IN THE SUPREME COURT OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the nature of an Appeal against a Judgment of the High Court of the Provinces under and in terms of section 9(a) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 read with Article 128 of the Constitution.

Kakille Dissanayake Arachchige Ruwan Chamara
No. 262A, Hillside Watta, Haliwala,
Galle.

1st Accused – Appellant – Appellant

Supreme Court Appeal No. 114/2020
SC (SPL.) LA No. CA 252/2019
High Court Galle -
No. SP/HC/GA/APL/1164/2017
Magistrate's Court of Galle -
No. 75510

vs.

1. **Officer-in-Charge**
Police Station,
Akmeemana.

Complainant – Respondent – Respondent

2. **Honourable Attorney-General**
Attorney-General's Department
Colombo 12.

Respondent - Respondent

Before:	**Jayantha Jayasuriya, PC, Chief Justice.** **Yasantha Kodagoda, PC, J.** **Kumuduni Wickremasinghe, J.**
Appearance:	Ms. Saranee Gunathilake instructed by Ms. Kethmini Dharmasena for the 1st Accused – Appellant – Appellant. Senior State Counsel Ms. Induni Punchihewa for the Respondent - Respondent Honourable Attorney-General.
Argued on:	1st December 2022 and 21st March 2023
Written Submissions filed on:	For the Appellant: 24th August 2020 and 4th May 2023. For the Respondent – Respondent: 10th February 2021 and 11th September 2024.
Judgment delivered on:	27th November 2024

<u>Yasantha Kodagoda, PC, J.</u>

Introduction and the background

1. This Judgment relates to an Appeal heard by this Court with regard to a Judgment dated 31st May 2019 of the High Court of the Provinces (Southern Province) holden in Galle which arises out of an Appeal heard by that court (No. SP/HC/GA/APL/1164/2017). That Appeal related to a judgment dated 15th February 2017 of the Magistrate's Court of Galle, pronounced in case No. 75510. The learned Judge of the High Court affirmed the judgment of the learned Magistrate and dismissed the Appeal against the judgment of the Magistrate's Court. The instant Appeal is against the afore-stated judgment of the High Court of the Provinces.

2. On 14th May 2008 the Officer-in-Charge of the Akmeemana Police Station (Complainant – Respondent – Respondent) instituted criminal proceedings (filed Plaint) in the Magistrate's Court of Galle against the Appellant and another (Bopalgoda Nishantha Kumara) alleging that on 30th August 2006 in Gonamulla, Galle, they had committed robbery of a gold chain (the value of which was approximately Rs. 15,000/=) which was in the possession of one Kamani Nilanka, and thereby committed an offence punishable under section 380 read with section 32 of the Penal Code. The Appellant before this Court was cited as the 1st Accused.

3. Following the conduct of a trial against both accused, by Judgment dated 15th February 2017, learned Magistrate of the Magistrate's Court of Galle found both accused *'guilty'* and convicted them for the offence charged. By the sentencing order dated 8th March 2017, the learned Magistrate sentenced the 1st and the 2nd Accused in the following manner:

    i. Rigorous imprisonment of 1 year.
    ii. Fine of Rs. 500/= (in default 6 months rigorous imprisonment).
    iii. Compensation of Rs. 10,000/= payable to the virtual complainant (prosecution witness 1).

4. Aggrieved by their conviction and the sentence imposed, the 1st and the 2nd Accused appealed to the High Court of the Provinces. After hearing counsel for the Appellant and the Respondent, the evidence of the case and the Judgment of the learned Magistrate, the learned Judge of the High Court, by his Judgment dated 31st May 2019 affirmed the conviction and the sentence of both Accused - Appellants.

5. Following a consideration of a Petition by which the 1st Accused – Appellant – Petitioner sought *Special Leave to Appeal* to this Court against the afore-stated Judgment of the High Court of the Provinces, leave was granted in favour of the Petitioner on the following questions of law:

    i. Did the learned High Court Judge err in law by affirming the Judgment of the Magistrate of Galle dated 15th February 2017 marked "X1" and the sentence imposed marked "XIV"?

ii. Did the learned High Court Judge fail to duly consider section 420 of the Code of Criminal Procedure Act, No. 15 of 1979, and also fail to consider the fact that the ingredients of the said section 420, were not satisfied?

iii. Did the learned High Court Judge err in law by holding that the identification parade notes, qualify as an admission, due to the fact that there was no objection to the making of the said notes as "Pe1" without due consideration of section 420 of the Code of Criminal Procedure Act, No. 15 of 1979?

iv. Did the learned High Court Judge fail to consider the identification parade report marked "P1", which most emphatically recorded the objection of the Petitioner against the said identification parade, in its entirety?

These questions of law arise founded upon the Appellant's allegation that the prosecution had failed to prove beyond reasonable doubt that it was he (the Appellant) along with the 2nd Accused who committed robbery of an item of jewellery which the virtual complainant was wearing at the time of the commission of the offence. [It appears that the 2nd Accused has not appealed to this Court against the Judgment of the High Court.]

Case for the Prosecution

6. **Testimony of Kamani Nilanka -** The first witness to testify for the prosecution was I.W. Kamani Nilanka (the virtual complainant). On the day of the incident – 30th August 2006, around 4.30 p.m., she had set off from her place of work in Gonamulla to go home. While proceeding on foot on the Yakkalamulla – Galle – Udugama road towards Yakkalamulla, she had noticed a motorcycle approaching her from the direction of Yakkalamulla (from the opposite direction). Having passed her, the motorcycle had been halted. Possibly having turned around, the motorcycle had once againt come towards her from the front direction. She had noted that it did not have a number plate. As she felt suspicious, she had covered her neck with the collar of her blouse. The person seated on the pillion had grappled with her. She shouted. He had then aimed a pistol at her and demanded that she does not shout. Thereafter, her necklace was snatched. For some time, she had grappled with the assailant and sat on the motorcycle, which moved a few feet along with her. That resulted in her falling off the motorcycle. She had sustained injuries.

7. Kamani Nilanka has also testified as to how that evening itself around 7.00 p.m. she complained to the Akmeemana police station and how she was treated at the Karapitiya hospital for the injuries sustained by her. She has also testified as to how she participated at an identification parade and identified the 2nd Accused as the person who snatched the necklace.

8. While providing her testimony, she made a 'dock identification' that the 2nd Accused was the person who snatched her necklace. Similarly, she identified the 1st Accused (Appellant) as the person who rode the motorcycle. She has also testified that at an identification parade held in the Magistrate's court, she identified both accused in the same manner as during the dock identification. Meanwhile, through her, the prosecution produced the corresponding identification parade notes which were marked as "P1" ("Pe1").

9. Under cross-examination on behalf of the 1st Accused (Appellant), it has been suggested to her that an incident in the nature of what was testified to by her did not occur. She has denied that suggestion. Learned counsel has inquired from her whether prior to seeing the accused at the identification parade, the accused were seen by her at the police station. She has answered that question in the negative. The witness has stated specifically that after the incident, she saw both accused for the first time in court on the occasion of the identification parade. She has also denied that the police told her that it was the accused who robbed her necklace. It has also been suggested to her that, since the 1st Accused was said to have only driven the motorcycle, he would not have had knowledge as to what the 2nd Accused did. The witness has responded that the 1st Accused would have known what happened.

10. Under cross-examination on behalf of the 2nd Accused, it has been suggested to her that the two accused had been shown to her at the Akmeemana police station prior to her participation at the identification parade. She has denied that suggestion. In response to a question posed to her, she has admitted that at the time of the robbery, the accused wore helmets.

11. **Testimony of Gamini Ihalawela -** The criminal investigation into this incident had been conducted by the then Officer-in-Charge of the Akmeemana police station Inspector of Police I.K. Gamini Ihalawela. Having recorded the complaint of Kamani Nilanka, this officer had proceeded to the scene of the crime and

conducted necessary investigations. On 10th September 2006, acting under his supervision and based on information received, Inspector Manamperi of the Akmeemana police station had arrested the two accused at a place in Walahanduwa. [It is in evidence that Inspector Manamperi had died by the time of the trial.] This witness has also said that it was he who produced the two accused for the identification parade which was held on 20th September 2006.

