PCLL Conversion Examination
January 2016
Examiner's Comments
Evidence

General Answer Notes – examiners were asked to consider all answers in their wider context. Not all students who gained pass marks managed to note all the authorities cited (although any that came close, *ceteris paribus*, were given very high marks). The notes here are quite detailed but so long as the answers given clearly identified the correct topic, and did not contain excursions into irrelevance, (the two most common features of failed scripts other than not answering the question *at all*), generally a pass mark was awarded.

Question 1 - Vulnerable Witnesses (Syllabus Section 7)

Somewhat surprisingly, this question was answered poorly by many students who clearly had no (or very limited) knowledge of the statutory provisions in place to deal with this topic.

(i) Witnesses in Fear/ Child witnesses - Video recorded evidence - **Section 79C** of the Criminal Procedure Ordinance provides that the court may admit into evidence a video recording of an interview between an adult (as defined) and a child in respect of limited stipulated offences. In *Chim Hon Man v. HKSAR* (1999) 2 HKCFAR 145 (CFA) Sir Anthony Mason said of the effect of the provision (page 156E) ... *a statement made by the child in the recording shall have the same effect as if given in oral testimony.*

By **section 79B CPO** – (1) A witness 'in fear' means a witness whom the court hearing the evidence is satisfied, on reasonable grounds, is apprehensive as to the safety of himself or any member of his family if he gives evidence. (2) Where a child, other than the defendant, is to give evidence, or be examined on video recorded evidence given under section 79C, the court may, on application or on its own motion, permit the child to give evidence or be examined by way of a live television link, subject

Where a witness in fear is to give evidence in proceedings in respect of any offence, the court may, on application or on its own motion, permit the person to give evidence by way of **a live television link**, subject to such conditions as the court considers appropriate in the circumstances.

Section 79B(2) of the Criminal Procedure Ordinance provides that the court may in respect of the same limited stipulated offences, permit a child to give evidence or be examined by way of a live television link. Where a child does give evidence, the judge bears the central responsibility for ensuring that the evidence is handled sensitively and with adequate preparation.

(ii) Any other adult victims or who have gone through some form of ordeal following criminal conduct – see *HKSAR v Shamsal Hoque* [2014] 6 HKC 395 where he court gave a very strong statement on the need to afford assistance to witnesses through the use of

screens to permit witnesses to testify out of sight of both the accused and the public gallery. In this case the court recognises that the interests of a fair trial remained paramount and that any departure from principles of open justice had to be appropriately justified.

Question 2 - Character Evidence (Syllabus Section 6)

This is a relatively simple question on section 54(1)(f)(ii) CPO – which clearly sets out the answer (more or less) in full. In short, (i) in the absence of the jury prosecuting counsel should tell the judge that he wishes to raise a matter of law (ii) prosecuting counsel will then argue that by s, 54(1)(f)(ii) "he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution". (iii) the judge's options are therefore either to allow the Prosecution to adduce D's previous convictions for possession of DD or to discharge the jury and order a re-trial (on the facts of this example, probably with a costs order against counsel personally). It is entirely a matter for the trial judge. But given his/her residual discretion to ensure a 'fair trial' for D - and in all likelihood he has a negligent Defence counsel - it is probably more likely a judge would discharge the jury (***credit to any student who points this out***). That said, if students simply say that D's 'Shield' would be lost and the Prosecution would be allowed to put his previous convictions for possession before the jury – this is 'strictly' correct.

Generally - Section 54(1)(f) of the Criminal Procedure Ordinance limits the liability of the accused to be questioned (and if questioned, to answer such questions) concerning some (but not all) matters relating to the credit of the accused. The general rule is that the accused may not be cross-examined as to matters relating to his character including his previous convictions - although accepted to be relevant, such cross-examination was considered contrary to policy. Section 54(1)(f) of the Criminal Procedure Ordinance also provides as follows:

(f) a person charged and called as witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other that wherewith he has been charged or is of bad character, unless -

(i) the proof that he has committed or been convicted of such offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or 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; or

(iii) he has given evidence against any other person charged in the same proceedings.

