PCLL Conversion Examination
January 2019
Examiner's Comments
Evidence

Question 1 – Character Evidence

This was a relatively simple question on section 54(1)(f)(ii) CPO – which section clearly sets out the answer (more or less) in full. In short, (i) in the absence of the jury prosecuting counsel should tell the judge that he wishes to raise a matter of law (ii) prosecuting counsel will then argue that by s, 54(1)(f)(ii) "he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution". (iii) the judge's options are therefore either to allow the Prosecution to adduce D's previous convictions for possession of DD or to discharge the jury and order a re-trial. It is entirely a matter for the trial judge – but given his/her residual discretion to ensure a 'fair trial' for D (and in all likelihood he has a negligent Defence counsel!) it is probably more likely a judge would discharge the jury.

It was somewhat surprising that far too many students failed to understand this question. Many who answered the question simply said that D would lose his shield and be XX on his previous convictions without thinking through the consequences for a fair trial and the function of the judge. This was a bare pass.

Question 2 – Previous Consistent Statements

This is potentially a wide topic with a wide range of authorities, but generally this question was answered well by the majority of students.

Most were be able to correctly describe the rule and note the four main exceptions if not explain them in any detail. Generally, regarding previous consistent statements**, (**also known as self-serving statements), the rule at common law both in civil and criminal proceedings is that these are generally *inadmissible* - ***Edmonds* v. *Walter* (1920) 3 Stark**. As a general rule, a witness is not permitted, during the course of giving evidence, to testify as to previous oral or written statements made by that witness on the topics which are consistent with his present testimony - R v Coll (I 889) LR Ir 522; HKSAR v Fun Tsz-yin & Chong Cheuk-wah [2002] 2 HKC 406; R v Ali [2004] 1 Cr App R 39. Alternatively, such a statement also cannot be proved by calling another witness to testify as to it being made. The rule is sometimes called 'the rule against narrative or the rule against self-corroboration'. The rule is one of long standing and is applied in criminal cases.

The four main exceptions were noted by most students who covered this question very well.

(a) Complaints in sexual cases

(b) Previous identification
(c) Statements in rebuttal of allegations of recent fabrication.
(d) *Res gestae* statements

Such statements may also be hearsay because, if they are admitted, they may be relied upon as evidence of the matters stated. As such, the above hearsay requirements apply to them, at least in theory. In practice, since they are only conditionally admissible, no hearsay notice can normally be served where they are left in reserve to rebut any suggestion of fabrication made in cross examination. If they are to be used for some other purpose, with permission, it would be wise to give notice.

(a) Complaints in sexual cases - In cases of rape and other sexual offences, if the complainant made a voluntary complaint at the first opportunity reasonably afforded, then the person to whom the complaint was made may give evidence of what was said in order to show its consistency with the complainant's evidence and, in cases in which consent is in issue, to negative consent. The exception applies in the case of written, as well as oral complaints. Evidence of the fact that a victim of a sexual assault made a complaint soon after the assault took place is admissible to bolster the credibility of the complainant as a witness. - *HKSAR v Leung Chi Keung* [2005] 1 HKLRD 425.

(b) Previous identification - Evidence is admissible of a former identification of the accused by a witness out of court - for example after an ID parade. It may be given either by that witness or by some other person present at the identification (a police officer who conducted the parade) and may include the words declaratory of the identification.

(c) Statements in Rebuttal of Allegations of Recent Fabrication - Where, in cross-examination, it is suggested that a witness has recently fabricated his or her evidence, evidence is admissible in rebuttal to show that on an earlier occasion the witness made a statement consistent with that testimony. The exception only arises, however, where what is alleged is *fabrication* at some period in time at or before the trial. Thus, merely to impeach the witness's evidence in cross-examination by general allegations of unreliability or untruthfulness will not suffice. In criminal cases, the statement in rebuttal is admitted merely to bolster the witness's credibility by negating the allegation of invention or reconstruction. The previous consistent statement of a witness may become admissible if his testimony is challenged as being a recent fabrication or an afterthought.

(d) Res gestae statements - Under the doctrine of *res gestae*, evidence is admissible of any act or statement so closely associated in time, place and circumstances with some matter in issue that it can be said to be part of the same transaction. *Rattan v R* [1972] AC 378; *Brown v R* (1913) 17 CLR 570; *R v Bedingfield* (1879) 14 Cox CC 341; *R v Turnbull* (Ronald) (1984) 80 Cr App R 104; *R v Andrews* [1987] AC 281.

Question 3 – Hearsay

This question was done very well by almost all students, many of whom appeared to have a good grasp of the authorities, particularly for 3(7) and the facts of *Kearley* which was impressive. The few students who failed this question were clearly guessing.

1. **Definition** of hearsay (suggestions)
   'Any statement made otherwise than by a person while giving oral evidence in the proceedings, which is tendered as evidence of the matters stated'.

   or

   'Evidence that is not within the personal knowledge of a witness, such as testimony regarding statements made by someone other than the witness, and that therefore may be inadmissible to establish the truth of a particular contention because the accuracy of the evidence cannot be verified through cross-examination.'
   (Other wording and/or variations are, of course, acceptable – if correct!)

2. **Answer: the evidence is not hearsay** – this is the simple, classic, case of an exception to the hearsay rule.

