

THE 'TURNBULL GUIDELINES' PROOF AND EVIDENCE UNDER THE MALAYSIAN EVIDENCE ACT 1950

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ABSTRACT

Turnbull guidelines is a requirement necessary as a matter of law where the case against the accused depended wholly or substantially on the correctness of one or more identifications of the accused, which is alleged by the defence to be mistaken identification. There is a possibility that a mistaken witness can be a convincing one and that a number of such witnesses could all be mistaken. The Court has accepted that evidence of identification is a category of evidence, which though admissible, is thought to be unreliable because of a risk of error. The circumstances in which the identification by each witness came to be made needs to be examined. Though, recognition is thought to be more reliable than identification, mistakes in recognition of close relatives and friends are sometimes made. The requirement is in the form of a warning (caution), and provided that the caution is done in clear terms, the judge need not use any particular form of words. The quality of the identification evidence is what matters in the end. A failure to follow the guidelines is likely to

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result in a conviction of the accused being quashed by a superior court, and an order for retrial of the case, as the omission would occasion a failure of justice. Obviously the words 'matters before it' in relation to the definition of proof in the Malaysia Evidence Act 1950 could not mean only 'evidence' but would include other matters the judge or the magistrate has to consider such as the need for special caution when appreciating the evidence of the case in question when it has to decide whether the accused has a case to answer at the close of the case for the prosecution or as to the guilt or innocence of the accused at the conclusion of the trial. The pertinent issue then is whether Turnbull guidelines is evidence or is it a matter other than evidence forming part of the 'matters before it' as to whether a fact is proved or disproved?

INTRODUCTION

The law of evidence specially lays down what matter is or is not admissible before the court in proving the existence or otherwise of the rights, duties and liabilities. Facts must be proved in the first instance, and section 3 of the Malaysian Evidence Act 1950 states that a fact is said to be 'proved' when after considering the *matters before it* (*author's emphasis*), the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Likewise, a fact is said to be 'disproved' when after considering the *matters before it* (*author's emphasis*), the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. When a fact is not 'proved' or 'disproved', the fact is then 'not proved'. Obviously, *matters before it* in relation to the definition of proof could not necessarily mean only 'evidence' but would include other matters the judge or the magistrate has to consider such as the need for special caution when appreciating the evidence of the case in question when it decides whether the accused has a case to answer at the close of the case for the prosecution or as to the guilt or innocence of

the accused at the conclusion of the trial. Whatever is considered by the court is evidence; circumstances which are considered by the court as well as probabilities do amount to evidence in the generic sense. That is so because evidence is the means by which a judge or a jury use to decide the truth of an assertion, the existence of a fact, and ultimately the guilt or innocence of the accused in a criminal case, and the truth or the legitimacy of the plaintiff's claims (or cause of actions) in a civil case. Evidence is the means by which facts are proved or disproved in that evidence is the cause and proof is the consequences. Therefore, in determining what is evidence, it is pertinent that it be read with that of 'proved'² or 'disproved'. The issue then is whether the Turnbull guidelines is a matter besides 'evidence' by reason of the words 'matters before it' and this is the subject matter of this article. This article proposes to look at the Turnbull guidelines and to then determine whether it is in the strict sense 'evidence, or not.

DEFINITION OF EVIDENCE

What is 'evidence, then? 'Evidence' is defined to include (a) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: Such statements are oral evidence; (b) all documents produced for the inspection of the courts: Such documents are called documentary evidence. It would be quite discernible that the definition of 'evidence' is not the real definition, but is rather a statement of the term 'evidence'. Therefore, 'evidence' would include circumstantial evidence³ and real evidence,⁴ even though they are not defined as 'evidence'. Similarly, even though, admission and confession are not defined as evidence, they are regarded as such by the Act. Nonetheless, real evidence, circumstantial evidence, admission and confession may still be classified either as documentary or oral evidence depending on whether they are introduced orally or as a document. An

² See *Noliana Sulaiman v PP* [2001] 1 CLJ 36 at 44-45; For a discussion as to what is 'evidence', see the article by Mohd Akram b Shair Mohamed, 'The Evidential Value of An Accused's Unsworn Statement From the Dock', [2003] 1 MLJ clxix.

