge the accuracy of a witness's memory, it is necessary to have a scheme that increases the reliability of suspect identification statements. It is therefore necessary to establish appropriate procedures and recording of line-ups and photograph identifications. The advice made by the Inquiry Commission into the *Sophonow Case* is relevant to these processes.

Third, authorities must investigate the reliability of witnesses so as to eliminate false witness testimonies. In order to achieve this, total disclosure of all available evidence in a case is necessary. Unless prosecutors disclose all of information they have regarding the suspect and witnesses, the problems of incorrect witness testimonies will never be solved. In addition, calling upon experts of suspect identification testimonies is absolutely essential. Psychologists and other experts who can properly evaluate witness testimonies are appropriate for this task.

Fourth, continuous efforts must be made to ensure fair trials. This is not limited to witness testimony issues but to all the aspects of a trial. All persons involved in the administration of criminal justice, including police, prosecutors, defense lawyers and judges, need to make this effort.

These points were discussed in detail in the court's decision in the Osaka Telephone Club

Case. The judgment states that police should: "try their best not to give suggestions to witnesses while conducting suspect identification processes"; "avoid conducting solo facial identifications as much as possible since it involves [the risk of] the manipulation [of the witness]"; and the witness's "initial testimony should be preserved as much as possible." These recommendations are highly appropriate.

In particular, the decision reached in this case was particularly noteworthy because solo facial identification is still conducted in Japan. Judge Sugita also recommended that, "in the future, in the context of recent trial verdicts, including previous Supreme Court decisions and cognitive science research, the court respectfully requests that the Osaka Prefectural police improve their obsolete investigation method as soon as possible."

The academic psychology community announced official detailed guidelines regarding methods of identification procedures, which include how to collect identification statements ("Guideline for Witness Testimony/Identification Procedure" by Law and Psychology/Witness Guideline Creation Committee, 2005, Gendaijinbun-sha). These recommendations were made by a team comprised of members from both legal and psychology disciplines, and are particularly relevant to any professionals involved in investigations on behalf of the state. The Committee claims that experts who only criticize the present condition do not improve the situation, and that these guidelines present a model of action that should be taken.

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FBI Facial Identification Fact Sheet

Retain original for your files. Send only legible duplicate copy to Special Projects Section, Laboratory Division. To expedite transmittal of form send to Special Projects Section by facsimile machine 8 00 a.m. to 5 30 p.m. EST/EDT, FTS 324-2926

Case Title _____


Date of Interview _____	Bulb Number _____	Field Office Number _____
Name of Witness _____		Interviewing Agent _____

Before referring to Facial Identification Catalog obtain description of unknown subject from witness and check pertinent boxes in each category listed below.
Using this information, direct witness to appropriate sections of the catalog and enter final selections on lines provided in each category.

Unsub Number _____	Sex _____	Age _____	Race _____	Complexion _____
Height _____	Weight _____	Build _____	Color of Eyes _____	Color of Hair _____

A Head <input type="checkbox"/> 1 oval <input type="checkbox"/> 2 round <input type="checkbox"/> 3 triangle <input type="checkbox"/> 4 long <input type="checkbox"/> 5 rectanglie	D Nose <input type="checkbox"/> 1 average <input type="checkbox"/> 2 concave <input type="checkbox"/> 3 hooked <input type="checkbox"/> 4 flared nostrils <input type="checkbox"/> 5 short <input type="checkbox"/> 6 large <input type="checkbox"/> 7 wide base <input type="checkbox"/> 8 narrow base <input type="checkbox"/> 9 long	F Chin <input type="checkbox"/> 1 average <input type="checkbox"/> 2 jutting <input type="checkbox"/> 3 pointed <input type="checkbox"/> 4 receding <input type="checkbox"/> 5 square <input type="checkbox"/> 6 double chin <input type="checkbox"/> 7 cleft/dimple <input type="checkbox"/> 8 short <input type="checkbox"/> 9 long	K Mustache and Beard <input type="checkbox"/> 1 mustache and beard <input type="checkbox"/> 2 mustache
B Eyes <input type="checkbox"/> 1 average <input type="checkbox"/> 2 bulging <input type="checkbox"/> 3 squinting <input type="checkbox"/> 4 deepset <input type="checkbox"/> 5 closedset <input type="checkbox"/> 6 widestset <input type="checkbox"/> 7 raised lids <input type="checkbox"/> 8 heavy lids <input type="checkbox"/> 9 overhanging lids	E Mouth <input type="checkbox"/> 1 average lips <input type="checkbox"/> 2 both lips thick <input type="checkbox"/> 3 both lips thin <input type="checkbox"/> 4 lips unequal <input type="checkbox"/> 5 wide lips <input type="checkbox"/> 6 small lips	G Cheek and Cheekbone <input type="checkbox"/> 1 average <input type="checkbox"/> 2 prominent <input type="checkbox"/> 3 sunken	L Facial Lines <input type="checkbox"/> 1 forehead <input type="checkbox"/> 2 mid-face <input type="checkbox"/> 3 eye area <input type="checkbox"/> 4 neck/chin
C Eyebrows <input type="checkbox"/> 1 average <input type="checkbox"/> 2 thin <input type="checkbox"/> 3 heavy <input type="checkbox"/> 4 meeting	H Ears <input type="checkbox"/> 1 average <input type="checkbox"/> 2 protruding <input type="checkbox"/> 3 closedset	M Scars <input type="checkbox"/> 1 horizontal <input type="checkbox"/> 2 vertical <input type="checkbox"/> 3 diagonal <input type="checkbox"/> 4 crescent	N Forehead <input type="checkbox"/> 1 average <input type="checkbox"/> 2 low <input type="checkbox"/> 3 high
			O Skin Irregularities _____

