



INDIAN JOURNAL OF LEGAL REVIEW

VOLUME 6 AND ISSUE 10 OF 2026

INSTITUTE OF LEGAL EDUCATION



INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN – 2583-2344

(Open Access Journal)

Journal's Home Page – <https://ijlr.iledu.in/>

Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>

Volume 6 and Issue 10 of 2026 (Access Full Issue on – <https://ijlr.iledu.in/volume-6-and-issue-10-of-2026/>)

Publisher

Prasanna S,

Chairman of Institute of Legal Education

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 73059 14348 – info@iledu.in / Chairman@iledu.in



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THE CONCEPT OF IDENTIFICATION PARADE AND DEFENCE OF ALIBI IN THE ZAMBIAN LEGAL SYSTEM

AUTHOR – COUNSEL COLLINS NKUMBWA, ESQ.

CIP, LL.B, LL.M, AHCZ. ASCZ, PHD CAND.

LECTURER OF LAW AND COMMISSIONER FOR OATHS

PRINCIPAL AUTHOR'S EMAIL – COLLINSNKUMBWA4@GMAIL.COM

BEST CITATION – COUNSEL COLLINS NKUMBWA, THE CONCEPT OF IDENTIFICATION PARADE AND DEFENCE OF ALIBI IN THE ZAMBIAN LEGAL SYSTEM, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 6 (10) OF 2026, PG. 43-47, APIS – 3920 – 0001 & ISSN – 2583-2344.

ABSTRACT

The Zambian legal system is premised on the concept of adducing evidence to establish both the commission of the offence and linking the accused to the alleged offence. This requirement necessitates elimination of the danger of false complaint and false accusation. This paper has established that an identification parade is vital in law of evidence to establish whether the accused person is the person who committed the offence. This paper has discussed various factors that are considered necessary to determine whether the identification parade can be said to be fair to an accused person. Similarly, the paper has established that an identification parade is critical when it comes to the defence of alibi. The prosecution has the onus to establish whether the accused was present at the crime scene during the day and time when the offence was committed. The judicial precedents take cognisance of the weaknesses of this type of evidence as illustrated in this paper.

Keywords – Identification, Alibi, Admissibility, evidential weight, honesty and reliability.

INTRODUCTION

The evidence of identification illustrates not only that a crime was committed but that the accused committed the crime. The test is always whether a given identification parade is capable of being described as fair to the accused. If so, it is competent for a court to convict on the evidence of a single identifying witness with some other evidence supporting the identification.

Alibi means a claim or piece of evidence that one was elsewhere when an act, especially a criminal one, is alleged to have taken place. The onus is on the prosecution to disprove the alibi. The prosecution takes a serious risk if they do not

adduce evidence from witnesses who can discount the alibi.

This paper elucidates the concept of identification parade and the defence of alibi in Zambia by taking into account the regional and international best practices.

BACKGROUND

There is no agreed definition of evidence. It is defined according to different scholars. According to Cross¹²⁸, evidence is defined as an expression which covers all facts which are admissible for the purpose of proving a case. According to Phipson¹²⁹, evidence is defined as

¹²⁸ Tapper, C. (2021). Cross And Tapper On Evidence (14th Ed.). Oxford: Oxford University Press

¹²⁹ Evans, T. J. (Ed.) (2018). Phipson On Evidence (19th Ed.). London: Sweet & Maxwell.

anything that tends to prove or disprove a fact in issue.

The Supreme Court of Zambia in *Bright Katontoka Mambwe Vs The People* described evidence as the means of ascertaining the state of facts being inquired into by the Court or other inquiring body. Evidence is comprised of facts, inferences from facts and statements which proves or tends to prove the facts being inquired into. The evidence of the prosecution is made up of facts, inferences from facts and statements which proves or tends to prove the facts being inquired into presented to the Court by or on behalf of the prosecution. Whereas the evidence of the defence is made up of facts, inferences from facts and statements which proves or tends to prove the facts being inquired into presented to the Court by or on behalf of the accused person(s).

The court further stated that in criminal proceedings, the prosecution must have presented evidence to the trial court for the court's record to have what is described as the prosecution's evidence. Similarly, the defense must have presented evidence to the trial Court either through the accused person(s) and or witnesses for the court's record to have what is described as defense evidence.¹³⁰

Based on the foregoing, it can be inferred that evidence refers to anything in form of information, objects, tools, documents or statement(s) that tend to prove or disprove the existence of facts in issue to enable a court to decide the fate of a case.

The following are the types of burden of proof: Legal burden also known as persuasive burden refers to an obligation on a party to prove a case. This burden is placed on the prosecution in a criminal matter and on the claimant in a civil matter. The Zambian Court¹³¹ stated that in criminal cases, the rule is that the legal burden of proving every element of the offence charged,

and consequently the guilt of the accused, lies from beginning to end, on the prosecution.

Evidential burden also known as burden of adducing evidence refers to an obligation to produce sufficient evidence to raise an issue or establish a fact in dispute. This burden rests on both the prosecution and defence or respondent to establish the facts before court as alleged.