³ See section 6-16, & 45-51 of the Malaysian Evidence Act 1950.

⁴ See section 60 (3).

admission if given through the mouth of a witness is oral evidence but if the same is reduced into writing, it then becomes a document. A view of the crime scene to appreciate the evidence (circumstantial) may be adduced in court either through oral evidence or through a document. Real evidence refers to material objects produced for the inspection of the court such as a knife or blood stained clothes. Even these can be regarded as documents since a document means anything which is a permanent record of the happening of a fact, and a blood stained cloth or a knife is a record of some fact. Section 4(1)(a) of the Oaths and Affirmation Act 1949 reads 'oaths shall be taken by witnesses, that is to say, all persons who ... give evidence... before the court...', suggesting that if a witness is to give oral evidence in court, it shall be made on oath from the witness box, or the same cannot be construed as 'evidence'.⁵ One can now probably see that proof is wider than 'evidence' as defined by the Evidence Act 1950 from the words 'matters before it' in the definition of proof. Evidence, thus defined, is not the only medium of proof. 'Matters before it' includes not only evidence in the strict sense but other matters as well, and these other matters are in a way, evidence in its general sense.

THE TURNBULL GUIDELINES

Having made matters clear as to what is evidence and proof, particularly the words 'matters before it', it is now pertinent to understand what Turnbull guidelines is. *R v Turnbull & Ors*⁶ is a leading Court of Appeal case on eyewitness identification, following a 1976 report by a Departmental Committee known as "Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases [1976] Cmnd Para 338" (Devlin Report) set up to report on evidence of identification.

The court in *R v Turnbull* stressed a need for a thorough and accurate warning and directions to juries on the dangers of the quality of identification, especially in regard to cases where the case against the accused depended wholly or substantially on the correctness of one or more identifications of the accused, which is alleged by the defence to be

⁵ See *PP v Sanassi* [1970] 2 MLJ 198 at 200.

⁶ [1977] QB 224; [1976] 3 All ER.

mistaken identification. Lord Widgery CJ, giving the judgment of the court laid down the following guidelines, which may be summarised as follows:⁷

1. Whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to *the possibility that a mistaken witness can be a convincing one and that a number of such witnesses could all be mistaken (author's emphasis)*. Provided, this is done in clear terms, the judge need not use any particular form of words.
2. The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Did passing traffic or a press of people impede the observation? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police was first given. In all cases, if the accused asks to be given particulars of such descriptions, the prosecutions should supply them.
3. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification of evidence. Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

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[1977] QB 224, at pp 228-231.

Lord Widgery further elaborated that the above matters go towards the quality of the identification evidence.

4. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger. The quality is good, for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like. The jury can safely be left to assess the value of the identifying evidence event though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. On the contrary, when the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. The quality of the identification evidence is what matters in the end. A failure to follow those guidelines is likely to result in a conviction being quashed as it would occasion a miscarriage of justice.

THE APPLICATION OF THE TURNBULL GUIDELINES

Turnbull was applied in the Privy Council case of *Reid v R*⁸ where their Lordship stated that 'experience has undoubtedly shown that police identification can be just as unreliable and is not therefore to be excepted from the now established need for the appropriate warnings'. The case illustrates that police officers, given their training in observation, is no less susceptible to the danger though, they might be thought to possess greater ability to identify people than is possessed by ordinary members of the public. In *Thomas v R*,⁹ a Privy Council appeal from Jamaica, the

⁸ (1990) 90 Cr. App. R 121; [1990] 1 AC 363; [1989] 3 WLR 771; [1993] 4 All ER 95.

