PCLL Conversion Examination
June 2022
Examiner's Comments
Evidence

Question 1 *"Examination in Chief" - Syllabus §7*

Surprisingly poorly done given the relative simplicity of the question. It is difficult to say why, this should be so, save that, as with so much of evidence, there is often a substantial cross-over with "criminal procedure" (see also s.65 Admissions; s.79A Video Evidence; or Voir Dire, for example). It seems too many students are still concentrating far too much on "black-letter law" and authorities in their textbook work for revision. Whilst this is obviously necessary, it is also most important, once the rules are understood, to view evidence *as part of trial procedure.* After all, what are the rules of evidence for other than to ensure the smooth running of a fair trial process?

For this question what needed to be explained is (when a party to the trial calls a witness to testify), the process of examining that witness known as "examination-in-chief" (as opposed to cross-examination – with which it might usefully have been compared at the outset). Examination-in-chief proceeds by way of counsel for the party who called the witness, asking the witness a series of questions designed to elicit the testimony of that witness. As a general rule, counsel conducting the examination-in-chief of a witness may not ask that witness a leading question.

As a matter of practice, only one counsel for a party may examine in chief. *Doe d Carter v Roe (1809) 2 Camp 280.*

A leading question is one that directly or indirectly suggests a particular answer. The rule is one of practice and fairness and the judge has a discretion to permit leading questions to be asked in examination in chief: *Bastin v Carew (1824) 171 ER 966; R v Murphy (1837) 173 ER 502; Mooney v James [1949] VR 22;*

The rule applies with equal force to examination-in-chief conducted by either the prosecution or defence. The rationale for the restriction on leading questions is probably that it is considered preferable that the witness tells his own story than simply calling him to assent to the leading questions of counsel for the party who called him. It is, after all, the witness and not counsel who has either sworn or affirmed that he will tell the truth. It is the veracity of the witness which the tribunal of fact has to assess and not counsel: *Mooney v James [1949] VR 22; R v Hardy (1794) 24 How St Tr 199, 660. R v Rawcliffe (2000) 115 A Crim R 509.*

The weight attached to answers to leading questions put in examination-in-chief may be substantially less than if the witness has given his testimony unprompted by leading questions *R v Wilson (1913) 9 Cr App R 124; R v Thynne [1977] VR 98; Mooney v James [1949] VLR 22. See also JH Phillips, 'Practical Advocacy: The Leading Question' (1988) 62 ALJ 807.*

However, the fact that the evidence is elicited by way of answers to leading questions does not render such evidence inadmissible. *Moor v Moor [1954] 1 WLR 927; Gabrielson v Farmer [1960] NZLR 832.*

There are circumstances in which over use of leading questions by the prosecution might render a conviction unsafe. *R v Wilson (1913) 9 Cr App R 124.*

Exceptions – it is possible only the best students would outline points 5-9 but it was expected all competent students should note points 1 - 4

The way in which the exceptions are permitted and the extent to which they are permitted are always subject to the discretion of the trial judge R v Murphy & Douglas (1837) 8 C & P 297.

The generally accepted exceptions include:

(1) Formal matters such as the name, address and occupation of the witness. This may, in appropriate cases include personal details of the witness. Plainly, the age of the witness would not be considered to be a formal matter in a case such as where the witness was the victim in a case involving a charge of unlawful sexual intercourse with a girl under 16.

(2) Introductory matters. See R v Robinson (1897) 61 JP 520.

(3) Matters which are not in dispute. Where a matter is not in dispute, as a matter of practice and subject to the discretion of the court, counsel may lead his witness through such matters.

(4) Counsel may lead if there is no objection from opposing parties and with the permission of the trial judge. Where the accused is represented, prosecuting counsel may lead the witnesses unless counsel for the accused objects. In that case, there is no duty on the judge to intervene. *R v Lam Hon-cheung Cr App 167/85.*

The position appears to be different where the accused is unrepresented. In that case, prosecuting counsel should employ leading questions with restraint. The court should not allow leading questions unless it is of the opinion that no prejudice will be suffered thereby. *R v Chan Kwon-kent Mag App 547/85.*

(5) Assisting the memory of a witness whose memory has failed. This may be done at the discretion of the trial judge.