The 'shield' of the accused - The accused has what is often described as a 'shield' against suggestions in cross-examination by the prosecution that he is of bad character. The basis for this is that knowledge by the jury of the previous conviction or bad character of the accused may prejudice a fair trial. If the proposed questions in cross-examination come within any of the three provisos to the general rule set out in section 54(1)(f), the accused is at risk of being cross-examined regarding four topics which are often collectively referred to as 'bad character'. The first topic is his previous convictions. The second is whether he has been charged with any offence other than that which is the subject matter of the trial. The third is whether he committed any offence irrespective of whether he has been either convicted or charged with that offence. An example of this third category is where the accused has previously asked a court to take into consideration one or a number of offences. When offences are 'taken into consideration', it is not necessary that the accused had been charged with them. The fourth topic is bad character generally. As mentioned above, the protection afforded by section 54(1)(f) relates to cross-examination concerning the matters which are often , collectively described as 'bad character'

Cross-examination as to character: section 54(1)(f)(ii)

The second manner in which the accused may lose the protection afforded him by section 54(l)(f) is contained in section 54(l)(f)(ii). This may occur in two ways: (1) the accused asserts his good character either by means of cross examination
of witnesses for the prosecution or by giving evidence of his own good character; or (2) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.

Assertion by the accused of his own good character - Where the accused asserts his good character either by way of cross examination of prosecution witnesses or by giving evidence he renders himself liable to cross-examination as to his bad character. Generally, if the assertion by either of these means is done deliberately then it is likely that the trial judge will permit such cross-examination. *R v Redd (1922) 17 Cr App R 36; R v Winfield (1939) 27 Cr App R 139*

<u>Question 3 - Similar Fact Evidence (Syllabus Section 15)</u>

This question requires a general discussion of similar fact evidence. In short - 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.* In my view, *DDP v P* **must** be cited and discussed for a competent answer.

The general rule is that evidence of the defendant's disposition towards wrongdoing, or of specific acts of misconduct on his part, is inadmissible to prove his guilt. This is because it would be extremely prejudicial. Clearly just because someone has been a thief in the past does not necessarily mean that they have committed the particular theft that they currently stand trial for, but the jury are likely to be prejudiced if they know about previous thefts.

On the other hand, if someone always employed a particular technique, and the current offence bore all the particular hallmarks of previous ones committed by this defendant it might seem unjust that the jury should not know about his/her previous behaviour. For this reason, **exceptionally**, evidence of disposition towards wrongdoing, or of specific acts of misconduct are admissible as relevant to the question of guilt on the current charge. This evidence is known as **"similar fact evidence"**, a term that has been adopted because the question of admissibility typically arose where an offence had been committed in an idiosyncratic way, and where previous behaviour by the defendant showed a propensity to indulge in similar behaviour. But the problem is not confined to such situations and can also arise, for example, where articles of an incriminating nature are found in the defendant's possession, or where the defendant admits interests, such as paedophilia, which may be relevant to the charge alleged against him.

Example (i) the Similar Fact evidence to prove Alan was in the neighbourhood would almost certainly be admitted.

Example (ii) is based on the facts of *Drysdale* - the Similar Fact evidence was not admitted. Brian (did) successfully appeal against his conviction. The court held that evidence of the earlier assaults on A was admissible to show a specific antipathy towards her, but evidence of the other matters amounted to no more than evidence of a general disposition to violence, and had been improperly admitted - ***R* v. *Drysdale* (1969) 66 WWR 664 –** it does not matter if the student does not reference this case provided the argument is correct. Of course extra marks should be given for citing ***Drysdale***

Generally, in every case it is necessary to try to assess the probative value of the disputed item of evidence and to weigh this value against any danger that the jury will misuse the evidence. It is this misuse of evidence by the jury that is referred to when courts speak of the "prejudicial effect" of an item of similar fact evidence. In a colloquial sense, all sound prosecution evidence is "prejudicial" to the defendant because it makes a conviction more likely. But the prejudice with which the courts are concerned is the improper prejudice that might arise because of misuse of the evidence.

In order to decide whether proposed similar fact evidence is positively probative in regard to the crime charged, it is first necessary to identify the issue to which the evidence is directed. It might be put forward, for example, to support an identification, to prove intention, or to rebut a possible defence of accident or innocent association. Whether the evidence is or is not positively probative is governed by the issue to which it is related, not some quality which the evidence is thought to possess in itself - *R v. Lunt (1986) 85 Cr App R 241*.

The leading case on similar fact evidence is *DPP v. P [1991] 2 AC 447* and in this case the key concept of relevance was re-emphasised by the House of Lords. The defendant was convicted of offences of rape and incest in respect of each of his two daughters, referred to as B and S. At the trial the defence made an application that the counts relating to daughter B should be tried separately from daughter S. This application was refused and the trial judge held that the evidence of B was admissible as similar fact evidence in relation to the count concerning S.