⁹ Privy Council Appeal No. 44 of 1990 - (Lord Bridge of Harwich, Lord Ackner, Lord Oliver of Aylmerton, Lord Lowry and Lord Browne-

brief facts were that the appellant was charged with the murder of one Bowden Craddock. The main prosecution witness was police constable named Bogle, who identified the appellant as having entered the room and having fired two shots, one of which injured him. The room where the assault took place was lighted only by a quart bottle torch. Bogle only observed the assailant for one and half minutes and part of the brief time was spent looking down the barrel of the gun. Bogle had known the appellant for some 14 years but had not seen him since 1976. The appellant was convicted. His appeal to the Court of Appeal was dismissed and he appealed to the Privy Council. The Privy Council in allowing the appeal took note that the risk of wrongful convictions in 'fleeting glances' cases was very serious. The trial judge never told the jury that visual evidence of identification was a class of evidence that was particularly vulnerable to mistake, and the reasons for that vulnerability, nor that the witnesses can well give inaccurate but convincing evidence. Unless there were exceptional circumstances to justify such a failure, the conviction would be quashed, because it would have resulted in a substantial miscarriage of justice; there were no exceptional circumstances in the instant case.

In another Jamaican's Privy Council case of *Mill v R*,¹⁰ the appellants, a father and three sons were charged with the murder of Peter Bachelor, viciously attacked with a machete during the night when the deceased was walking home. The deceased died within minutes of the attack. The deceased and the appellants lived in close proximity in the rural district of St Catherine. For many years, there had been a feud between the two families over a roadway within the Mill's property. All the Mills pleaded alibi (they were at home), except Balvin who admitted to wounding the deceased on a plea of self-defence. Even then their lawyer who acted for all of them conducted the case on the basis that the prosecution witnesses were mistaken in their critical visual identifications. None of the appellants sought to answer the prosecution case by oral evidence, but in their defence they put forward their unsworn statements. Arthur Mills (the father) and Balvin Mills were sentenced to death by the trial judge of the Catherine Circuit Court. Garfield Mills and Julius Mills, being juveniles were to be detained during Her Majesty's pleasure. Their appeals to the Jamaica's Court of Appeal were dismissed. They were

Wilkinson); See also *Farquharson v R* – Privy Council appeal No. 344 of 1992, 14th June 1993, which applied the Turnbull guidelines.

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[1995] 3 All ER 865.

then subsequently granted special leave to appeal to the Privy Council. The Privy Council dismissed their appeals. It was a fact that all the witnesses, the deceased and the appellants lived in the same small community, and knew each other. It was not a fleeting glance case but rather a classic recognition case despite that the critical events occurred during the hours of darkness. There was, however, no evidence that it was a moonlit night nor that it was pitch dark. The facts were that the eyewitnesses had no difficulty identifying the assailants, and were assisted by the lighting from the nearby house and the flashlight of one of the assailants. One prosecution witness, Mitchell, testified that when he was with the deceased in a local bar that night, Garfield, Julius and Balvin came in and 'circled' them and left. The deceased also left with another witness, Richard Brailsford who testified that Garfield and Balvin jumped out from under a shaded tree. Richard Brailsford said that he was able to see it all happen by the light of a kerosene lamp shining from a nearby house. Richard Brailsford said that Garfield struck the deceased on the foot with a machete, and the deceased ran off. According to Richard, Balvin shone a flashlight at the deceased and together with Garfield they chased after the deceased. He then heard a shout and went into the direction where he found the deceased dying on the road. Mitchell too overheard the commotion and ran in that direction and found the deceased badly injured in the road. Another witness, Ronald Brailsford (Richard's cousin) corroborated Richard's evidence in the sense that the deceased ran up to a nearby shop and had a wound behind his foot. Ronald could not take the deceased home due to interruptions at the scene of someone finding money on the ground. According to Ronald, the deceased walked on towards his house, next Ronald saw the deceased on the ground, surrounded by a group one of whom had a flashlight. Ronald testified that the four appellants were attacking the deceased with machetes, and then they ran off. Another witness, a security guard also saw a group of men, illuminated by flashlight attacking someone on the ground. He identified the four assailants, and as a matter of fact knew them by name and sight. The Privy Council further held that a trial judge had a broad discretion in a recognition case to express himself in his own way and was not required to cast his directions on identification in a set form of words. So long as the warning is there, it is sufficient, though, the judge did not use the words 'a mistaken witness can be a convincing one'. It would be sufficient for the trial judge if he had directed the jury of the danger of convicting on identification evidence alone, and to convey to the jury that it was not

