PCLL Conversion Examination
January 2020
Examiner's Comments
Evidence

Question1

A question on hearsay requiring candidates to identify exceptions to the hearsay rule. Most candidates correctly defined hearsay as a starting point.

Elsie's dying comment

a) As Elsie is deceased the question required discussion as to whether her statement to Lucy could be admitted by the prosecution as evidence against Eric for the charge of murdering his wife. As it is an assertion other than one made by a person while giving oral evidence it is inadmissible of any fact asserted being hearsay.

   Quite a few candidates fell into the obvious trap of discuss the "dying declaration" exception. It does not of course apply here because the declarant is not the murder victim. The *res gestae* exception would be possible however, and most candidates spotted this, although some did not accurately define a "*res gestae*" statement. Here the statement by Elsie was made spontaneously and at the time of the killing and in the face of an emergency, so may be admitted for the basis of establishing that Eric did kill Mindy. In *R v Andrews* [1987] AC281 the court considered the possibility of concoction by a witness. Here Elsie has immediately run to Lucy at the time of the incident. There was an unusual or starting dramatic event and Elsie's cry to Lucy was approximately contemporaneous with Mindy's drowning. The events dominated Elsie's thoughts and her statement to Lucy was spontaneous and instinctive. The prosecution should be able to get this evidence in therefore Elsie being deceased.

   Most candidates answered this part of the question reasonably well, and successfully ruled out other exceptions to the hearsay rule as being applicable.

Eric's hotel bill

b) Eric wants to show that he was not there at the time of Lucy's drowning. He may try and argue that the hotel bill showing his stay in China at the time is just circumstantial evidence to support him. This seems unlikely to succeed, as it does specific details as to date/name/ location etc. It would clearly be argued by prosecution that he is trying to use the bill to show the truth of the content, and as such it may be ruled out as hearsay evidence: *Oei Hengky Wiryo* v HKSAR (2012).

   Even if it is hearsay though, Eric may be able to have the hotel bill admitted under s.22A EO. The receipt is produced by a computer and is evidence of any fact stated therein. Direct oral evidence of the facts would be admissible and those requirements under s. 22A (2) EO (a-c) would seem to be met. Quite a few candidates stated that s.22 EO applied. This is not really that type of situation. The hotel receptionist would

not be compiling a record from information supplied by a person who had knowledge of personal matters dealt with in the information (Eric's stay at the hotel). Also, any answers suggesting that Eric could serve a section 65B CPO statement upon the prosecution or admit facts under S65C CPO, relating to his stay at the hotel were wide of the mark.

This part of the question produced mixed answers overall.

Question 2

An essay question on the expert witness in criminal cases. This question was generally answered very well by most candidates, although some omitted to deal with the issue as to how expertise would be determined in the High Court. Also some answers were rather thin on content and covered only the basics.

Some pointers.
An expert will give evidence on matters which are outside the knowledge or experience of the trier of fact. Expert evidence is an exception to the general rule against a witness giving opinion evidence, and it is essentially testimony from a person on an issue which is ultimately for the court to decide. For example, the court may hear from experts in the field of DNA, psychiatry, fingerprinting all areas the court would normally not have knowledge of. There are limits to the testimony of experts:

- Evidence must fall within a recognized field of expertise i.e. matters of science, art, trade or learning which is capable of being made the subject of study, experience or research and because of this the person is capable of becoming an expert (*R v Chor-man* [1975] HKLR 546);

- The party proposing the expert must be able to substantiate their expertise by reference to: specialized skill or knowledge acquired through experience or education which is relevant to the issue; resume and qualifications; published and learned articles or books on the issue and number of times that the expert has been permitted /accepted by other tribunals to give evidence as an expert;

- if a judge or jury is able to come to a conclusion on the evidence based on their own experience and knowledge and without the assistance of an expert then any such expert evidence is inadmissible (*R v Turner* [1975] 2 WLR 57, *R v Chan Hon Wai* [1993] 1 HKC 531);

- the expert may not give opinions about which he is not qualified to speak and must only give opinions within the confines of his established expertise (*HKSAR v Tsang Chiu-tak & Another* [1999] 3 HKLRD 301).

