PCLL Conversion Examination
January 2022
Examiner's Comments
Evidence

Question 1

Of the 5 questions set for this examination, despite being relatively straightforward, it appeared to cause the most difficulties. It was clear from too many answers, that students did not have the first idea of what a "s.65 Formal Admission" or, if they did, how such evidence was dealt with in a criminal trial. This is a little concerning as Formal Admissions under s.65C and s.65B are questions which will be asked of *every* trial lawyer in *all* criminal trials. This question received the highest failure rate overall.

Formal **Admissions -** this question requires explanation of the statutory provisions for admission of evidence covering section 65C and section 65B. However, on the facts, the students must distinguish between adducing the expert reports (section 65B) and the other items (section 65C) and show they understand the difference between the two sections – i.e., adducing 'facts' and 'witness statements'. The items from the burglary will be admitted at having been recovered from the bin together with the photographs (as admitted facts, s.65C). The **findings** of the expert report will also be admitted as facts s.65C whilst the statement producing the report and the other police statements will be admitted s.65B.

Section 65C Proof of Any Fact by formal Admission:
(1) Subject to the provisions of this section, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or defendant and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.

(2) An admission under this section-
(a) may be made before or during the proceedings;
(b) if made otherwise than in court, shall be in writing;
(c) if made in writing by an individual, shall purport to be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk, or some other similar officer of the body corporate;
(d) if made on behalf of a defendant who is an individual, shall be made by his counsel or solicitor;
(e) if made at any stage before the trial by a defendant who is an individual, must be approved by his counsel or solicitor (whether at the time it was made or subsequently) before or during the proceedings in question;
(f) may be made in either official language.

(3) An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including any appeal or retrial).

(4) An admission under this section may with the leave of the court be withdrawn in the proceedings for the purpose of which it is made or any subsequent criminal proceedings relating to the same matter.

(5) …

Section 65B Proof of Any Written Statement:

(1) In any criminal proceedings, other than committal proceedings, a written statement by any person shall, subject to the conditions contained in subsection (2), be admissible as evidence to the like extent as oral evidence to the like effect by that person.

(2) A statement may be tendered in evidence under subsection (1) if

(a) the statement purports to be signed by the person who made it;
(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief;
(c) before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and
(d) none of the other parties or their solicitors, within 14 days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence under this section:

Provided that paragraphs (c) and (d) shall not apply if the parties agree before or during the hearing that the statement shall be so tendered.

(3) If a statement tendered in evidence under subsection (1)

(a) is made by a person under the age of 21, it shall give his age;
(b) is made by a person who cannot read it, it shall be read to him before he signs it and shall be accompanied by a declaration by the person who so read the statement to the effect that it was so read;
(c) subject to any directions of the court, is made in a language other than an official language, it shall be accompanied by a translation in an official language and, unless otherwise agreed by or on behalf of the prosecutor and defendant (or, if more than one, all the defendants), the translation shall be certified by the court translator;
(d) refers to any other document as an exhibit, the copy served on any other party to the proceedings under subsection (2)(c) shall be accompanied by a copy of that document or by such information as may be necessary in order to enable the party on whom it is served to inspect that document or a copy thereof.

(4) Notwithstanding that a written statement made by any person may be admissible as evidence by virtue of this section

(a) the party by whom or on whose behalf a copy of the statement was served may call the person making the statement to give evidence; and

(b) the court may, of its own motion or on the application of any party to the proceedings either before or during the hearing, require the person making the statement to attend before the court and give evidence.

(5) So much of any statement as is admitted in evidence by virtue of this section shall, unless the court otherwise directs, be read aloud at the hearing and where the court so directs an account shall be given orally of so much of any statement as is not read aloud.

(6) Any document or object referred to as an exhibit and identified in a written statement admitted in evidence under this section shall be treated as if it had been produced as an exhibit and identified in court by the maker of the statement.

(7) A document required by this section to be served on any person may be served
(a) by delivering it to him or to his solicitor; or
(b) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or by sending it by registered post addressed to the secretary or clerk of that body at that office.

