mental make-up play a part in many human judgments."[102] Nevertheless, there are limitations to the admissibility of expert evidence. In *R v Turner*, since the defendant's veracity and the likelihood of having been provoked were matters within the competence and experience of a jury, the psychiatric evidence was held to be rightly excluded.[103]

1.080 In *HKSAR v Tang Yuk Wah,*[104] on the issue of memory impairment, the majority of the CA refused expert evidence as to the defendant's state of mind. The psychiatrist's opinion was based mainly on the defendant's assertion of having an alcohol and drug abuse problem, but there was no evidence of a long history of abuse. This is because the defendant had been in custody for two years before the trial and had been unable to abuse alcohol or drugs, thus there was simply no evidence to support the contention that the defendant suffered from memory impairment.[105]

1.081 The facts upon which an expert relies to give his opinion must be made known. Hence, in *R v Tai Muk Kwai,*[106] it was held that the court could not be deprived of the opportunity of seeing the materials that provided the basic data underlying the opinion contained within a certificate of a government chemist.[107]

1.082 When addressing issues that are in contention, an expert is not allowed to rely on another expert's opinion to support his own. In *HKSAR v Nancy Ann Kissel,*[108] Yeung VP held that where an opinion by an expert was based on the reports of others and if the reports could not be proven by other evidence, then whether the reports are described as irrelevant, or having no weight, the better approach is to exclude those reports as evidence to avoid the danger that they may unduly influence the jury.[109]

(e) Oral evidence v documentary evidence

1.083 Section 3 of the Interpretation and General Clauses Ordinance (Cap.1) defines a document as "any publication and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks, or by more than one of these means". At common law, an arguably circular definition was adopted in *R v Daye* — any written thing capable of being evidence is properly described as a document and it is immaterial on what the writing may be inscribed.[110] Audio tape recordings[111] and television films are also considered documents under this definition.[112]

1.084 A document may be tendered as "real evidence" if it could be demonstrated that the witness was either the author of it, had possession or control of it, received it, or was properly connected with it in some other way.[113] This, however, means that the document *itself* is admitted, not the truth of its contents. In *HKSAR v Chan Sau Hing*, the connection

102 *Ibid.*, 841.
103 *Ibid.*, 842.
104 [2007] 3 HKLRD 320.
105 *Ibid.*, [70]–[77] (Barnes J, Stuart-Moore VP agreeing).
106 [1980] HKC 655.
107 *Ibid.*, 660.
108 [2014] 1 HKLRD 460.
109 *Ibid.*, [142].
110 [1908] 2 KB 333, 340.
111 *R v Stevenson* [1971] 1 WLR 1.
112 *Senior v Holdsworth, ex p Independent Television News Ltd* [1976] QB 23.
113 *R v Horne* [1992] Crim LR 304; *HKSAR v Chan Sau Hing* (CACC 211/2011, 13 November 2002).

between the defendant and the document was established by evidence that the defendant had been present in premises in which fraud had been practiced and that the fraudsters would leave documents for inducing the victims to part with their money.[114]

5. Assessment of Evidence

1.085 Upon the assessment of evidence, the fact-finding tribunal (which would be either the judge or the jury, depending on the court in which the case was tried) would find what happened at the material time. In reaching a conclusion, the fact-finding tribunal would have to assess and weigh the available evidence before it as it deems fit.

1.086 Whilst the Hong Kong legal system (which models its English counterpart) provides an appeal mechanism, appealing is not a means for litigants to re-litigate fact-finding issues. This section deals with how trial courts *should have* performed the fact-finding exercise and how the appellate court would handle an appeal disputing the fact found by the court below.

(a) Approach in criminal appellate courts

(i) *Magistracy appeals as rehearing of the case*

1.087 An appeal against the determination of a Magistrate goes to the CFI which will either be dealt with by way of "alternative procedure" or "case stated". The English Divisional Court in *R v Hereford Magistrates' Court, ex p Rowlands* explained which route an appellant should adopt when he is aggrieved by the decision of a Magistrate:[115]

> (1) where the complaint is that the Magistrate made an error of fact or an error of fact *together with* an error of law, the appellant should appeal by way of "alternative procedure";
> (2) where the complaint is that the Magistrate made an error of law *only* or that he has acted in excess of his jurisdiction, the appellant should appeal by way of "case stated".

Given this section deals with how an appellate court deals with an error of fact, it shall only explore how the CFI hears an appeal by way of "alternative procedure".

1.088 Section 133 of the MO stipulates that an appeal by way of "alternative procedure" is conducted by way of *rehearing* on the evidence before the trial court supplemented by further evidence that the appellate court might admit under its statutory power to do so. Nevertheless, a rehearing is *not* a re-trial. The principle of rehearing is well-founded and recognised in *Chou Shih Bin v HKSAR.*[116] The CFA held that when it comes to a fact-finding decision, the CFI would recognise that it did not enjoy the advantage which the Magistrate enjoyed having received the evidence first-hand. Even so, it will not fail to quash a conviction that it considers unsafe.[117]

114 (CACC 211/2011, 13 November 2002), [19].
115 [1998] QB 110.
116 (2005) 8 HKCFAR 70 (Bokhary PJ).
117 *Ibid.*, 78.

1.089 McWalters J in *HKSAR v Ip Chin Kei* gave another detailed explanation of this principle.[118] His Lordship summarised how a Magistracy appeal should be conducted:[119]

(1) An appeal under s.113 of the MO is conducted by way of rehearing on the evidence before the trial court supplemented by further evidence that the appellate court might admit under its statutory power to do so.
(2) The grounds of appeal will inform the appellate court of the areas where the appellant will seek to persuade the appellate court to depart from the Magistrate on findings of fact or law when conducting the rehearing.
(3) The appellate court will only depart from a Magistrate's finding of fact or determination of a witness's credibility if satisfied that it is wrong.
(4) An error by the Magistrate, especially an error constituting a material irregularity, may lead to the appellate court allowing the appeal and quashing the conviction.
(5) The test in determining whether an error by the Magistrate should lead to the appeal being allowed and the conviction being quashed is whether it is just for such an order to be made.
(6) Absent the appellate court identifying any error by the Magistrate and absent any of the grounds of appeal succeeding, the appellate court must still perform its statutory duty of conducting a rehearing. Unless the appellate court is satisfied that the guilt of the appellant has been proven beyond a reasonable doubt on the evidence adduced by the prosecution, the appeal must be allowed.

1.090 Although the judge has to bear in mind that he does not enjoy the advantage of receiving the evidence first-hand, he can make his independent judgment regarding the evidence.[120] In other words, the judge has to assess the evidence and come to his conclusion as to whether the evidence proves the elements of the offence beyond a reasonable doubt.[121] Errors of law could also be addressed in the re-hearing and may lead to the quashing of the conviction.[122]

1.091 Whilst a Magistrate may deliver an oral verdict, it is insufficient for him to say in his oral verdict that he has considered the evidence or he has found the defendant guilty beyond reasonable doubt. The oral verdict should indicate the main points of reasoning of the Magistrate, as well as the considerations given to the law and evidence relevant to the case. In *HKSAR v Lee Siu Wo*,[123] Deputy Judge Toh quoted *HKSAR v Sin Chi Yin*[124]:[125]

> "I am aware of the workload in the Magisterial Courts and it would be unrealistic to suggest that their oral reasons should take the form of a carefully prepared written judgment. But good sense and practice requires that the important legal and evidential features of the case should at least be covered by the magistrate in note form, albeit orally. Having said that, over-generalised statements such as "I have warned myself of all necessary warnings as required by law" or in the absence of specific references, phrases such as 'I have considered all the evidence before me' are, in my view, inadequate."

118 [2012] 4 HKLRD 383.
119 *Ibid.*, [65].
120 *Chou Shih Bin v HKSAR* (2005) 8 HKCFAR 70, 77 and 78.
121 *HKSAR v Ip Chin Kay* [2012] 4 HKLRD 383, 392.
122 *Ibid.*, 397 and 398.
123 [2002] 3 HKLRD 283.
124 (HCMA 511/1998, 31 December 1998) (KK Pang J).
125 *HKSAR v Lee Siu Wo* [2002] 3 HKLRD 283, 285.

1.092 Magistrates have also been criticised for delivering their oral findings, then later supplementing or correcting them in their statement of findings.[126] As noted by Beeson J:[127]

> "Whilst in rare instances it may be necessary or justifiable for a magistrate to deliver full oral findings and later to supplement or correct them in a statement of findings eg to avoid possible confusion on appeal, the practice is neither recommended nor desirable."

1.093 Similarly, *HKSAR v CKS*[128] held that a professional judge (a Magistrate or a District Judge) was under a duty to analyse material points of evidence and give adequate reasons for any conclusion or decision. In performing his fact-finding function, the judge had to evaluate the evidence in dispute. Merely reciting a witness's testimony and stating that the witness was found to be truthful was not evaluation.[129] Barnes J summarised this duty as follows:[130]

> "The gist is that whether the reasons given are adequate is to be judged according to the purpose for which the duty to give reasons is imposed. Adequate reasons help develop the correct decision-making process, thereby enhancing the acceptability of decisions to the public. It serves the interests of the parties, who are given an explanation of the outcome. It also serves the interests of the public by facilitating supervision by the appellate court."