The defence successfully appealed against this decision and the appeal court came to the conclusion that the similar fact doctrine required some feature of similarity beyond what had been described as "the incestuous father's stock in trade". The appeal was successful on the grounds that there was no **"striking similarity"** beyond evidence that he had abused more than one young member of his family.

Since *DPP v. P,* the basic propositions regarding the admission of similar fact evidence can be distilled as these:

(i) The admission of similar fact evidence is exceptional and requires a strong degree of probative force;

(ii) Sufficient probative force may be gained where the evidence as to the similar fact and the facts in issue display such a close or striking similarity or such an underlying unity that, if accepted, it would be inexplicable, in common sense, on grounds of coincidence but this is not an essential element unless identification is in issue.

(iii) Where identification is in issue there needs to be some kind of hall-mark by the defendant to allow evidence of previous wrong doing by that particular defendant to be admissible. Offences can be identical without being strikingly similar. (see below)

(iv) Where there is no "striking similarity", evidence of previous misconduct, or of the possession of incriminating articles, may be admitted because it is of particular relevance not derived from such a striking similarity. It has been of particular relevance, for example, in proving a particular and essential part of the prosecution case denied by the accused; in establishing motive and in disproving a defence of innocent association, especially on cases involving the possession of drugs and of charges of a sexual nature.

Question 4 - Previous Consistent Statements (Syllabus Section 8)

This is potentially a wide topic with a wide range of authorities, but students should (I suggest as a minimum) be able to at least correctly describe the general rule and note the four main exceptions if not explain them in any detail.

Generally, regarding 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 general rule, a witness is not permitted, during the course of 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 in order 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

Such statements may also be hearsay because, if they are admitted, they may be relied upon as evidence of the matters stated. As such, the above are also generally regarded as being exceptions to the hearsay rule.

(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 in order 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.*

What constitutes a 'complaint' - The complaint must relate to the sexual character of the act and arise in a manner which supports the credibility of the complainant and

evidence would be inadmissible if it was not capable of meeting those objectives.' If there is an issue as to whether what was said amounts to a complaint then the trial judge has to determine as a matter of law whether the words are capable of amounting to a complaint.

What is reasonable is a question of fact and degree for the judge to determine. If a considerable time elapses between offence and complaint, the complaint is inadmissible. The assumption that a victim of a sexual assault (particularly a child victim) will make a complaint at the first opportunity to do so is of doubtful validity. The determinant of this issue has to do with the circumstances of and any explanation for delay. In *R v Valentine [1996] 2 Cr App R 213*, the court set out the modern approach to the issue as follows:

> "The complaint has to be made within a reasonable time of the alleged offence and on the first occasion that reasonably offers itself for the complainant concerned to make the complaint that was made in the terms in which it was made. We now have a greater understanding that those who are the victims of sexual offences, be they male or female, often need time before they can bring themselves to tell what has been done to them; that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may feel it quite impossible to tell their parents or members of their family." - *Valentine was followed in HKSAR v Hung Wai-tak [2000] 4 HKC 641 where the foregoing passage was described by Stuart-Moore ACJHC as the 'modern and proper approach to evidence of recent complaint'.*

In relation to complaints by children, in determining whether the complaint is at the first opportunity which reasonably presents itself, there was a body of scientific opinion as well as common sense which suggested many reasons why children would be reluctant to report sexual abuse and consequently why they might report it at all or might do so only after considerable delay such as love or fear of the offender, a feeling of shame at what has occurred, fear of the consequence for themselves or the family unit, a perception that they would not be believed and a reluctance to talk about sexual matters. Thus, the court should consider the circumstances of each case and in particular: (1) the age of the complainant; (2) his or her relationship with the offender; (3) what, if anything, was alleged to have been said by the offender to the child about non-disclosure; and (4) the person to whom the complaint was made.