12. Under cross-examination on behalf of the 1st Accused, in response to a question as to whether the virtual complainant revealed to the police, external characteristics of the perpetrators of the robbery, this witness has said that she said that the perpetrators were unknown persons and that if seen again, she would be in a position to identify them. Investigators have been unable to recover the robbed necklace or locate the motorcycle that was used to commit the robbery. He has denied the suggestion that prior to the conduct of the identification parade the police showed the accused to the virtual complainant.

13. Under cross-examination on behalf of the 2nd Accused, the witness has denied a suggestion that the two accused were handed over to the Akmeemana police station by officers of the Galle police station and then they were shown to the virtual complainant at the Akmeemana police station.

14. **Testimony of Priyangani Samarawickrema -** The prosecution had called one more witness to testify; that being K.K. Priyangani Samarawickrema, being the Registrar of the Magistrate's Court of Galle. Through her, the prosecution had produced marked "P2", the Medico-Legal Examination Form relating to the forensic clinical medical examination of the virtual complainant by Dr. S.G.H. Ambepitiya.

Case of the 1st and 2nd Accused

15. The 1st and 2nd Accused testified on their own behalf from the witness box. The 1st Accused has admitted that the 2nd Accused was known to him, as he was a construction worker working at his house. While denying any involvement in the commission of the offence of robbery, both accused have sought to explain the circumstances under which they were arrested. According to them, on the day they were arrested, in order to comply with a bail condition imposed on them relating to a different case, which required them to sign a book at the Galle police

station, they had proceeded to the Galle police station. At the time they went to the Galle police station, two police officers of the Akmeemana police station had been present. So was another person, whose connection to this case is unknown to them. Having shown the accused to that other person, the two police officers had inquired whether *'is it them?'*. To that inquiry, that person had responded in the affirmative. Thereafter, the two police officers of the Akmeemana police station had taken both accused to the Akmeemana police station.

16. At the Akmeemana police station the accused had been shown to the virtual complainant, and a police officer had suggested that the accused were the persons who had committed the robbery. They had been kept at the police station overnight and on the following day, they had been produced before the Magistrate's Court and an identification parade conducted. At the parade, the virtual complainant had identified both accused. The Attorneys representing the accused at the identification parade had informed the Magistrate that at the police station they were shown to the virtual complainant.

Submissions of counsel for the Appellant

Production of the identification parade notes by the Prosecution without objection from the Defence, being treated by the Judge of the High Court as an admitted fact under section 420

17. Learned counsel for the Appellant submitted that, the learned Judge of the High Court had erred when he treated the fact that the notes relating to the identification parade being admitted in evidence by the defence without objection amounted to *"an admitted fact of the case for all purposes"*. Learned counsel submitted that this error had occurred as the learned Judge had failed to appreciate that there was a distinction between the admission of the identification parade notes in evidence and the admission of the identity of the accused as the persons who committed the offence. She alleged that the learned Judge had grossly erred when he concluded that "*once a document is marked without being objected to by the opposite party, it should be considered an admitted fact. No one can challenge the contents of the document thereafter by various means*".

18. Learned counsel for the Appellant also submitted that, even if the learned Judge had recognised that the identification parade notes (marked and produced as "P1") had been admitted in evidence without any objection from the defence and

therefore serves as 'evidence', he should have given due regard to the challenge made by the defence counsel to the holding of the identification parade, since the accused had been previously shown to the virtual complainant at the Akmeemana police station. In this regard, learned counsel brought to the attention of this Court the principles contained in ***The Queen vs. Sivanathan*** *[68 NLR 350].* She also submitted that the prosecution had failed to eliminate or counter the serious doubt that the defence had raised regarding the reliability of the identification of the accused. She also submitted that the learned Magistrate had erred in shifting the burden of proving those suspicious circumstances to the defence.

Unreliability of the evidence relating to the visual identification of the Appellant and the absence of proper judicial evaluation of such evidence

19. Learned counsel for the Appellant placing reliance on ***Roshan vs. The Attorney-General*** *[(2011) 1 Sri L.R. 364]* and ***The Attorney-General vs. Joseph Aloysius and Others*** *[(1992) 2 Sri L.R. 264]* submitted that the identity of the accused, as the person who committed the offence is a *fact in issue* in any criminal trial, and submitted that it must be proved by the prosecution beyond reasonable doubt. In this regard, the primary submission of the learned counsel for the Appellant was that the prosecution had failed to prove beyond reasonable doubt the identity of the 1st Accused – Appellant – Appellant as the person who rode the motorcycle in which the 2nd Accused – Appellant arrived at the scene and robbed the necklace of the virtual complainant. Learned counsel asserted that the evidence of visual identification provided by the prosecution was weak and that both the learned Magistrate and the learned Judge of the High Court had failed to adequately evaluate the quality of the evidence of visual identification of the accused persons. In this regard, she submitted that the nature and the standard of evaluation is laid down in ***Roshan vs. The Attorney-General*** *[(2011) 1 Sri L.R. 364]* and in ***Rathnasingham Janushan and Another vs. OIC, Headquarters Police Station Jaffna and Others*** *[SC Appeal 07/2018, SC Minutes of 4th October 2019].* Learned counsel adverted to the fact that particularly when the purported identification had been under difficult circumstances (as in the instant case), there was a necessity for the learned trial judge to have applied the *'Turnbull principles'.*

20. It was the contention of learned counsel for the Appellant that the virtual complainant had admitted that both perpetrators of the crime had been wearing helmets at the time of the robbery. In the circumstances, the learned trial judge and the learned judge of the High Court should have considered whether under such

circumstances, the virtual complainant had sufficient opportunity to see the faces of the two persons concerned. She queried as to whether in the given circumstances the virtual complainant's subsequent purported identification of the accused at the identification parade would be accurate and reliable.

21. Learned counsel also submitted that the prosecution had taken no effort to ascertain from the virtual complainant as to the features of the perpetrators' faces, which enabled her to identify the two accused at the identification parade. According to the police investigator, even when the virtual complainant was interviewed and her statement recorded by the police, she had not revealed any special identification features of the perpetrators. All what she has said was that she would be able to identify if the perpetrators are seen again.

22. She submitted that, particularly given the consistent position maintained by both accused, that at the Akmeemana police station they were shown by the police to the virtual complainant, there could not have been any value to be attached to the identification of the accused at the identification parade. Learned counsel also submitted that according to the testimony of the virtual complainant, several traumatic things had happened to her within a short period of time. In the circumstances, it would be highly improbable that she would have had sufficient time and clear opportunity to properly look at and thereafter recall the facial identification features of the perpetrators. Learned counsel also submitted that, even if the virtual complainant had seen the person on the pillion of the motorcycle who is said to have snatched her necklace, it is highly unlikely that she would have seen the face of the person who rode the motorcycle (whom the prosecution alleges is the 1st Accused – Appellant – Appellant).

23. Learned counsel for the Appellant also assailed the reliability of the identification of the Appellant, on the premise that the accused had been shown to the virtual complainant the day before the identification parade at the Akmeemana police station. Learned counsel drew the attention of this Court to an entry made by the learned Magistrate in "P1" (identification parade notes) when he set-about to hold the identification parade, that the Attorneys-at-Law who appeared for the two suspects (accused at the trial) objected to the conduct of the identification parade on the footing that prior to the conduct of the identification parade, the witness was provided with an opportunity to see the accused.

24. In view of the foregoing, learned counsel submitted that no reliance could be placed on the virtual complainant's purported visual identification of the accused at the identification parade which was held nearly a month after the incident.

25. In view of the foregoing, learned counsel for the Appellant submitted that since the conviction of the 1st Accused – Appellant – Appellant is unsafe and unlawful, the Appeal should be allowed and the conviction and the sentence of the 1st Accused – Appellant – Appellant be set-aside.

