

**PCLL CONVERSION EXAM**  
**June 2010**  
**Examiner's Comments**  
**Evidence**

**Question 1.**

**In most criminal proceedings a court may act on the evidence of a single, unconfirmed witness. Historically, there was two main exceptions to this rule. However, the position has now changed. Briefly explain the law of corroboration at common law and set out the main exceptions and current statutory rules in Hong Kong.**

Quite a few students seemed to find this question difficult. Many appeared to have no idea about the statutory exceptions (or where to find them) despite the fact this was an 'open book' exam. I was really looking for a brief definition at common law; (historically) corroboration is credible, independent testimony which affects the accused by connecting or tending to connect him with the alleged offence. The testimony must implicate the accused. It must confirm or tend to confirm that the accused committed the crime. See also *R v Baskerville* per Lord Reading; *DDP v Hester*, *HKSAR v Tang Kwok-wah*. Then setting out the main 'exceptions' (which are in all the text-books:

Common Law exceptions: Sedition and Treason; Perjury and in some cases Identification.

Statutory abrogation now applies to witnesses who are accomplices s. 60 CPO; victims of sexual offences s 4B EO; and children s 4A EO.

**Question 2**

**What is circumstantial evidence and how does it differ from direct evidence? Give example of both.**

This question was a rather general one, which itself seemed to spit students. Perhaps because many were 'suspicious' that it appeared too straightforward? It is a very straightforward question and those who adopted this approach did well. Many students tried to shoe-horn in too much irrelevance to 'pad-out' an otherwise simple answer. Circumstantial evidence differs from direct evidence often where the prosecution's case is a complicated one made up of a number of pieces of evidence. In cases of difficulty or where e.g. much has been made in argument of the fact that the case is 'only circumstantial' it is often sensible to give the full direction. In *R v Stephens and Clarke*, unreported (95/1758/S2), Henry LJ said (approving the direction below) that cases of difficulty 'cry out for a careful direction'.

Reference has been made to the type of evidence which you have received in this case. Sometimes a jury is asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw a defendant commit a crime; if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the defendant himself having admitted it, these

would all be good examples of direct evidence against him. On the other hand it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant who they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime.

It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a jury can say 'We now know everything there is to know about this case'. But the evidence must lead you to the sure conclusion that the charge which the defendant faces is proved against him.

Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case.

Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.

### **Question 3**

**Where there is no direct evidence that the defendant committed the offence charged but there is independent evidence that he committed other 'similar offences' then evidence of 'similar fact may be admitted. Discuss.**

This question was a complete disaster for far too many students. It was by far, the question that many students completely misunderstood. Most appeared to think it was about 'character' evidence, or s.54 (i)(f)(ii) and keeping the 'shield'. This is bizarre as evidence of 'similar fact' is both in the question and is a separate topic in the syllabus. More students failed this question with a 'zero' mark than any other on the paper, simply because they appeared not to have heard of 'similar fact' as a discrete topic. Again, this is odd in an open book exam where a quick look at the 'Contents' page of any evidence text-book will highlight this topic.

The question was about the leading case of *DPP v P* 93 Cr App R 267, 279 Lord Mackay LC said: "Once the principle has been recognised that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises, demonstrates that there is no single manner in which this can be achieved."

The leading case relating to the principles to be applied in similar fact cases is *DPP v P* 93 Cr App R 267. In HK the leading authority is *HKSAR v Zayed Ali* [2003] 2 HKLRD 849; (2003) 6 HKCFAR 192. The argument in favour of this approach has

considerable force. On this approach, taking into account the test in *DPP v. P*, the question of admissibility should be considered along the following lines.

(1) The matters in issue which the prosecution has to prove to establish guilt, having regard to the charge, must first be identified. For this purpose, the defences open to and any specific defence raised by the accused would be taken into account. However, in the well known words of Lord Sumner in *R v. Thompson* [1918] AC 221 at 232: "The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice." Obviously, if a fact which the prosecution has to prove is accepted by the defence, it would not be in issue.

(2) The evidence the admissibility of which is in question should be focused on.

(3) The following questions should then be asked: what is the matter in issue to which the evidence is said to be relevant and why, that is, what is the reason for saying that the evidence is probative of that matter in issue?

