PCLL Conversion Examination
August 2022
Examiner's Comments
Evidence

Question 1

Previous Consistent Statements - Syllabus §8

This was potentially a wide topic with a wide range of authorities, but students as a minimum were expected to be able to correctly describe the general rule and note the four main exceptions and, if not explain them in any detail, set out the main evidential rules. This was a question that was done well by most students who appear to have grasped the main issues and identified relevant exceptions

Previous Consistent Statements**, (**also known as self-serving statements), the rule at common law both in civil and criminal proceedings is that these are generally *inadmissible - Edmonds v. Walter (1920) 3 Stark*. As a rule, a witness is not permitted, during giving evidence, to testify as to previous oral or written statements made by that witness on the topics which are consistent with his present testimony - *R v Coll (I 889) LR Ir 522; HKSAR v Fun Tsz-yin & Chong Cheuk-wah [2002] 2 HKC 406; R v Ali [2004] 1 Cr App R 39.*

Such a statement may not be proved by calling another witness to testify as to it. The rule is one of long standing and is applied in criminal cases. The rationale of the rule is variously stated and includes:

(1) although inconsistent utterances may undermine credibility, mere repetition of a statement does not tend to show it to be true - *Nominal Defendant v Clements (1960) 104 CLR 76; R v Laramee (1991) 65 CCC (3d) 465, 484; Corke v Corke & Cook [1958] P 93.*

(2) a concern about the ease with which such evidence could be manufactured; - *Jones v SE & Chatham Railway (1918) 87 LJ KB 775,*

and

(3) the avoidance of a proliferation of issues not central to the facts in issue - *Fox v General Medical Council [1960] 1WLR1017, 1024-1025. This was endorsed in R v Lau Man-ching & Mok Pui-chee [1995] 2 HKCLR 145, [1995] 3 HKC 224.*

The rule concerning previous consistent statements applies with equal force to both witnesses called for the prosecution and witnesses (including the accused) called for the defence - *R v Roberts (1943) 28 Cr App R 102.* For example, testimony by the accused that he has complained on a previous occasion that he was assaulted by the police to extract a confession is not admissible because it is a previous consistent statement. There is no discretion to admit such testimony unless it comes within one of the exceptions to the rule set out below.

Four Main Exceptions

(a) Complaints in sexual cases
(b) Previous identification

(c) Statements in rebuttal of allegations of recent fabrication.
(d) *Res gestae* statements

(a) Complaints in sexual cases
In cases of rape and other sexual offences, if the complainant made a voluntary complaint at the first opportunity reasonably afforded, then the person to whom the complaint was made may give evidence of what was said to show its consistency with the complainant's evidence and, in cases in which consent is in issue, to negative consent. The exception applies in the case of written, as well as oral complaints. Evidence of the fact that a victim of a sexual assault made a complaint soon after the assault took place is admissible to bolster the credibility of the complainant as a witness. - *HKSAR v Leung Chi Keung [2005] 1 HKLRD 425. The rule applies and is limited to in rape and kindred sexual offences - R v Lillyman [1896] 2 QB 167; White v R [1999] l AC 210; R v Kovacs (2008) 192A; Crim R 345; R v Jarvis & Jarvis [1991] Crim LR 374.*

(b) Previous identification
Evidence is admissible of a former identification of the accused by a witness out of court - for example after an ID parade. It may be given either by that witness or by some other persons present at the identification (a police officer who conducted the parade) and may include the words declaratory of the identification.