An expert should never be a 'hired gun'. An expert witness has under common law the following obligations, 1) an overriding duty to assist the court impartially on matters relevant to the expert's area of expertise, 2) an expert witness's primary duty is to the court not to the party retaining the expert.

A party intending to rely on expert evidence must give notice to the other side of any findings by their expert as soon as practicable after receipt. S. 65DA CPO.

The decision as to whether or not the expert is competent to give evidence as an expert is a matter for the Judge: R v Chan Kim-hung & Others [1971] HKLR 479, R v Yeung Kwok-fai [1996] 2 HKCLR 32. In the Court of First Instance this would take place in the voir dire in the absence of the jury, often before the trial starts.

Question 3

This was not answered well generally and the answers were very mixed. Some candidates did well in one part of the question and then missed the point completely in another part.

a) Alex has testified so s.54 CPO will apply. Alex would normally have a shield to protect him from revealing his past record. However, this is a cut-throat defence i.e. evidence against a co-accused, and supports the prosecution case and clearly undermines Chan's defence: *see R v Ng Hang Yee* [1987] HKLR 1093. A lot of candidates missed this point and stated that he would not lose his shield because he hadn't put his own character in issue. Alex clearly stated that Chan brought the boxes back, which it transpires contained stolen items. This would trigger Section 54(1)(f)(iii) CPO allowing the prosecution and indeed Chan's own barrister to apply to adduce Alex's previous convictions. The ultimate decision on the admission of such evidence would be a matter for the judge who would need to consider fairness to Alex in deciding whether to allow such application. If admitted they will be relevant to Alex's credibility as a witness in the current proceedings as they are dishonesty offences. If Alex denies having such convictions they can be proved under section 15 EO.

b) Bill gave evidence. Therefore s.54 CPO applies again. However, he has not given evidence against his co-accused. Here he has sought through his witness Derek to establish his own good character (religious devotion *R v Ferguson* (1909) and also see *R v Redd* [1923] 1 KB 104). Therefore his shield "may" be lost under section 54 (1) (f) (ii) CPO. The issue for the judge will be whether to allow this relatively minor spent conviction to be adduced. Bill's conviction is 4 years old and of a wholly different nature, so it is very unlikely that the judge will allow it to be adduced it as it will be highly prejudicial in front of the jury. Bill should be regarded as a person of good character at this stage therefore.

   Candidates generally understood this part of the question, and gave better answers than those provided under either part a) or part c) below.

c) Chan has given evidence but has no previous convictions so s.54 CPO has no bearing here. He can of course still be cross-examined by both prosecution and counsel for the other two defendants (who he has blamed) in order to undermine his evidence generally. Many candidates spent time discussing how Chan had lost his shield which was rather superfluous to the question. Good candidates also explained that the judge

would need to give a good character direction for Chan: See *R v Lee Kam-Yuen* [1995] 1 HKCLR 264

Question 4

Overall this question was answered reasonably well by candidates although under part b) many candidates did not adequately explain the real practical implications of treating one's own witness as hostile. They merely stated that Desmond was hostile and was open to being cross- examined by the prosecution. This was not an adequate answer.

a) Frank was unable to remember the details here. The first thing that the prosecutor would do is to try to get Frank to remember things a bit more clearly without leading him, perhaps rephrasing the questions in chief. Many candidates forgot that point. Failing that, Frank may be able to refresh his memory from his witness statement, before continuing with his evidence. Even though his statement was not completely contemporaneous to the incident, the court has a wide discretion to allow it here. In *Leung Chi – yuen* [1989] HKLY 222, the court allowed a witness to read their statement during an adjournment, stating that giving testimony should not be a test of memory. Frank should not be coached by the prosecutor or be allowed to compare his statement to any other prosecution witness. Here, Frank did not have time to read his statement before trial, through no fault of his own. In *R v Da Silva* [1990] 1 AER 29 the courts laid down criteria for allowing such refreshment in the witness box. The witness must have begun giving evidence, he/she made a statement much closer to the incident even though not contemporaneous, he/she has not read the statement before coming into court, and has expressed a wish to read the statement before continuing to give evidence. Frank should be able to comply with the above. There is no suggestion Frank is being hostile here as some candidates suggested.

