PCLL Conversion Examination
June 2021
Examiner's Comments
Evidence

Question 1

Overall, this was not a well answered question. Far too many candidates focused primarily on the hearsay rule but if they had read the quote more carefully, they would have realized that the question required a thorough analysis and critique of opinion evidence and expert testimony. Candidates who performed well examined the rationale for the existence of the rule which requires a witness to speak only to facts which are within his/her personal knowledge. This is consistent with the fundamental doctrine that it is for the jury and not the witness to draw inferences and that a witness should not give an opinion or draw conclusions about issues within the purview of the jury. In this context, candidates would have also briefly discussed hearsay evidence. However, the stronger candidates also discussed the major exception to the rule; that of expert witnesses. Where the issue in a case is such that competence to form an opinion depends on special knowledge or experience, expert evidence may be admissible (*Davie v Edinburgh Magistrates*). However, an expert is only allowed to give opinion evidence which is within his area of expertise, and which is outside the general knowledge of the court or jury. The facts forming the opinion of the expert must be proved by admissible evidence and should enable the jury to evaluate the opinion of the expert. The opinions should also be confined to factual situations and should not be about hypothetical matters. Apart from merely commenting on the factors that courts utilize to assess the necessity and suitability of experts, candidates were also expected to address issues such as whether the testimony of experts in highly technical areas can in effect usurp the function of a judge or jury.

Question 2

Most candidates were able to identify the major issue in this question and the answers were generally satisfactory. Section 54(1)(f) of the CPO gives a defendant a "shield" to protect him/her from being cross-examined on matters relating to character including previous convictions. The rationale of the prohibition is to prevent the prosecution from introducing prejudicial material which could mislead a jury into thinking that just because a person has a criminal record means that he/she is more likely to have committed the offence with which he/she has been charged.

Section 54(1)(f)(ii) contains two provisions by which this shield may be lost. One is where 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. At first glance, it may appear that Peter has lost his shield due to s 54(1)(f)(ii) because by accusing the victim of being a liar, his defence may have involved imputations on the character of the victim. However, the key issue here is that Peter chose not to give evidence. According to *R v Butterwasser* (1948), this section has no application where the accused makes imputations against prosecution witnesses but does not testify himself. Therefore, the prosecution would not be entitled to give evidence-in-chief of Peter's previous conviction.

The other way in which a defendant might lose his shield is where the defendant asserts his own good character. Whether the defendant has put his character in issue by giving evidence of good character is a matter of law for the judge to decide and any cross-examination on his previous convictions is always at the discretion of the judge. It is important to note that for cross examination as to character to be permitted, the evidence of good character must be put forward by the defence either by cross-examining prosecution witnesses or by giving evidence himself. It is equally important to note though that a defendant cannot assert one part of his character as good without putting into question his whole character (*R v Samuel*).

In *R v Ferguson*, the prosecution was held to be entitled to question the defendant as to his bad character after the defendant gave evidence that he was a religious man who had attended church services for several years. Similarly, in *R v Baker*, the defendant's assertion that he had been earning an honest living for a few years was held to be an assertion of good character.

In the question, most of the stronger candidates argued that the judge would most likely hold that Tom had put his character into issue by claiming to be a generous and religious person who had been truthful his whole life. However, these candidates also correctly noted that a judge has the discretion to exclude questioning permissible as a matter of law under s 54(1)(f)(ii). The discretion is to be exercised to secure a fair trial.

Question 3

(a) Most of the candidates recognized the fact that this question involved a civil claim. Although candidates had little difficulty in determining that Peter would bear the legal burden of proof, few candidates stated the precise parts of the claim that Peter would need to prove. Examples of this included the fact that he had entered a contract of insurance with AZA, that the fire was one of the risks that fell under the policy and that he had suffered a loss as a result of the fire. Thereafter, the burden would shift to AZA to show that Peter had committed arson. Most candidates were able to identify that the standard of proof would be on a balance of probabilities (*Miller v Minister of Pensions*).

(b) Although some candidates erroneously veered into areas such as privilege against self-incrimination without prejudice communications, the majority dealt with this in a somewhat satisfactory manner. The question required a straightforward discussion of the topic of confidential communications between a client and a lawyer for the purpose of obtaining legal advice, which falls under advice privilege. Candidates were expected to discuss the rationale for the existence of the rule as was explained in *R v Derby Magistrates' Court Ex parte B*. In addition, s13 of the Mutual Assistance in Criminal Matters Ordinance (Cap. 525) also protects from disclosure communications between a legal adviser and his client made in connection with the giving of legal advice to the client. The communication does not need to be regarding ongoing or contemplated litigation. However, not all such communication is privileged.