(c) Statements in Rebuttal of Allegations of Recent Fabrication
Where, in cross-examination, it is suggested that a witness has recently fabricated his or her evidence, evidence is admissible in rebuttal to show that on an earlier occasion the witness made a statement consistent with that testimony. The exception only arises, however, where what is alleged is *fabrication* at some period at or before the trial. Thus, merely to impeach the witness's evidence in cross-examination by general allegations of unreliability or untruthfulness will not suffice. In criminal cases, the statement in rebuttal is admitted merely to bolster the witness's credibility by negating the allegation of invention or reconstruction. The previous consistent statement of a witness may become admissible if his testimony is challenged as being a recent fabrication or an afterthought. Not every attack on the veracity of a witness entitles recourse to this exception. The rule is stated thus by Dixon CJ in *Nominal Defendant v Clements (1960) 104 CLR 476, 479*

(d) *Res gestae* statements

Under the doctrine of *res gestae*, evidence is admissible of any act or statement so closely associated in time, place, and circumstances with some matter in issue that it can be said to be part of the same transaction. *Rattan v R [1972] AC 378; Brown v R (1913) 17 CLR 570; R v Bedingfield (1879) 14 Cox CC 341; R v Turnbull (Ronald) (1984) 80 Cr App R 104; R v Andrews [1987] AC 281.*

Question 2

Similar Fact Evidence – Syllabus §15

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. These two cases should be cited for a competent answer. Only around 50% of students were able to cite these two central authorities at the outset. Those who did received high marks – those who did not generally wrote poor answers which failed to address the issue correctly. A small but significant number of students appeared unable to identify the question as one of similar fact as opposed to CPO s.54(1)(f) (ii)

For marks at the higher end of the scale, students also mentioned HKSAR *v Wong Tin Chuk* CACC 761 of 1997 and *R v Musquera* [1999] Crim L R 857. In relation to the issue of identification, see *R v Brown* [1997] Crim L R 502 and *R v John W* [1998] 2 Cr App R. 289.

The question presents a classic 'similar fact' situation in the leading case of *DPP v P* [1991] 2 AC 447; 93 Cr App R 267 and, those students who correctly identify the question concerns 'similar fact' evidence, should begin by discussing this generally. Then go on to explain that it is a matter of law for the judge to decide whether such evidence is admissible.

Once the principles of 'similar fact' have been recognized and admitted, what must 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 way this can be achieved.

In Hong Kong the leading judgment is *HKSAR v Zabed Ali* [2003] 2 HKLRD 849. where the CFA said it was necessity for the jury to be given an adequate direction in respect of such evidence. If admitted, the jury should be directed as to the matter in issue to which such evidence might be relevant and how it might be relevant.

The jury should be told that the fact that the accused has a bad character, or the propensity as shown by such evidence does <u>not</u> mean he is guilty of the offence charged.

Evidence led in previous trials where a defendant was acquitted may be admissible in a subsequent trial of that defendant as 'similar fact 'evidence: *R v Z* [2000] 2 Cr App R 285.

<u>Specifically:</u> This scenario is raised in *Makin v Attorney General for New South Wales* [1894] AC 57 PC and *R v Smith* 11 Cr App R 229) At the close of arguments on 22 July 1893 the Privy Council announced that its advice was that the appeal should be dismissed, and its reasons were published on 12 December 1893.

Lord Herschell held that the evidence, in this case, was admissible, however, as a rule evidence of a past similar event should not be admissible unless there are exceptional circumstances.

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of

evidence is on the one side or the other."

Evidence of similar facts can only be admitted if it is both relevant and its probative value outweighed any prejudicial effect.

Here there is no direct evidence that the defendant committed the assault but merely evidence of *opportunity* to do so. This, is far from sufficient to enable a jury to convict. Having been allowed to hear evidence suggesting the commission of two other 'similar fact' offences - all of which the defendant had the opportunity to commit – the jury must be sure that the events to which the witnesses have testified: a) took place, and b) looking at the whole of the evidence, ask: has the Prosecution established the relationship between the circumstances of these offences/occurrences. For example: in time, place and/or any other circumstances highlighting any unusual characteristics of the assault – sufficient to persuade a jury that they are so close that they may be 'sure' that this is a series of 'similar offences' committed by the same person.

If that is so, looking at the case against D is it possible that he can have an innocent explanation for the fact that all the assaults took place at the same location and in each case, he offered each child a box of "jelly babies" before taking them to the park etc. etc.; or is the only reasonable explanation that these children were all assaulted by the D?