(6) To contradict an opposing party's evidence. Where the opposing party has called evidence that an event occurred or words were uttered, where it is intended to contradict such evidence, it is permissible to ask a witness whether the event occurred or the words were spoken. In criminal trials this is more likely to be used by the defence because, generally, the prosecution has nothing to contradict when it calls evidence. The issue may arise for the prosecution either in re-examination of prosecution witnesses or when evidence is called in rebuttal.

(7) To establish a negative. This might include asking the victim of a rape whether she consented to intercourse with the accused.

(8) Where an expert is giving evidence. This exception is more limited than is commonly thought. For example, it would be improper to lead on factual matters observed by the expert where those matters were in dispute.

(9) Hostile witnesses and circumstances where events have not culminated in the witness being declared hostile. *Melhuish v Collier (1850) 15 QB 878, 19 LJQB (NS) 493*.

Question 2 ***Hearsay Evidence – (Syllabus § 10)***

This question was done very well by most students, helped no doubt by a similar question being asked several years ago – students who revised the topic of hearsay generally appeared to have few difficulties is working through the questions and giving the right answer.

First Definition of hearsay – 'Any statement made otherwise than by a person while giving oral evidence in the proceedings, which is tendered as evidence of the matters stated'. Other wording and variations are, of course, acceptable – if correct! Another example - Hearsay is an out of court statement, made in court, to prove the truth of the matter asserted. In other words, hearsay is evidence of a statement that was made other than by a witness while testifying at the hearing in question and that is offered to prove the truth of the matter stated. For example, Witness A in a murder trial claimed from the witness box: "Witness B (the "declarant") told me that the defendant killed the victim." The definition of hearsay is not too difficult to understand.

Obviously the matter can become very confusing when one considers all of the many exceptions to the general rule against hearsay. The elements of what is capable of constituting hearsay will be identical in both criminal and civil proceedings although the rules on the admissibility of hearsay evidence are very different in civil and criminal proceedings.

Fives Qs &As

1. In an action for slander brought by C against D, C calls X who says in the witness box "I heard D say to the meeting "C is a thief - he stole £100 from the charity". C relies on this evidence not to prove the truth of the assertion that C is a thief but to prove that the words of which he complains were spoken.

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

2. In the same action, D calls Z who says in the witness box "I can verify that C is indeed a thief. Y told me only last week that he saw C with his fingers in the till".

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**.**

3. The Manageress of a sauna and massage parlour was charged with acting in the management of a brothel. To prove that premises were used as a brothel it is sufficient to prove that more than one woman offers sexual services. It does not matter whether the statement that the services will be

provided is true or not. It is the fact that the offer is made that is important. Plain clothes PCs pretending to be customers gave evidence in court for the Prosecution that they had been offered various sexual services.

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 lawfully being used as a massage parlour and sauna or unlawfully as a brothel - *Woodhouse* v. *Hall* (1980) 72 Cr App R 39

4. The making of the statement is relevant to the state of mind of the maker which in itself is a fact in issue. The fact in issue is whether, at the time X made his will, X had testamentary capacity. Y wants to call evidence that at the time X made the will X went around dressed as Hitler, shouting "I am Hitler".

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.

5. An implied assertion is a statement or conduct from which it is possible to infer a particular fact. Police suspected X of dealing in drugs. They searched his flat but found only small quantities of drugs on the premises. However, while they conducted the search the police took ten telephone calls from people asking for X to sell them drugs and in two cases asking for "the usual quantity". The trial judge** considered the evidence of a request for drugs to be relevant to the question whether X was a drug dealer and was therefore admissible. Is this correct?

Answer: the evidence is hearsay - the majority of the House of Lords disagreed with the trial judge. The view taken by the majority, 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. The leading authority which states that implied assertions are capable of amounting to hearsay is ***R* v. *Kearley*, [1992] 2 AC 228**.