1.094 Although a District Judge sits alone, it is presumed that the judge is professional. It may be the case that it is preferable for him to set out the necessary elements of an offence in the reasons, yet failure to do so does not undermine the conviction:[131]

> "Where the judge is a professional judge sitting alone, however, it can be assumed, unless there are indications to the contrary, that the judge is well aware of the elements of the offence charged and that the reasons, pointing to where the evidence is accepted or rejected, are directed to those elements."

1.095 Similarly, the absence of any reference to the usual corroborative warning in the reasons for the verdict is not fatal. As held in *HKSAR v Kwok Kau Kan*, a professional judge was expected to have applied the correct law and procedure, unless it was clearly shown to the contrary. The important thing was whether he had indeed exercised caution in approaching the uncorroborated evidence of the victim.[132]

126 *HKSAR v Pang Byron* [2013] 3 HKLRD 228, 238.
127 *Ibid.*, 238.
128 [2012] 3 HKLRD 588.
129 *Ibid.*, [30]–[34].
130 *Ibid.*, [34].
131 *HKSAR v Kwok Chi Wah* [1991] 1 HKLRD 481.
132 [2000] 2 HKLRD 1, 13, [2000] 1 HKC 789, 802.

1.096 Most recently, in *HKSAR v Lam Hin Fai*,[133] Poon J reiterated the above principles (quoting Yeung JA in *HKSAR v LKS*[134]):

> "The applicable legal principle is that where the judge is a professional judge sitting alone, it can be assumed unless there are clear indications to the contrary, that the judge is well aware of the elements of the offence charged: see *HKSAR v Kwok Chi Wah*; and *Li Defan v HKSAR*."

In *HKSAR v LKS*, Hon Yeung JA (as he then was) restated:

> "[40] Generally, a judge does not need to say in his judgment that he has reminded and directed himself in questions of law. The judge is a professional judge. The CA must assume that the judge is aware of the relevant legal principles and acts accordingly, especially the fundamental principle that each offence must be dealt with independently. The law does not require the trial judge of a criminal case to describe in detail in his judgment the relevant legal principles and his thought process in making his decisions…
>
> [41] In *R v Chan Shiu Sing* [1980] HKLR 310, the CA held that there is no need for a District Judge in a criminal case to expressly indicate that he has reminded himself of certain fundamental legal principles, eg the burden of proof and the standard of proof, etc.
>
> [42] Unless there is material showing that a trial judge errs in points of law, a trial judge not listing the relevant legal principles in his judgment cannot amount to a valid ground of appeal against conviction. …"

(ii) *Court of Appeal hearing appeals from the District Court and the Court of First Instance*

1.097 Within the accusatorial (or adversarial) system of the common law trial, the role of the judge is a referee to ensure both parties acted fairly. Examination-in-chief and cross-examination are conducted by advocates with substantial autonomy (subject to the relevant rules). That said, at times, it may be necessary for the judge to intervene in the questioning to clarify matters. This is an important power that must be exercised carefully to avoid giving the impression that the judge is "entering into the arena", which could constitute a ground of appeal as it may obstruct a party's proper presentation of its case. The issue of the dividing line between permissible and impermissible judicial intervention was addressed in the oft-quoted judgment by Lord Parker CJ in *R v Hamilton*:[135]

> "Of course it has been recognised always that it was wrong for a judge to descend into the arena and give the impression of acting as advocate. Not only is it wrong but very often a judge can do more harm than leaving it to

133 [2016] 2 HKLRD 1227.
134 (CACC 78/2008, 23 February 2009).
135 Cited with approval in *HKSAR v Hui Po Keung* (CACC 240/2011, 29 November 2012).

> an experienced counsel. Whether his interventions in any case give ground for quashing a conviction is not only a matter of degree, but depends to what the interventions are directed and what their effect may be…"

1.098 In *R v Yeung Mau Lam*, Power JA set out five applicable principles. These are as follows:[136]

(1) The number of interruptions alone is not decisive.
(2) The quantity and quality of the interruptions must be looked at as factors which react upon each other.
(3) Actual bias on the part of the judge need not be established, it is enough if by his conduct he would be thought by the informed bystander to be taking over the conduct of the case from the prosecution.
(4) Where a judge sits without a jury, the appellate court must ask itself whether a person listening to the case would justifiably have had the impression that the judge had by his questions entered the arena.
(5) The ultimate question for the consideration of an appellate court is whether the judge's conduct was such that it would have caused an informed bystander listening to the case to say that the defendant had not had a fair trial.

1.099 As Denning LJ noted in *Jones v National Coal Board*,[137] questions must, where necessary, be asked to clear up points which have been overlooked or left obscure. The judge should also discourage repetition and intervene to ensure that he follows the points being made by advocates. Power JA added that:[138]

> "it is the duty of the judge to ensure, at all times, that he understands the evidence of the witnesses and that the witnesses make responsive answers to the questions asked. We further observe that while it is desirable that judicial questioning comes either at the end of cross-examination or, preferably, at the end of re-examination, there may well be circumstances in particular trials which make it proper for the judge to intervene by asking questions at much earlier stages."

1.100 Therefore, the mere volume of interventions is not decisive, though a large number will put the court on notice.[139]

1.101 In light of the number of cases accusing trial judges of "entering into the arena", McMahon J highlighted trial judges' case management role in *HKSAR v Sin Ying Yi*:[140]

> "This challenge to the Judge's handling of this case is illustrative we think of a malaise in the conduct of complex, and indeed other, cases, which makes a false assumption about a judge's role. Judges are not there to flow with

136 [1991] 2 HKLR 468, 469.
137 [1957] 2 QB 55, (Denning LJ).
138 *R v Yeung Mau Lam* [1991] 2 HKLR 468, 474.
139 *R v Matthews* (1984) 78 Cr App R 23.
140 [2008] 3 HKLRD 352, [42].

> whatever tide is created by the approach adopted by counsel. To the contrary, the managerial flow of a case is in the judge's hands, not counsel's. It is a judge's positive duty to manage trials. His function is to adjudicate cases and that means adjudication upon evidence properly and efficiently presented. If that requires vigorous management, then he must manage vigorously. And if counsel, whether for the prosecution or the defence, are not presenting their respective cases in an intelligible and economical manner, the judge must ensure that they do so. Firm skilled management by the court is not inconsistent with the interests of a defendant for no one is hereby advocating the exclusion of relevant evidence, or the inclusion against him of inadmissible evidence, or the use of a biased procedure. Not only did the Judge in the present case not err in his approach or intervene inappropriately, he performed the judicial task in a complex commercial crime case in precisely the way it should be performed."

1.102 In that case, it was held that the large number of interventions made by the trial judge had largely been caused by the prosecution's unsatisfactory conduct of its case and that there was no interference with the defence case especially because the interventions mostly occurred during the pre-trial review procedure and the first prosecution witness's examination-in-chief.[141]

1.103 In *HKSAR v Tai Chiu Tak*,[142] Yuen JA accepted the guidance in *Sin Ying Yi*, reiterating that the trial judge cannot only focus on the efficiency of the trial. The proper course of action is to, in the absence of the jury and witnesses, warn the counsel about the time and against digression.[143] The recent case of *HKSAR v Lau Hong*[144] is an example where the defendant successfully appealed against a conviction for the possession of imitation firearm on the ground that the Magistrate had "entered into the arena", and successfully opposed the re-trial application.

1.104 In *HKSAR v Cheung Kam Shing*,[145] the CA summarised the principles as to how would the appellate court consider whether the summing-up of a trial judge is fair and balanced:[146]

> "All defendants in a criminal case should be entitled a fair trial. This court has repeatedly emphasised that regardless of how strong the prosecution evidence were, or how weak or unpersuasive the defendant's defence or evidence were, the defendant should still not be deprived of his opportunity to be fairly tried (see *HKSAR v Zhu Jinni* [2012] 4 HKLRD 444 and *HKSAR v Hong Tsz Yin* [2011] 5 HKLRD 447 etc).

141 *Ibid.*, [39].
142 (CACC 214/2011, 4 October 2013).
143 *Ibid.*, [44].
144 [2019] HKCFI 1613.
145 (張金城) (Transliteration) [2019] HKCA 8 (Chinese Judgment), (Yeung CJHC) (Ag), Poon and Pang JJA (as Poon CJHC then was). Affirmed in *HKSAR v Wong Wai Sun* (黃維新) (Transliteration) [2019] HKCA 147 (Chinese Judgment), (Yeung CJHC) (Ag), Cheung and Pang JJA.
146 *Ibid.*, [43]–[48].