Submissions of Senior State Counsel for the Respondents

26. Learned Senior State Counsel submitted that at the trial, the identification parade notes were led in evidence when the virtual complainant gave evidence, and its contents were not marked as an 'admission' under section 420 of the Code of Criminal Procedure Act. In the circumstances, learned SSC submitted that the submissions of the learned counsel for the Appellant that there was non-compliance with the provisions of section 420 were totally misconceived in law and irrelevant. In the circumstances, she invited this Court to answer the corresponding questions of law in the negative.

27. Learned SSC also drew the attention of this Court to section 414(2) of the Code of Criminal Procedure Act, and submitted that in terms of the said section, in order to produce the identification parade notes, it was not necessary for the prosecution to have called either the Magistrate who conducted the parade or any other person who assisted the learned Magistrate in the conduct of the parade, to testify at the trial and produce the identification parade notes.

28. Learned Senior State Counsel also submitted that the learned Judge of the High Court had only concluded that the identification parade notes were produced by the prosecution without any objection from the defence. He has not treated the contents of the said notes as an 'admission' under section 420. She submitted that, even otherwise, the learned Magistrate had carefully considered the evidence relating to the identity of the perpetrators being the accused, and arrived at correct and reliable findings in that regard.

29. Learned SSC submitted that the virtual complainant had correctly identified both accused at the identification parade held only 20 days after the incident. At the

parade she has clearly and separately explained to the learned Magistrate the conduct of each accused at the time of the incident. This description of the 1st Accused (Appellant before this Court) being the rider of the motorcycle and the 2nd Accused being the person who snatched her necklace has been consistently testified to by her at the trial.

30. Learned SSC also submitted that the position taken up by the accused that they were shown to the virtual complainant at the Akmeemana police station has been *'clearly, repeatedly and consistently rejected'* by the victim when she was cross-examined. The investigation officer had also denied this position.

31. Learned SSC drew the attention of this Court to the observations of His Lordship the Chief Justice Jayantha Jayasuriya in *Rathnasingham Janusha and Another vs. OIC, Police Station Jaffna and Others (cited above)* wherein His Lordship has explained the factors to be taken into consideration when evaluating testimony regarding identification of accused. Learned SSC submitted that since the virtual complainant had struggled with the 2nd Accused at the time the latter snatched the necklace, the 2nd Accused had come to close proximity with the witness, thus providing an opportunity for the witness to have clearly seen the face of the 2nd Accused. Furthermore, the incident had taken place around 5.15 p.m., which would have enabled the virtual complainant to have clearly seen the face of the 2nd Accused.

32. She submitted that both the learned Magistrate and the learned Judge of the High Court had correctly considered factors which are relevant to the determination of whether visual identification is reliable and arrived at a correct finding.

33. Since the virtual complainant had ample opportunity to see the 2nd Accused clearly, it was not a *'fleeting glance'* or a purported identification *'under difficult circumstances'*. She therefore submitted that the application of the *'Turnbull principles'* were not necessary in view of the circumstances relevant to the instant case. She submitted that in more recent judgments such as *R. vs. Courtnell [(1990) Criminal Law Review 115], R. vs. Oakwell [66 Criminal Appeals Reports 174], R vs. Curry and Keeble [(1983) Criminal Law Reports 737]* and in *Keerthi Bandara vs. Attorney General [(2000) 2 Sri L.R. 245]* courts have clarified that in each and every case of visual identification the *'Turnbull principles'* need not necessarily be applied. This is particularly so in the instant case, since the virtual complainant

had adequate light, the perpetrator was seen at close proximity and she had ample opportunity to see the perpetrator.

34. Learned Senior State Counsel submitted that *'merely wearing a helmet does not make it difficult to identify a person'*. Furthermore, she submitted that there was no evidence that the helmet had a visor which the perpetrator was wearing, would have made it difficult to clearly see the perpetrator's face.

35. In view of the foregoing, learned Senior State Counsel submitted that the prosecution had adequately discharged its burden of proving the identity of both accused beyond reasonable doubt.

36. Therefore, learned Senior State Counsel urged this Court to affirm the conviction and the sentence and dismiss the Appeal.

Visual identification of perpetrators of offences and the applicable law

37. When an offence is committed, a critical issue that immediately arises is the identity of the perpetrator of the offence (*i.e.* the person who committed the offence). In certain instances, the identity of the perpetrator of the offence may be apparent, and in some others, it may need to be investigated into and ascertained. While in a few cases the identity of the accused is not in issue, in most other cases, it is very much a contentious issue. Therefore, determining the identity of the perpetrator of the offence is considered a key component of most investigations into offences. That is because, during the corresponding trial, a foremost responsibility of the prosecution would be to prove beyond reasonable doubt that the person indicted (the accused) was in fact the perpetrator of the offence.

38. In any criminal prosecution, the prosecutor must necessarily prove two components. They being,
(a) that the offence contained in the indictment / charge sheet had been committed (as alleged and in the manner contained in the indictment / charge) by whomsoever, and
(b) that the person who committed such offence is the person named in the indictment, who has been arraigned in the dock.
The ability of the prosecutor to perform this task would be dependent upon investigations conducted into the commission of the offence in issue. The

prosecutor can discharge this duty with the aid of either direct evidence or presumptively by circumstantial evidence.

39. In order to identify the perpetrator of the offence, during the course of the corresponding criminal and forensic investigations, investigators would need to rely on a host of sources of information, including in particular, information that the victim of crime and others who may have witnessed the commission of the crime (eye-witnesses) would be in a position to provide. When such information is available and is deemed by the prosecutor to be reliable, he presents such evidence through the testimony of the relevant eye-witnesses. This is referred to as testimony of visual identification.

40. While in terms of section 9 of the Evidence Ordinance, evidence relating to the identity of the person who committed the offence is a *relevant fact,* that it was the accused who committed the offence is a *fact in issue* of every criminal case. This reflects the imperative nature of the need for the prosecution to prove that the accused before court was the offender.

41. Trial courts must necessarily approach and treat testimonial evidence regarding purported visual identification of the accused as the person who committed the offence, with considerable caution. The need for trial courts to adopt this approach arises out of the fact that what may appear to be a simple case of visual identification would in fact amount to several distinct and vulnerable phases and perceptions of human cognition. These phases of cognition and perceptions have been most helpfully explained by Justice Evatt in the Australian case of ***Craig vs. The King*** *[(1933) 49 Commonwealth Law Reports 429]* in the following manner:

> *"An honest witness who says, 'the prisoner is the man who drove the car', whilst appearing to affirm a simple, clear and impressive proposition, is really asserting:*
> *(i) that he observed the car,*
> *(ii) that the observation became impressed upon his mind,*
> *(iii) that he still retains the original impression,*
> *(iv) that such impression has not been affected, altered or replaced, by published portraits of the prisoner, and*
> *(v) that the resemblance between the original impression and the prisoner is sufficient to base a judgment not on resemblance but of identity."*

42. Thus arises, the need for courts to approach evidence relating to visual identification of the accused with a degree of caution, and the need for the court

to satisfy itself regarding the integrity, quality, reliability and sufficiency of the identification evidence. The accused should be convicted only if the evidence relating to identification or recollection is sufficiently reliable to prove the case against the accused beyond reasonable doubt. The prosecution must prove beyond reasonable doubt that the person who committed the offence is the person named on the indictment and present in court inside the dock (unless, the trial is taking place in terms of the law at a time when the accused is not before court – *a trial in absentia*). However, even if a *trial in absentia* has been held, and I would think particularly in such cases, the prosecution must have proved that the perpetrator of the offence was in fact the person named in the indictment.