**This case was upheld by the Court of Appeal and two Law Lords and was only dismissed by a majority in the Lords.

Question 3 ***Character Evidence - (Syllabus at §6)***

Another topic that has featured regularly on past papers in various forms – this question was generally answered well by most students although, as always, far too many strayed into "similar fact" evidence which is a wholly separate topic. For a competent answer students must identify and discuss <u>both</u> the 'Credibility' and 'Propensity' limbs at the very least. After that there is no

'hard' answer as to what a judge *must* do – but the discussion below would suggest that the robbery defendant would still likely be given both the propensity and credibility direction whether or not the shoplifting conviction was disclosed to the jury – which it probably should be as it is largely irrelevant to the present charge.

Guidance as to the ambit of the discretion in the judge to give a Credibility and a Propensity direction whenever a defendant has testified or made pre-trial answers or Statements is given in the decision of the Court of Final Appeal in *Tang Siu Man v HKSAR No. 2* [1998] HKCFAR 107.

The Court commented that given the wide range of circumstances in which good character (in all its suggested manifestations) might come into play, any set rule of practice apt to cover all cases must necessarily be suspect. 'Where there is evidence of good character it will not always be necessary to give both limbs of the Vye direction; and the mere absence of any previous convictions does not of itself necessarily drive a judge to give a good character direction. The conclusions of the CFA were as follows, (at 133B-134 A):

There is no need in this jurisdiction (Hong Kong) to impose the Vye and Aziz regime on trial judges. The regime has not been demonstrated to work well in other jurisdictions. At the extremity, those rules of practice require trial judges to give directions testing the limits of common sense, and then to add qualifications in an attempt to return to the confines of common sense. Whatever the imperatives making that regime desirable in England, none has been demonstrated here.

Where positive evidence of good character has been adduced and nothing discreditable concerning the defendant has emerged, a summing-up which fails to give a full Vye direction and if needs be something more might well render the summing-up unbalanced and unfair. As a matter of humanity and indulgence, expressing the traditional inclination of the common law in favour of the defendant in criminal trials, springing from the time when the law was according to the common estimation of mankind severer than it should have been, per Cockburn CJ in Rowton (1865) 19 Cox CC 25 at 30 - trial judges have often in practice given both limbs of the good character direction on mere absence of previous convictions. They will doubtless continue to do so in the future.

Sometimes one limb of the direction is enough: for example, where in essence the central issue is credibility and an inclination on the part of the jury to believe the defendant means in effect he is entitled to an acquittal: to fail to give the credibility direction in such circumstances may well render the summing-up unbalanced and unfair to give the propensity limb may be excessive. Absence of previous convictions is a concept indulgently construed by trial judges. Even where there are one or two very minor offences which are unrelated.

Credibility

Where a defendant does <u>not</u> give evidence and he has <u>not</u> made any statement to the police, or other authority or person that is admitted in evidence, obviously para 1 (below) can be ignored. The classic direction is along the lines of the following:

1. (If a defendant has given evidence) In the first place, the defendant has given evidence, and as with any man of good character his good character supports his credibility. This means it is a factor which you should take into account when deciding whether you believe his evidence. (If a defendant has not given evidence but has e.g. made a statement to the police or has answered questions in an interview). In the first place, although the defendant has chosen not to give evidence before you, he did, as you know give [an explanation to the police]. In considering [that explanation] and what weight you should give it, you should bear in mind that it was made by a person of good character and take that into account when deciding whether you can believe it.

The direction as to propensity may be given whether or not the defendant has testified and whether or not he has made out-of-court statements adduced in evidence.

Propensity

2. In the second place, the fact that he is of good character may mean that he is less likely than otherwise might be the case to commit this crime now. I have said that these are matters to which you should have regard in the defendant's favour. It is for you to decide what weight you should give to them in this case. In doing this you are entitled to take into account everything you have heard about the defendant, including his age, […] and […]. (Obviously the importance of good character will vary from case to case, and becomes stronger if the defendant is a person of unblemished character of mature years, or has a positively good character, and at this stage the benefit of this to a defendant whose good character justifies it may be pointed out to the jury, with words such as: Having regard to what you know about this defendant you may think that he is entitled to ask you to give [considerable] weight to his good character when deciding whether the prosecution has satisfied you of his guilt).

