PCLL Conversion Examination
January 2021
Examiner's Comments
Evidence

Question 1

Whilst the first part of this question was generally well answered, candidates had more difficulties with the second part. In the first part, most candidates recognized Anne's statements as hearsay, i.e. statements adduced for the purpose of establishing their contents being true. However, the stronger candidates then analysed whether these statements could be held admissible under the dying declaration exception. The rule states that a statement of a person made as that person was dying is, in certain circumstances, admissible as evidence of the cause of that person's death at the trial of another person of the murder or manslaughter of the deceased person. The statement must be made orally or in writing or by way of signs or gestures. Candidates cited cases such as *R v Woodcock* (1789) in which it was held that the statements would only be admissible if at the time they were made, the maker of the statements was under a settled and hopeless expectation of death. Given the facts in the scenario, the conditions for the admissibility of the Anne's statements as a dying declaration would most likely be met because her words suggest that she had a settled, hopeless expectation of death, with no hope of recovery. Some candidates also submitted that even if the dying declaration exception did not apply, the statements could fall under the *Res Gestae* exception.

In the second part, candidates often had no difficulty in identifying the statement heard by Clarissa amounting to hearsay if the prosecution were to then adduce it to show that John and Christian were involved in the robbery. However, most did not go further and explain that it could possibly fall under the *Res Gestae* exception (i.e. the statement was made so close to the events in question that it could be said to form part of the transaction). The question required discussion of cases such as *Ratten v R* (1972) and *R v Andrews* (1987). In these scenarios, the court must decide whether the event was so unusual as to dominate the thoughts of the maker of the statement that the utterance was instinctive reaction, giving no chance for concoction or fabrication. The stronger candidates argued that John's statement was an excited utterance made at the time of the escape from the shop when it was made instinctively and without any chance for reflection.

Question 2

Most candidates had little difficulty with part (a) of the question. They recognized that compellability would not be an issue because of Stephanie's determination to testify against Jack. Given her age, the main issue would be competence. The stronger candidates mentioned section 4A of the Evidence Ordinance and concluded that she could give unsworn evidence. Under the section, if Stephanie could provide intelligible testimony and could understand the questions and answer them in a coherent and comprehensible manner, she would be adjudged as competent.

Part (b) of the question was also generally well answered. Most candidates were able to successfully explain the rules in relation to the protections accorded to vulnerable witnesses in s79 of the CPO. The better answers contained a detailed discussion of s79B and s79C and highlighted the procedures involved in allowing the evidence-in-chief of a vulnerable witness when giving evidence way of live television link and video recording. The best candidates also discussed the use of depositions and the fact that the courts have an inherent common law power to regulate their own procedure by allowing witnesses to give evidence from behind a screen or by clearing the court.

Question 3

On average, this was the question that posed the most difficulties for candidates. Whilst most were able to discuss the surface issues, few examined the topic in enough detail. A good answer required a full discussion of similar fact evidence and how the topic has been addressed by the courts in cases such as *Makin v AG for NSW* (1894) and *DPP v Boardman* (1975). Generally, mere evidence of propensity is not admissible and there are two main reasons for this. The first is that no matter how many times a person may have committed previous offences, it does not prove that he may have committed the offence he is presently charge with. Therefore, the evidence is irrelevant. The second reason is that even if the evidence of propensity is probative, its prejudice outweighs any probative value. However, the stronger candidates also recognized that it is not an absolute rule. There have been cases where evidence of propensity has been accepted. One such case was *R v Straffen* (1952) of which it was said that refusal to admit the evidence of disposition would have been an "*affront to common sense*". Other cases such as *R v Thompson* (1918) have allowed evidence relating to the possession of incriminating articles under the similar fact rule. Given these cases, candidates who explored the issues further examined the competing principles involved and concluded that each case engages an exercise in weighing the strengths of the competing principles. If the probative value of the evidence is small and the risk of prejudice is great, the evidence ought not to be admitted. On the other hand, if there is great probative value and the risk of prejudice is small, the evidence could be admitted.

Question 4

This question presented a few scenarios and required candidates to have a good understanding of the rules on witnesses refreshing their memory. Part (a) required a discussion of cases such as *R v Richardson (1971)* and *Lau Pak Ngam v R (1966)*. According to these cases, court testimony is not a memory test and to refuse access to statements could lead to difficulties for honest witnesses. The usual practice in Hong Kong is to show prosecution witnesses their statements before they go to court. Therefore, it is likely that Craig would be allowed to refresh his memory from his notebook before testifying in the case.

In part (b)(i), the nature of the note and whether it would be considered a "contemporaneous" document were of utmost importance. In *R v Britton* (1987), the defendant, who was arrested for an assault on a police officer, when released from police custody went directly home and made a type written account of the event and was

permitted to refresh his memory from these notes at his trial. Similarly, most candidates stated that since the note of the incident was made contemporaneously (i.e. made at the first practicable opportunity at a time when the events were fresh in Craig's mind), Craig would most likely be allowed to refresh his memory in court.

In part (ii) of question (b), candidates had to examine cases such as *R v Da Silva* (1990) and apply the reasoning to the scenario. In *Da Silva*, the CA held that a witness can refer to a document made at the time of the events in question even though the statement may not fall strictly within the definition of "contemporaneous". The judge should be satisfied that the witness cannot recall the details because of the lapse of time; that the witness made a statement closer to the actual time of events and the contents of the statement represent his recollection at the time it was made; that he had not read the statement before coming into the witness box and that he wished to have an opportunity to read the statement before he continued to give evidence. Once the witness has read the statement made earlier, it should be taken away before he resumes his evidence. If these conditions could be met, Craig would be allowed to refer to the note.

Question 5

There was considerable variance in the answers for this question. Whilst some candidates were able to identify the issue of identification evidence, the possibility of mistaken identity and the need for a *Turnbull* warning, other candidates gave very general answers without much discussion of the legal principles or authorities.

In part (a), the more successful candidates stated that even though Fiona was a police officer, the judge would still need to instruct the jury that Fiona's evidence could be mistaken. However, these candidates also mentioned that given their training, police officers are more likely to understand the importance of accuracy in ID evidence and are more likely to exercise care in identifying a suspect. Therefore, an honest officer is more likely to be reliable than an ordinary member of the public (*R v Ramsden*). However, some candidates also pointed out that none of this means that just because a police officer is involved, the *Turnbull* warning can be dispensed with (*HKSAR v Chan Yiu Ki*). In this case, the judge would need to tell the jury that Fiona's evidence could still be mistaken because the alley was dark, and Fiona was 10 metres away from Derek at the time of the identification. However, one factor that few candidates mentioned was that Derek was under the observation of Fiona for some time.

The second part of the question concerning Tony was generally poorly answered. Few, if any, candidates considered whether Tony's evidence would even fall within the ambit of ID evidence. Arguably, it could be a mere description because it was so general that it could apply to a significant percentage of individuals in Hong Kong. Therefore, a *Turnbull* warning might not even be required.

However, even if Tony's evidence could be regarded as being enough to identify Derek, and this is what most candidates focused on, the evidence was of such poor quality that it should be withdrawn from the jury (*R v Turnbull*). Tony's age, the possible issues with his eyesight, his misdescription of Derek in terms of hair color and ethnicity and his

inability to pick out Derek in an ID parade were all factors that could be used to argue that the evidence was of very poor quality.