sufficient that they regarded the witness as credible, and had emphasised that an honest witness could be a mistaken witness. The Privy Council emphatically rejected a mechanical approach in that *R v Turnbull* is not a statute and does not require an incantation of a formula or that it must be in a set forms of words. All that is required of the judge is that he should comply with the sense and spirit of the guidance in *Turnbull* as restated by the Privy Council in *Junior Reed v R* [1993] 4 All ER 95. Further, though, the judge did not expressly say that a number of convincing witnesses may be mistaken he did nevertheless tell the jury that it was a recognition case and directed the jury as to the dangers inherent in that evidence and to consider whether the witnesses were mistaken.¹¹

THE RECEPTION OF THE TURNBULL GUIDELINES BY THE MALAYSIAN COURTS¹²

The Malaysian Supreme Court in *Yau Heng Fang v PP*¹³ also applied the *Turnbull* guidelines as a matter of judicial and practical wisdom as to the need for quality in the evidence of identification. Mohamed Azmi SCJ held that the appellants should not have been called to enter their defence without any other evidence to connect the appellant with the crime, as the evidence of identification was of poor quality: no *prima facie* case could have been established, and the appellant should have been acquitted without his defence being called. The case was followed by the High Court in *PP v Hussain bin Sudin*,¹⁴ whereby the accused was charged under the Firearms (Increased Penalties) Act 1971 and section 109 of the Penal Code for abetting the escape of a prisoner under lawful police custody by discharging a firearm with intent to cause the death or hurt to one of the two policemen who were guarding the prisoner. The prisoner was undergoing treatment in the hospital when a gunman with another man, at about 2.15 a.m., aided the prisoner's escape. The prosecution's case against the accused was by identification of the two policemen and a taxi driver. The accused was arrested 7 months later,

¹¹ *Ibid* at pg 872.

¹² See also Mohd Akram bin Shair Mohamed, "Identification Evidence and *Turnbull* Guidelines: Should Our Courts Follow?" [1989] CLJ 945.

¹³ [1985] 2 MLJ 335.

¹⁴ [1991] 3 CLJ 2568 (HC).

and these persons identified the accused in two separate identification parades. The issue was whether the gunman who aided the prisoner's escape was the accused. The taxi driver readily admitted that he could not be sure whether the accused was the gunman who held him up that fateful night, as he had a poor vision of them. That he was shown the photograph of the accused shortly before the identification parades and had actually in his testimony admitted that he guessed that the accused was the gunman corroborated his poor vision of the offender that fateful night. At the time of the prisoner's escape, one of the policeman had a poor vision of the gunman given the small bulb, which was not bright, and had only seen the side of the gunman's face when he was seized, as the gunman had the pistol shoved to the left side of his neck. The gunman asked for the key to the handcuff, and then knocked his head with the butt of the gun. The shocked and frightened policeman was dazed by the knock. The policeman only had a fleeting glance of the gunman now and then, when the gunman snatched the key from him and when the gunman threw the key to the prisoner, and also when the gunman and the prisoner were trailing behind him as the gunman's companion was dragging him out of the ward. He was in a confused state when he was dragged out of the ward. The prisoner, the gunman and the other man then fled together in a taxi, and then in a different part of the hospital, hijacked a different taxi and got away. The other policeman was outside the ward looking into the poorly lit ward where the prisoner was, and had a fleeting glance lasting 3 or 4 seconds of the gunman with another man. He was shocked and the whole thing happened so fast. As a matter of fact, he had fallen when he retreated backwards, before taking refuge in another ward. It is the finding of fact of the trial judge that despite the striking similarity of the prisoner and the accused, both the policemen had failed to notice their resemblance, begging the question whether they could actually remember the gunman's features during the incident that material night. The two policemen too were together for half an hour in the room of the inspector who conducted the identification parade. It could not be said that the two policemen were not oblivious that the purpose of their presence had to do with the identification of the gunman. Moreover, they knew that the accused was a 'wanted man' as his photographs were in newspapers and in the police posters at the police station. There were other serious irregularities in the sense that the accused had the dirtiest clothes among all other participants. The accused was acquitted since no *prima facie* case had been established, as there was no supporting