Notes – probably for outstanding students/marks only:

Judges are directed not to detract or qualify from the direction, for example by commenting that initially everyone has a good character. (See Berrada (1990) 91 Cr App R 131; Cohen (1990) 91 Cr App R 125)

Where the defendant has called character witnesses, the jury should be reminded of their evidence and of the way it relates to credibility.

A defendant who is of good character is entitled* to have the judge direct the jury as to its relevance even if he is jointly tried with a defendant of bad character. … The judge will have to decide what if anything to say about the character of the defendant who is not of good character. He might think it best to grasp the nettle and tell the jury that they have to try the case on the evidence; there having been no evidence about the character of the particular defendant, they must not speculate and must not take the absence of any information as to his character as any evidence against him. On the other hand a judge might think it best to say nothing about the absence of evidence as to character of the co-defendant]. Where the co-defendant's bad character is in evidence, a full direction on its significance must be given R v Cain 99 Cr App R 208‖ Archbold (2013) 4-484.

* Entitled‘ must be read subject to the decision in Tang Siu Man. But the point is that where the judge does give a direction as to the relevance of good character in relation to one defendant he must decide how he is to deal with the contrast between that fact, on the one hand, and, on the other, silence about the character of another defendant.)

As for the position of a defendant who has pleaded guilty to another offence upon the same indictment and his entitlement nonetheless to a character direction, see Teasdale (1994) 99 Cr App R 80.

Where an accused is of mature years and is of unblemished character and /or where positive evidence of his good character has been adduced (beyond the fact of a record clear of any material blemish) attention should be drawn to the combined impact of maturity and good character. On the other hand, where the defendant with a good character is young, a good character direction should not be diluted or rendered nugatory by reference to his mere youth or to the fact (if it is a fact) that no character witnesses have been called.

A good character direction should be given in the form of an affirmative statement rather than a rhetorical question (R v Lloyd [2002] Cr App R 355) and should not be qualified by suggesting that its significance in relation to propensity is less when the offence is spontaneous (R v Fitton [2001] EWCA Crim 215).

For a character direction involving a person with few ties to Hong Kong, or in regard to a person about whom discreditable conduct emerges at trial, see HKSAR v Mahommed Saleem (No. 2) [2009] 5 HKLRD 478.

Question 4 ***Identification Evidence – Visual ID – Syllabus § 14***

This question was on the frequently asked topic of visual ID and almost all students were able to spot this was a question about Turnbull in the normal course of events- However, this year, there was *twist* as it specifically related to identification from photographic/CCTV images. This caused most students some problems mainly because very few were unable to cite **A-G's reference (No 2 of 2002) [2003] 1 Cr App R** and this lead far too many just going around in circles repeating the familiar Turnbull mantra

As such this was a question that relates to ID evidence from photographic images/CCTV and mask wearing. This first part is a straightforward question. Clearly most students had no problem explaining the judge's duty to deal with the burden and standard of proof and to identify that the Turnbull Directions needed and should raise few problems. However, this is *not* a simple Turnbull case and any students who got no further than explaining the familiar Turnbull directions could expect a poor mark and many students did so on this question.

The answer should be firmly based on **A-G's reference (No 2 of 2002) [2003] 1 Cr App R 21**, where Rose LJ stated that there were at least four circumstances in which, subject to judicial discretion to exclude and subject to appropriate directions, the jury may be invited to conclude that the defendant committed the offence on the basis of *a photographic image from the scene of the crime* (i)

(1) where the image is sufficiently clear, the jury can compare it with the defendant sitting in the dock; (ii)

(2) where a witness knows the defendant well enough to recognise him as the offender depicted in the image, he can give evidence of this; (iii) and this is so even if the image is no longer available for the jury;

(3) where a witness who does not know the defendant spent substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images in the photograph are available to the jury; and

(4) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images in the photograph are available for the jury.

(i) See Archbold (2020) (HK) [14-119] and Archbold (UK) (2020) [14-63]. See also HKSAR v Lee Wan Hong [2012] 2 HKLRD 1171, applying A-G's Reference.