(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 person 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 in time 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*

> " If the credit of a witness is impugned as to some material fact to which he deposes upon the ground that his account is a late invention or has been lately devised or reconstructed, even though not with conscious dishonesty, that makes admissible a statement to the same effect as the account he gave as a witness if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction. But, inasmuch as the rule forms a definite exception to the general principle excluding statements made out of court and admits a possibly self-serving statement made by a witness, great care is called for in applying it. The judge at the trial must determine for himself upon the conduct of the trial before him whether a case for applying the rule of evidence has arisen and, from the nature of the matter, if there be an appeal, great weight should be given to his opinion by the appellate court. It is evident, however, that the judge at the trial must exercise care in assuring himself not only that the account given by the witness in his testimony is attacked on the ground of recent invention or reconstruction or that a foundation for such an attack has been laid by the party but also that the contents of the statement are in fact to the like effect as his account given in his evidence and that having regard to the time and circumstances in which it was made it rationally tends to answer the attack."

In the same case, Menzies J held (page 490) that that attack on the veracity of the witness need not come via cross-examination but may come by 'eliciting evidence of the fabrication or in some other positive way'. The passage from the judgment of Dixon CJ was endorsed in *R v Wong Bing-jai & Anor Cr App 12/83.*

(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 5 - Hearsay Evidence (Syllabus Section 10)

Definition of hearsay – '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.

Obviously the matter can become very confusing when one considers all of the many exceptions to the general rule against hearsay. The elements of what is capable of constituting hearsay will be identical in both criminal and civil proceedings although the rules on the admissibility of hearsay evidence are very different in civil and criminal proceedings.

Q&A

1. In an action for slander brought by C against D, C calls X who says in the witness box "I heard D say to the meeting "C is a thief - he stole £10 from the charity". C relies on this evidence not to prove the truth of the assertion that C is a thief but to prove that the words of which he complains were spoken.

Answer: Correct - the evidence is not hearsay – this is the simple, classic, definition of an exception to the hearsay rule.

2. In the same action, D calls Z who says in the witness box "I can verify that C is indeed a thief. Y told me only last week that he saw C with his fingers in the till".

Answer: the evidence is hearsay D relies on this evidence to support his defence of justification. For that purpose, the out of court statement (i.e. the statement made by Y that he saw C with his fingers in the till) is being put forward as evidence of the truth of that statement. It is therefore hearsay**.**

3. The Manageress of a sauna and massage parlour was charged with acting in the management of a brothel. To prove that premises were used as a brothel it is sufficient to prove that more than one woman offers sexual services. It does not matter whether the statement that the services will be provided is true or not. It is the fact that the offer is made that is important. Plain clothes PCs pretending to be customers gave evidence in court for the Prosecution that they had been offered various sexual services.

Answer: the evidence is not hearsay - the evidence of these PC's was original evidence not hearsay evidence because the very fact that the offers were made was relevant to a fact in issue - whether the premises was lawfully being used as a massage parlour and sauna or unlawfully as a brothel - *Woodhouse* v. *Hall* (1980) 72 Cr App R 39

4. The making of the statement is relevant to the state of mind of the maker which in itself is a fact in issue. The fact in issue is whether, at the time X made his will, X had testamentary capacity. Y wants to call evidence that at the time X made the will X went around dressed as Napoleon, shouting "I am Napoleon".

Answer: the evidence is not hearsay - The statement would be hearsay only in the (unlikely) event that it is used to show that the statement was true and that X was in fact Napoleon. The evidence Y wants to call is therefore admissible as original evidence if used to show that X went around saying that he was Napoleon.

5. An implied assertion is a statement or conduct from which it is possible to infer a particular fact. Police suspected K of dealing in drugs. They searched his flat but found only small quantities of drugs on the premises. However, while they conducted the search the police took ten telephone calls from people asking for K to sell them drugs and in two cases asking for "the usual quantity". The trial judge** considered the evidence of a request for drugs to be relevant to the question whether K was a drug dealer and was therefore admissible. Is this correct?

Answer: Incorrect - **the evidence is hearsay** - the majority of the House of Lords disagreed with the trial judge. The view taken by the majority, as expressed by Lord Bridge, was this. The words spoken by the callers revealed their state of mind. As the callers themselves were not called to give evidence, the police officers could give evidence of the callers' requests if the purpose of adducing that evidence was to show the callers' state of mind. However, their state of mind was irrelevant to the fact in issue. The only way in which the callers' requests could be relevant was as an implicit statement that K was a supplier. When adduced for that purpose, Lord Bridge considered the evidence to be hearsay and (in criminal proceedings) inadmissible. K was therefore acquitted. The leading authority which states that implied assertions are capable of amounting to hearsay is *R* v. *Kearley*, [1992] 2 AC 228.

**This case was upheld by the Court of Appeal and two Law Lords and was only dismissed by a majority in the Lords.