Only if there is no credible innocent explanation may the jury take the whole of this evidence into account in deciding whether they are sure that D sexually assaulted A. Further, it is for the prosecution to prove that there is no credible innocent explanation, and not for the defendant to prove that there is.

Question 3

Competence & Compellability – Syllabus §5

This question was done well, and the issues covered adequately by most students – around 20% of answer received high marks as a result.

Accomplices: An accomplice is, as a rule, a competent witness - R v Turner [1975] QB 834, 61 Cr App R 67; R v Chu Kwan-kong Cr App 139/77; R v Tsui Lai Ying & Others [1987] HKLR 857.

His evidence is admissible even if it is not corroborated - 2 R v Attwood & Robbins (1787) 1 Leach 464; R v Baskerville [1916] 2 KB 658

However, if an accomplice is jointly charged in the same indictment in the same proceedings with the accused against whom he proposes to testify, he is not competent as a witness for the prosecution - R v Grant [1944] 2 All ER 311; 30 Cr App R 99; R v Shorrock (1947) 32 Cr App R

It is not appropriate for the courts to control the grant of immunity to a witness by the prosecution because it is not for the courts to direct prosecution policy either generally or in a particular case and the courts do not exercise a disciplinary function over the prosecution. There may be circumstances in which the exercise of this discretion by the executive may give rise to an abuse of the process of the court - HKSAR v Cheung Ting Bong [2006] 1 HKC 286.

In those circumstances, **section 54 of the Criminal Procedure Ordinance provides that the accomplice is only competent for the defence.** To make the accomplice a competent witness for the prosecution, the proper procedure is to terminate his part in those proceedings as an accused person. This may be done by:

(1) a plea of guilty by the accomplice to the charge that he faces;
(2) removing the accomplice from the indictment;
(3) filing a *nolle prosequi* in the proceedings with respect to that accomplice;
(4) offering no evidence against the accomplice to secure his acquittal.

(ii) Spouse of Accused: At common law, the spouse of the accused was generally incompetent to give evidence either for or against the accused. There are several common law and statutory exceptions to this rule. In proceedings other than criminal proceedings, section **5 of the Evidence Ordinance** renders spouses both competent and compellable both for and against each other. So far as criminal proceedings are concerned, section **6 of the Evidence Ordinance** preserves the common law rule.

Statutory modifications: witness for the accused – students should be aware of at least the basics of s. 57 CPO

The husband or wife of an accused are competent to give evidence on behalf of the accused or a co-accused: section **57(1) of the Criminal Procedure Ordinance**. Subject to section 57(5), the husband or wife of an accused shall be compellable to give evidence on behalf of the accused: section 57(2). The failure to call the husband or wife of an accused to give evidence on behalf of the accused or a co-accused shall not be made the subject of any question or comment by the prosecution: section 57(11). The fact that the husband or wife of an accused has applied for, or been granted or refused, an exemption under this section shall not be made the subject of any question or comment by the prosecution: section 57A (4).

(1) The husband or wife of an accused shall be competent to give evidence on behalf of the accused or a co-accused and, subject to subsection (5), shall be competent to give evidence for the prosecution.
(2) Subject to subsection (5), the husband or wife of an accused shall be compellable to give evidence on behalf of the accused …
(5) Subject to subsection (6), where an accused and the husband or wife of the accused are standing trial together, neither spouse shall at the trial be competent to give evidence for the prosecution under subsection (1), or be compellable to give evidence under subsection (2) or (3).
(6) Subsection (5) shall not apply to either spouse who is no longer liable to be convicted of any offence in the trial (whether as a result of pleading guilty or for any other reason).