> A trial judge should not express strong views over disputed issues so as to avoid a bystander having the impression that he wanted the jury to accept his view or that he is making another closing speech for the prosecution.
>
> A trial judge should also not criticise the defence case too severely, as this would be in effect amount to a usurpation of the function of the jury and leaving the jury with little real choice than to comply with what are obviously the judge's views or wishes (see *Hong Tsz Yin*, supra and *Mears v The Queen* (1993) 97 Cr App R 239 etc).
>
> Yet, a trial judge is absolutely entitled to comment upon the evidence of the prosecution and the defence. As long as those comments are reasonable and balanced, despite being adverse to the defendant, they would not form the basis of a ground of appeal against the conviction.
>
> Sometimes the evidence put forward by a party might be so implausible such that when a judge summarises and repeats those evidences, those comments would seem to be adverse or even unfair to the party calling those evidences. Yet, those comments might not necessarily be unfair; rather, it is just that those evidences are simply unconvincing. Even the comments have been fair and balanced, those evidences would nonetheless objectively be adverse to that party. In those circumstances, one cannot say those comments by the judge are prejudicial and hence he is deprived of a fair trial. This court must emphasise that the trial judge has no duty to conceal or improve the weaknesses inherent in the defence case (see *Hong Tsz Yin* [71]).
>
> This court must also point out that when considering whether a trial judge's summing up is balanced and whether the trial is fair, the court must look at the entire summing-up and consider what impression it gives overall. (see *HKSAR v Umali* [2011] 3 HKLRD 55 [14(e)]).[147]

147 The Chinese original reads: 「在任何刑事案件的被告人都應獲得公平審訊。本庭亦多次強調不論控方的證據多麼強而有力，亦不論辯方的抗辯理由及證據是多麼薄弱和不具說服力，被告人都不應被剝奪他應獲得的公平審訊機會（見香港特別行政區訴朱金妮 [2012] 4 HKLRD 444及*HKSAR v Hong Tsz Yin* [2011] 5 HKLRD 447等案）。

主審法官不應就具爭議的事實議題過份表達強烈的意見，避免他人覺得法官指示陪審團要接納他的看法或令人覺得他是作出另一篇的控方結案陳詞。

主審法官亦不應對辯方的案情批評得太過不留餘地，否則會侵蝕陪審團就事實裁決應有的自主空間（見上述*Hong Tsz Yin* 及*Mears v The Queen* (1993) 97 Cr App R 239等案）。

但主審法官絕對有權就控辯雙方的證據作出評論。只要評論是合理及持平的，法官就證據作出對被告人不利的評論本身不構成推翻定罪的理由。

有些時候，由於一方的證據及/或說法不合信或不合理，法官覆述該些證據及/或說法及就該些證據及/或說法作出評論時，會顯得對該方不利，亦可能會被視為對該方不公平。但事實上，法官的評論並非不公平，只是有關的證據及/或說法不具說服力，而就該些證據及/或說法作出的評論，即使合理，客觀而言亦可能會對提出該些證據及/或說法的一方造成不利的後果。在上述情況下，強稱因為法官的評論對被告人不利，而令他未能得到公平審訊的說法是不能成立的。本庭必須強調，法庭是沒有責任去隱瞞或修飾辯方案情或說法的弱點（見上述 *Hong Tsz Yin*案判案書第71段）。

本庭亦要指出主審法官對陪審團的指引是否持平，審訊是否公平，必須根據原審法官對陪審團的整體指引作出，而重點是整體指引給人的印象和觀感（見*HKSAR v Umali* [2011] 3 HKLRD 55案判案書第14(e)段）。」

1.105 In a simplistic form, the CA in *HKSAR v Tam Chu Kwong*, upon an extensive review of English and Hong Kong authorities, summarised the law into six principles. These are presented below:[148]

(1) However flimsy and incredible the defence case may be, the defendant is nevertheless entitled to a fair trial. For such entitlement to be seen in a trial before a judge and a jury, the judge's summing-up must be unbiased and without influencing the jury in making their independent judgment on factual issues (*HKSAR v Hong Tsz Yin* [2011] 5 HKLRD 447, [63]; *HKSAR v Zhu Jinni* [2012] 4 HKLRD 451, [40]).

(2) A judge is entitled to express his views on factual issues in his summing-up including those of the defence case provided that they are presented in a restrained manner and not so vigorous as to give an impression that he is instructing the jury to accept his personal views. Also, a "summing-up" should not give an impression that it was another closing speech for the prosecution (*HKSAR v Zhu Jinni* [2012] 4 HKLRDD 451, [30] and *HKSAR v Yeung Chor Ming* [2004] 1 HKLRD 136, [39]).

(3) No defendant has the right to demand the judge to conceal in his "summing-up" the weaknesses and deficiencies of the defence case. However, if the comments made by the judge are so weighted against the defence case, the jury would be left with little choice other than to comply with the judge's views (*HKSAR v Hong Tsz Yin* [2011] 5 HKLRD 447, [71] and the judgment of the Privy Council in *Mears v The Queen* (1993) 97 Cr App R 239, [72]).

(4) What the judge says to the jury carries more weight than what counsel says in a closing address and the judge's "summing-up" is the last word the jury hears before they retire. As such, the judge must be very careful in making comments on the defence case (*Liu Ping Keung v HKSAR* (2005) 8 HKCFAR 52, [24] and [26]).

(5) Ultimately, whether a "summing-up", when reading as a whole, is balanced is a matter of impression and feel (*HKSAR v Umali* [2011] 3 HKLRD 55, [14(e)] and *HKSAR v Hong Tsz Yin* [2011] 5 HKLRD 477, [66j]).

(6) A "summing-up" which is unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury (*HKSAR v Umali* [2011] 3 HKLRD 55, [14(d)]).

(b) Approach in civil appellate courts

1.106 Similar to the criminal appellate courts, civil appellate courts are generally reluctant to engage in a fact-intensive review of the evidence. This section briefly discusses the approaches adopted in appeals from Masters' decisions and appeals in the CA.

148 [2017] 3 HKLRD 445 (Chinese Judgment), [2017] 3 HKLRD 458 (English Translation), [25]. The same has been approved in *HKSAR v Lai King Hin* (黎景軒) (Transliteration) (CACC 244/2017, 2 November 2018), (M Poon J) (giving the judgment of the court).

(i) *Hearing de novo in appeals from Masters' decisions*

1.107 Subject to O.5 r.6 and O.12 r.1 of the RHC, an appeal from decisions of Masters shall be heard by a Judge in chambers.[149] Such appeals are conducted by way of an actual hearing *de novo* of the application. The judge will treat the matter as though it came before him for the first time.[150]

1.108 The judge in chambers is in no way fettered by the Master's previous exercising of discretion. However, a judge hearing an appeal from a Master is entitled, if he thinks fit, to adopt the Master's reasoning in his judgment without setting out the reasoning himself. This does not mean the judge has failed to exercise the discretion conferred on him.[151] In *Ip Yin Ping v Ip Anne*, Deputy Judge Lam distilled these principles:[152]

(1) No matter whether the matter comes before the court by way of appeal or a fresh/renewed application, the court has to exercise its discretion unfettered by the decision of the Master.

(2) At the same time, the court is entitled to give whatever weight it deems appropriate to the decision of the Master.

(3) If the court deems fit, it may adopt the reasoning of the Master.

(4) It follows from (1) that the court should exercise its discretion by reference to all relevant facts and circumstances of the case as it is rather than confining itself to facts and circumstances of the case as it was before the Master.

(5) It would be more appropriate to lodge an appeal against the decision of the Master rather than making a fresh application.

(ii) *Appeals in the Court of Appeal*

1.109 Civil appeals in the CA are extensively addressed in O.59 of the RHC. For present purposes, only the treatment of evidence and factual questions will be briefly discussed here.

1.110 In appeals against decisions of factual questions, the burden of showing the CA that the trial judge was wrong as to the facts lies on the appellant. It is trite law that the trial judge can see the demeanour of the witnesses and can "estimate their intelligence, position and character in a way not open to the courts who deal with later stages of the case".[153]

1.111 In *Ting Kwok Keung v Tam Dick Yuen*,[154] Bokhary PJ considered when an appellate court could properly disturb findings of fact made by a trial judge. First, his Lordship held that one should not overstate the judge's advantage in being able to "observe the demeanour" of witnesses:[155]

> "It is common to speak of a trial's judge's advantage of having "seen and heard" the witnesses. I have no quarrel with that way of putting it. But it may be preferable to speak instead of a trial judge's advantage of having received the evidence at first-hand. There would appear to be two reasons why. First, it is as

149 RHC O.58 r.1(1).
150 Litton VP in *Kilkenny Ltd v AG* [1996] 1 HKC 30, 37; *Kung Wong Sau Hin v CP Lin* [1988] 2 HKLR 209.
151 *Ip Yin Ping v Ip Anne* (HCMP 1840/2002, 20 January 2003).
152 (HCMP 1840/2002, 20 January 2003), [10].
153 *Khoo Sit Hoh v Lim Thean Tong* [1912] AC 323, 325.
154 (2002) 5 HKCFAR 336.
155 *Ibid.*, [36]–[37].

where a witness is screened from the public, there is no undue prejudice to the defendant.

(2) The principle of open justice is engaged when a witness is screened from the public. There is a limited restriction to the public nature of the proceedings and the courts will have to balance that limited restriction against the rights of a witness, taking into consideration the nature of the evidence to be given by the witness and the effect it will have on him or her in giving such evidence and that this is necessary to achieve the due administration of justice.

(3) A fair trial involves fairness to the defendant, the witnesses, and the public. The rights of victims and witnesses are recognised and an important consideration in the criminal trial process. It is part of the court's function to regulate its proceedings and employ appropriate measures to ensure that a witness's ability to give effective evidence is not affected and this will serve the public interest to encourage generally witnesses to come forward to testify in criminal trials.

(4) A complainant in a sexual offence will more than likely be giving evidence that is embarrassing and sensitive. That alone justifies allowing the complainant to give evidence screened from the public to achieve the due administration of justice. An appropriate direction to the jury can be given that they do not read anything adverse to the defendant by the use of the screen.

4.061 The judiciary has now in place a Practice Direction 9.10 that governs the "Use of Screens in Sexual Offence Cases in Magistrates' Courts". In essence, Practice Direction 9.10 stipulates that the prosecution shall notify the defendant not later than 10 days before the pre-trial hearing or 21 days before the commencement of trial whether a witness has requested the use of:

(1) a screen in giving evidence and, if so, the type of the screen requested (eg whether hiding from the defendant, the public or both);
(2) a special passageway; and/or
(3) a support person.