43. Generally, information relating to the identity of the perpetrator of the offence stem from eye-witnesses to the offence, which may include the victim of crime, if any. Such information which eye-witnesses to the commission of an offence would possess and provide to investigators, may result in the identification of the offender. Such information, can be divided broadly into the following seven (7) categories:

    i. The perpetrator of the offence is a person who has been known to the witness, and therefore the identity of the perpetrator is provided by him to the investigator, often referring to the perpetrator by name. That would be possible, as the perpetrator had been known to the witness for some time prior to the commission of the offence, and the witness having recognised the perpetrator when he committed the offence. Due to this reason, the exact identity of the perpetrator is revealed by the witness to the investigator. The identity of the perpetrator would generally be given in the form of disclosing the perpetrator's full name or a part of the name, or as a reference to his *alias*, if the perpetrator has one. The witness will also reveal the manner in which the perpetrator came to be known to the witness. Additionally, a physical description of him and such additional information which would facilitate the investigator to trace, identify and arrest the perpetrator would generally be provided, unless such additional information is unnecessary given the obvious identity and whereabouts of the offender.

    ii. The perpetrator of the offence has been known to the eye-witness or he has been previously seen by him. However, the exact details of identity such as

the perpetrator's name is not revealed, as such information is not known to the witness. However, the witness is likely to reveal the manner or the circumstances under which he had previously seen the perpetrator. At the time the perpetrator of the offence committed the offence in issue, the witness has recognised the offender as a person previously seen or known by him. In this situation, the witness would state to the investigator that though the exact identity (by the name) of the perpetrator is not known, if seen again, the perpetrator could be identified by him. Such witnesses are also likely to provide some additional information which would help investigators to trace the perpetrator, such as the perpetrator's physical characteristics, general whereabouts, where he is generally seen and is to be found, and his relationships with others. Eliciting such additional information is the responsibility of the investigator, as it is such information that would aid the investigator to trace and apprehend the perpetrator of the offence.

iii. The perpetrator of the offence has not been previously known to the witness, nor has he been previously seen by him. However, the witness has clearly seen the perpetrator immediately before, during and or soon after the commission of the offence, and therefore he is in a position to reveal to the investigator the offender's appearance and certain physical characteristics which were seen and observed by him. Such characteristics would generally include the gender, approximate height and age, built, gait, complexion, nature of the hair and the manner in which the hair was groomed, general posture, nature and description of the clothes worn, unique identification characteristics of the perpetrator such as the presence of birthmarks, tattoos, scars and deformities if any which were seen by the witness, and personal effects he has been carrying. It is with the aid of such information that the investigator will attempt to trace the suspected perpetrator. [There may be additional material and information gathered in the course of the investigation which may be useful in establishing the identity of the perpetrator and tracing him.]

In this situation, either on his own volition or in response to a question put by the investigator, the witness is likely to indicate, whether or not, if seen again or is shown, he would be in a position to identify the perpetrator. While the term *'will be able to identify'* is an indication of the confidence

which the witness intends to be able to identify the perpetrator, the term *'may be able to identify'* is generally used by an eye-witness as a reflection of the witness's sincere willingness to 'attempt to identify' the perpetrator, if seen again.

It appears evidently that, the virtual complainant of the offence of robbery – Kamani Nilanka falls into the latter category.

iv. Independent of whether or not the perpetrator having been previously known to the witness, due to one or more of the following reasons, the witness may be unable to reveal to the investigator the identity of the perpetrator or provide a description of externally visible characteristics of the perpetrator of the offence. Such inability could be due to one or more of the following reasons:

   a. Though the witness had seen the offence being committed, he has not seen the face or the overall appearance of the perpetrator.
   b. Though the witness had seen the commission of the offence and the perpetrator, he has not had the occasion to clearly observe the perpetrator due to the brevity of time during which the witness saw the perpetrator. Thus, the image of the perpetrator has not left behind a lasting impression.
   c. Due to certain environmental factors such as darkness, rain, smog and fog or the existence of certain intervening physical items, or due to the distance between the witness and the perpetrator, the witness has not been able to clearly see the face of the perpetrator.
   d. Due to the relative movement of either or both the perpetrator and the witness, the witness had not clearly seen the perpetrator.
   e. Due to impairment of vision of the witness, due to disease or old-age, he has not clearly seen the perpetrator.
   f. Due to lack of or the absence of attention, the witness not having been able to properly see the perpetrator.
   g. Due to the witness not having been in a position to observe the perpetrator as a result of intoxication, being unconscious or because the witness had been asleep.
   h. Due to the perpetrator having used a face-mask or some other means of concealing his identity and external features (including head gear such as a helmet, the nature of which is such that it would conceal

the appearance of the wearer), the witness having been unable to see the face of the perpetrator.

i. Due forgetting occasioned by the lapse of time or other reasons such as illness (e.g. dementia) or old age.

v. Situations where the police arrive at the scene of the crime almost immediately or soon after the commission of the offence, and (a) both the victim / eye-witnesses and the perpetrator of the offence remain or are available at the scene, or (b) pending the arrival of the police, the offender had been apprehended and kept through actions of vigilantes, and the victim / eye-witness makes an 'on the spot' (spontaneous) identification of the perpetrator, who is thereafter arrested by the police.

vi. Situations where an eye-witness to the offence, on a subsequent occasion quite accidentally sees the perpetrator of such offence and alerts a police officer to the perpetrator's identity. Based on such information, the police officer causes the arrest of the suspected perpetrator.

vii. Situations where a police officer has witnessed the commission of the offence, seen the offender, and promptly causes his arrest.

44. Information falling within all these categories to the exclusion of category '(iv)' above, can result in establishing the visual identification of the perpetrator of the offence.

45. It is necessary to take note of the fact that, investigators may also be able to have recourse to establishing the identity of the perpetrator of an offence through other direct means such as (i) voice identification, (ii) finger, thumb, palm and foot impressions, (iii) DNA comparison, (iv) handwriting and signature, (v) contemporaneous audio-visual recordings (including CCTV footage) with or without technical aides to enhance clarity of the visuals and the ability to identify persons (such as by using facial recognition software). These methods, most of which are presently available in Sri Lanka, significantly enhance the opportunity and the ability of investigators to establish the identity of perpetrators of crime and arrest them.

46. Furthermore, items of physical material found at the scene of the crime may also result in the establishment of the identity of the perpetrator through indirect means.

47. It is information falling into category '(i)' above, that is most helpful to investigators, as the witness can provide simple, clear, and precise evidence relating to his having recognised the perpetrator of the offence at the time the offence was committed. As the identity of the perpetrator is known to the witness and the witness has provided to the investigator direct information regarding his identity, the investigator has to only verify the reliability of the witness and the information provided to him. If the information received is found to be reliable and truthful, the alleged perpetrator must be traced and apprehended by the investigator. In this situation, the prosecutor would have to establish not only the credibility of the witness, but the truthfulness of the testimony of the witness as well. Thus, the trial judge or the jury would need to assess the credibility and testimonial trustworthiness of the witness. These objectives can be satisfied particularly if the investigator seeks to gather investigative material by which he could verify the information provided by the witness. If verified and found to be correct, such material would form corroborative evidence at the trial.

48. When information falling into category '(ii)' is received by an investigator, he would have to use the information provided by the witness as well as additional information and material, if any, that may be available such as (a) fingerprints, palm and foot impressions of the perpetrator found at the scene of the crime, (b) personal effects of the perpetrator found at the scene of the crime, and (c) other relevant investigative material, for the purpose of determining the identity of the perpetrator. It is thereafter, that the perpetrator could be traced and arrested. Once apprehended, the investigator would have to take steps to verify whether in fact the person arrested is the person who had actually committed the offence. This objective is achieved by providing an opportunity for the witness to attempt to identify the perpetrator from amongst a group of persons. When such a process is followed, causing the identification of the perpetrator is unlikely to pose a difficulty to the witness, since, the person to be identified by him is a person whom the witness had seen and known over a period of time and hence selecting him from among a group of persons would not be difficult.

49. Particularly as regards categories '(ii)' and '(iii)' above, there are two aspects which are of critical importance. They are,

    (a) procedures to be followed by the investigator during the investigation into the commission of an offence as to the obtainment of information from eye-witnesses (particularly regarding the appearance of the perpetrator of the offence) and the treatment and verification of such information, and

    (b) the judicial evaluation of testimonial evidence relating to the purported identification / recognition of the accused as being the perpetrator of the offence.

