PCLL Conversion Examination
January 2015
Examiner's Comments
Evidence

The examination consisted of five questions all of which were compulsory and which could yield a maximum score of 50. Each individual question was worth 10 marks. The passing mark was 25 marks. The five questions raised topics as outlined below. The examination was held over three hours and written on an open book basis with no designated reading time.

As with past exams, the examiners prepared a list of factors in advance of the examination that were relevant to answering each question. Thus, to answer the questions successfully, candidates needed to address a majority of those factors and to do so in a structured and relevant manner. Candidates should have also been able to express themselves in a clear and succinct way. In order to answer the questions satisfactorily, candidates needed to have been able to cite primarily relevant case law but also some legislation.

The overall standard was good although there were a number of poor papers as well. As in previous years, there were various reasons for failed papers or poor grades being given to some papers including: lack of familiarity with the relevant authorities and commentaries; weaknesses in the analysis of the issues; weaknesses in addressing the specifics in each question or by responding to only parts of the question; omissions and occasionally poor standards of expression which detracted from the clarity of the answer. Some observations may be made on the questions and responses as well in turn.

The first question was a fairly straightforward evidentiary question raising the admissibility of hearsay evidence. As it was a criminal case the burden of proof was on the prosecution to establish each and every element of the offence to a standard of proof which is beyond reasonable doubt. The best answers dealt with the general principle involving hearsay and noting that such evidence is inadmissible if the purpose of introducing it is to prove directly that any fact so stated by one person on a previous occasion is true. There are many authorities for this proposition including *Wiryo* or, by example, *Walton v R* - a persuasive authority from the Australian High Court. In the latter case a statement that X was going to meet the accused was not admissible as to the truth of that statement but was admissible as to state of mind or intention making it possible to infer that how the declarant had in a given set of circumstances. Relying upon this authority in analysing the problem it could be argued that the hearsay statement in question would be admissible as evidence that the declarant acted as he stated: i.e. that he had killed the person he had referred to. The hearsay statement in question could also be considered as admissible as part of the *res gestae;* essentially meaning 'the things done' and which is used to justify the admission or the use in certain circumstances of words which might otherwise be inadmissible. Essentially, if the use of the words irrespective of the truth of any facts stated, is itself in issue or relevant to a fact in issue, it does not breach the hearsay rule and will be admissible. Here, as a statement of intention made in advance of and leading up to the act in question, it might be admissible per *Ratten* though

in opposition to this view the statement in question might arguably be too remote, non-contemporaneous and perhaps not sufficiently proximate for the prosecution to rely upon it as an exception to the hearsay rule. These then were the two most relevant exceptions to the hearsay rule which merited analysis in this problem and as such no other exceptions needed to be discussed although quite a few students nevertheless still felt the need to discuss some.

The second question asked for a discussion of the concept of relevance as contrasted with the concepts of admissibility and weight of the evidence. To begin to answer this question it would have been helpful if the students had set out for example a working definition of 'relevance'. One of the best is given by Lord Simon in *DPP v Kilbourne*: "evidence is relevant if it is logically probative or disprobative of some matter which requires proof." The idea of relevance is fundamental to evidence law because all relevant evidence is prima facie admissible while irrelevant evidence is not. Thus the relevance of an item of evidence can determine what rules or principles of law govern its admissibility. Students in their answers at times sought to construct arguments for or against the relevance of a given item of evidence by way of example or generalization. Once relevance had been introduced some students also then asked what is the extent to which courts take into account the weight of an item of evidence in determining its relevance, and whether they are right to do so? The weight, or 'probative worth' or 'probative value' of an item of evidence will generally, though not always, be determined in a criminal jury trial by the jury. That said, sometimes judges do decide questions of weight; for example on a submission of 'no case to answer', and in exercising the judicial discretion to exclude prosecution evidence where its potential for causing unfair prejudice to a defendant is greater than its probative value. Thus, from reviewing these and other approaches, it could be seen that the best answers dealt with all three concepts both individually and collectively. Turning to admissibility, the concept involves a matter of law – in contrast perhaps to relevance and weight, which are more matters of logic and common sense and this at times came through in quite a few of the answers. However, it was routinely noted in the answers that questions of admissibility may still turn on the relevance that a particular item of evidence has in the circumstances – as with the rule against hearsay for example. It followed from this that before one could address the legal question of admissibility, one may have had to clarify the logical or common sense question of relevance, and only then, at times its weight as well. These are very fluid yet related topics and the students showed diverse approaches to addressing them in their discussions.

The third question raised issues of competency and compellability of witnesses. One might begin an answer with reference to the general rule that all persons are competent and that all competent witnesses are compellable albeit subject to qualifications for spouses. Inasmuch as there has been an evolution of the common law in this regard it could be remarked many of the original reasons for the exclusion of a spouse's evidence have now been rejected. On the facts of the problem there was a specific issue in relation to competence given the intervention of a psychiatrist; albeit the nature of that consultation was not disclosed. This opened the way for some discussion. On the facts of the problem though, given that the prosecution appeared willing to call the psychiatrist's patient to testify, it suggests competence although if it were to be assumed that there was