(4) If in answer to those questions, it is concluded that the evidence is relevant to a matter in issue for reasons *other than* to show mere propensity on the part of the accused to commit the crime in question, that is, it is not mere propensity evidence, then the test in *DPP v. P* has to be applied in deciding as a matter of law whether it is admissible: whether its probative force in support of an allegation against the accused is sufficiently great to make it just to admit it, notwithstanding that it is prejudicial to the accused. It is only where the test is satisfied that the evidence would be ruled admissible as a matter of law. If it is not satisfied, the evidence would be ruled inadmissible. But if in answer to the above questions, it is concluded that it is mere propensity evidence, then it would be inadmissible on the basis of the exclusionary rule.

Also, in relation to the issue of collusion, see *R v Ryder* 98 Cr App R 242 and *R v H* 99 Cr App R 178. In relation to identification, see *R v Brown and Others* [1997] Crim L R 502 and *R v John W* [1998] 2 Cr App R 289. Much assistance will also be derived from *R v Wharton* [1998] 2 Cr App R 289 and *R v Musquera* [1999] Crim LR 857 (and commentary). In the former case, the Court of Appeal considered when a 'sequential' approach and when a 'cumulative' approach to similar fact evidence would be appropriate.

#### **Question 4**

**In criminal trials in Hong Kong the law of evidence reflects a special risk of mistake inherent in evidence of visual identification. Discuss, giving examples of circumstances where the law says that mistakes as to identity might occur.**

This question was done well by nearly all students and is clearly a topic that was revised and 'anticipated' on the exam paper this time. Astonishingly, there were three or four papers who managed to 'answer' this question without any mention Turnbull! They failed. Whenever the case against the accused depends wholly or substantially on the correctness of one or more visual identifications which are alleged to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification.

In addition he should instruct them as to the reasons for the need for such a warning, and refer to the possibility that a mistaken witness may be a convincing one and that a number of identifying witnesses could all be mistaken R v Turnbull [1977] QB 224, 63 Cr App Rep 132, CA (Eng).

The rules laid down in R v Turnbull supra are intended primarily to deal with the problems inherent in the 'fleeting glance' identification and not e.g. with the problem which arises when the question is which of a number of persons known to have been present at the scene of an offence did a particular act: R v Oakwell [1978] 1 All ER 1223 at 1227, 66 Cr App Rep 174 at 178, CA (Eng); R v Curry, R v Keeble [1983] Crim LR 737, CA (Eng); R v Hewett [1978] RTR 174, CA (Eng); R v Nelson, R v McLeod (1983) Times, 18 November, CA (Eng). See also R v Constantinou [1989] Crim LR 571, CA (Eng) (warning unnecessary where only identification evidence consisted of photofit picture); R v Tran Duc Cuong [1995] 1 HKCLR 31, [1994] 1 HKC 355, CA.

The rules in R v Turnbull supra are to be applied flexibly bearing in mind the circumstances of the case: R v Keane (1977) 65 Cr App Rep 247 at 248, CA (Eng); R v Chik Shui Wai [1977] HKLR 259. In a case of rape where the only live issue is identification, the warning in R v Turnbull supra is sufficient, it has been suggested there is no need to direct the jury on corroboration: R v Chance [1988] QB 932, 87 Cr App Rep 398, CA (Eng), followed in R v Sung Kwok Man [1994] 2 HKC 161, CA.

#### **Circumstances where mistakes as to Identity might occur.**

The jury (tribunal of fact) should therefore examine carefully the circumstances in which the identification, by each witness, was made. For 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? 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?

Recognition may be more reliable than an identification of a stranger, but a jury should nevertheless be warned that mistakes may occur.

Where the quality of an identification is good, the jury may safely be left to assess it. Where it is poor, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. Where a witness is mistaken about the age of a defendant she has identified, the erroneous belief did not vitiate the identification.

A failure to follow the above guidelines is likely to result in the quashing of a conviction on appeal

#### **Question 5**

**Explain the voir dire procedure and the ‘alternative procedure’. Using examples, describe the circumstances in which a voir dire is used.**

This was another question which was, generally done well. However, some students thought they could tackle it without referring to the main authorities. These students were marked down or failed where the answer was simply discursive. A voir dire (or a ‘trial within a trial’) is used to test the admissibility of evidence. The most common evidence challenged by the accused on the grounds of admissibility is an admission or a confession. Other evidence which is sometimes tested includes whether a person of unsound mind is competent to give evidence.