50. Not only an investigator, even a court of law must be acutely conscious of the distinct possibility that an honest and sincere witness whose credibility is not in doubt, may even though unintentionally, provide an incorrect identification / recognition of the perpetrator, notwithstanding the fact that the perpetrator has been well-known to him. That may be due to –

    (a) one or more of the reasons cited under category '(iv)' above, which may have impeded or affected the vision and observation,

    (b) the appearance of the two persons being similar, or

    (c) the fact that the witness had only a *fleeting glance* of the perpetrator of the crime and thereafter merely 'assumed' who he was (the perpetrator's identity).

    Any one of these situations can result in a mistaken and thus a wrong identification of the perpetrator, which unless considered carefully and rejected, would lead to a miscarriage of justice. Particularly in cases where there is no corroborative evidence to establish that the accused before court is in fact the person who had committed the offence, it is not only the credibility of the witness who provides evidence of identification that is central, the testimonial trustworthiness of such witness's testimony would be of utmost importance. While issues surrounding the credibility of the witness would affect the veracity of the testimony, testimonial trustworthiness would have a bearing on the accuracy and reliability of the purported facts deposed to in the testimony of the witness. In such cases, the veracity of the testimony and the accuracy of the evidence of identification serve as the bedrock of the case. Particularly, trial courts exercising criminal jurisdiction must guard themselves against the possibility of fallacious or defective testimony relating to purported visual identification of the perpetrator of the offence.

51. When information falling into category '(iii)' referred to above is received by an investigator, his skills of investigation would have to be optimally utilised. As the witness has been unable to reveal the identity of the perpetrator, the investigator will be required to consider the information provided by the witness such as the perpetrator's externally visible physical characteristics, and additional information and evidence which may be available such as the perpetrator's (a) fingerprints, palm and foot impressions, (b) biological and physical material containing the DNA of the perpetrator, (c) personal belongings of the perpetrator found at the scene of the crime, (d) crime intelligence provided by informants, and proceed on a voyage of investigation to trace and locate the perpetrator of the offence. This is likely to pose a considerable challenge to the investigator. Once the suspected perpetrator is located, the investigator will be compelled to arrest him for the initial purpose of ascertaining whether the person whom he has located and arrested is in fact the perpetrator of the crime. [In the instant case, the position of the prosecution had been that the information provided by Kamani Nilanka to the Akmeemana police station fall into this category.]

52. When information falling within category '(iii)' is received by a police investigator, for the purpose of determining the identity of the offender, the investigator would have to show the suspect apprehended by him to the witness (the victim of crime / eye-witness to the crime who has claimed that if seen again he would be able to / will attempt to identify the perpetrator), and ascertain whether in fact the suspect is the perpetrator of the crime.

53. If following the arrest of the suspect, he is initially shown to the eye-witness while the suspect is in the custody of the police (as claimed by the Appellant in this matter) or pictured in a photograph taken following his arrest, in all probability the witness is likely to 'assume' that police investigators have apprehended the actual perpetrator, and will therefore positively identify the suspect as the perpetrator. Such an assumption by a lay witness is most likely, given his probable belief that the police left to themselves will apprehend the correct / actual culprit.

54. Therefore, for the process of identification to be safe / reliable, the suspect should not be shown to the eye-witness in police custody, and it is imperative to show the witness a group of persons, amongst whom the arrested suspect is present. It should be done without revealing in advance to the witness, who the investigator

had arrested, and to invite the witness to attempt to identify the perpetrator of the crime, if in fact he is present amongst the group. It is for this purpose, that an identification parade is conducted, as provided by section 124 of the Code of Criminal Procedure Act.

55. It is necessary to note that section 124 has been amended by Act No. 11 of 1988 to enable the witness to cause the identification of the perpetrator of the offence, even from a concealed position. Furthermore, section 82(2)(b) of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 10 of 2023 enables a victim of crime or any other witness to participate at an identification parade from a remote location with the aid of a contemporaneous audio-visual link. This is as a means of protection to be accorded to the relevant victim of crime or other witnesses.

56. In most developed countries, identification parades are conducted by police investigators themselves. However, in countries such as Sri Lanka, the law requires that an identification parade be conducted by a Magistrate on a request made by the police. That is to ensure the integrity of the process of identification.

57. In ***The Attorney-General vs. Joseph Aloysius and Others*** *[(1992) 2 Sri LR 264]* Justice Sarath N. Silva (as His Lordship was then) has explained the purpose for which an identification parade is conducted, in the following manner:

> *"An identification parade is held for the purpose of ascertaining whether any suspect arrested by the police in the course of an investigation, is the person seen by the witness as doing a particular act or being present, at or about the time the offence was committed. It is a step in the process of investigation and does not form part of the trial".*

58. As commented upon by Chief Justice Abrahams in ***Vandendriesen v. Houwa Umma*** *[39 NLR 65]*, the identification procedure of an arrested person must be carried out in such a way that not only must the identifying witness be given every reasonable chance of being right, but must also be given every reasonable chance of being wrong. Identification parades must be conducted to a high level of integrity.

59. Application of the principles and the procedure that has to be followed, as referred to in ***C.M. Perera and Others v. The State*** *[77 NLR 224]* are in my view, most appropriate. I shall not delve further into features of an identification parade

required by law to be followed, as learned counsel for the Appellant did not impugn the procedure followed by the learned Magistrate who conducted the identification parade which resulted in the identification of the 1st and 2nd Accused.

60. Be that as it may, what is critical is that for evidence of identification emanating from the conduct of an identification parade to have any evidential value, as stated by me earlier, the arrested suspect should not have been shown to the witness at any time between his arrest and the holding of the identification parade. Nor should a photograph of the arrested suspect be shown to the witness at any time prior to the holding of the identification parade. Furthermore, the witness should not have had an opportunity of seeing the suspect during that intervening period of time. Particularly a trial court must be acutely conscious of the possibility of an over-zealous police officer engaging in such inappropriate conduct for the purpose of ensuring that the suspect arrested by the police would be positively identified at the identification parade.

61. However, a mere objection by the Attorney-at-Law who represented the suspect at the identification parade that the suspect was shown to the witness while he was in police custody and therefore is objecting to the conduct of the identification parade or a suggestion by the defence counsel during cross-examination of the witness to that effect, should not necessarily give rise to a reasonable doubt that the suspect was shown to the witness prior to the holding of the identification parade. However, if (a) the witness admits that such an improper procedure was followed, (b) there is direct or circumstantial evidence in support of such allegation, or (c) the court identifies suspicious conduct by the police in that regard, then the trial court must give its earnest attention to that aspect of the case and determine whether any value should be attributed to the evidence of identification or recognition emanating from the identification parade.

62. Should the eye-witnesses fall into category '(iv)', he will not be able to assist the investigator in causing the identification of the perpetrator.

63. If the identification of the perpetrator was founded upon the situation contained in category '(v)', both the statement to the police made by the eye-witness as well as the notes of investigation by the police officer(s) who arrived at the scene of the crime should reflect that the arrest of the suspect was preceded by an 'on the spot'

(spontaneous) identification soon after the commission of the offence. In this situation, the conduct of an identification parade would not be essential and it may be redundant to cause the witness to once again identify the perpetrator of the offence.

64. In the situation referred to in category '(vi)' which would be different from an 'on the spot identification', where the eye-witness has made an informal identification at an unexpected moment after the commission of the offence, the need for the conduct of an identification parade may not be imperative. Nevertheless, the police would need to interview the purported eye-witness in detail and record information regarding the manner in which the witness was able to identify the offender at the time he claims he did.

65. However, in both categories of '(v)' and '(vi)', should the police make an application under section 124 of the Code of Criminal Procedure Act, it would be necessary for the Magistrate to conduct an identification parade, as the conduct of a parade even under such circumstances would not be purposeless.

66. What is important to note is that the conduct of an identification parade would be essential when the suspect while being interviewed by the police has disputed his identification made by the purported eye-witness.

67. As regards evidence of identification stemming from the holding of an identification parade, it must be noted that, as held by Chief Justice Basnayake in ***The Queen vs. V. P. Julis and Two Others*** *[65 NLR 505]*, the fact that a witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification at the trial. The jury or the court may act only on the evidence given before them. The principal evidence of identification is the evidence of a witness given in court as to how and under what circumstances he came to pick-out a particular person (the accused) at the identification parade as being the offender and details of the part played by such person during the commission of the offence.

