PCLL Conversion Examination
June 2020
Examiner's Comments
Evidence

Question 1

(i) A question on admissibility of documentary evidence. The diary entry of the delivery details made by Daisy may be admissible pursuant to section 22 EO. Specifically, under section 22(1) EO, it seems that direct oral evidence of the fact of delivery would be admissible. The diary forms part of a record compiled by a person acting a duty (employment contract term here). One of Daisy's roles is to deal with delivery entries. She acts upon information directly supplied by John who has personal knowledge of the delivery, having himself loaded the van. Also under section 22 (1) (c) (i) John is now dead. Provided Daisy's record is admissible as a description of the delivery details, the record will be admissible for the purpose of proving that the contents are true. *S-J v Lui Kin Hong Jerry* [2000] 1 HKLRD 92.

Most students correctly identified this issue as being a problem of hearsay, although the analysis was too brief at times. Some students needed to spell out fully the requirements to enable admissibility of the diary entry.

ii) Bill currently enjoys the benefit of the shield under s.54 CPO, and would be protected from revealing his past record. However, if he does give evidence and undermines the character of any prosecution witness, or puts his own character in issue (for example by stating he is a person of good character) then the prosecutor can apply to the Judge/Magistrate under Section 54(1)(f) CPO to adduce his previous conviction. This will then be relevant to Bill's credibility as a witness of truth. If Bill denies having any convictions it can be proved under section 15 EO. Whether the court would allow such an application is highly debatable, but the judge has full discretion. Bill's offence was 10 years ago now so is rather stale and allowing its introduction given it is a dishonesty offence would be highly prejudicial for Bill. Against that, it was a breach of trust case, and on these facts is also not a spent conviction under section 2 Rehabilitation of Offenders Ordinance (Cap 297). Bill should be advised either to elect not to give evidence, or if that is too risky given his likely conviction on the facts, then to avoid saying anything that might trigger an application by the prosecutor.

Quite a few students identified the relevant section, but did not mention how the previous conviction may be introduced and how Bill might avoid this happening, so missed out on full marks. Also some students stated that Bill's conviction was "spent" here which is not the case as he received a six-month prison sentence.

Some students mentioned similar fact evidence, as a way of introducing Bill's previous conviction but there is really little to lead down that path on the facts here. One conviction for a laptop theft 10 years earlier seems of insufficient probative force to support a recent theft of bottles of champagne. See *DPP v P* [1991] 2AC

417. There is insufficient for a judge to rule such previous conviction should be admitted. The prejudice for Bill would far outweigh the probative value of such evidence.

Question 2

(i) Susie is giving self-serving evidence, stating that she has already narrated what happened to Debby (out of court). This is a previous consistent statement and is generally inadmissible on the basis that it amounts to Susie bolstering her evidence by creating evidence for her own benefit. However, there are exceptions for recent complaints in sexual offences. Susie will be allowed to give this evidence to show that she told a consistent story at the earliest opportunity; here straight after the attempted rape. Her account is therefore entirely credible she would say: *HKSAR v Leung Chi Keung* [2005] 1 HKLRD 425. The complaint by Susie to Debby was made straight after the incident as a result of a perfectly acceptable question by Debby: *R v Osbourne* [1905] 1 KB 551. The court should allow this evidence in.

This question was not answered particularly well, and students identified various other methods of introducing Susie's statement in this case. Reference to res gestae was not appropriate.

(ii) Mike is giving hearsay evidence. This is an out of court statement made by a person not giving evidence in order to show the truth of the facts asserted: *R v Sharp* [1988] 1 WLR 7. It appears that Mike is trying to blacken Susie's name, by trying to prove that she has done something similar to Eric. This evidence cannot be tested as to its veracity or accuracy, and the jury may give it undue weight as evidence. It is therefore prima facie inadmissible. There can be no other reason why Mike would state this in court, other than to imply the truth of his assertion, so it is hard to see if there is any other reason why this evidence might be allowed: *R v Ng Kin Yee* [1993] 2 HKC 148. Mike's lawyers should have taken a statement from Eric to consider whether he should be called as a defence witness, if they wished to rely on him.

The prosecutor should have objected to this evidence being given, as soon as it became apparent, although it may have been difficult to stop it from coming out. In practical terms, if the case is being heard in the High Court, the prosecutor may request a discharge of the jury on the basis that they will now be prejudiced against Susie as a witness of truth, no matter if the judge directs them to ignore such testimony from Mike.

Students answered this part reasonably well, and explained why Mike's comment was hearsay evidence. Too many referred again though to s.54 CPO and Mike's shield, for which there was limited credit. There is no information as to whether Mike even has any previous convictions. Secondly, it is not at all clear that such a comment by Mike in court would lead to any previous conviction (if he had any) being introduced anyway.

Question 3

(i) Carina is a competent witness for the defence s.57 (1) CPO and is also compellable under s. 57 (2) CPO. The difficulty for Alex is that she appears rather reluctant to attend court. Eric should try to reassure his wife about giving evidence. The previous driving matter is now spent and under S. 2 ROO (Cap 287) is inadmissible and she cannot be cross-examined by the prosecutor on this very trivial offence. Although under s3(2) (c) CPO the court has a discretion to allow cross-examination of a witness on such convictions, in practice this is extremely rare. In any event it has no relevance whatsoever to the assault charge on Alex, and neither does it go to Carina's credibility as a witness of truth. The court will not take it into consideration.