4.062 Finally, for complainants of sexual offences, an anonymity order is possible, where the witness shall be referred to by a pseudonym (eg, Miss X) throughout the trial, and also in any subsequent statement of findings, verdicts or judgments, etc.[92] Such order is granted pursuant to s.156 of the CO. Zervos J also explained to us the importance and rationale of that provision:[93]

> "Its enactment is in recognition by the legislature that a complainant in a sexual offence needs to be specially treated given the nature of the alleged crime and the matters likely to be raised in the course of a trial. In addition, the court has the common law power, and the duty to regulate its proceedings, and in particular the manner in which witnesses might give their evidence, when it is necessary to meet the requirements of justice in a particular case."

92 CO s.156.
93 *HKSAR v Shamsul Hoque* [2014] HKC 395 (Zervos J).

4.063 When a witness gives evidence under these protected means, the trial judge is obliged to remind the jury that they should not give preferential treatments to the evidence of that witness:[94]

> "In this case the witness[es] X [Y and Z] gave evidence by means of [video recorded evidence-in-chief] [live-link television] [behind a screen].
>
> The giving of evidence in this way is perfectly normal in cases like this. It is designated to enable the witness[es] to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness[es] give[s].
>
> The fact that the evidence has been so given must not in any way be considered by you as prejudicial to the defendant."

3. Cross-Examination

4.064 Cross-examination is one of the fundamental aspects of an adversarial system. Its importance was explained by the CFA in *HKSAR v Wong Sau Ming*:[95]

> "A fundamental feature of a fair trial is the right to cross-examine witnesses. As Wigmore pointed out in his classic work on Evidence, for centuries, the policy of the common law system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. And he described it as "beyond any doubt the greatest legal engine every invented for the discovery of truth."

4.065 In *R v Bingham*,[96] the House of Lords held that a party is generally entitled to cross-examine a witness if the party has an interest in doing so. In that case, a rare situation occurred where the defendant was sworn but was not asked any questions in examination-in-chief. The prosecution could still cross-examine the defendant. Further, in *R v Hilton*,[97] it was held that a co-defendant has a right to cross-examine a defendant even though the defendant did not give any evidence which is unfavourable to the case of the co-defendant. This is because of the fundamental right enjoyed by a person being charged to examine witnesses.

4.066 The immediate observable difference between questions asked in examination-in-chief and cross-examination is that leading questions are allowed to be asked, and are very often asked, in the latter. The scope of cross-examination is not limited to the issues raised in the examination-in-chief.[98]

94 *Specimen Directions* 24A.
95 (2003) 6 HKCFAR 135, [2003] 3 HKC 463, [1] (Li CJ, Bokhary, Chan PJJ, Power and Brennan NPJJ).
96 [1999] 1 WLR 598.
97 [1972] 1 QB 421, [1971] 3 All ER 541.
98 *HKSAR v Ko Wai Cheung* [1998] 2 HKC 624 (Beeson J).

4.067 One of the many functions of cross-examination is to discredit the credibility of the testimony given by the witness or even the general credibility of the witness himself. As explained by the CFA in *HKSAR v Wong Sau Ming*:[99]

> "...in applying the test of relevance, the court should in its discretion usually permit questions in cross-examination as to credit if the truth of the imputation conveyed would materially affect the court's opinion as to the witness's veracity on the subject matter of his testimony. Conversely, questions in cross-examination as to credit are usually not permissible if the truth of the imputation conveyed would not have any material impact on such opinion. The imputation may relate to matters which are so remote in time or are of such a kind that the truth of the imputation would not have any material impact on the court's assessment of the witness's veracity."

(a) The rule in *Browne v Dunn*

(i) *The general duty to put case to a witness*

4.068 In *Browne v Dunn*,[100] the House of Lords held that it was a rule of professional practice and essential to fair play that, if a party intended to ask the jury to disbelieve the evidence of a witness, that party should put to the witness that the evidence is not accepted. Otherwise, that party would not be allowed to rely on that argument in his closing submission. As a practice and in compliance with the rule, advocates would have to "put his case" to the witness in the course of cross-examination.

4.069 The primary rationale of the rule in *Browne v Dunn* is to allow the witness an opportunity to respond to the opposite party's case so that the witness of no party would be ambushed. As explained in *HKSAR v Tsui Sin Yee*:[101]

> "The purpose of the rule established by *Browne v Dunn* is to prevent a party; and the rule as a matter of practicality is directed usually at the party whose evidence is given last, from embarking upon a presentation of their case in evidence which is novel and upon which, if it had been put to them, the other parties' witnesses would have been able to provide relevant evidence. It is not a rule which requires aspects of a party's case to be put to the other party where must have in any event been perfectly aware from the conduct of the proceedings that those assertions were part of the case against him."

The essence is to make clear to the witness that his evidence is disbelieved or challenged, such that he could respond.

(ii) *Witness' evidence manifestly unbelievable — "Raised Eyebrow" situation*

4.070 In some circumstances, it would *not* be necessary to put a version to the witness if the evidence of a witness could be so manifestly unbelievable that the duty to put case is

99 (2003) 6 HKCFAR 135, [2003] 3 HKC 463, [25] (Li CJ, Bokhary, Chan PJJ, Power and Brennan NPJJ).
100 (1893) 6 R 67.
101 [2010] 1 HKLRD 876, [44] (MacMahon J).

dispensed with. As suggested by Lord Morris in *Browne v Dunn* itself,[102] sometimes a story told by a witness might be "so incredible and romancing that the most effective form of cross-examination would be to ask him to leave the witness box".

4.071 In *HKSAR v Sunami Marwito*,[103] the prosecution did not cross-examine the toddler defence witness, and accordingly did not put any case to the toddler, yet it then invited the jury to reject the evidence of the toddler. The court found that the toddler's evidence was so confused that nothing could rescue it from confusion. Since the prosecution case was that the toddler's evidence is meaningless, there is no need to put its case under such circumstances.

4.072 However, in *Lo Chun Nam v HKSAR*,[104] the earlier-mentioned approach was described as "raised eyebrow".[105] Although there may be cases where the "raised eyebrow" approach is sufficient to discharge the duty of counsel, in a criminal trial, it is better and less likely to lead to confusion to take the issue more obviously.[106] In that case, the prosecutor merely asked the defendant a general question at the end of the cross-examination: "I put it to you that PW1, PW2, PW3, and PW4 all were telling the truth." This has caused confusion which could have been avoided by a fuller cross-examination.

4.073 That said, it is not necessary to go to the other extreme and put every minute detail of the case to the witness.[107] In *HKSAR v Liu Chenghao*,[108] the court said that the question boils down to a simple rule of fairness, whether a reasonable opportunity has been given to allow the evidence in question to be properly assessed. Accordingly, a technical breach of the rule in *Browne v Dunn* might not be significant if no unfairness resulted:[109]

> "It goes without saying that whether any unfairness is done in a particular case when the rule in *Browne v Dunn* is not followed. Depends on the circumstances of each particular case. If the witness in question knows or has been given notice that the opposite party/cross-examiner does not accept his evidence or a certain part of his evidence, the rule in *Browne v Dunn* is not applicable; and when the evidence as a whole in a particular case shows that there is overwhelming evidence in support of the trial judge's decision, it would be questionable for an appellate court to overturn that decision just because the rule in *Browne v Dunn* has been violated.
>
> However, if part of the evidence which is to be challenged is of crucial importance to the case, or the allegation which is to be made against a witness is serious, then unless the witness is fully aware of that, in my judgment, in order to be fair to the witness and to both parties, and for enhancing the recognition

102 (1893) 6 R 67.
103 [2000] 1 HKLRD 892 (Stuart-Moore VP, Michael Wong JA, and V Bokhary J).
104 (2001) 4 HKCFAR 1 (Li CJ, Bokhary, Chan, Ribeiro PJJ, and Silke NPJ).
105 *Ibid.*, 7.
106 *Ibid.*
107 *R v Fenlon* (1980) 71 Cr App R 307.
108 (劉成浩) [2014] 2 HKLRD 389 (Chinese Judgment), [2014] 2 HKLRD 413 (English Translation) (Deputy Judge Woo).
109 *Ibid.*, [38]–[39].

of the court's role in the administration of justice, the rule in *Browne v Dunn* should be observed."

4.074 Apparently, the rule in *Browne v Dunn* would be applied with more flexibility with regards to the defendant, who is in the courtroom throughout the prosecution case and is supposedly familiar with the stance of the prosecution, whether through the advice of his legal representatives or otherwise.

4.075 The exact meaning of "not being able to rely on the argument", stipulated in *Browne v Dunn*[110] as being the consequence of not following the rule, needs to be revisited in light of subsequent authorities, which seems to have lessened the consequences of breaching the rule. In *HKSAR v Z*,[111] the CFA held that even if the evidence of a witness has not been challenged during cross-examination, the court is not bound to accept his evidence. Further, the court may convict on the basis of certain weaknesses and inconsistencies in the defendant's evidence even though those weaknesses and inconsistencies have not been put to him. Ultimately, the concern is fairness and the seriousness of the consequence of a breach of the rule in *Browne v Dunn* would depend on the nature of the case which has failed to be put and the awareness of the witness.[112]

4.076 The rule in *Browne v Dunne* was addressed by the CFA in *HKSAR v Chan Hoi Tat*.[113] Counsel for the defendant argued that the trial judge had failed to properly consider a defendant's evidence, and the reason given by the judge seemed to indicate that he had already accepted the complainant's evidence even before considering the alibi evidence. This was squarely rejected. Chan PJ held that the *Browne v Dunn* rule is to:[114]

> "…ensure fairness to a witness whose evidence or any of the points to which he has testified is being questioned: he should be told that he is not to be believed on his evidence or on the point in question so that he can have an opportunity to offer an explanation unless it is obvious to him that his evidence is being challenged. (See Lord Herschell LC, p.71 and Lord Halsbury, p.76.) In the present case, it cannot be said that DW1 could have been under any misapprehension that his evidence was not being challenged. It must have been quite plain to him from the way questions were asked when he was cross-examined that his evidence was being tested and that the prosecution was impeaching his reliability if not also his credibility. There is nothing unfair to him by not putting directly to him that his evidence was not to be accepted."