Determinations of admissibility are a matter of law and are therefore decided by the Court. In the Court of First Instance, the decision will be made in the absence of the jury. A voir dire may take place before the commencement of the trial proper or during the course of the trial when the evidence challenged is raised. For a confession to be admissible, it must not only be voluntary but must be relevant to a fact in issue.

The Court should hold a voir dire where the defence have admitted a confession or admission was made by the accused, but have objected to the Prosecution’s claim that the confession or admission was made voluntarily. The defence may object on the basis that the confession was not voluntary because the accused confessed under the influence of oppression, an inducement or threat.

A voir dire is also mandatory where a so-called ‘double barrelled attack’ is made by the defence on the admissibility of the confession. *Thongjai and Anor v R* [1998] AC 54 (PC). A double barrelled attack is said to be made on the admissibility of the confession evidence when the accused denies making the confession **and** alleges that before or at the time the Prosecution allege he confessed the accused was ill treated by the police. Evidence of oppression, an inducement or threat may constitute ill treatment of the accused.

The key issue, denoting the necessity of a voir dire is, therefore, whether the voluntary nature of any confession alleged by the Prosecution is subject to challenge. It should also be noted that the judge may be required to hold a voir dire into the admissibility of an alleged confession, even though the defence have not raised a challenge to it, where there is evidence before the Court suggesting the confession may not have been voluntarily made.

Where the admissibility of a confession is challenged on a voir dire, the burden lies on the Prosecution to establish that the confession was voluntarily made, beyond a reasonable doubt. If the Prosecution fails to do so, the confession will be ruled inadmissible. The underlying rationale of the rule requiring the Prosecution to prove the voluntary nature of an alleged confession, where a challenge has been made to it, is to try to ensure the reliability of the confession and to preserve the accused’s right to silence. *Secretary for Justice v Lam Tat-ming and Anor* [2000] 2 HKLRD 431.

A threat need not be severe to negate the voluntary nature of a confession. A confession may be held to be involuntary even where it is merely tainted by the threat of violence. The original classic statement on ‘voluntariness’ was made by Lord Sumner in the Privy Council case, *Ibrahim v R*. It provides that a voluntary

confession should not have been obtained either by fear of prejudice or hope of advantage, exercised or held out by a person in authority. To this definition has been added the requirement that a confession has not been obtained by oppression or deception. What constitutes oppression will vary according to the circumstances of the case and the offender.

Oppression has been defined by Justice Sachs in *R v Priestly* as words or conduct which tends to sap and has sapped that free will which must exist before a confession is voluntary. This definition was referred to in the English Court of Appeal decision *R v Prager (No 2)*, in which Lord Justice Edmund Davies, quoting Lord MacDermott's address to the Bentham Club in 1968, stated that oppression includes: '... questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent'.

**The procedure on the voir dire is as follows:**

- (i) The Prosecution witness produces the confession statement, which will be marked as a provisional exhibit, and the witness leaves the Court;
- (ii) Defence counsel states the objections made to the admissibility of the statement, which are recorded by the Court, and the Prosecution witness returns to the witness box;
- (iii) The Court states that a voir dire will be held;
- (iv) The Prosecution witness gives evidence in chief on the special issue only;
- (v) Defence counsel cross examines the witness on the special issue only;
- (vi) The remaining Prosecution witnesses are called and examined on the special issue only;
- (vii) A no case submission on the special issue may be made;
- (viii) The accused may give evidence/call defence witnesses on the special issue only and cross examination is also limited to the special issue only;
- (ix) The judge/magistrate hears submissions and rules on the special issue (defence counsel has the last word). If the statement is admitted into evidence, it becomes an exhibit and if it is not admitted it is returned to the prosecutor;
- (x) The Prosecution calls its witnesses on the general issue;
- (xi) The Prosecution closes its case and the defence is invited to make a no case submission;
- (xii) The Court rules on the no case submission and, if there is a case to answer, the defence call the accused/witnesses on the general issue. Even where the statement has been ruled admissible, the defence may deny its truthfulness.

In the Magistrates' courts and the District Court, the magistrate or judge will determine both a challenge to the admissibility of the evidence (the special issue) and the guilt or innocence of the accused (the general issue), so the voir dire may occur either before or during the trial with less inconvenience. If the alternative procedure is used, the evidence as to whether the evidence on the special issue (admissibility) and the evidence on the general issue (guilt or innocence) is led from the Prosecution witnesses all at the same time. There is no separate mini hearing on the admissibility evidence alone.