(ii) See R v Dodson and Williams (1984) 79 Cr App R 220 at 228, 229 as to the permissibility of such a course but of the perils of which the jury should be warned. See also R v Downey [1995] 1 Cr App R 547 and R v Blenkinsop [1995] 1 Cr App R 7. The quality of the photograph, the angle of the depiction, whether the defendant's features have changed, any distinctive features of the person shown on the CCTV depiction, the length of time the jury has had to observe the defendant – these are the types of factors which may be relevant.

(iii) See for an example, R v West [2005] EWCA Crim 3034.

Question 5 ***"Vulnerable Witnesses" Syllabus §7***

This was another question, like question 1, where the evidence rules are clearly firmly linked to criminal trial procedure. That said, on this paper, this question (as with question 2 on Hearsay), was covered very well and most students received high marks – those who managed to revise this this topic fully found little or no difficulty in outlining the right answer in the context of criminal procedure generally. A straightforward question generally well done although some were a little sketchy on why the Defence might object to screens/CCTV rather than live testimony from the witness box. This simply "right to a fair trial" and "the right of a Defendant to confront his/her accuser" (save in exceptional cases – e.g., very young children), was too often missed.

(a) Witnesses in Fear/ Child witnesses - 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.*

By **section 79B CPO** – (1) A 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, 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

Where a witness in fear is to give evidence in proceedings in respect of any offence, the court may, on application or on its own motion, permit the person to give evidence by way of **a live television link**, subject to such conditions as the court considers appropriate in the circumstances.

Section 79B(2) of the Criminal Procedure Ordinance provides that the court may in respect of the same limited stipulated offences, permit a child to give evidence or be examined by way of a live television link. Where a child does give evidence, the judge bears the central responsibility for ensuring that the evidence is handled sensitively and with adequate preparation.

(b) Any other adult victims who have gone through some form of ordeal following criminal conduct – see *HKSAR v Shamsal Hoque* [2014] 6 HKC 395 where the court gave a very strong statement on the need to afford assistance to witnesses through the use of screens to permit witnesses to testify out of sight of both the accused and the public gallery. In this case the court recognises that the interests of a fair trial remained paramount and that any departure from principles of open justice had to be appropriately justified.

Cases on allowing screens

First case is *R v X, Y and Z* (1990) 91 Cr App R 36 where the English Court of Appeal were concerned with a complaint that the use of a screen with a child witness would act in a prejudicial way to the defendants in the trial. At trial, a screen was erected in court so as to prevent the child witnesses from seeing or being seen from the dock. It was on this basis that the Court considered the issue and rejected there was prejudice to the defendants.

The second case is *R v Cooper and Schaub* [1994] Crim LR 531, where the English Court of Appeal at that time observed that the use of screens had been confined to child witnesses but there had been occasions when such protection had been afforded to adult witnesses although it should only be in most exceptional cases that such apparatus should be used when an adult was giving evidence. By no means every case of rape or prosecution for sexual offences should involve the use of screens.

The third case is *R v Foster* [1995] Crim LR 333, where at trial a screen was used to separate the witness from the defendant. The English Court of Appeal explained that the comments in *Cooper and Schaub* were not intended to depart from the test in *X, Y and Z*, namely that it was the judge's duty to endeavour to see that justice was done. The Court held that a warning to the jury not to read anything adverse to the defendant into the fact that the witness was giving evidence from behind a screen resulted in no real danger of prejudice to the defendant.

(ii) Defence Objections

In *HKSAR v Shamsal Hoque* [2014] 6 HKC 395 the court concluded:

(1) The right to confront your accuser is engaged when a witness is screened from the defendant but is not engaged when a witness is screened from the public. Even in such circumstances when it is engaged, it is generally viewed that any prejudicial effect is cured by an appropriate direction to the jury. In a case 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 in order 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 are an important consideration in the criminal trial process. It is part of the court's function to regulate its proceedings and to 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 in order 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.

It is quite apparent from the foregoing that a defendant's right to a fair trial is not jeopardized or prejudiced by addressing the reasonable concerns and anxieties of a witness in a case concerning a sexual offence. It is imperative that witnesses come forward and give evidence and feel assured that appropriate measures will be put in place to lessen the trauma and the anxiety in giving evidence in such cases.

The criminal justice system is equipped to ensure that there is fairness to all.