4.077 Most recently, in *HKSAR v Dumayag*,[115] the defendant was charged with one count of breach of condition to stay. During the trial, the defendant elected to give evidence. The prosecutor, nonetheless, did not cross-examine the defendant. That said, the prosecution attacked the defendant's testimony in the course of the closing submission. The defendant was convicted after trial.

110 (1893) 6 R 67.
111 (FAMC 68/2011, 24 February 2012) (Bokhary, Chan and Ribeiro PJJ).
112 *Ibid.*, [4].
113 (2013) 16 HKCFAR 34.
114 *Ibid.*, [19].
115 [2018] 2 HKLRD 914.

4.078 On appeal, the defendant argued that whilst the prosecutor in the trial has violated the rule in *Browne v Dunn*. On the other hand, the prosecution sought to defend the Magistrate's ruling by arguing that the situation was one of the "raised eyebrow" situation. In allowing the appeal, Deputy Judge Anthony Kwok said:[116]

> "The prosecuting counsel chose not to cross-examine the appellant at the stay application as he thought it would be improper for him to impeach her credibility at that stage even before the trial commenced. In his written closing submission, he made it plain to the magistrate that the appellant has a defence available to her that she has the requisite honest and reasonable belief that she was not in breach of her visa condition. No cross-examination of the appellant, however, was ever conducted after the appellant had elected to go to the witness box and adopted what she had testified under oath earlier in the stay application. As a result, it has never been put to the appellant by the prosecuting counsel that what she had said was untrue and unconvincing and how was it that her explanations would be regarded as unreasonable. Applying the *Browne v Dunn* rule, while there might be credible explanations offered by the appellant in the individual point relied by the prosecuting counsel to hammer her in his closing submission, the stark fact of reality was that the appellant was effectively denied of an opportunity to respond and deal with her criticisms and, with respect, the magistrate just adopted those criticisms as submitted by the prosecution in her statement of findings and reached a negative finding that the appellant was not an honest and reliable witness.
>
> This was not a "raised eyebrow" case as contended by the respondent. I am aware that the period of overstay by the appellant in this case was of course long and also the fact that the tolerance displayed by the appellant for her employer's misconduct was, on its face, somewhat surprising. On the other hand, one also has to note however that the fact of the present case is also distinctly different from the usual run-of-the-mill cases in that the defendant did not chose to overstay because she was terminated by the previous employer and she could not find a new job in Hong Kong. The appellant in this case has all along been working in the same household non-stop for 12 years or more (which was not challenged) and yet she was in breach of her condition of stay only because her employer, for reasons best known to herself, did not process her new employment contract with the Immigration Department as promised. One cannot but ask the rhetoric question: What good would there be for the appellant to continue her employment in Hong Kong without a proper employment visa? How she would be able to enforce her right as an employee if it was her intention that her employment contract was not to be approved by the Immigration Department and she was just working here illegally?
>
> According to the appellant, Leung repeatedly assured her that she had connections and her working visa could be "back-dated" so that she would not be in breach of her condition of stay. She also had a very strong emotional tie

116 *Ibid.*, [57]–[60].

(4) The provisions of ss.48 to 51 shall not apply in relation to hearsay evidence admissible apart from this section, notwithstanding that it may also be admissible by virtue of this section."

6.125 The EO s.47(1) provides that hearsay evidence should not be excluded, unless a party against whom the evidence is to be adduced objects to the admission and the court is satisfied that the exclusion is not prejudicial to the interests of justice. The party seeking to adduce hearsay evidence shall give notice to the other party.[187] A failure to do so, while does not automatically render such evidence inadmissible, may have its weight adversely affected and other costs consequences.[188]

6.126 A party cannot rely on s.47 of the EO to escape from the obligation of producing the deponent of an affirmation for cross-examination.[189] However, hearsay evidence of a statement made by those whose were not competent as a witness cannot be admitted.[190]

6.127 Section 48 goes on to provide for the parties' power to call witness for cross-examination on the hearsay statement.

(a) Weight to be placed on hearsay evidence

6.128 The EO s.49 allows the court to have regard to the following factors when assessing the weight of hearsay evidence:

> **"49. Considerations relevant to weighing of hearsay evidence**
>
> ...
>
> (5) For the purposes of sub-s.(1), regard may be had, in particular, to the following –
>
> (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
>
> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
>
> (c) whether the evidence involves multiple hearsay;
>
> (d) whether any person involved had any motive to conceal or misrepresent matters;
>
> (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
>
> (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight;
>
> (g) whether or not the evidence adduced by the party is consistent with any evidence previously adduced by the party."

187 EO s.47A(2).
188 *Ibid.*, s.47A(4).
189 *High Fashion Garments Co Ltd v Ng Siu Tong* (HCA 12093/1999, 5 May 2003); *Cheung Wei Man Vivien v Centaline Property Agency Ltd* (HCA 286/2000, 25 September 2003).
190 EO s.50(1).

6.129 The court is duty-bound to show that it has had proper regard to the factors listed in the statute. In *Aqua-Leisure Industries Inc v Aqua Splash Ltd*,[191] Le Pichon JA said:

> "The first matter to note is that s.49 is framed in mandatory terms, ie 'the court shall have regard ...' to, inter alia, the circumstances set out in sub-s.(2) if any inference can reasonably be drawn from them as to the reliability or otherwise of the evidence. There is nothing in the judgment to suggest that the Judge had s.49 in mind when evaluating the weight of the evidence adduced by the plaintiffs. Not once did he allude to the statutory considerations contained in s.49 such as multiple hearsay or the absence of any attempt to identify the source of the information and chain of evidence."

6.130 Another flaw identified by her Ladyship is that the trial judge should not have deprived the appellants of their right under EO s.48 to apply to cross-examine the maker of the hearsay statements. Given that multiple hearsay was involved, the failure to identify the source of the information or chain of evidence meant that the appellants were denied this benefit.[192]

6.131 In applying EO s.49, courts have held that the fact that some evidence was "double hearsay" does not result in automatic exclusion — since the section makes quite clear the court must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.[193] In practice, courts are likely to defer to the trial judge's assessment of the weight so long as the factors are considered.[194]

6.132 The factors listed under EO s.49(2) are also relevant as to how the court exercise its discretion under EO s.47(1), bearing in mind the interest of justice. In *High Fashion Garments Co Ltd v Ng Siu Tong*,[195] Deputy Judge Johnson Lam clarified that it is not in every case where a party seeks to adduce hearsay evidence, the other party would be entitled to seek an order from the court directing the former party to procure the attendance of the maker for cross-examination. His Lordship further emphasised the purpose of the legislation:[196]

> "Such a proposition is plainly untenable and would probably defeat the main purpose of the Evidence (Amendment) Ordinance 1999 to further liberalise the admission of hearsay evidence. The discretion must be exercised in the light of, amongst other things, the impact of that piece of hearsay evidence, the relationship of the maker with either party, the history of the case, the practicalities as to the procurement of the maker to give evidence and other relevant considerations. I am of the view that the factors set out in s.49 of the Evidence Ordinance (albeit in the context of weighing hearsay evidence) would also be relevant."

191 [2003] 1 HKLRD 142, 157.
192 *Ibid.*, 157.
193 *Zheng Biao v Kwok Wai Lung* (CACV 241/2004, 13 May 2005), [9].
194 *Kowloon Motor Bus Co (1993) Ltd v K K Cargo Systems (HK) Ltd* (CACV 372/2002, 4 April 2003).
195 [2004] 1 HKLRD 928.
196 *Ibid.*, 933.

6.133 Accordingly, s.47 does not bestow on a litigant a right to ignore court directions as to cross-examination of deponents of affidavit evidence. It does not deal with other procedural restrictions laid down by other rules. As s.47(4) also makes it clear, the new hearsay regime does not apply hearsay evidence that could be admissible under other avenues.

7. The Way Forward

(a) The English Criminal Justice Act 2003

6.134 The law of hearsay in Hong Kong remains piecemeal. Many aspects of which retain obsolete and anarchic rules dating back to the eighteenth and nineteenth centuries. In the United Kingdom, the criminal hearsay regime has undergone a radical overhaul after the enactment of the Criminal Justice Act 2003 (CJA) which codifies the rules and provides for very specific gateways under an elaborate and complex statutory scheme.

6.135 Section 114 (1) of the CJA states that an out-of-court statement is admissible if and only if:

> "(a) any provision of this Chapter or any other statutory provision makes it admissible,
> (b) any rule of law preserved by s.118 makes it admissible,
> (c) all parties to the proceedings agree to it being admissible, or
> (d) the court is satisfied that it is in the interests of justice for it to be admissible."