evidence to indicate that the accused was the gunman in question that material night. The case emphasised that the need for quality in the evidence of identification cannot be gainsaid bearing in mind the guidelines set out by Lord Widgery in *R v Turnbull & Ors*, namely the risk of mistaken identification given the circumstances of the identification and the necessity to mind that there is a special need for caution when the case depends on evidence of visual identification. The judge should point out to himself or the jury (if applicable) that a convincing witness may be mistaken.

In a quite recent case of *Jaafar Bin Ali v PP*,¹⁵ the facts were that the accused was charged with attempted murder of one Noor Junizah. This Noor Junizah accepted an invitation by a motorcyclist rider who took her to a rubber plantation. The accused had a helmet on and was not known to the victim. The victim alleged that she could see the accused well when he removed his helmet but that was for 10 minutes after which she was strangled. Moreover, it was then a bit dark. Those factors could have compromised her visual identification of the accused. The identification parade also had serious irregularities as she was shown two persons prior to the identification parade, and hence was of no corroborative value. Justice Augustine Paul quashed the conviction because the trial judge (sessions court) failed to adequately address his mind that an honest witness and a convincing witness could be mistaken under the given circumstances. The evidence of identification was of poor quality. At the material time, she had a poor vision of the real culprit. The judge also said that where the quality of the identification is poor, the case should be withdrawn unless there is other evidence to support the identification.¹⁶

SUPPORTING EVIDENCE

The Singapore case of *Heng Aik Ren Thomas v PP*¹⁷ received Turnbull guidelines with a new point added to it. If the visual identification is credible, though, not so reliable, the accused cannot be convicted without supporting evidence. The supporting evidence (corroboration in a non-

¹⁵ [1998] 4 MLJ 406.

¹⁶ [1998] 4 MLJ 406.

¹⁷ [1998] 3 SLR 465 (CA).

technical sense) required is to add up to the quality of the identification evidence, rather than corroboration evidence of the kind required in *R v Baskerville*.¹³ In other words, corroboration in its technical sense is formidably more supportive.

In *R v Baskerville*, Lord Reading C.J. said at page 667; "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it".

In *R v Islam*,¹⁹ the Court of Appeal held that although a recent complaint, can help the jury to decide whether the complainant has told the truth, it cannot be independent confirmation of the complainant's evidence since it does not come from a source independent of the complainant. The trial judge should direct the jury as to its limited effect as there was every danger of the jury having thought, as one view might be a common sense reaction that such evidence was indeed further evidence of the truth of the complainants, rather than of being limited assistance in assessing the veracity of the complainer. The independent evidence should not merely tend to confirm that the crime has been committed but must implicate the accused.

Odd coincidences can, if unexplained, be supporting evidence. Lord Widgery in *R v Turnbull*²⁰ gave an example where an accused charged with robbery had been identified by three witnesses in different places on different occasions, but each had only a momentary opportunity for observation. Immediately after the robbery, the accused had left his home and could not be found by the police. When they later saw him, he claimed to know who had done the robbery and offered to help them find the robbers. At the trial, he then put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way.²¹ Likewise, in the absence of any

¹⁸ [1916] 2 KB 658.

¹⁹ [1999] 1 Cr App R 22.

²⁰ [1977] QB 224, at pg 230, [1976] 3 All ER 549 at 553.

²¹ See *R v Long* (1973) 57 CR App R 871.

explanation, fabrication of evidence could also amount to supporting evidence. Lord Widgery CJ in *R v Turnbull* said:²²

"False alibis may be put forward for many reasons; an accused, for example who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."