a genuine question in this regard it would be decided by a judge at a voir dire: *R v Deakin*. Reference would have to be made to the statutory provisions and thus *section 3B* of the Evidence Ordinance providing that the only persons who are not competent are those of unsound mind who appear incapable of receiving just impressions of the facts. Both limbs in the test would have to pertain before our prosecution witness would be disqualified. To call such a person for the prosecution a judge would have to be satisfied beyond reasonable doubt that the person is competent and it is likely that if the person were to testify for the defence that the prosecution would then have to prove incompetence. *Section 6* of the Evidence Ordinance is essentially read to refer back to the common law for guidance on the true position. In their answers students should have then assumed competency by this point and continued with their analysis. Turning to whether the person could be compelled to give evidence is another matter and in general the person would be compellable if she may lawfully be required by the court under the sanction of a penalty for contempt to give evidence as a witness: *section 34(1).* Usually competence and compellability go together and that would be the starting point for the situation in the problem; namely to recognize what would be a defendant's right to obtain the attendance of and examine all witnesses under article 11(2)(e) of the Bill of Rights. The common law position was set out in *Hoskyn* where the House of Lords held that a spouse is generally not compellable as a witness for the prosecution. While Lord Wilberforce penned the majority opinion Lord Edmund-Davies' dissent has come to have more force overtime and since 1979. The dissent and a reform movement over the recent decades have seen legislative changes with spouses now being compellable in limited cases and in Hong Kong since 2003 with amendments to *section 57* of the Criminal Procedure Ordinance. Thus, under *section 57 (1) and (2),* the person in question would be a competent witness for either the prosecution or the defence. However, given the nature of the charge she would also be compellable for the prosecution as the offence is a specified offence under *section 57(4)* of the Criminal Procedure Ordinance with regard to the one charge of indecent assault involving the 14 year old and assuming she was a child of the family. The point about familial relationship was often not expressly dealt with in the answers and yet this was a factor in the analysis. It would be open to such a person to apply for an exemption under *section 57A* from giving evidence.

The fourth question could have begun with a brief explanation of the term 'legal burden' in contrast to an 'evidential burden' and how they normally exist concurrently. The general rule too may have usefully been noted from *Woolmington* although the question asks for a discussion of *article 87* of the Basic Law. Some students noted for completeness that the article is complemented by *article 11(2)* of the Bill of Rights as well. There were a wide range of key arguments in support of validating the burden which the students could have referred to including: on the presumption of innocence itself both in the legislation and at common law; deference to the will of the Legislative Council; regulatory versus criminal offences; the essential elements of an offence versus defences to it; peculiar knowledge; the penalties for the offence; and *section 94A* of the Criminal Procedure Ordinance. Taking them briefly in turn, the most important case on the topic is *AGHK v Lee Kwong Kut* which upheld and rejected government appeals in respect of three defendants under two different offence sections. Thus the case supports arguments on either side of the topic. Other English authority on this topic includes *Sheldrake* which was decided after and refers very briefly to *Lee Kwong Kut* as well.

Sheldrake too was a conjoined appeal along with *AGs Ref No 4 of 2002* which again yielded a divided result with one offence section being 'read down' to an evidential burden to validate it. Both *Lee Kwong Kut* and *Sheldrake* rehearse some of the other main arguments noted above and which the best students in their answers developed. Deferring to the will of the Legislative Council of course parallels the notion of Parliamentary supremacy and there is ample support for this position in numerous cases including *Lee Kwong Kut.* The regulatory versus criminal offence division is one that appears in both the commentary and the case law with cases such as *Lambert*. In *Lambert***,** Lord Clyde validated the distinction and illustrated it with reference to license cases etc. Some commentators find the distinction unhelpful though in that regulatory offences may still entail serious risk of harm or loss of life despite lacking the moral quality of a true criminal offence and thus arguably not meriting separate treatment. Focusing upon the essential elements of an offence versus a defence to the offence offers another perspective on the problem. Once again this came up in *Lee Kwong Kut* where Lord Woolf said that such reverse burdens were more acceptable so long as the prosecution retained the responsibility to prove all essential elements. 'Peculiarity' as a factor, and as to when a fact is within a defendant's own knowledge as a further justification for imposing a burden upon the defendant as a reverse onus, also arises occasionally. There are reasons of practicality that also support this justification. Penalty too plays a role in that the greater the penalty is the heavier will be the burden upon the prosecution to justify the reverse onus. Various courts and judges have been influenced by the severity of the penalty. Lastly, *section 94A* of the Criminal Procedure Ordinance clearly allows for the imposition of a burden upon the defendant when there is a negative averment and this too may thus detract from the presumption of innocence. In summary, compatibility in imposing a legal burden upon the defendant with *article 87* of the Basic Law may be demonstrated on numerous bases and while no one canvassed all of these points many students were able to draw out several of them for discussion.

The fifth and last question mainly concerned identification evidence and whether the evidence of one witness can be supported by the others. It also concerns similar fact evidence. It is important to have the identification supported because of the dangers associated with identification evidence and the need for directions to be given by the judge in accordance with *Turnbull*. There is the separate issue of child evidence which was often noted by students as well. Pursuant to *Turnbull* a judge must warn a jury of the special need for caution before convicting on identification evidence. A judge would be expected to tell a jury the reason for such warning as well. Students made some reference to the risks that a witness may be mistaken in their identification and yet can be very convincing. A judge should direct the jury to closely examine all of the circumstances in which the identification was made and even that the judge should point out the weaknesses in the identifications as well. A judge should also direct a jury to consider whether any other evidence supports the identification evidence. Some of the evidence potentially put forward involves evidence of bad character and this too could be commented upon. Students referred to the tests for exclusion of evidence and whether or not the probative value of the evidence would exceed its prejudicial value and the common law test in this regard under cases such as *Sang*. Reference was made by some to the 'defendant's shield' and *section 54(1)(f)* of the Criminal Procedure Ordinance, and paragraph (i) on similar fact evidence and how it applied. In this regard students

compared and contrasted similarities and dissimilarities and cases such as *Makin*, *DPP v P* and *Zabed Ali.* The possible evidence of contamination or collusion was also an issues to be touched on: *R v H* and jury instructions as well.