The answers were rather mixed here. Some students even omitted all mention of competence and compellability, and only considered Carina's conviction and its admissibility. The good students addressed both issues. One point that frequently appeared in answers, was that Carina could apply for exemption from giving evidence under s.57A(1) CPO. This provision only applies where the spouse is giving evidence for the prosecution or on behalf of a co-accused. Reference to s.65B CPO and Carina giving evidence by way of a written statement (to avoid having to give oral evidence) was also completely misconceived.

(ii) Elly is a child of 8. She is presumed competent to give evidence unless the contrary is shown, and her evidence will be unsworn. Her evidence if accepted will be capable of corroborating the evidence of Carina and Alex. (See section 4 EO). A judge does not have to investigate Elly's competence unless he has reason to doubt it (*R v Hampshire* [1996] QB1) but as Elly appears young for her age, the judge will certainly need to establish beforehand that she is able to understand questions and answer in a manner that is coherent and comprehensible: *DPP v M* [1977] 2 Cr App R 70. She will certainly be asked to confirm her understanding as to what telling the truth means. If the judge believes Elly cannot understand or is unlikely to give intelligible evidence, then no weight is likely to be given to what she says. From Alex's point of view he will hopefully still have the evidence from his wife to support his defence.

Elly is a vulnerable witness under part Part IIIA CPO and is likely to be allowed to give her evidence by TV link, video recording or by deposition in writing. See ss 79B, C and E CPO.

Most students answered this part of the question well. Students identified the correct legal provisions. Given Elly's age the provisions of s.79 CPO would apply. More reference to the ways points made in the previous paragraph would have helped to improve marks.

Question 4

A question on section 65B CPO and proof by written statement. Candidates should discuss the requirements for admission of such evidence and the rationale for saving time and costs where evidence by either side is unchallenged, thus avoiding the need for witnesses to attend court. Reference should be made to the type of witness who may be accepted by way of this section (e.g. medical practitioners, expert witnesses, witness giving non-disputed evidence, loser's statements and so on). Candidates should mention the risks generally of accepting such evidence or not serving a counter-notice within 14 days of receipt of such notice (where such evidence involves evidence to be challenged). Generally, candidates may refer to some of the specific requirements for such evidence to be admitted contained within s.65B(2) and (3) CPO. Any reference to section 65C CPO (admissions of fact) is not required.

This was possibly the least well answered question on the paper. Many students completely missed the point. This was not a question asking about the very specific provisions relating to the taking of depositions for children in certain cases or mentally incapacitated persons. It was a general question relating to all witnesses. Those students who omitted any mention of s.65B CPO, concentrating only on the detailed provisions of s.79E CPO, obtained little if any credit.

For those that did identify what was required, more could have been said about the nature and type of witnesses who could be deemed appropriate for a s.65B CPO written statement.

Question 5

(i) Any witness may be allowed to refresh their memory from a witness statement whilst in the witness box. *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, cannot remember the events clearly due to the time lapse, 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. Oral testimony should not simply be a test of memory. Applying this to the facts, provided PC Chan's statement had been made sufficiently closely even though not strictly contemporaneously, he should be allowed to read it. Here it was only two weeks after the incident that PC Chan wrote up his statement based upon his notes. This is not a long time period, and PC Chan could say that this was simply caused because the suspect was only arrested two weeks after the incident. So this was the first time he had any reason to recall the details in writing. In *R v Leung Chi-yeun* [1989] HKLY 222, a witness was allowed to read his statement during an adjournment despite it not being contemporaneous. Once PC Chan has read his statement it will be removed from him before he continues with his evidence.

Almost all students answered this part of the question well. My only comment would be that you must always refer to the relevant case law, when discussing the facts.

(ii) Despite the comments in *R v Da Silva* (supra) the courts have allowed a witness to refer to a statement in court, even where they had already read their statement before coming into court. This is to avoid the court being deprived of reliable or accurate testimony. So even where the requirements of Da Silva do not all apply, the court may still allow memory refreshment in the witness box, as occurred in *R v South Ribble Magistrates Court, ex p Cochrane* [1996} 2 Cr App R 544 where the witness had already read a non-contemporaneous statement before commencing their evidence. It is a matter for the judge as to whether to allow PC Chan to do this now, but it seems very likely.

Again, most students decided that PC Chan would still be able to refer to his statement, even though he had looked at it before. There is no absolute bar to the court allowing this (as some students stated) and most likely it would be allowed as in the *South Ribble* case above. There seems little reason why not on the facts.

Some general points

The overall pass rate was reasonably good for this examination. Where students had performed badly on one question (e.g. Q4), this did not necessarily prove fatal to their passing overall and they were usually able to still gather enough marks from the remaining 4 questions to meet the required pass mark of 50%. However, I would still like to re-emphasise the importance of attempting all 5 questions. Those students who had left one, or even two blank answers on their answerbooks, unfortunately stood little chance of reaching the required standard. Time-management is crucial in these examinations and from my observations some students spent far too long discussing peripheral points at length, gaining little extra credit for their efforts.