

PCLL Conversion Examination
June 2015
Examiner's Comments
Criminal Procedure

Introduction

I was generally disappointed at the standard of the papers presented for marking for this examination. There were few really good papers, but I would classify the majority of the papers of those who passed as mediocre.

The long form questions in the paper invariably contain a question relating to venue of trial. I assume that students have access past papers, so such a question should not be a surprise to them. The point is that the method for approaching this question is always the same i.e. what is the likely sentence after trial? Which level of court is empowered to impose such a sentence?

Part A

Question 1.1

For this question students were expected to decide on the appropriate venue for the trial of this case, having regard to the 2nd schedule of the Magistrates Ordinance, and the likely sentence that the defendant would receive if he was convicted after trial. Taking the schedule alone, all three first instance courts had jurisdiction. To answer it correctly required students to have a knowledge of drug trafficking tariff cases. Few students seemed to appreciate that the tariff depends on the nature of the drug, and that *Lau Tak Ming* is the tariff for trafficking in heroin up to 600grams [with *Abdullah* providing tariffs for larger quantities]. The drug here was Ketamine, and the tariff case was *SJ v. Hii Siew Cheng*.

As with questions concerning jurisdiction in previous examinations, a number of students considered that because of the maximum sentence the appropriate trial court was the Court of First Instance; others chose the Magistrates Court. The correct choice was the District Court because the likely sentence after trial would exceed 2 years but not 7 years.

Not everyone who selected the District Court as the proper venue mentioned the transfer procedure as provided for in section 88 of the Magistrates Ordinance.

Question 1.2

This question required the application of a little bit of common sense. There were two conflicting admissions. The verbal admission amounted to an admission of possession of DD, which was the defendant's case, whilst the second admission during the interview at the police station, was an admission to possessing the DD for the purpose of sharing with friends at a party, which constitutes trafficking. The common sense aspect required students to appreciate that the first admission need not be challenged, and that only the second one required their full consideration. The question required references to the Secretary for Security's Rules and Directions for the Taking of Statements and the Questioning of Suspects. The first issue was whether that admission was voluntary or if, because of oppression in refusing to allow the defendant to have access to his medication, it was rendered involuntary. Even if it was concluded that the admission was voluntary students should have also mentioned the trial judge's residual discretion. The mode of dealing with the issue in judge alone trials is by way of the alternative procedure, which few students recalled.

Overall, this question was poorly answered.

Question 1.3

This question was a straight-forward one but overall the responses were unimpressive. The defendant had previously been sentenced on two occasions to DATC, and thus a third such sentence was unlikely, particularly as the charge was one of trafficking in DD rather than simple possession, as had been the position in the previous two cases. *Lau Tak Ming* was mentioned liberally once again, providing a tariff for heroin of 5 to 8 years for the relevant quantity of narcotic. *Hii Siew Cheng*, on the other hand, provides a range of 4 to 6 years. So the simple answer should have been that DATC was unlikely and the likely sentence was one of imprisonment for 4 to 6 years. Many students saw fit to mention S190A of the CPO, which is irrelevant simply because the offence of trafficking in DD is an excepted offence.

Question 1.4

This question required a general summary of the procedure for appealing against conviction *and* sentence from the District Court to the Court of Appeal. This part was, in general terms, reasonably answered.

The question also required students to deal with the issue of the admissibility of fresh evidence on appeal, in accordance with the very specific test contained in S83V. Many students forgot to mention that the notice of motion should also contain an

explanation as to why the evidence was not presented at trial.

The majority of students passed this question.

Part B

Question 2

The answers to this question were generally reasonable, although a few students confused the no case submission with the application for discharge under section 16 of the CPO, following a paper committal.

This question invited an analysis of the tests prescribed in the well-known case of *Galbraith*, and an indication that the result of a successful application was that the defendant would be acquitted. Whilst the acquittal would also entitle the defendant to apply for his legal costs, most students missed this point.

Question 3

This question required a discussion of the provisions for vulnerable witnesses in part IIIA of the CPO, particularly as they relate to children [as opposed to witnesses in fear generally and mentally incapacitated witnesses]. There was a need to distinguish between offences of sexual assault as compared with offences concerning physical abuse, where the maximum ages allowing for the witness to testify by videolink differ. A few students only referred to section 79F, which provides in cases of serious sexual abuse, for the DPP to apply for a straight transfer of the case to the Court of First Instance without affording the accused the opportunity of electing a preliminary inquiry which might facilitate him insisting on the prosecution calling the vulnerable witness to testify in committal proceedings [as well as the trial].

This question generally attracted reasonable answers.

Question 4

Many students had not carefully read this question, and embarked on a discussion concerning costs in criminal cases.

The question required students to deal with various provisions relating to compensation and restitution, including section 73 of the CPO, section 98 of the Magistrates Ordinance, and section 30 of the Theft Ordinance [restitution].

Conclusion

As I said at the outset, what is disappointing is that many students have obviously attempted this examination with little or no preparation and I emphasise once again apart from studying the prescribed material, the benefits to be gained from perusal of past examination papers. This paper was far from difficult, if students had covered the course material.