6.136 It goes on to define a "statement" as "any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form."[197] Further, the exclusionary applies only if "one of the purposes of the person making the statement appears to the court to have been (a) to cause another person to believe the matter, or (b) to cause another person to act or a machine to operate on the basis that the matter is as stated."[198] In other words, words written in a private diary that is not intended for others to see would not satisfy the definition. Section 118 of the CJA does retain some common law exceptions, namely, confessions and *res gestae*.

6.137 The English hearsay rules have also been influenced by the European Court of Human Rights (ECtHR) jurisprudence. This demonstrates how a strict exclusionary rule could potentially encroach upon a defendant's right to fair trial. In *Al-Khawaja and Tahery v UK*,[199] the ECtHR considered the fact that key prosecution evidence had been in the form of a written statement by a witness who did not give evidence in person at trial amounted to a violation of art.6(1) and 6(3)(d) of the European Convention on Human Rights because the statement was the "sole and decisive evidence" against the defendant. The UK Supreme Court, nonetheless, did not welcome the

197 CJA s.115(2).
198 CJA s.115(3).
199 [2009] ECHR 110.

decision in *Al-Khawaja*. In *R v Horncastle*,[200] Lord Phillips strenuously defended the legitimacy of the English regime:[201]

> "...The manner in which the Strasbourg Court has approved those exceptions has resulted in a jurisprudence that lacks clarity.
>
> The sole or decisive rule has been introduced into the Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions...."

6.138 After the Supreme Court judgment, *Al-Khawaja and Tahery v UK* was again referred back to the Grand Chamber of the ECtHR.[202] This time, the ECtHR held that where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of art.6(1) or 6(3)(d).[203] Further, the court shall consider whether there were sufficient counterbalancing factors including strong procedural safeguards to ensure that each trial, judged as a whole, was fair.[204]

6.139 The reason why this facet of the jurisprudence was explored is this. Article 11(2)(e) of the Hong Kong Bill of Rights (which was entrenched as s.8 of the Hong Kong Bill of Rights Ordinance (Cap.383)) also provides similar rights to defendants in a criminal trial. Unfortunately, this question has not arisen in local jurisprudence.

(b) Law reform in Hong Kong

6.140 In a report by the Hong Kong Law Reform Commission, various shortcomings of the present law of hearsay have been identified:[205]

> "The complexity and illogicalities of the rule and its exceptions result in considerable uncertainty, not least in some instances in determining the very question of whether or not the out-of-court assertion is being used for a hearsay purpose. In recent appellate decisions, Hong Kong courts have noted the criticisms of the English *Kearley* decision and strongly recommended legislative reform of the law.
>
> Furthermore, the law of hearsay has failed to adjust to the social reality of increasing global mobility. Rather than relaxing the rule, the law has forced parties to expend significant time and resources in bringing witnesses back to the trial jurisdiction.
>
> The existing law of hearsay also fails adequately to take account of advances in the electronic recording of communications. Recorded telephone conversations

200 [2009] UKSC 14.
201 *Ibid.*, [14].
202 (2012) 54 EHRR 23.
203 *Ibid.*, [147].
204 *Ibid.*, [152].
205 Law Reform Commission, Report on Hearsay in Criminal Proceedings: Executive Summary, [42]–[44].

(ii) *HKSAR v Zhou Limei*

7.012 The CFA had an opportunity to comprehensively review this area of law in *HKSAR v Zhou Limei*.[10] The defendant in the case was charged with trafficking in dangerous drugs. He was intercepted on the arrival at the Hong Kong Airport. A search of the defendant's suitcase in her presence revealed two packets containing a white powder which tested positive for heroin in a rapid drug test. When asked (under caution) what are the substances found in her suitcase, the defendant replied "I suppose this is dangerous drug?" in Punti (我諗呢一啲係毒品㗎). Prior to the jury being empanelled, a *voir dire* was held in which the trial judge ruled that the statement was admissible in evidence. The jury convicted the defendant as charged after trial.

7.013 In allowing the appeal and quashing the conviction, the CFA held that the statement was ambiguous and should not be admissible. Much emphasis was placed on the last syllable「㗎」which the CFA held that what the defendant meant was only suspicion instead of knowledge to the dangerous drugs. As such, the utterance was ambiguous and the trial judge erred in allowing the same to be placed before the jury.

7.014 The CFA summarised the relevant principles as follows:[11]

(1) Where the prosecution seeks to rely on an equivocal statement as an admission, the judge should consider whether it is reasonably capable of constituting an admission probative of a relevant fact in issue.
(2) If it is so capable, subject to the exercise of the court's residual exclusionary discretion, it is admissible and should be left to the jury to decide if it does, in fact, constitute an admission, to be relied on as an exception to the hearsay rule. If it is not reasonably capable of being an admission, it is inadmissible.
(3) If the statement is left to the jury, they should be permitted to consider the whole of what transpired, placing the statement in context.
(4) The jury should be told that they can only rely on the statement against the defendant if they find beyond a reasonable doubt:
    (i) that the defendant made the claimed admission;
    (ii) that, viewed in context, it was indeed intended to be an admission probative of a fact in issue; and
    (iii) that the substance of the admission is truthful.
(5) The judge should give appropriate directions as to how to deal with the statement, drawing attention to its ambiguity and other possible meanings and indicating any matters that the jury may take into account in deciding whether admission was intended. The judge should also give appropriate directions in respect to how any contextual evidence may or may not be used.
(6) The judge should also identify for the jury, if they find that the statement is an admission, what its scope or limits are, ie, what it is that the defendant may be found to have admitted.
(7) Since an equivocal statement may have little probative value, the judge has to consider whether to exercise his discretion to exclude the statement on the ground that its probative value is outweighed by a risk of unfair prejudice. The more equivocal the statement, the less may be its probative value. Depending on its content and relevance, the fact in issue provable by the statement may be of greater or lesser probative value in relation to the offence as a whole. Evidence admitted to establish the statement's context may be highly prejudicial.

10 (2017) 20 HKCFAR 71, [2017] 4 HKC 212.
11 *Ibid.*, [43].

(b) Declaration against self-interest

7.015 Broadly speaking, a confession is a declaration against self-interest. As defined by the House of Lords in *Commissioners of Customs and Excise v Harz*:[12]

> "A statement of fact which suggests an inference as to any fact that is relevant and which is adverse to the interests of the person responsible for the statement is, however, generally against him, although it is "hearsay" and is usually described as an admission."

7.016 In the ancient case of *R v Warickshall*, the judges laid down the following principle:[13]

> "Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore is admitted as proof of the crime to which it refers."

That case was concerned with a full confession of guilt, which is perhaps the most straightforward type of confession. However, declarations against self-interest can take many different forms, some of which require extra analysis on the principles of admissibility, probative effect, and prejudicial value.

(i) *Mixed statement*

7.017 An inculpatory statement is one which shows or tends to show the guilt of the defendant. An inculpatory statement is admissible provided that it is voluntary and the residual discretion to exclude is not exercised. Opposite to that is an exculpatory statement, which the defendant denies being guilty. An exculpatory statement is inadmissible, because it falls within the rule against hearsay, and possibly the rule against prior consistent statement as well. In essence, an exculpatory statement is nothing more than "self-serving". A mixed statement is one which is partly inculpatory and partly exculpatory, which would be considered now.

7.018 It is conceivable that a statement could change from inculpatory to exculpatory, or vice versa, upon the disclosure of other evidence, or the change of other circumstances. However, the relevant time frame for determining whether a statement is inculpatory or exculpatory is when it is made. As explained in *HKSAR v Yuen Man Tung*:[14]

> "Whether a statement is or is not wholly exculpatory is not a question resolved by having regard to the issues which remain to be determined in the light of admissions made at the time of trial. Its nature is to be determined rather by its

12 [1967] 1 AC 760, 786A, [1966] 3 All ER 433, 449H.
13 168 ER 234, 234–235.
14 (CACC 442/2003, 16 April 2004), [18] (Ma CJHC, Stock JA, and Reyes J).

deciding where the truth lies. You may feel that the incriminating parts are likely to be true — for why else would he have made them? You may feel that there is less weight to be attached to his [excuses] [explanations], for they were not made on oath, have not been repeated on oath, and have not been tested by cross examination."

(ii) *Confession by conduct*

7.026 In *Lam Chi Ming v R*,[31] where the defendant was prosecuted for murder, the Privy Council held that a confession could be made by demonstration or gesture as by words. Confession by demonstration or gesture can be just as damning to the defendant as if he uttered in words the meaning behind the demonstration or gesture. However, the jury may accept that meaning only if they find that it is the only irresistible inference that could be drawn from such a demonstration or gesture. In that case, the prosecution produced evidence of a muted video tape where it could be seen that the defendant led the police to the waterfront and made a gesture indicating throwing a knife into the water. The Privy Council commented that this could show the defendant knew where the murder weapon had been thrown into the sea and it was inconceivable that anyone other than the murderer would dispose of a knife in this fashion.

7.027 In *R v Li Shu Ling*,[32] the Privy Council held that a confession could be made by the defendant's re-enactment of the crime. This could be within a video recording in which the defendant also made an oral confession, or in a separate video recording of the re-enactment at the crime scene itself. Further, the re-enactment could be done by third-party actors. The defendant must be given a proper warning that he need not take part in the re-enactment, and he should also be given the opportunity to comment on his re-enactment and the video recording thereof as soon as practicable after the re-enactment. Re-enactment is appropriate where it is easy to demonstrate the essential features of the crime, eg, in that case, where the defendant demonstrated how he strangled the victim with his hands and then tied a rope around the victim's neck. The Privy Council gave an opposite example that in a case where the killing was committed in the course of an affray with many people milling about the victim and the killer, any attempt of re-enactment would be highly misleading.

