

**PCLL Conversion Examination
January 2018
Examiner's Comments
Evidence**

Question 1

This question required candidates to address some of the arguments for and against the abolition of the rule against hearsay. Whilst some of the candidates answered this question well and were able to identify the relevant issues on both sides of the argument, many candidates merely stated the general rule, discussed its inadequacies briefly before stating the exceptions to the rule. A better approach would have been to consider the possible reasons for and against the abolishment of the rule and then to pick a position whilst explaining the rationale for that position. Candidates who advocated for the abolishment of the rule suggested that the strict application of the rule could at times lead to injustice; that an accused was entitled to utilize all the evidence available in defending the charge; that the present rules and exceptions were often complex and confusing and that strict application of the rule could at times lead to weaker evidence being held admissible and the stronger evidence being held inadmissible. Candidates who favored maintaining the rule argued that hearsay evidence was often not the best evidence as it was not delivered on oath. Also, unlike evidence given in court, it lacked solemnity and was not given under observation of an arbiter. Other reasons included the fact that admission of hearsay in the prosecution's case was antithetic to an accused's right to confront the witnesses against him and that not all hearsay evidence was excluded as there were a number of exceptions to the rule.

Question 2

This question was 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 better 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

While most candidates were able to identify the major issue regarding the loss of the shield, very few went beyond that. This question required the candidates to first discuss the fact that since Stephen had chosen to testify on his own behalf, he could no longer claim the privilege against self-incrimination. However, s 54(1)(f) of the CPO gave him a "shield" to protect him from being cross-examined on matters relating to character including previous convictions. Candidates were then expected to discuss one of the provisions in s 54(1)(f)(ii) which states that if a defendant asserts his own good character, he may lose his shield. Candidates had to consider whether a judge would hold that

Stephen had indeed put his character into issue by referring to his involvement with the children's hospital. This is a matter of law and any cross-examination on previous convictions is always at the discretion of the judge. After considering cases such as *R v Ferguson* and *R v Baker*, the majority of the candidates concluded that Stephen would most likely lose his shield. However, very few candidates went examined the factors that a judge would take into consideration in the exercise of his discretion to exclude the questioning. Also, few candidates mentioned that even if a judge were to hold that cross-examination as to his previous convictions was permissible, the cross-examination on bad character would only go to credit and that any questioning allowed would not be prolonged or extensive.

Question 4

The majority of the candidates did not answer this question satisfactorily. On the whole, the answers in part (a) were better but most candidates missed the main issues in both parts. In part (a), most candidates were able to identify the fact that witnesses can refresh their memory by looking at their witness statement before going into court and some even stated the rationale, namely, that testimony in a witness box 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. However, the point that most candidates missed was that it is very important that there is no coaching of a witness or for the witnesses to be given their statements in circumstances which would enable them to compare with one another what each has said. In this scenario, it could be argued that the prosecutor ought not to have shown each witness both statements. This would not necessarily mean that the witnesses' evidence would become inadmissible but the prosecutor should have informed the defence about this situation and the defence counsel could then referred to the matter in cross examination and in his submissions. Even fewer candidates were able to identify the relevant issues in part (b) and instead focused their discussion on hearsay. The question required an examination of the general rule on previous consistent statements. The candidates who did well discussed the application and the rationale of the rule. However, they also explained that there are a number of exceptions to this rule; one being statements to rebut claims of recent fabrication. Citing cases such as *R v Oyesiku*, they suggested that since the prosecutor had alleged that Erica's account was a recent fabrication, Edwina's evidence could be admitted.

Question 5

There was considerable variance in the answers for this question. Whilst most candidates were able to isolate the issue of identification evidence and 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. For part (a), the more successful candidates stated that even though Nigel was a police officer, the judge would still need to instruct the jury that Nigel's evidence could be mistaken because the alley was dark and Nigel was 8 metres away from Duncan at the time of the identification. However, the fact that Duncan had been under the observation of Nigel for some time was a factor that had to be considered by the jury. Also, a failure to give the Turnbull

warning could lead to the conviction being overturned. For part (b), some of the candidates pointed out that poor and unsupported evidence such as a “fleeting glance” should be withdrawn from the jury. However, a few candidates mentioned that in some cases, the identification of one witness could support the identification by another. Therefore, John’s identification could be supported by Nigel’s identification of Duncan even though several honest witnesses could still be mistaken.