68. However, in my view, there is nothing obnoxious to the law in (i) a police investigator using the age-old aid to identification referred to as *'photo-fits'* and *'identikits'* (which comprise of several components of images or drawings of various parts and features of the human face and other parts of the human body)

or modern computer-based programmes of facial image reconstruction for the purpose of forming an understanding of the possible appearance of the perpetrator or (ii) showing an album containing photographs of a number of possible suspects, and inviting the witness to attempt to identify the perpetrator. However, such measure should be adopted for the limited purpose of enabling the investigator to trace and arrest the suspected perpetrator, and without any suggestion being made to the witness. Further, the investigator should necessarily conduct such activity with the highest degree of integrity, and soon after the process, make contemporaneous notes of such investigative technique. In a situation where an aide had been used by the police to develop an image of the suspect wanted by them, it would be the responsibility of the prosecution to present to court evidence of such method used to cause the identification of the accused, which should necessarily include making the pool of photographs, photo-fit devise or computer programme and the image generated by it, available for examination by court. Court must exercise greatest possible caution and be circumspect when evaluating evidence relating to such investigative technique. Furthermore, following the arrest of the suspected perpetrator, an identification parade must be held in terms of the law, and the witness should have no opportunity of seeing the arrested person in the custody of the police either live or as seen in a photograph or a video. Furthermore, investigators should desist from revealing to the identifying witnesses any information regarding the external appearance characteristics of the suspect arrested by them.

69. Particularly in cases where the testimony tendered by the prosecution regarding the identification of the accused as being the offender is contested, for the purpose of consideration and analysis of the testimony in issue relating to identification, time and again our courts have cited the full bench judgment of the Court of Appeal in the United Kingdom in ***R v. Turnbull and Others*** *[1976] 3 All ER 549 [also reported in (1977) QB 224],* referring to principles contained in that judgment as the *'Turnbull principles'*. Understandably, learned counsel for the Appellant laid heavy emphasis on the principles contained in this judgment and on the fact that the learned trial and appellate judges had not applied the principles contained in this judgment.

70. Though articulated as 'guidelines' which should be used by the trial judge at a trial before a jury, it is my view that the guidelines contained in *R v. Turnbull and Others* are equally applicable to judicial evaluation of evidence relating to identification.

Thus, I shall reproduce below, excerpts from that judgment at some length, notwithstanding it resulting in the lengthening of this judgment.

> *"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications 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 reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.*
>
> *Secondly, 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? Was the observation impeded in any way, as for example by passing traffic or a press of people? 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 to the police? Was there any material discrepancy between the description 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 has reason to believe that there is such material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given …*
>
> *Finally, he should remind the jury of any specific weakness which had appeared in the identification 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.*
>
> *All these matters go to the quality of identification evidence. 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. In our*

judgment, when the quality is good, as 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 even 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 … .

When, in the judgment of the trial judge, 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. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there had been no mistaken identification. For example, X sees the accused snatch a woman's handbag; he gets only a fleeting glance of the thief's face as he runs off, but he does see him entering a nearby house. Later, he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's. Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in R v. Long (1973) 57 Criminal Appeal Reports 871 … .

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstance which the jury might think was supporting when it did not have this quality, the judge should say so …

Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. 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. …

A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe … ."

71. It would be seen that the *dicta* contained in *R vs. Turnbull* does not contain principles of law, and are essentially very useful guidelines, which is based on commonsense and scientific findings relating to human sight, observation, instilling in the brain the image seen, its storage, memory, recollection and communication of what was recalled – the several facets of the functioning of the human brain and the nervous system which enable recognition and identification of a person purportedly seen in the past. These guidelines are a source of assurance to an appellate court that the acceptance if any of testimonial evidence relating to the identity of the accused under inherently difficult or doubtful circumstances had been arrived at by the trial court / jury, only after necessary scrutiny and evaluation. However, it is necessary to note that as observed by Chief Justice Lord Widgery in ***R v. Oakwell*** *[(1978) 1 All ER 1223],* these guidelines are not applicable to all instances where testimony relating to the identity of the accused is in issue, but only to instances occasioned by the witness only having had a moment of time (an extremely brief period of time and opportunity) to see the perpetrator, a situation commonly referred to as a *fleeting glance* or observations for a longer duration, but under difficult circumstances.

72. However, even in other instances, testimony relating to purported sighting of the perpetrator and his identification must, prior to acceptance, be subject to the assessment of credibility of the witness and trustworthiness of the testimony given by such witness. When the integrity of the witness is not in issue, there may not be a need to assess credibility. Yet, there remains the need to focus on and assess testimonial trustworthiness, as even the most honest witness who truly and sincerely believes that the testimony being provided by him is truthful, may for the reason that he is a human, have provided testimony which is incorrect founded upon an honest mistake.

73. However, well before proceeding to the assessment of testimonial trustworthiness of the testimony provided by a witness, it is the inescapable duty of the trial judge to determine the credibility of the witness, particularly as the most innocent

looking, socially accepted, well-educated and confident witness with a character that has not been blemished so far, may while displaying an unsuspicious demeanour and a balanced deportment, may intentionally give false evidence, which may relate to the identification of the offender. Thus, the starting point for judicial evaluation of visual identification evidence is necessarily the assessment and determination of the credibility of the witness.

74. In ***Rathnasingham Janushan and Another vs. The Officer-in-Charge, Headquarters Police Station, Jaffna and Others*** *[SC Appeal 07/2018, SC Minutes of 4th October 2019]* Chief Justice Jayantha Jayasuriya observed the following:

> *"Facts leading to assess the quality of evidence of visual identification are important facts a court needs to take into account in deciding on the identity of an accused. What matters is the quality of evidence. In such situations the evidence of the witness should demonstrate that there was sufficient opportunity for the witness to have seen the person concerned at the time of the incident and thereafter had the ability to identify the person concerned during his testimony in court. …*
>
> *Factors such as, the duration of the interaction between the witness and the suspect, distance between them, the nature of the light under which the witness observed, whether there are any special reasons to remember the suspect such as presence of unique physical features, existence of any factors impeding the opportunity for clear and uninterrupted observation, whether the witness had seen the suspect before and if so the number of occasions and whether the suspect was known by name or not, are relevant to determine the quality of visual identification evidence. … This list of factors is not exhaustive, but could vary according to the facts and circumstances of each case. … These factors are equally relevant and important in situations of both 'identification' and 'recognition'. …*
>
> *In Turnbull, guidelines were laid down in regard to evidence of visual identification in situations of 'fleeting glance' or 'identification in difficult circumstances' and subsequent jurisprudence clarified that such guidelines need not be adopted in each and every case of visual identification. … However, in R v. Bowden [1993 Crim. L.R. 379] and Beckford and Others v. R [97 Cr. App. R. 409 at 415], the importance of Turnbull guidelines in cases of visual identification was re-emphasised. …*
>
> *A trial court in determining the guilt or innocence of an accused need to examine and analyse the evidence of 'visual identification' of any witness, bearing in mind*

the factors discussed hereinbefore and make an assessment of the quality of evidence and decide whether the identity of the accused had been proven or not."

75. I note that the afore-stated observations of His Lordship the Chief Justice in *Rathnasingham Janushan and Another vs. The Officer-in-Charge, Headquarters Police Station, Jaffna and Others (cited above)* are of particular relevance to the instant Appeal, since even in that case, under cross-examination answering a question as to the appearance of the assailants, the witness had said that they came in motor-cycles wearing helmets and covering their faces. His Lordship has noted that a careful consideration of these items of evidence should have played a vital aspect in the analysis of evidence relating to 'visual identification'. His Lordship had expressed the view that it was unfortunate that both the trial judge as well as the judge of the High Court who sat in Appeal, had failed to adopt such a process. In the circumstances, His Lordship had concluded that such error had a serious impact in the final outcome of the case, thereby adversely affecting the interests of the two appellants. In fact, for the determination of this Appeal, the application of the precedence contained in His Lordship the Chief Justice's afore-stated judgment is more than sufficient. Understandably, that is why learned counsel for the Appellant laid heavy emphasis on the said judgment.