WHEN A TURNBULL WARNING IS NOT REQUIRED

A Turnbull warning is not necessary, even though the defendant denies being the offender where there is no possibility of the witness being mistaken about the identity of the offender. In *R v Cape*,²³ the defendants were alleged to be involved in a fight in a pub. The pub landlord, who knew the men, testified that they were so involved. The defendants admitted being in the pub at the time but denied involvement; they suggested the landlord was lying and was motivated by a grudge. The issue before the jury was simply whether they accepted the evidence of the landlord as truthful: that did not call for a Turnbull warning since identification was not an issue. In *R v Slater*,²⁴ the offence took place in a nightclub and the accused accepted that he had been there. The accused was 6' 6" tall and the Court of Appeal noted that there was no evidence to suggest that anyone remotely similar in height to the accused was present in the nightclub where the offence took place; no Turnbull warning

²² [1977] QB 224, at pg 230, [1976] 3 All ER 549 at 553.

²³ [1996] 1 Cr App R 191.

²⁴ [1995] 1 Cr App R 684.

was needed. Conversely in *R v Thornton*,²⁵ the offence took place in a wedding reception. The accused accepted that he was at the reception. There were a number of people present who were dressed similarly to the accused (black leather jacket, black trousers) and several people were allegedly involved in the offence. The Court of Appeal thought that a mistaken identification was clearly possible; a Turnbull warning should be given.

CONCLUSION

In a final analysis, it is established from cases mentioned and discussed of the importance of the Turnbull guidelines as a rule of practice that has become a rule of law for the Malaysian courts, namely that an honest and a convincing witness could be mistaken. The credibility of the witness²⁶ or the relevancy²⁷ of the evidence is not the issue rather it is the quality of the evidence that begs adequate attention from the court. It must be done in clear terms, and it is not necessary to employ any particular form of words. No mechanical approach is required, so long as the warning is there, it is sufficient. The need for quality in the evidence of identification cannot be gainsaid, and a failure by the trial court to take heed of the matter would occasion a failure of justice. In *Reid v R*,²⁸ the Privy Council said;

“No hesitation in concluding that a significant failure to follow the identification guidelines as laid down in Turnbull.... will cause a conviction to be quashed because it will have resulted in substantial miscarriage of justice.If convictions are to be allowed upon uncorroborated identification evidence there must be strict insistence upon

²⁵ [1995] 1 Cr App R 578.

²⁶ Section 118 of the Evidence Act 1950 reads ‘All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.’

²⁷ Section 5 and 9 of the Malaysian Evidence Act 1950.

²⁸ [1993] 4 All ER 95 at pg. 100 and 102.

a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict. It is only in the most exceptional circumstances that a conviction based on uncorroborated identification evidence will be sustained in the absence of such a warning."

The court exercising its appellate or revisionary jurisdiction would in the event of a non-direction or a misdirection of the guidelines quash the conviction, set aside the sentence, and order a retrial. The Turnbull guidelines is, therefore, among the matters that the court must consider when it decides whether or not there is a *prima facie* case against the accused at the close of the case for the prosecution, or when it decides on the guilt or the innocence of the accused at the conclusion of the trial.²⁹ This is evident since under the Malaysian Evidence Act 1950 a fact is 'proved' when, after considering the *matters before it*, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The Turnbull guidelines, though, is not evidence in the strict sense, it forms part of the *matters before it*, and is still evidence in the generic sense. The warnings or directions as enunciated in Turnbull, and received by the Malaysian courts is among the matters before the court, and subsequently, there is a need to take special caution where the quality of the identification evidence becomes an issue. Where there is no identification evidence at all, the judge's decision is simple. Where there is identification evidence but it is of poor quality (unreliable and not sufficient to found a conviction) and it is unsupported by other evidence, the case should be withdrawn from the jury. In the Malaysian context, it must be held that no *prima facie* case has been established and the accused must be acquitted. A judge should not tell the jury that the poor identification evidence would be withdrawn if there was no supporting evidence. The reason being that it is for the judge to decide if there is evidence capable of supporting the identification. It is a question of fact for the jury to decide whether it does support it. The jury might be inappropriately influenced in their decision if they knew of the judge's view.³⁰

²⁹ See section 173 (f) & (h), and (m) of the Malaysian Criminal Procedure Code.

³⁰ *R v Akaidere* [1990] Crim LR 808.