Question 4

Hearsay – Syllabus § 10

Students too often complain that an evidence paper contains no question on hearsay evidence. It is a mistake to assume that it is a topic on the syllabus of such general application that any evidence exam *must* include a question on hearsay evidence – there is no rule which says that *any* topic in the syllabus should be prioritised. That said, as all students will revise this topic

fully, where, as in this case, a specific question on hearsay is included it is done well. Most students appeared to find this question an easier one and a failure mark on this question was rare.

Definition of hearsay, basic rule – '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.

For 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.

(ii) Dying Declarations - The oral or written statement of a person made as that person was dying is, under some circumstances, admissible as evidence of the cause of his death at the trial of another **but only is a case involving the murder or manslaughter** of the deceased.

The declaration may be by way of signs - Chandrasekera v R [1937] AC 220. The declaration, often known as a dying declaration, is not admissible for any other purpose - R v Mead (1824) 107 ER 509: Nembhard v R [1981] 1 WLR 1515, [1982] 1 All ER. Such a declaration is only admissible if at the time that it was made, the maker of the statement was under a settled, hopeless expectation of death - R v Peel (1860) 7 F & F 21: Sussex Peerage Case (1844) 11 Cl & Fin 85.

It is not sufficient that the declarant subsequently was in a settled hopeless expectation of death. The expectation must exist at the time of the declaration. R v Hope [1909] VLR 149; R v Austin (1912) 8 Cr App R 27.

The declarant must be a person who, if he had lived, would have been a competent witness, at the time of the declaration - R v Pike (1829) 172 ER 567.

The belief of the declarant must be that his death is imminent and impending. However, it is not necessary that the declarant believed that death would be immediate in the sense that death was impending not instantly, but in a very short time indeed.

The rationale of the rule is set out in R v Woodcock as follows:

The principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive of falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.

The fact that a dying declaration has been elicited by way of leading questions, even by the police, does not render it inadmissible - R v Smith (1865) 10 Cox CC 82; R v Fitzpatrick (1910) 46 JLTR 173 (CCR). The opposite was held to be the case in R v Smith (1901) 17 TLR 522. However, in such a case, the weight to be attached to the declaration may be diminished - R v Stephenson [1947] NI 10.

For completeness Sections 70 and 73 of the Evidence Ordinance provide limited extensions of the dying declarations rule but the rule only applies to the prosecution – students who can note this should be given credit.

iii) Res Gestae - Often the act the subject of a criminal prosecution is part of an event or series of events which is complex in nature. For the court to gain an understanding of the criminal act, it may be necessary to place it in its context of complex facts. In some cases, to give a complete picture of such events, it may be necessary to give evidence of other events which may not be directly probative of the fact in issue or may be inadmissible because one or more of those events offend the rules of evidence. The doctrine of **res gestae** provides some limited assistance in getting over some of the problems of admissibility thus created. The doctrine makes admissible matters which are said or done in the context of a complex fact situation where those matters would otherwise be inadmissible.

The doctrine of *res gestae* is only partly an exception to the hearsay rule. Although most *res gestae* issues are concerned with words spoken by some person who is not giving testimony, and the prosecution seeks to prove those words for the purpose of proving that what was said is true, the *res gestae* rule also relates to actions and opinions as well - R v Bond [1906) 2 KB 389, 400; O'Leary v R (1946) 73 CLR 566; R v Karetai (1988) 3 CRNZ 564.

It is convenient to discuss the *res gestae* rule using the well-recognised classifications employed by Cross - see Cross on Evidence 7th edition page 658-674. However, those classifications are merely aspects of a single rule - R v Callender (Archbold News 13 March 1998).

Thus, where the statement would be, by itself, hearsay, but it accompanies a relevant act, if the statement is so mixed up with the act that it cannot in truth be separated then the statement may be given in evidence of the truth of what is asserted. For a hearsay statement to be admissible under this head it must be (see *R v Wong Wing-chun* [1978) HKLR 326.):

(1) A statement which relates to the act it accompanies;
(2) The statement must be contemporaneous with the act;
(3) The statement may be made by a party to the act including the victim.