Question 2

Question 2 - Suggested Answer Guidelines

This question was done moderately well by most students It is a question on section 54(1)(f)(ii) CPO – which 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 (on the facts of this example, probably with a costs order against counsel personally). 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 *(credit was given to only a handful of students who pointed this out).* That said, if students simply say that D's 'Shield' would be lost and the Prosecution would be allowed to put his previous convictions for possession before the jury – this is 'strictly' correct.

Generally - Section 54(1)(f) of the Criminal Procedure Ordinance limits the liability of the accused to be questioned (and if questioned, to answer such questions) concerning some (but not all) matters relating to the credit of the accused. The general rule is that the accused may not be cross-examined as to matters relating to his character including his previous convictions - although accepted to be relevant, such cross-examination was considered contrary to policy. Section 54(1)(f) of the Criminal Procedure Ordinance also provides as follows:

(f) a person charged and called as witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other that wherewith he has been charged or is of bad character, unless -

(i) the proof that he has committed or been convicted of such offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(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 and conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
(iii) he has given evidence against any other person charged in the same proceedings.

The 'shield' of the accused - The accused has what is often described as a 'shield' against suggestions in cross-examination by the prosecution that he is of bad character. The basis for this is that knowledge by the jury of the previous conviction or bad character of the accused may prejudice a fair trial. If the proposed questions in cross-examination come within any of the three provisos to the general rule set out in section 54(1)(f), the accused is at risk of being cross-examined regarding four topics which are often collectively referred to as 'bad character'. The first topic is his previous convictions. The second is whether he has been charged with any offence other than that which is the subject matter of the trial. The third is whether he committed any offence irrespective of whether he has been either convicted or charged with that offence. An example of this third category is where the accused has previously asked a court to take into consideration one or a number of offences. When offences are 'taken into consideration', it is not necessary that the accused had been charged with them. The fourth topic is bad character generally. As mentioned above, the protection afforded by section 54(1)(f) relates to cross-examination concerning the matters which are often , collectively described as 'bad character'

Cross-examination as to character: section 54(1)(f)(ii)

The second manner in which the accused may lose the protection afforded him by section 54(l)(f) is contained in section 54(l)(f)(ii). This may occur in two ways: (1) the accused asserts his good character either by means of cross examination
of witnesses for the prosecution or by giving evidence of his own good character; or (2) 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.

Assertion by the accused of his own good character - Where the accused asserts his good character either by way of cross examination of prosecution witnesses or by giving evidence he renders himself liable to cross-examination as to his bad character. Generally, if the assertion by either of these means is done deliberately then it is likely that the trial judge will permit such cross-examination. *R v Redd (1922) 17 Cr App R 36; R v Winfield (1939) 27 Cr App R 139*

It follows that there are only really two options for the trial judge here i) to allow the Prosecution to adduce Brian's previous convictions or ii) to discharge the jury and order a re-trial on the basis that to allow the previous convictions to go before the jury would likely result in their prejudicial effect outweighing their probative value possibly resulting in an unfair trial – particularly where Defence Counsel should never have asked such questions of his/her client in the first place and was likely negligent, knowing the likely application by the Prosecution under 54(I)(f)(ii) would follow.

Question 3

A familiar question on *voir dire* evidence and one that has been asked several times before in past papers. This was the question that, overall, most students understood and received the most marks. Also all the main authorities (important to quote in this question) appeared to be familiar to many students, as were the "1992 Rule & Directions"

The statement made by Colin is clearly a confession as in incriminates him in the offence charged. It could be said that it is a mixed statement as he claims that Derek was the mastermind and this could be argued to be partially exculpatory. If it is a mixed statement then the principles in *Aziz* apply. The confession was made to a person in authority, defined as anyone who (may reasonably be supposed by the accused to have or who) has authority or control over the accused or over the proceedings or prosecution against him *Deokinanan v R* [1969]. A police officer is clearly a person in authority so we must consider whether the confession was voluntary or not.