b) Desmond seems to be deliberately adverse to the prosecutor now. He is not simply being forgetful or failing to come up to proof. The prosecutor may with leave prove that Desmond has made a previous statement inconsistent with his current position. Desmond must be given the opportunity to answer as to whether he has made an earlier statement to police though (s. 12. EO). It seems this happened straight after the incident when things were very fresh in Desmond's mind. If Desmond denies making any statement this can be proved by putting his inconsistent statement to him (s.13 EO). The prosecutor can then cross-examine him on his previous statement, provided the court gives leave to show inconsistency. Under ss 13 and 14 above, the statement made by Desmond must be relative to the subject matter of the proceedings *R v Funderbunk* 90 Cr App R 466. Clearly so here.

   The court may now question the credibility of Desmond as a witness at all here though. This would not be particularly helpful for the prosecution given that his previous written statement may have no credibility now. In other words, no account may be taken of anything he has said. The judge would direct the jury that Desmond's sworn court testimony cannot simply be replaced by his original statement to the police: See *R v White* 17 Cr App R60, CCA. Given that there are two other prosecution witnesses though to prove the case against Lok, the prosecutor may well

decide to dispose of Desmond fairly soon after it is apparent that he no longer wishes to be cooperative. Desmond is not crucial to the prosecution case. Also there seemed a failure by most candidates to make reference to the relevant sections of the Evidence Ordinance on this part of the question.

Question 5

For the most part candidates did quite well here. They correctly identified the relevant law, although some wrongly believed Michael to be compellable, despite his diplomatic status.

Sally as Mak's spouse is a competent witness for the prosecution (s. 57(1) CPO, and as this is a specified offence, i.e. a sexual offence against a child of the family under 16 (see s57(4) (c) (i) CPO) she is also compellable. However, Sally could apply for exemption from giving evidence under s. 57A CPO if she can show that serious harm might be caused to the relationship between them as husband and wife; or serious emotional, psychological or economic consequences might occur for them as husband or wife, and there is insufficient reason to expose them to that risk. Nearly everybody correctly identified the position with Sally although some forgot to deal with the possibility of exemption for her.

Celia is competent to give evidence and potentially compellable (although she is willing to give testimony here anyway so this issue does not arise). She is under 14 so her evidence will be unsworn and would be capable of corroborating any other evidence given by others. There is no longer any need for the judge to give a warning about a child 's uncorroborated evidence (See s. 4A EO). Celia will be asked whether she understands the importance of telling the truth, and will be capable of giving intelligible testimony, if she can understand the questions and answer them in a coherent and comprehensible manner: *DPP v M* [1977] 2 Cr app R70. Given her age this is likely to be satisfied. She is a vulnerable witness under part Part IIIA of the CPO and is likely to be allowed to give her evidence by TV link, video recording or deposition in writing. See ss 79B, C and E CPO. Very few candidates dealt with the final procedural point which was a little surprising.

Michael is competent to give evidence but as a diplomat is not compellable (*R v Nawaz* [1976] 1 WLR 830). In practical terms, the best that the prosecution can probably do is to seek to try and persuade him to come back (moral compunction) to HK to give evidence, given that the victim is a child. The prosecution may try to get the defence to accept Michael's evidence by way of a read-out s.65 CPO statement, but as he would appear to incriminate Mak, the defence would hardly accept this and would inevitably serve a counter-notice in objection, requiring his attendance. Those candidates who believed he was compellable and could be forced back to HK had completely missed the point.