3. **Answer: the evidence is hearsay** D relies on this evidence to support his defence of justification. For that purpose, the out of court statement (i.e. the statement made by Y that he saw C with his fingers in the till) is being put forward as evidence of the truth of that statement. It is therefore hearsay**.**

4. **Answer: the evidence is not hearsay** - the evidence of these PC's was original evidence not hearsay evidence because the very fact that the offers were made was relevant to a fact in issue - whether the premises was being used as a massage parlour and sauna or as a brothel - *Woodhouse* v. *Hall* (1980) 72 Cr App R 39

5. **Answer: the evidence is not hearsay -** The statement would be hearsay only in the (unlikely) event that it is used to show that the statement was true, and that X was in fact Napoleon. The evidence Y wants to call is therefore admissible as original evidence if used to show that X went around saying that he was Napoleon.

6. **Answer: the evidence is not hearsay -** the Privy Council held that the evidence should have been admitted because it did not matter whether or not the statements were true. What was relevant was whether they could have induced in the Defendant an apprehension of certain death if he didn't do as they wished. Evidence of what the terrorists said was therefore original evidence - *Subramanian* v. *Public Prosecutor* [1956] 1WLR 965

7. **Answer: The evidence is hearsay** - the majority of the House of Lords disagreed. The (majority) view as expressed by Lord Bridge, was this: The words spoken by the callers revealed their state of mind. As the callers themselves were not called to give evidence, the police officers could give evidence of the callers' requests if the purpose of adducing that evidence was to show the callers' state of mind. However,

their state of mind was irrelevant to the fact in issue. The only way in which the callers' requests could be relevant was as an implicit statement that K was a supplier. When adduced for that purpose, Lord Bridge considered the evidence to be hearsay and (in criminal proceedings) inadmissible. K was therefore acquitted. *R* v. *Kearley*, [1992] 2 AC 228

Q4 Answer Guidelines

Children/Corroboration/Vulnerable Witnesses: This question was done moderately well. There is no longer any rule of law requiring corroboration of the unsworn evidence of a child (that is, a person under the age of 14) and no longer any rule of practice requiring a warning of the danger of convicting on the uncorroborated evidence of a child simply because he/she is a child (see section 4A Evidence Ordinance). Note also that unsworn evidence of a child may corroborate evidence, sworn or unsworn, of another person (Evidence Ordinance, section 4).

Competence: section 3 of the Evidence Ordinance provides that only persons of unsound mind (in circumstances there defined) shall be incompetent to give evidence in any proceedings. In *R v Lam Chi Keung [1997] HKLRD 421* Mortimer JA in the judgment of the Court of Appeal noted that in consequence it would appear that even a child who is unable to give intelligible evidence is competent if otherwise of sound mind. Clearly, a child witness is to be regarded as competent at least until the contrary is shown.

Vulnerable/ Child Witnesses: Section 79B(1) Criminal Procedure Ordinance (Cap 221) In this section "witness in fear" means a witness whom the court hearing the evidence is satisfied, on reasonable grounds, is apprehensive as to the safety of himself or any member of his family if he gives evidence. (2) Where a child, other than the defendant, is to give evidence, or be examined on video recorded evidence given under section 79C, in proceedings in respect of (a) an offence of sexual abuse; (b) an offence of cruelty; or (c) an offence which involves an assault on, or injury or a threat of injury to, a person and the offence is triable (i) on indictment; or (ii) either summarily or on indictment, the court may, on application or on its own motion, permit the child to give evidence or be examined by way of a live television link, subject to such conditions as the court considers appropriate in the circumstances.

Video recorded evidence: Section 79C of the Criminal Procedure Ordinance provides that the court may admit into evidence a video recording of an interview between an adult (as defined) and a child in respect of limited stipulated offences. In *Chim Hon Man v. HKSAR (1999) 2 HKCFAR 145* (CFA) Sir Anthony Mason said of the effect of the provision (page 156E): a statement made by the child in the recording shall have the same effect as if given in oral testimony.

Q5 Answer Guidelines

Hostile Witness – Around 50/50 of students where completely on point. Many completely failed to understand the difference between 'hostile' and merely 'unfavourable' evidence and the consequences that follow. Students who did well

remarked that PW1 has been called by P but gave evidence which did not support the prosecution's case by s.12 Evidence Ordinance 'adverse' means was plainly 'hostile' and not merely unfavourable *R v Prefas and Pryce* [1987] Crim LR 327; [1986] 86 Cr App R 111.

The prosecution should apply for leave of the court to treat witness PW1 as a hostile witness - a witness who had in effect changed sides - and be allowed to cross-examine him to show that he had earlier made statements which are inconsistent with the evidence he has now given in court.

As for directions the Judge is bound to direct the jury along the lines that: the earlier statement of PW1 was put before them by the prosecution to throw doubt on the reliability of PW1' evidence here in court. However, they must decide whether they can accept any part of the evidence which PW1 has given in court and, if so, what part of it. If they decide that there is serious conflict between the evidence PW1 gave and the statements previously made by him, they may think that they should reject his evidence altogether and not rely upon anything PW1 has said in the witness box.

So, a jury in this case would likely doubt the credibility of PW1 generally and draw their own conclusions – but it is ultimately a matter for the jury and not a matter for law for the judge. However, they must be directed that whilst PW1's sworn testimony in the trial of D may not be believed they should not simply substitute PW1's earlier statement for it *R v White 17 Cr App R 60, CCA.*