Chau Ching Kay, Nauthum v HKSAR [2003] 1 HKLRD 99; (2002) 5 HKCFAR 540. It is settled law that a confession statement may be admitted in evidence if it was made voluntarily in the sense that it has not been obtained from an accused either by fear of prejudice or hope of advantage excited or held out by a person in authority or by oppression. *Secretary for Justice v. Lam Tat Ming & another* (2000) 3 HKCFAR 168*; Ibrahim v. R.* [1914] AC 599; *DPP v. Ping Lin* [1976] AC 574; and *R. v. Lam Yip Ying* [1984] HKLR 419.

SJ v Lam Tat Ming and Anor [2000] 2 HKLRD 431; (2000) 3 HKCFAR 168 - appeal, inter alia, concerns the proper approach to the exercise of this residual discretion in relation to a voluntary confession. Where a law enforcement agency through an undercover operation obtained from a suspect a confession that is held to be voluntary, how should the court approach the exercise of this residual discretion ?

Inducements? Defined in *Ibrahim v The King* [1914], where Lord Sumner stated that the statement would not be voluntary if it was caused by "fear of prejudice or hope of reward excited or held out by anyone on authority." Further considered in *DPP v Ping Lin* [1976] - see Lord Hailsham' s guidance. In this case the fact that the police told Alan that Bert had confessed and implicated Alan caused Alan to confess, but this is probably not an "inducement" as it does not really count as fear of prejudice or hope of reward.

Oppression? Oppression means "conduct which tends to sap, and has sapped, the free will of the accused so that he speaks when otherwise he would have remained silent." The failure to provide

a solicitor is a serious matter but is probably not enough by itself to engage the notion of oppressive behaviour by the police.

Fraud? The police lied about Dave's confession and this directly caused S to confess. This might be a possible argument here and the confession may well be excluded on this basis - *Ajoda v The State* [1982]. A further approach is, of course to rely on the judge's residual discretion. In criminal cases the judge has a discretion to exclude evidence where a confession has been obtained unfairly focusing on how confession was obtained. It states that if the confession was made in circumstances where D's fundamental right to remain silent was undermined or effectively denied by his interrogators then the confession may be excluded because it would be unfair to the accused to use the confession. It does not matter whether the confession was voluntary or not.

Substantial breaches of the *1992 Rules and Directions for the Questioning of Suspects* can amount to unfairness. Here the failure to provide legal advice (unless the denial of a solicitor really was justified- R v Samuel [1988]) combined with the lie about Dave's confession could be deemed sufficient to warrant the exercise of the residual discretion.
See *R v May* [1952] Per Lord Goddard:

"The test of the admissibility of a statement is whether it is a voluntary statement. There are certain rules known as the Judges' Rules which are not rules of law but rules of practice drawn up for the guidance of police officers; and if a statement has been made in circumstances not in accordance with the rules, in law that statement is admissible if it is a voluntary statement, although in its discretion the court can always refuse to admit it if the court thinks there has been a breach of the rules."

Question 4

This question was done reasonably well although far too many students appeared to think it was another opportunity to cover s.54(i)(f)(ii) CPO in question 2 – it was not. Good/ Bad Character and its admissibility into evidence in this question relates a much more general issue. In a competent answer students had to identify and discuss both the 'Credibility' and 'Propensity' limbs of the good character direction 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)

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 here, 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 5

This was a question on "similar fact" evidence and another topic that has been covered in some past papers. Similar fact is regarded as one of the more difficult topics in the syllabus as the law can be very confusing. That said, it was very pleasing to find that the majority of students received a pass mark for question which was generally well done. Most students spotted the question was about "similar fact" (not always the case in the past) but a minority of failed answers were those that spent far too much time referencing either good/bad character generally and/or s.54(I)(f)(i)/(ii) etc. rather than getting to the point.
The facts here allow for a general discussion of similar fact evidence. In short - the leading case relating to the principles to be applied in similar fact cases is *DPP v P [1991] 2 AC 447*, cited with approval by the CFA in *HKSAR v Zabed Ali [2003] 2 HKLRD 849.* In my view, *DDP v P* **must** be cited and discussed for a competent answer.