(c) Voluntariness

7.028 For a confession to be admissible, the defendant must have made the confession voluntarily. Historically, a defendant is not competent to testify under oath, the rule on the voluntariness of confession was, thus, in stricter terms. In the ancient case of *R v Moore*,[33] the test was stipulated as follows:

> "[I]f the threat or inducement is held out actually or constructively by a person in authority, it cannot be received, however slight the threat or inducement, and the prosecutor, magistrate, or constable, is such a person, and so the master or mistress may be."

31 [1991] 2 AC 212, [1991] 3 All ER 172.
32 [1989] AC 270, [1988] 3 All ER 138.
33 (1852) 169 ER 608, 610.

This could be viewed as an absolute test since the confession is excluded as long as there is any threat or inducement however slight, and the influence of such threat or inducement on the mind of the defendant is disregarded.

7.029 Under modern law, the element of absoluteness was removed. Lord Sumner summarised the applicable legal position in *Ibrahim v R*:[34]

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage [excited] or held out by a person in authority."[35]

7.030 This modern position should not be construed without paying adequate regard to the historical context behind the requirement of voluntariness of a confession. As stated by the CFA in *Secretary for Justice v Lam Tat Ming*:[36]

> "The rule of voluntariness as established by these principles is an essential safeguard for the accused against the coercive power of the law enforcement agencies.
>
> The underlying rationale is based both on the need to ensure the reliability of confessions as well as the right of silence. In this context, judges often refer to the maxim *nemo debet prodere se ipsum*, no one can be required to be his own betrayer and some judges refer to the right as the right to silence or the privilege against self-incrimination. I shall refer to it as the right of silence."

Thus, in each criminal trial, the prosecution bears the burden of proof to satisfy the court that the confession is voluntary, and the standard of proof is one of beyond reasonable doubt.[37]

(i) *Person in authority*

7.031 The first important issue to consider is who constitutes a "person in authority". In *Deokinanan v R*, the Privy Council seemed to have cited the following passage from *R v Todd*[38] as being the definition of person in authority:[39]

> "A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason that it is a rule of law that confessions made as the result

34 [1914] AC 599, 609, [1914–15] All ER Rep 874, 877.
35 Lord Sumner's judgment initially read "...by fear of prejudice or hope of advantage exercised or held out by a person in authority". In *DPP v Ping Lin* [1976] AC 574, [1975] 3 All ER 175, it was suggested that the word "exercised" is meaningless and corrupt and Lord Sumner likely actually said "excited". Nonetheless, the general meaning is still obvious and unaffected.
36 (2000) 3 HKCFAR 168, 177I–178B, [2000] 2 HKC 693, 701H (Li CJ, Litton, Ching and Bokhary PJJ, Sir Anthony Mason NPJ).
37 *Li Ming Kwan v R* [1973] HKLR 275.
38 (1901) 13 Man LR 364.
39 *Deokinanan v R* [1969] 1 AC 20, 33A–33B, [1968] 2 All ER 346, 350F.

Thus, in that case, where the police merely said "do me a favour, this was a joint operation by your family", after which the defendant made a confession, it was held that any hope that he had on the police not pursuing investigations on his family was self-generated.

7.040 On the other hand, even if the fear or hope was originally self-generated, if a person in authority subsequently had words or conduct which was capable of constituting an inducement, there is an inducement. In *R v Chan Yip Kan*,[53] where the defendant offered to make a confession in exchange for being a prosecution witness, and the police officer did not give a direct answer, this was held to constitute an implied promise, and hence an inducement, since the prosecution had failed to discharge its burden of proof that the defendant's mind was not influenced by the lack of direct answer.

7.041 However, *R v Chan Yip Kan*[54] was distinguished in *Chau Ching Kay v HKSAR*.[55] In that case, after the defendant made a conditional offer, the police gave no answer at all but proceeded to ask him about the details of the offence. The defendant did not mention or ask about the offer again throughout the interview, even in the presence of his lawyer subsequently. The court held that the set of facts was inconsistent with there being an inducement.

B. Prosecution disproving influence

7.042 Insofar as the second limb is concerned, the prosecution is obliged to prove that those inducements *had not influenced* the defendant. The relevant point in time for considering whether the mind of the defendant had been influenced is when he makes the confession. Hence, where the effect of the inducement had already ended by the time he made the confession, it might be voluntary. As explained in *R v Smith*:[56]

> "The court thinks that the principles to be deduced from the cases are really this: that if the threat or promise under which the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time-limit between the two statements, the circumstances existing at that time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement."

In that case, the police told the suspects in the parade that none of them is going to bed until one of them "owns up". This was held to be a clear threat. However, where nine hours had passed and the suspects were allowed to go to bed, the effect of the threat or inducement had dissipated.

(iii) *Oppression*

7.043 The word oppression does not appear in Lord Sumner's classic formulation, but the English CA in *R v Prager (No 2)* seemed to have suggested an expanded form of the classic formulation which included "oppression":[57]

> "That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police

53 [1986] HKC 35.
54 *Ibid.*
55 (2002) 5 HKCFAR 540 (Bokhary and Chan PJJ, Litton, Mortimer and Lord Cooke NPJJ).
56 [1959] 2 QB 35, 41.
57 [1972] 1 All ER 1114, 1118.

> officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."

7.044 The requirement that a voluntary confession must not be made under oppression was confirmed in *DPP v Ping Lin*.[58] The Privy Council, in that case, explained that such a requirement was confirmed to err on the safe side at a time where more subtle interrogation techniques are being used and to ensure that previous safeguards are not whittled down.

7.045 The definition of oppression in this context could be found in *R v Prager (No 2)*:[59]

> "The only reported judicial consideration of 'oppression' in the Judges' Rules of which we are aware is that of Sachs J in *R v Priestley* where he said:
>
> '...to my mind, this word in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before confession is voluntary...Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world.'
>
> In an address to the Bentham Club in 1968, Lord MacDermott described 'oppressive questioning' as--
>
> 'questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when he otherwise would have stayed silent.'"

It is apparent that whether there is oppression depends very much on the circumstances of the case and the characteristics of the defendant. Ultimately, the issue is whether the free will of the defendant was compromised.

7.046 Despite being very fact sensitive, certain questioning practices have been consistently criticised by the courts as being oppressive eg, questioning of an undue length and which continues after the defendant has indicated that he does not wish to answer further questions could amount to cross-examination in the nature of oppression.[60] Questions phrased without care and asked with impatience and excitability would also inevitably take on the appearance of cross-examination.[61]

58 [1976] AC 574, [1975] 3 All ER 175.
59 [1972] 1 All ER 1114, 1119.
60 *R v Chan Tung Hoi* [1985] 1 HKC 554.
61 *HKSAR v Leung Chiu Ming* [2001] 1 HKLRD 272 (Mayo VP, Hartmann and Suffiad JJ).

(3) The second scenario is where there is both Dock ID and prior identification. At this juncture, it shall be appropriate to summarise the court's stance on various types of out-of-court identifications. ID Parade has consistently been regarded as the most reliable and least prejudicial method of identification. At the other end of the spectrum would be confrontation identification. Other methods lie somewhere in between. It seems that the court will exercise its discretion to exclude evidence of Dock ID (or not allow Dock ID to be performed altogether), if the out-of-court identification used by the prosecution is unfair to the defendant, and there is no good reason why a more reliable identification method was not used.[78] On the other hand, evidence of prior identification can be adduced by the eyewitness and/or[79] the police officer-in-charge of the identification process, and it seems that the court's approach is not to exclude such out-of-court identification evidence outright, but give them appropriate weight as they deserve, which could be negligible in some cases.[80]

(4) The final scenario is where there is only evidence of out-of-court identification. This means that the witness fails to identify that the person in the dock is the person he previously identified out of the trial. This is the situation in *R v Osbourne*,[81] and evidence of the witness's identification out of court, which is adduced by a separate witness (who is most likely a police officer), is admissible.[82] Same as above, identification evidence from less favourable identification methods will not be excluded outright and it goes to weight.

9.060 Apart from referring to "evidence that the witness identifies the defendant as the person he saw committing the crime which the defendant is being prosecuted", "identification evidence" could also refer to evidence that the witness sees the commission of the crime which the defendant is being prosecuted for (or evidence that the witness sees the perpetrator at or around the scene and at or around the material time). This type of identification evidence provides the direct or circumstantial evidence required to prove the commission of an offence, and it is generally admissible subject to the usual exclusionary rules.

(b) *Voir dire*

9.061 *Voir dire* for the purposes of determining the admissibility of visual identification evidence is a rare occurrence, if any. This is because as discussed earlier, even if a sub-optimal identification procedure was conducted with no good reason why a formal ID Parade was not held, the court will rarely exercise its discretion to exclude such evidence. This goes to weight rather than admissibility.

9.062 In *R v Walshe*,[83] it was held that holding a *voir dire* to rule on the admissibility of an ID Parade is a novel procedure and should be discouraged. The English CA held "strongly to the view that a trial-within-a-trial is an entirely inappropriate procedure".