LITERATURE REVIEW – REGIONAL AND INTERNATIONAL PERSPECTIVE

Lisa J. Steele¹³² states that an alibi is not a traditional affirmative defense. It is a response to the prosecution's case. Logically, an accurate alibi means that the prosecutor's witnesses have misidentified an innocent defendant either through good faith eyewitness identification mistakes or through deliberate lies by co-offenders or cooperating witnesses.

The scholar refers to the case of *Skakel v. Commissioner*, wherein the Connecticut Supreme Court set out four factors to consider in reviewing the reasonableness of trial counsel's decision not to investigate and/or present alibi witnesses. These include: (1) the importance of the alibi to the defense; (2) the significance of the witness's testimony to the alibi; (3) the ease with which the witness could have been discovered; and (4) the gravity of the criminal charges and the magnitude of the sentence that the petitioner faced.

The United States Supreme Court in *Perry v. New Hampshire*¹³³, stated the due process clause is implicated in the admission of suggestive eyewitness identification testimony only if police misconduct caused the suggestiveness. It was stated that even where police use a suggestive identification procedure, however, suppression of the identification is not inevitable. The Supreme Court precedent mandates a case-by-case examination to determine whether the indicia of reliability concerning the identification

¹³⁰ *Bright Katontoka Mambwe Vs The People* SCZ Judgment No. 8 Of 2014 Page J11

¹³¹ *Mwelwa Murolo V The People*

¹³² Lisa J. Steele. Alibi Defenses: Millstone or Key to the Jailhouse Door? THE CHAMPION. NACDL.ORG. © zimmytws | stock.adobe.com.

<https://www.publiccounsel.net/wp-content/uploads/2021/03/Steele-March-16.pdf>

¹³³ 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012)

outweigh the corrupting effect of suggestive conduct by law enforcement.

The scholar further discusses the determination of the reliability of an identification. It is submitted that the courts consider factors such as the witness's opportunity to view the criminal at the time of the offense, the witness's degree of attention, the accuracy of the witness's prior descriptions of the criminal, the level of certainty demonstrated by the witness at the time of the confrontation, and the time lapse between the crime and the confrontation.¹³⁴

Ofer Raban elucidates that the admissibility of police-arranged identification procedures and consequent in-court identifications which is governed by the Sixth Amendment's right to counsel and by the Due Process clause. The scholar argues that evidence of identification procedures and consequent in court identifications may be excluded from trial if that right to counsel was violated.

The scholar further defines a suggestive identification procedure as one that suggests to the identifying witness who is the suspect expected to be identified. It is argued that suggestiveness may take many forms: asking the witness to pay particular attention to "number three" in a six-person lineup; having the defendant as the only Hispanic in a photo array; presenting numerous photographs with only the suspect appearing in all of them; or, as in many of the cases we will examine, presenting only the suspect to the witness, handcuffed and surrounded by police officers (the oft-used single-person showup).¹³⁵

John¹³⁶ refers to alibi as a form of defence whereby a defendant attempts to prove that he or she was elsewhere when the crime in question was committed. From Latin, meaning "elsewhere" (alius, other on the model of ibi, there). The consequence of the defence failing to

disclose an alibi properly to the Crown is that the trier of fact may draw an adverse inference that it has been fabricated.

The scholar notes that although there may be good reason why defence counsel may wish to withhold alibi evidence from the Crown or even the police, they risk an adverse inference at trial which they may not be able to correct later. Although there is no standard mechanism for disclosing an alibi in Canada, many U.S. and Australian states have stringent "alibi-notice-laws" imposed on defence counsel.

The Indian legal system emphasises the role of the witness in establishing the identity of the accused. One of the methods of establishing the identity is "Test Identification Parade" required Under Section 9 of Indian Evidence Act. The idea of the parade is to test the veracity of the witness on the question of his capability to identify from among several persons, an unknown person whom the witness had seen in the context of an offence.¹³⁷

Rao¹³⁸ defines identification to mean proving or finding before the court that a person, article or animal is the very same that he or it alleged, charged to be. The scholar refers to Test identification as a process by which the identity of the persons, things or animals concerned in the offence under investigation or trial is established, through a test parade. The test is used in the actual meaning of an examination in which the witness is to find out the person, thing or animal in a test identification parade.

It is further argued that identification parades are held in criminal cases to prove or disprove the guilt or innocence of the accused whether it is held in respect of persons or articles. Section 9 of the Indian Evidence Act, 1872 makes the identification of proper accused and properties admissible and relevant facts in a court of Law, but there is no specific provision to direct the

¹³⁴

<https://osad.illinois.gov/content/dam/soi/en/web/osad/publications/digest-by-chapter/ch-27-identification.pdf>

¹³⁵ Ofer Raban, On Suggestive and Necessary Identification Procedures, 37 Am. J. Crim. L. 53 (2009)

¹³⁶ John Burchill. Alibi Evidence: Responsibility for Disclosure and Investigation. Manitoba Law Journal| Volume 41 Issue 3

¹³⁷

<https://police.py.gov.in/Police%20manual/Chapter%20PDF/CHAPTER%2038%20G%20Identification.pdf>

¹³⁸ Paper presented by, Sri. V. Srinivasa Rao, XVI Additional District Judge, Nandigama. TEST IDENTIFICATION PARADE. <https://cdnbbsr.s3waas.gov.in/s3ec015a01f0597ac4bdf35c24846734ee/uploads/2024/03/2024031266.pdf>

suspected to be present for the identification parade by the Investigating Officer.