(iv) The opinions of qualified experts – an exception to the rule forbidding the expression of opinions concerns the evidence of properly qualified expert witnesses. This exception is recognition of the fact that there are many topics outside the scope of the knowledge or experience of the tribunal of fact which hears and determines a case. In such a case, a court may receive the evidence of an expert to provide the court with a basis for the tribunal of fact considering and understanding the evidence placed before it which might otherwise have little or no meaning or not be understood. The purpose and limitations of expert evidence is perhaps best expressed in Davie v Lord Provost [1953] SC 34. (See also R v Turner [1975] QB 834, 841; 61 Cr App R 67 and R v Yeung Kwok-fai Mag App 901/95) In answer to a contention that uncontradicted expert evidence should be accepted by a court in the absence of competing evidence, the Court of Session held:

Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or a judge sitting as jury, any more than a technical assessor can substitute his advice for the judgment of the court ... Their duty is to furnish the judge or jury with necessary scientific criteria for testing the accuracy of their conclusions, to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing, and tested, becomes a factor (and often an important factor) for consideration along with the whole of other evidence in the case, but the decision is for the judge or the jury.

Question 5

Witnesses 2 - Character Evidence - Syllabus § 6

Another question that was done well by most students. Correctly identifying the issues raised concerned CPO s.54 as a starting point lead almost all students to write competent answers. Where answers to this question were incomplete it would appear this was down to running out of time at the end of the exam rather than any failure to understand what was being asked or the issues raised. A note and reminder to all students perhaps, to read the question paper fully at the start of the exam and not to overrun on earlier questions. Over five questions, three outstanding marks and two poor failures will rarely amount to a pass mark *overall.*

Alan: A alleges that it might be B who had stolen the watches. This is a case of s.54(1)(f)(iii) CPO as A has given evidence against a co-D in the same proceedings, and A will lose his bad character shield. A has a previous conviction for criminal damage that is spent. Can this be adduced by the prosecution? Technically, yes it can, but the Rehabilitation of Offenders Ordinance requires that the conviction should not be mentioned when spent unless justice cannot be done. Here I think the judge might deem the conviction inadmissible as it will not be required for justice to be done as it was a long time ago and for a completely different sort of offence - ie it is irrelevant

A also puts his own good character in issue by calling his Catholic priest – s.54(1)(f)(ii) CPO applies here. But given the above and considering cases such as *Timpson* [1993] it is unlikely that A's previous conviction will be adduced. He will essentially be regarded as a person of good character, and he should also be able to get both limbs of the good character direction under the principles in *Vye* [1993] and *Tang Siu Man* [1998].

Brian: The questions to Keith are an imputation on a prosecution witness – s.54(1)(f)(ii). But s.54 only applies to "a person charged and called as a witness" – ie it only applies to Ds that give oral evidence at the trial. If D's counsel attacks the character of Prosecutions witnesses, but D does not give evidence himself then he cannot be cross-examined on his bad character under s.54 (not that he has any previous convictions).

B does not have any previous convictions, but he has pleaded guilty to one of the Counts on the indictment (Count 1) in this case. Is he still of good character? Contrast the approaches in *Teasdale* [1993] and *Challenger* [1994]. The case of *Tang Siu Man* [1998] would suggest that the judge should use his discretion to decide what direction to give the jury, the ultimate requirement that it must be fair and balanced. At the very best B would get the propensity limb of the *Vye* direction as he has not given evidence.

Colin: The issue here is whether C's comments about Keith are an imputation. An "imputation" can be any allegation of faults or vices, reputed or real. e.g. witness is corrupt (*R v Wright* [1910]) that the witness has committed a crime (*R v Hudson* [1912]), that the witness is lying (*R v Jones* [1923]), etc. Here I think that saying Keith would like to see him sacked implies that Keith is lying, and I think this is accordingly an imputation. S.54(1)(f)(ii) CPO is engaged and P can cross-examine C on his previous convictions.

Clearly the judge's direction in this case is very inadequate – bonus marks for students who address this point.