The general rule is that evidence of the defendant's disposition towards wrongdoing, or of specific acts of misconduct on his part, is inadmissible to prove his guilt. This is because it would be extremely prejudicial. Clearly just because someone has been a thief in the past does not necessarily mean that they have committed the particular theft that they currently stand trial for, but the jury are likely to be prejudiced if they know about previous thefts.

On the other hand, if someone always employed a particular technique, and the current offence bore all the particular hallmarks of previous ones committed by this defendant it might seem unjust that the jury should not know about his/her previous behaviour. For this reason, **exceptionally**, evidence of disposition towards wrongdoing, or of specific acts of misconduct are admissible as relevant to the question of guilt on the current charge. This evidence is known as **"similar fact evidence"**, a term that has been adopted because the question of admissibility typically arose where an offence had been committed in an idiosyncratic way, and where previous behaviour by the defendant showed a propensity to indulge in similar behaviour. But the problem is not confined to such situations and can also arise, for example, where articles of an incriminating nature are found in the defendant's possession, or where the defendant admits interests, (an example would be perhaps paedophilia or other anomalous sexual 'kink'), which may be relevant to the charge alleged against him and thus making the offence charge "strikingly similar".

Generally, in every case it is necessary to try to assess the probative value of the disputed item of evidence and to weigh this value against any danger that the jury will misuse the evidence. It is this misuse of evidence by the jury that is referred to when courts speak of the "prejudicial

effect" of an item of similar fact evidence. In a colloquial sense, all sound prosecution evidence is "prejudicial" to the defendant because it makes a conviction more likely. But the prejudice with which the courts are concerned is the improper prejudice that might arise because of misuse of the evidence.

In order to decide whether proposed similar fact evidence is positively probative in regard to the crime charged, it is first necessary to identify the issue to which the evidence is directed. It might be put forward, for example, to support an identification, to prove intention, or to rebut a possible defence of accident or innocent association. Whether the evidence is or is not positively probative is governed by the issue to which it is related, not some quality which the evidence is thought to possess in itself - *R v. Lunt (1986) 85 Cr App R 241*.

The leading case on similar fact evidence is *DPP v. P [1991] 2 AC 447* and in this case the key concept of relevance was re-emphasised by the House of Lords. The defendant was convicted of offences of rape and incest in respect of each of his two daughters, referred to as B and S. At the trial the defence made an application that the counts relating to daughter B should be tried separately from daughter S. This application was refused and the trial judge held that the evidence of B was admissible as similar fact evidence in relation to the count concerning S.

The defence successfully appealed against this decision and the appeal court came to the conclusion that the similar fact doctrine required some feature of similarity beyond what had been described as "the incestuous father's stock in trade". The appeal was successful on the grounds that there was no **"striking similarity"** beyond evidence that he had abused more than one young member of his family.

Since *DPP v. P*, the basic propositions regarding the admission of similar fact evidence can be distilled as these:

(i) The admission of similar fact evidence is exceptional and requires a strong degree of probative force;

(ii) Sufficient probative force may be gained where the evidence as to the similar fact and the facts in issue display such a close or striking similarity or such an underlying unity that, if accepted, it would be inexplicable, in common sense, on grounds of coincidence but this is not an essential element unless identification is in issue.

(iii) Where identification is in issue there needs to be some kind of hall-mark by the defendant to allow evidence of previous wrong doing by that particular defendant to be admissible. Offences can be identical without being strikingly similar. (see below)

(iv) Where there is no "striking similarity", evidence of previous misconduct, or of the possession of incriminating articles, may be admitted because it is of particular relevance not derived from such a striking similarity. It has been of particular relevance, for example, in proving a particular and essential part of the prosecution case denied by the accused; in establishing motive and in disproving a defence of innocent association, especially on cases involving the possession of drugs and of charges of a sexual nature.