NATIONAL PERSPECTIVE

The Supreme Court of Zambia in *Ilunga Kabala and John Masefu v The People*¹³⁹ discussed the concept of identification and alibi defence. The following principles of law were elucidated. Firstly, it was established that to put suspects with visible injuries on their bodies on an identification parade consisting of other persons having no such injuries is tantamount to providing identifying witnesses with a clue. It was also stated that if suspects of different heights are placed among other persons of comparable heights and that the general standard of dress, let alone general appearance of participants at the parade is more or less similar.

The test is always whether a given identification parade is capable of being described as fair to the accused. The emphasis ought to be placed on fairness and not necessarily on the number of parades conducted. The court stated that the sole object of an identification parade is to test the ability of an identifying witness to pick out a person he claims to have previously seen on a specified occasion. To achieve that object, those charged with the duty of conducting identification parades must ensure that such parades are free from unfairness.

The court further stated that there is no rule of evidence or practice in Zambia which calls for the holding of a firearm's identification parade. In any criminal case where an alibi is alleged, the onus is on the prosecution to disprove the alibi. The prosecution takes a serious risk if they do not adduce evidence from witnesses who can discount the alibi unless the remainder of the evidence is itself sufficient to counteract it.

The Court of Appeal of Zambia in *Banda vs the People*¹⁴⁰ laid down similar principles of law. The court stated that it is competent for a court to convict on the evidence of a single identifying

witness. The court sounded a caution to trial courts that in the case of a single identifying witness, there should be some other evidence supporting the identification. The court relied on a number of cases to establish the principles of law. In *Chimbini v. The People*¹⁴¹, it was stated that it is necessary to test the evidence of a single witness with due care. The honesty of the witness is not the abiding consideration. The court must be satisfied that the witnesses' observation is reliable.

In *Kateka v. The People*¹⁴², it was stated that when it comes to identification of the accused, the question is not one of credibility in the sense of truthfulness, but of reliability, and the greatest care should be taken to test the identification.

The court in *Haamenda v. The People* adopted the principles laid down by Lord Widgery CJ's dicta in *R. v. Turnbull*¹⁴³, that: "where the quality of the identification is good and remains so at the close of the defence, the danger of mistaken identification is lessened; the poorer the quality, the greater the danger. In the latter event the court should look for supporting evidence of identification. Odd coincidence can provide corroboration.";

Further guidance was given in *Mavuma Kabanja Situna vs The People*¹⁴⁴ if the opportunity for a positive and reliable identification is poor, then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which should render a mistaken identification too much of a coincidence.

Similarly, the court in *Love Chipili v. the People*¹⁴⁵ stated that if the circumstances of the attack are traumatic and there is only a fleeting glimpse of an assailant, the fact that an appellant had previously been seen by the identifier does not render an identification safe.

Lastly, the court in *Nyambe v. the People*¹⁴⁶ stated that the witness should specify by what features

¹³⁹ *Ilunga Kabala and John Masefu v The People* (1981) Z.R. 102 (S.C.)

¹⁴⁰ *Banda vs the People* Appeal No. 183/2013

¹⁴¹ *Chimbini v. The People* [1973] ZR 191

¹⁴² *Kateka v. The People* [1977] ZR 35

¹⁴³ *Haamenda v. The People* [1977] ZR 184

¹⁴⁴ *Mavuma Kabanja Situna v. The People* [1982] ZR 115

¹⁴⁵ *Love Chipili v. the People* [1986] ZR 115

¹⁴⁶ *Nyambe v. the People* [1973] ZR 228

or unusual marks if any, he alleges to recognize the accused and the circumstances in which the accused was observed, the state of light, the opportunity for observation, the stress of the moment should be carefully canvassed.

CONCLUSION AND RECCOMENDATION

From the foregoing, it is clear that evidence of identification serves two purposes. Firstly, it establishes that a crime was committed and secondly, that the accused committed the crime. While it is permissible to convict on the evidence of a single identifying witness, the courts are cautious of possibility of making honest mistakes in identification of the accused hence the need for some other evidence supporting the identification.

With reference to defence of alibi, the onus is on the prosecution to disprove the alibi and if not disputed, the court may take it that the allegation by the accused person is established. This is not the case in other jurisdictions as the burden of proof rests on the accused person.

While the two concepts seem to be working well in the Zambian legal system, it is vital for the legislature to promulgate a law or amendments to the law to enhance uniformity of application of the two concepts in the law. This promotes certainty and predictability of application of the two concepts in the legal system. The is the case in the Indian legal system which provides for a specific law regulating the identification of suspects.

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ISSN 2583-2344



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