76. When deciding an Appeal against a conviction in a case where recognition or identification of the perpetrator of the offence is being contested, it would provide a sense of comfort to the judges of appellate courts, if they can be satisfied that, given the facts and circumstances of the case, the trial judge had been alive to the *Turnbull principles* and had applied them in an appropriate manner. If the impugned judgment of the learned trial judge reflects that he was acutely conscious of the *Turnbull principles* and where appropriate had applied them in a fitting manner to the testimony given by the eye-witness as to the identity of the offender, even though the judge may not have mentioned the term *'Turnbull principles / guidelines'*, that would be of no particular consequence.

Judgment of the Magistrate's Court

77. The learned Magistrate has noted that the identification parade notes ("Pe-1") were admitted in evidence without contest. However, he has <u>not used</u> the fact that the defence did not object to admitting in evidence "P1" as an admission by the

defence that the accused were correctly identified by the virtual complainant Kamani Nilanka at the identification parade.

78. A reading of the judgment pronounced by the learned Magistrate reveals that he has accepted *ex-facie* the testimony given by the virtual complainant Kamani Nilanka and by police officer Ihalawela, and concluded that the virtual complainant had both at the identification parade and at the trial correctly identified the 1st and 2nd Accused as the perpetrators of the robbery perpetuated on her. He has also accepted their testimony (which in lay terms would be referred to as their 'word of mouth') that the police did not show the two accused to the virtual complainant either at the Galle or Akmeemana police stations. The version of the accused (as contained in their testimony) that they were shown to the virtual complainant, has been rejected based on reasons recorded by the learned Magistrate. In the circumstances, the learned Magistrate has concluded that the identity of the two accused had been proven beyond reasonable doubt by the prosecution.

79. The learned Magistrate has to some extent subjected witness Kamani Nilanka to an assessment of credibility and concluded that she is a credible witness. However, a reading and consideration of the judgment does not reveal that the learned Magistrate had subjected the testimony of Kamani Nilanka to a desirable form of assessment of testimonial trustworthiness. The learned Magistrate has concluded that the defence had not been able to successfully contest the correctness of the identification of the accused. In the circumstances, the learned Magistrate has concluded that the prosecution has proven its case against the accused beyond reasonable doubt and convicted the accused for having committed robbery of Kamani Nilanka's necklace.

Judgment of the High Court

80. As regards the admission of the identification parade notes ("P1") without contest, the learned Judge of the High Court has noted that the Appellants had assailed the *'admission of the identification parade during the trial and thereafter'*. He has noted that *'however, the notes of the identification parade were marked as 'Pe-1' without being objected to by the Appellants'*. In the circumstances, he has concluded that *'it is an admitted fact of the case for all purposes'*. The learned Judge has proceeded to note that *'once a document is marked without being objected to by the opposite party, it should*

be considered as an admitted fact. No one can challenge the contents of the document thereafter by various means'. What exactly was meant by the learned Judge in that regard is clarified when he has observed further that *'if the procedure by which the identification parade was held was objected to by the Appellants at the time it was held on reasonable and provable grounds, they would have objected to the tendering of the notes of the parade at the outset and asked the prosecution to prove'*. Therefore, it is clear that though the learned Judge of the High Court has used the term *'admitted fact'* , what he has in fact meant is that the document "P1" had been admitted in evidence without being subject to any requirement of proof.

Analysis by this Court of the evidence and the impugned Judgments

81. **Purported recognition of the marking of the identification parade notes without objection from the defence, as an admission of the identity of the accused:**
It is a matter of record and it is not in dispute that when the prosecution sought to mark in evidence the notes relating to the identification parade ("P1"), the defence did not raise any objection. As pointed out by the learned Senior State Counsel, in this regard, section 414(2) of the Code of Criminal Procedure Act is of relevance. It provides as follows:

> *"The depositions regarding an identification parade (or the notes thereof) held by a Magistrate or Justice of the Peace and the depositions of the witnesses who assisted the Magistrate or the Justice of the Peace to hold the parade or affidavits by them may be given in evidence in any inquiry, trial or proceeding under this Code although the deponents or the Magistrate or the Justice of the Peace or the witnesses referred to are not called to testify as witnesses."*

Thus, for the purpose of producing in evidence "P1", all what was necessary was to establish that the document in issue contained the notes of the identification parade relating to the instant case. The defence by not objecting to the production and the marking of the document "P1", had dispensed with the requirement of proving the genuineness of the document in the manner provided by law.

Of course, though not urged before us, it would have been appropriate for the prosecution to have produced "P1" through the Registrar of the Magistrate's Court – Priyangani Abeywickrema, being the custodian of the case record in which the notes relating to the identification parade had been filed (as opposed to producing it through Kamani Nilanka). This is because the Registrar could have authoritatively testified as to the genuineness of "P1" being a public document

which forms part of the case record in issue. Thus, having tendered "P1" through the virtual complainant Kamani Nilanka was not the correct procedure. However, examining that aspect of this case is not required, particularly as the defence had not objected to the document being produced.

What is important to note is that the impugned judgment of the High Court contains no reference by which it can be concluded that the learned Judge had proceeded on the footing that the defence had 'admitted' that the perpetrators of robbery (as alleged by the prosecution) were the two accused. He did not act on the footing that the evidence relating to the identity of the accused were 'admitted facts' for the purposes of section 58 of the Evidence Ordinance. All what the learned Judge had done was to express the proposition that since the notes of the identification parade ("P1") were produced by the prosecution without any objection from the defence, the defence is estopped from challenging the fact that the identification parade was held in the manner contained in "P1" and that at such parade the virtual complainant Kamani Nilanka identified the two suspects arraigned at the parade (being the two accused) as being the perpetrators of the robbery, and informed such fact to the learned Magistrate who conducted the identification parade.

82. I do not see anything objectionable to that line of thought entertained by the learned Judge. Once a document is admitted at a trial without objection by the opposing party and the opposing party not insisting that the party tendering such document proves the genuineness, admissibility and the relevancy of such document, should the document be *ex-facie* an original (primary evidence of the document) or in a recognised form of a copy thereof (secondary evidence of the document) to the extent provided by provisions of the Evidence Ordinance, the contents of such document must be treated as being unimpugned evidence. Thus, in the circumstances of this case, it was quite correct for the learned Judge of the High Court to have treated "P1" as a genuine document containing a correct record of the identification parade and the contents of "P1" as amounting to a narration of what transpired at the identification parade.

83. What would have been objectionable was if the learned Judge had concluded that by the admission of the notes of the identification parade, the defence had admitted the identification evidence given by Kamani Nilanka that the accused were the two persons who participated in the robbery. The learned Judge has not

done so. In fact, it is necessary to observe that neither the learned Magistrate nor the learned Judge of the High Court had in this regard done anything beyond what is permissible by law.

84. In the circumstances, it was not necessary for the learned Magistrate to have complied with the procedure contained in section 420 of the Code of Criminal Procedure Act (as amended), as neither the contents of "P1" nor the identity of the accused as being the perpetrators of the offence of robbery were treated as 'admitted facts' (for the purposes of section 58 of the Evidence Ordinance) by either the learned Magistrate or the learned Judge of the High Court. Therefore, it is the view of this Court that the argument presented in this regard by the learned counsel for the Appellant is misconceived both in fact and in law, and must therefore fail.

85. **Identification of the Accused:**
During testimony at the trial, the virtual complainant – Kamani Nilanka while showing the accused in the dock, has stated that the person who pointed a pistol at her and snatched her necklace was the 2nd Accused (who arrived at the scene seated on the pillion of the motorcycle), and the person who rode the motorcycle was the 1st Accused (Appellant). Similarly, as evident from "P1" (identification parade notes), at the identification parade held on 20th September 2006, the virtual complainant has stated to the Magistrate the same. It is this evidence of identification which learned counsel for the Appellant assailed as being unreliable and having been accepted without being subject to an application of the *Turnbull* principles / guidelines.