78 See *HKSAR v Tang Chun Yu* (HCMA 761/2005, 16 November 2005) (V Bokhary J).
79 *R v Christie* [1914] AC 545.
80 See *HKSAR v Mui Tak Ming* (HCMA 1093/2006, 17 April 2007) (Beeson J).
81 [1973] QB 678, [1973] 1 All ER 649.
82 The inconsistency goes to weight but not admissibility: *Lam Tsz Wah v R* [1984] HKLR 54.
83 (1982) 74 Cr App R 85.

This was because the prosecution does not have the burden to prove the admissibility of ID Parade; it was admissible, and its quality is another matter to be considered by the jury. Similarly, in *R v Flemming*,[84] which concerned the admissibility of a group confrontation, it was further explained that the appropriate procedure would be to first admit the evidence and withdraw it if necessary, according to the *Turnbull* principles.[85]

However, in *R v Beveridge*,[86] it was held that a trial judge must consider the depositions and statements and submissions of counsel when the admissibility of an ID Parade is challenged, and in a rare occasion, the trial judge will think it desirable to hold a *voir dire* to determine the course of action. However, that case was decided on the basis that the English statute which provided that the court may refuse to allow evidence where it would have such an adverse effect on the fairness of the proceedings. There is no equivalent statute in Hong Kong and there are no Hong Kong cases which follow *R v Beveridge*.[87] **9.063**

(c) Withdrawing identification evidence

Compared with holding a *voir dire*, a far more appropriate and common procedure to deal with visual identification evidence of insufficient quality is for the trial judge to intervene and withdraw such evidence from the jury. In cases which identity is disputed, and there is no other identification evidence from the prosecution, this necessarily implies that the entire case is withdrawn, and the defendant is acquitted. *R v Turnbull*[88] is the leading authority on withdrawing identification evidence and the relevant passages deserve a full citation:[89] **9.064**

> "When, in the judgment of the trial judge, the quality of the identifying 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 that lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification."

In addition to the power to withdraw the case under *Turnbull*, the trial judge already enjoys the power to withdraw the case and direct an acquittal after the prosecution closes its case, ie, determining whether there is a case for the defendant to answer. One would recall the familiar principles in *R v Galbraith*:[90] **9.065**

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where

84 (1988) 86 Cr App R 32.
85 See [9.072]–[9.090].
86 (1987) 85 Cr App R 255.
87 *Ibid.*
88 [1977] QB 224, [1976] 3 All ER 549.
89 *Ibid.*, 229H–230A, [1976] 3 All ER 549, 553c.
90 [1981] 2 All ER 1060.

there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence, (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

9.066 The Privy Council in *Daley v R* held that there is no conflict between *Turnbull* and *Galbraith*:[91]

"A reading of the judgment in *Reg v Galbraith* [1981] 1 WLR 1039 as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery CJ had put it, was not his job. By contrast, in the kind of identification case dealt with by *Reg v Turnbull* [1977] QB 224 the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as *Reg v Turnbull* itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice."

Thus, after the prosecution closes its case, the judge must consider the *Galbraith* test. However, where identity is disputed, the judge should additionally consider *Turnbull*. Even if there is a case to answer according to *Galbraith* alone, the case might still need to be withdrawn after considering *Turnbull* as well. This is because *Turnbull* deals with the situation where the identification evidence is too unreliable for a jury to properly convict, and would be unfair to the defendant if the jury is allowed to consider, even if the witness is honest.

9.067 Another potential distinction between *Turnbull* and *Galbraith* is that on one interpretation of *R v Turnbull*, the judge can withdraw the case from the jury after the close of the defence case:[92]

"All these matters go to the quality of the 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.

91 [1994] 1 AC 117, 129D–129G; [1993] 4 All ER 86, 94g–94j. Cited in *HKSAR v Limbu* [2006] 4 HKC 285, [20] (Stuart-Moore and Woo VPP, Tang JA).

92 [1977] QB 224, 229B, [1976] 3 All ER 549, 552e.

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;..."

However, *R v Yip Chi Keung*[93] doubted whether the earlier-mentioned passage is a good law. This is because the passage seems to be based on a school of thought which was subsequently rejected by *Galbraith*.

9.068 Whether the quality of identification is so poor that the judge should withdraw the case from the jury depends on the same factors as those in the *Turnbull* Directions on identification, which the tribunal of facts has to consider when coming up with the verdict. They shall be discussed in detail in the following section.

9.069 Before leaving this section, it is necessary to consider what is corroboration in the *Turnbull* sense. Even if the quality of identification in itself is so poor that the judge should withdraw the case, the judge might not need to do so if there is supporting evidence for the identification:[94]

"... 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 *Reg v Long* (1973) 57 Cr App R 871. The accused, who was 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 later he was seen by them he claimed to know who had done the robbery and offered to help to find the robbers. At his trial he 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. In our judgment odd coincidences can, if unexplained, be supporting evidence."

Thus, the judge has to determine whether a piece of evidence is capable of supporting the identification evidence, to render it capable to be considered by the jury. This exercise is similar to the judge giving directions to the tribunal of facts on whether or not to accept a piece of evidence as corroborative of the identification evidence.

9.070 Where multiple witnesses make the same identification, the overall identification evidence could still be poor to justify withdrawing the case from the jury. The witnesses may all have had only the opportunity of a fleeting glance or a longer

93 [1988] HKLR 229.

94 *R v Turnbull* [1977] QB 224, 230B–230D, [1976] 3 All ER 549, 553c–553e.

Similarly, in *HKSAR v Ng Kwok Fai*, it was held that whether the substantive principles provided in *Turnbull* were applied is more important in the specific wordings used by the judge:[102]

> "There is no magic to the words "*Turnbull* guidelines" or the phrase " special need for caution" in the context of identification cases. It is not so much a question of whether the Magistrate has used the words but how he has approached his task of evaluating the identification evidence to determine whether he has applied the proper standards to the consideration of such identification evidence given the risks and dangers of mistaken the identification with which we are all familiar."

9.075 Incorporating the *ratio* of *Turnbull* and fine-tuning the same, the *Specimen Directions* suggested a trial judge to give the *Turnbull* Directions in the following fashion. It is largely based on the original passage in *Turnbull*:[103]

> "This is a trial where the case against the defendant depends [wholly] or [to a large extent] on the correctness of one or more identifications of him which the defence alleges to be mistaken. To avoid the risk of any injustice in this case, such as has happened in some cases in the past I must therefore warn you of the special need for caution before convicting the defendant in reliance on the evidence of identification. A witness who is convinced in his/her own mind may, as a result, be a convincing witness, but may nevertheless be mistaken. The same may apply to a number of witnesses [Add if appropriate: mistakes can also be made in the recognition of someone known to a witness, even of a close friend or relative.]
>
> You should therefore examine carefully the circumstances in which the identification by each witness was made. How long did he have the person he says was the defendant under observation? At what distance? In what light? Did anything interfere with the observation? [And, where appropriate]
>
> Had the witness ever seen the person he observed before? If so, how often? If only occasionally, had he any special reason for remembering him? How long was it between the original observation and the identification to the police? Is there any marked difference between the description given by the witness to the police when he was first seen by them and the appearance of the defendant?
>
> [Add if appropriate]
>
> I must remind you of the following specific weaknesses which appeared in the identification evidence …"

102 (HCMA 726/2010, 8 December 2010), [22] (Mackintosh J).
103 *Specimen Directions* 28.

(b) When would *Turnbull* Directions be needed?

(i) *Prosecution case depends wholly or substantially on identification evidence*

9.076 *Turnbull* Directions are needed "whenever the case against the accused wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken". Thus, it is given in cases which the identity of the defendant is disputed, or the identity of the defendant is not disputed but what he was doing at the scene is disputed.

(ii) *Not necessary when the fact-finding tribunal is to make identification*

9.077 As held in *HKSAR v Tagao Saudee Abad*,[104] where the jury is assessing the reliability of recognition evidence, it may be that no full *Turnbull* Direction is necessary.[105] This would be the case because:[106]

> "When a jury has regard to video recordings or photos in a case where the prosecution has called recognition evidence, it is invited to do so for the purpose of determining the reliability of the recognition evidence. In so doing it inevitably forms its own view on whether the defendant is or could be the person in the video or photo. After looking at the videos or photos and observing the defendant the jury may form the view that the image they see could be that of the defendant and then after hearing the recognition evidence they may become sure of that fact."

9.078 This is the same situation as in *HKSAR v Ng Siu Kam*[107] and *HKSAR v Lau Tat Keung Milky*.[108] These cases echo the English position in *R v Downey*,[109] which held that inviting the jury to *directly* consider whether the person shown in a photograph is the defendant who has appeared before them is a different process from considering an eyewitness' identification evidence.[110]

9.079 But this is not an absolute statement of the legal position. Whether a legal direction is necessary and the scope of that legal direction will ultimately depend on the factual circumstances of each case.[111]

(c) Specific *Turnbull* Directions

9.080 The standard *Turnbull* Directions is certainly not a straitjacket which the trial judge has to give in exact wordings in every case. Depending on what the identification evidence the prosecution tenders, and what lines of attack were adopted by the defence, the *Turnbull* Directions have to be modified.

104 (CACC 366/2015, 24 May 2017).
105 *Ibid.*, [66].
106 *Ibid.*, [65].
107 (CACC 474/2009, 2 September 2011).
108 [1995] 4 HKC 662.
109 [1995] 1 Cr App R 547.
110 *Ibid.*, 555.
111 *HKSAR v Tagao Saudee Abad* (CACC 366/2015, 24 May 2017), [67].