Furnish detailed description of hat, glasses, and clothing (from waist up). Include photos of drawings showing similar items, if possible. Use drawing of head to mark position of hairline, hat, scar(s), bandage(s), beard, mustache, etc.



FBI/DOJ

Figure 8 Facial Identification Fact Sheet used by the FBI

Figure 8 shows the common template used by the FBI when suspect identification testimony is taken. Because of the use of this identification statement recording form, the failure to confirm basic information in any kind of case does not arise. The Fact Sheet

demonstrates the diligence of the FBI in recording witness' statements of gender, age, race, height, weight, physique, and facial features (hair, eyes, eyebrows, nose, mouth, jaw, cheeks, ears, head, mustache and beard, skin, scars and forehead). This shows that

there already are established systems to secure the accuracy of suspect identification statements by investigative organizations in other countries. When we consider this, we have to conclude that data collection methods used by Japanese police authorities are outdated. Authorities must seriously consider introducing proper data collection methods based on the guidelines mentioned above as soon as possible.

Conclusion

As mentioned earlier, Mr. Truscott was inspired by a series of new trial acquittal verdicts in Canada and started his own appeal to prove his innocence. The Marshall case was the first case for which a formal Inquiry Commission was established to inquire into the reasons behind his miscarriage of justice, which motivated other defendants to appeal for new trials. At the beginning of the Commission's Report published in 1989, it is noted that:

"While we know it is impossible to guarantee that there will never be another miscarriage of justice such as the one that occurred to Donald Marshall, Jr., we believe it is imperative that responsible authorities do everything humanly possible to reduce or eliminate such possibilities. It is in that spirit that we offer this Report.¹⁹⁾"

We must keep in mind that this is quoted from a report by a public investigative

commission established by the Canadian government. In the Marshall Report, the Commission stated that prosecutors should be obligated to show all of the evidence they possess to the defendant. However, this recommendation was not immediately introduced to the Canadian criminal justice system. Sometime later, in 1991, however, the Supreme Court in Canada accepted the recommendation as law in a groundbreaking decision, which stated that prosecutors have an obligation to show all available evidence to the defendant and their lawyers. Fortunately, in Canada, if there is more than one witness testimony, prosecutors are obligated to deliver the information to the defense lawyers involved in the case. In contrast, in Japan, unfortunately, prosecutors do not have any such obligation and courts do not consider such an obligation to be necessary. In addition to that, solo facial identification tests, which were strongly criticized by the Chief Justice in the Osaka Telephone Club case, continue to be conducted across Japan.

If we are a victim, the authorities may ask us, "Is this the person who did it?" At a time like this, we may cause a miscarriage of justice unless we say, "Solo facial identification is dangerous. Please conduct a line-up." It is natural for a victim to hate the perpetrator. Victims want the authorities to arrest criminals no matter what. However, it is this simple desire for justice that may sometimes creates unjust results. This is something we should always be cautious about.

19) See, Royal Commission on the Donald Marshall Jr. Prosecution (Halifax: Queens Printer, 1989).

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