However, according to *R v Railton*, any communications between a lawyer and a client intended by one or both to facilitate a crime or fraud are not covered by privilege. Although most candidates were able to state the law, the analysis of the scenario was at times lacking.

Many too readily assumed that the mere fact that Peter wrote such a letter to his lawyers indicated nefarious intent on his part, thereby depriving him of the privilege. However, the stronger candidates stated that the loss of the privilege would depend on the exact wording of the letter. If he had merely asked about the legal ways in which he would be able to obtain monies under the policy or whether he would be able to obtain monies under the policy if a particular event occurred, then the letter would most likely still be privileged. However, if his letter had asked for advice to cover the fire and make it look like arson or any other advice on concealing an insurance scam, then the letter would most likely not be covered by privilege.

Question 4

This question involved the admissibility of evidence collected by police. In general, relevant, non-confession evidence is admissible. In *R v Leathem*, Crompton J held that "*it matters not how you get it, if you steal it even, it would be admissible in evidence*". However, most candidates correctly stated that the court maintains a discretion to exclude such evidence on grounds such as the prejudicial effect outweighing the probative value or the inclusion of the evidence preventing a fair trial. The first part of the question concerned the issue of entrapment and in *R v Loosely*, the HL confirmed that although it is not a defence, the court could stay the proceedings as an abuse of process or exclude the evidence by virtue of s78 PACE (which HK cases have referred to even though it does not apply in HK). The stronger candidates compared the facts in the question relating to John to the case of *R v Christou* where the appellants had argued that they had been tricked into incriminating themselves and that a caution should have been administered before the undercover officers engaged in conversation with them. The CA held that no one had forced the appellants to do what they did, and the admissibility of the evidence would have no effect on the fairness of the trial. Although some candidates argued that there was an element of entrapment here, others stated that it was minor because the mobile phone had been stolen two weeks ago and rather than encouraging John to commit an offence, PC Wong had merely inserted himself into a scenario where the crime was already ongoing. Therefore, they argued that John's chances of having the evidence excluded would be slim.

The same principles would apply regarding the tools found during the illegal search. The evidence would be admissible if it were relevant, but the court would retain the discretion to exclude it if the admission of the evidence would result in unfairness in the proceedings. The stronger answers contained the argument that since Charlie's lawyers would have a chance to cross-examine PC Chan about the nature of the search and Charlie himself would have the chance to give evidence regarding the ownership of the tools and their use, it was again unlikely that the evidence would be excluded.

Question 5

(a) All three parts of this question were generally well answered. The first part was a straightforward question on competence and compellability. Most candidates were able to cite s57(1) of the CPO when giving the answer that the spouse of an accused shall be competent to give evidence for the prosecution unless the spouse is also standing trial with the accused. Since Amy was not charged together with John, she would be a competent

witness to give evidence for the prosecution. However, according to s57(3) CPO, Amy would only be compellable to give evidence for the prosecution in respect of a specified offence. Since theft does not fall within the definition of a "specified offence" as stipulated in s57(4) CPO, Amy would not be a compellable witness for the prosecution. Also, she could continue to refuse to give evidence even if she had previously made a witness statement.

(b) Most candidates had no difficulty with this question and answers included a discussion of the general rule that a defendant is not a competent witness for the prosecution. The situation is the same when there are two defendants charged jointly, i.e., D1 cannot be called to give evidence against D2. Therefore, under normal circumstances, Peter would not be called as a witness against David by the prosecution. However, this prohibition is removed if David is no longer as defendant in the proceedings. This could happen either by David pleading guilty, the trials being severed, David having been previously acquitted or David pleading not guilty and the prosecution accepting the plea and entering a *nolle prosequi*, thereby giving David immunity from prosecution. If any of the above were to happen, David would then cease to be a defendant and he would be competent and compellable witness for the prosecution.

(c) The crux of the question concerned section 2 of the Rehabilitation of Offenders Ordinance (ROO) which restricts cross-examination regarding previous convictions. Most candidates picked up on this and were able to state the law and its effect clearly. Therefore, most of these candidates reached the conclusion that since Tony's previous conviction had been for a very minor offence, that the sentence been 14 days of imprisonment, that it had been his first conviction and that he had not been convicted of any further offences since then, it was therefore highly unlikely that the prosecution would be allowed to cross examine him on his previous conviction.

A small number of students missed the point about the ROO and focused instead on the loss of the shield. Those students were still awarded points even though the emphasis of the question was not on this topic.