It is to be noted that in her testimony she has not revealed details of any external characteristics of the two offenders which she noted at the time of the incident. Under cross-examination of police officer Ihalawela, learned defence counsel for the 1st Accused-Appellant had questioned whether the virtual complainant – Kamani Nilanka had provided information in her statement to the police as regards the external characteristics of the perpetrators. Ihalawela while avoiding to answer that question has merely said that she said that she '*would be able to identify the perpetrators if seen again*'. This is a clear indication that the virtual complainant has not provided such information to the investigator. It also appears that the police investigator while questioning the virtual complainant has not even

asked her to describe features of the face of the perpetrators and other characteristics of the offenders which she noticed.

Furthermore, under cross-examination the virtual complainant has admitted that at the time of the incident, both accused were wearing helmets. In the circumstances, what exactly of the external appearance of the faces of the two perpetrators were visible to the virtual complainant? What were the other externally visible characteristics of the two offenders that were noticed by the victim?

The virtual complainant in her evidence explains how the motorcycle initially went past her. At that time, there was nothing special in a motorcycle going past her in the opposite direction. Therefore, she does not say that she looked at the faces of the rider and the man on the pillion. This is quite understandable and quite natural, as there was no particular reason to do so. Thereafter, the motorcycle took a turn and came up to her from her opposite direction. It passed her once again, turned back and stopped. The man on the pillion, grappled with her and snatched her necklace. As an act of resistance, she even sat on the pillion. She has identified this person who robbed her necklace as the 2nd Accused. In the circumstances, it is quite possible that she was able to see the face of the 2nd Accused at very close proximity. It is quite probable that it is due to such circumstances that the 2nd Accused's facial appearance got impregnated in her mind, and she was able to subsequently identify the 2nd Accused at the identification parade.

It appears from the evidence of the virtual complainant that at no point of time did the rider of the motorcycle (supposedly the 1st Accused) get off from the motorcycle. She does not even say that the 1st Accused looked at her, let alone his having come close to her. Furthermore, in so far as the 1st Accused is concerned, at no point of time in her testimony does she even say that she looked at the face of the rider of the motorcycle and thereby got an opportunity of seeing his face. If so, how did she identify the 1st Accused initially at the identification parade held 20 days following the incident and also at the trial held nearly 7 years after the incident? Was it a chance identification (at the identification parade selecting the correct suspect could have been occasioned by a chance of 1:7) or was the identification founded upon the police having shown the two accused to her at the Akmeemana police station on the day before the holding of the identification

parade (though the virtual complainant had understandably denied that suggestion)?

86. Notwithstanding all the factors stated above which cast serious doubt as to whether Kamani Nilanka had in fact seen the face of the rider of the motorcycle, even if the highest amount of credence were to be given to her testimony and it can be assumed that she saw the face and the general appearance of the rider of the motorcycle, what she had of him was only a *'fleeting glance'*, and that too *'under difficult and doubtful circumstances'*. Therefore, the learned Magistrate was duty-bound to have applied the *'Turnbull principles / guidelines'* to the extent relevant to the facts and circumstances of this case. It is regrettable that such duty has not been performed in this case. In fact, a plain reading of the impugned judgment of the learned Magistrate reveals that, sadly though, he was not even aware that there was a need to apply certain principles for the purpose of subjecting the testimony given by Kamani Nilanka to the assessment of testimonial trustworthiness for the purpose of determining the accuracy and reliability of her testimony pertaining to the identification of the accused. He had such duty, notwithstanding the learned Magistrate's opinion that the credibility of the witness Kamani Nilanka had not been successfully assailed by the defence. Furthermore, when there are multiple accused, the issue of visual identification against each of them has to be considered separately, which has not been done in the instant case.

87. A consideration of the Judgment of the learned Judge of the High Court also reveals that he too had not addressed his mind to the need for the learned Magistrate to have subjected the testimony given by the virtual complainant Kamani Nilanka to testimonial trustworthiness. The learned Judge of the High Court has not considered whether the evidence relating to the identification of the accused as being the perpetrators of the offence of robbery had been correctly and judiciously considered by the learned Magistrate.

88. It must be noted that, a plain reading of the judgment of the learned Magistrate shows that he has not approached identification evidence to the required degree of caution and circumspection. The learned Magistrate has not assessed and arrived at findings on the integrity, quality, reliability and sufficiency of the evidence relating to the identification of the accused.

89. There is another aspect of the case for the prosecution to which the learned Magistrate and the learned Judge of the High Court ought to have given their attention to. Given the fact that the virtual complainant has not revealed any special identification features of the offenders to the police and there having been no other eye-witnesses or circumstantial evidence, how were the investigators of the Akmeemana police able to trace and arrest the suspects? Inspector Ihalawela does not offer any explanation as to how they were able to locate and arrest the offenders. The absence of such an explanation does lend some amount of credence to the version of the accused that they were taken-over by officers of the Akmeemana police station, when they went to the Galle police station to mark their presence at that police station as a condition of bail imposed in another case. Is it that the police assumed that since the two accused had a 'criminal record' (possibly of having committed a similar offence in the past), both of them were responsible for having committed the robbery referred to in this case as well? Is that why they took the two accused to the Akmeemana police station and showed them to the virtual complainant?

90. These questions give rise to the integrity of the entire investigation and the findings of the identification parade.

Conclusion reached

91. Due to the absence of a proper judicial appreciation of the identification evidence in this case by the learned trial judge (the learned Magistrate who delivered the Judgment) and the absence of proper scrutiny of such fact at the appellate stage (by the learned Judge of the High Court), renders the finding regarding the identity of the 1st Accused – Appellant – Appellant unsatisfactory and unsafe.

92. This Court notes that, apart from the identification evidence the reliability of which is very much doubtful, there is no other evidence which the prosecution has presented which links the 1st Accused to the commission of robbery.

93. Therefore, it is not possible to allow such finding to remain, as it may render a miscarriage of justice. I agree with the core submission of learned counsel for the Appellant that the prosecution has failed to prove beyond reasonable doubt that the two accused were the perpetrators of the offence of robbery perpetuated on the virtual complainant Kamani Nilanka. Thus, there is a compelling need for this

Court to quash and set-aside the conviction and the sentence imposed on the 1st Accused – Appellant – Appellant.

Answers to the questions of law in respect of which *Special Leave to Appeal* had been granted

i. *Did the learned High Court Judge err in law by affirming the judgment by the Magistrate of Galle dated 15th February 2017 marked "X1" and the sentence imposed marked "XIV"?*

Yes. Given the weaknesses in the evaluation by the learned Magistrate of the testimony relating to the visual identification of the accused, the learned Judge of the High Court erred in affirming the conviction of the accused.

ii. *Did the learned High Court Judge fail to duly consider section 420 of the Code of Criminal Procedure Act No. 15 of 1979, and also fail to consider the fact that the ingredients of the said section 420, were not satisfied?*

No. There was no need for him to have considered the applicability of section 420 of the Code of Criminal Procedure Act.

iii. *Did the learned High Court Judge err in law by holding that the identification parade notes, qualify as an admission, due to the fact that there was no objection to the making of the said notes as "P1" without due consideration of section 420 of the Code of Criminal Procedure Act, No. 15 of 1979?*

No. The learned Judge of the High Court has not concluded that the admission of the identification parade notes ("P1") amounts to an admission of the identification of the accused. The learned Judge has merely concluded that since "P1" was admitted in evidence without any challenge, there was no need to prove its contents.

iv. *Did the learned High Court Judge fail to consider the identification parade report marked "P1", which most emphatically recorded the objection of the Petitioner against the said identification parade, in its entirety?*

No.

Outcome of the Appeal

94. In view of the foregoing findings reached by this Court, the conviction and sentence of the 1st Accused – Appellant – Appellant is quashed and set aside, and accordingly, this Appeal is allowed.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, Chief Justice.

I agree.

Chief Justice

Kumuduni Wickremasinghe, J.

I agree.

Judge of the Supreme Court