PCLL Conversion Examination
June 2015
Examiner's Comments
Evidence

Question 1 was concerned with the three 'classic' approaches to 'similar fact' evidence. Some candidates clearly struggled to identify the topic at all and did very badly as a consequence. However, most students who recognised the question area covered this quite well. It was, in my view, the most difficult question on the exam paper but I was quite encouraged that very many students were able to present answers that achieved solid marks and referenced the (two) central authorities in this area.

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. These two cases had to be cited and discussed for a competent answer. Outstanding students also mentioned *HKSAR v Wong Tin Chuk* CACC 761 of 1997 and *R v Musquera* [1999] Crim L R 857. In relation to the issue of identification, see *R v Brown* [1997] Crim L R 502 and *R v John W* [1998] 2 Cr App R. 289.

The question presents the three classic 'similar fact' situations in the leading case of *DPP v P* [1991] 2 AC 447; 93 Cr App R 267. Those students who correctly identifed the question concerns 'similar fact' evidence, began by discussing this generally before going on to explain that it is a matter of law for the judge to decide whether or not such evidence is admissible.

In Hong Kong the leading judgment is *HKSAR v Zabed Ali* [2003] 2 HKLRD 849. where the CFA said it was necessary for the jury to be given an adequate direction in respect of such evidence. If admitted, the jury should be directed as to the matter in issue to which such evidence might be relevant and how it might be relevant.

Re Q1(i) : This scenario is raised in *Makin v Attorney General for New South Wales* [1894] AC 57 PC and *R v Smith* 11 Cr App R 229)

Re Q1(ii) Where there is no direct evidence that the defendant committed the offence charged but there is independent evidence that he committed other similar offences students had to look at *R v Straffen* 36 Cr App R 132. Re the bad character element, the jury should be told that the fact that the accused has a bad character (as shown by such evidence re B & C) does not mean D is guilty of the offence charged. See *HKSAR v Zabed Ali* (supra) The judge should point out to the jury that the evidence is admitted before them only because it goes beyond mere evidence of disposition, and should tell them that if they think it merely contains evidence of disposition they should not take any notice of it: *R v Rance & Herron* (1976) 62 Cr App R 118, 122 interpreting Lord Hailsham in *Boardman* [1975] AC 421, 453; though this may not always be necessary.

Re Q1(iii): The jury/tribunal of fact must consider: a) are they sure that W, X and Y did not put their heads together to make false accusations against the defendant? See *R v Ryder* 98 Cr App R 242 and *R v H* [1995] 2 AC 737. If not sure of this, the evidence of X

and Y is of no value, and should be ignored. If a jury are sure that there was no collaboration of that kind, they would be entitled to consider the evidence of X and Y in deciding whether W was speaking the truth. b) Is it reasonably possible that all three persons, (W, X & Y), independently making the similar accusations, could all be either lying or mistaken? If the answer is no and it is incredible, then a jury may well be satisfied that W was speaking the truth.

Question 2 was, in my view a much more straightforward question requiring simple factual answers. **Kieran** Francesca's statement, as this would be a murder/manslaughter case, could be a dying declaration - apply the various elements as set out in *Bedingfield* and *Waugh.* It appears that this statement may well satisfy the test. **Chloe** - In this situation Chloe should be asked to perform a dock ID to trigger the previous consistent statement exception rule, i.e. she would be allowed to adduce her previous statement relating to the prior identification (i.e. the ID parade) which can then be given in evidence (*Christie*). However, if Chloe cannot even do a dock ID then the Prosecution will have to call the police officer to give evidence about what happened at ID parade as suggested in *Osbourne* and *Virtue*. This approach should be criticised as it is essentially hearsay evidence and has been frowned on in *HKSAR v Lam Wai Leung.* On the other hand, is this simply a common sense approach to a rather awkward hearsay problem. One could argue that there is no need the regard to evidence as being unreliable so is any harm really done by admitting it? **John Receptionist** - Need to look at the various requirements of the documentary records compiled by a person under a duty; hearsay exception in s.22 Evidence Ordinance. It appears this evidence will be admissible provided all reasonable steps have been taken to find the receptionist. **Sidney** - The only possible route to admissibility is *res gestae*. It fits into the first category of "statements contemporaneous to an emotionally overpowering event" - *Andrews*. The students should go through the 4 part test. However it should be noted that it can be very hard to prove *res gestae* (for the reasons that occurred in *Teper v R*) and the Prosecution may struggle to get this evidence admitted.

Question 3 concerned ‘Recent Complaint’ in a sex case where students who understood that there were ‘special rules’ to be applied, did quite well. On the other hand, it was somewhat surprising to find that far too many students had no idea about this and too many answers contained unconvincing waffle.

‘Recent Complaint’ is a well-known common law exception to the hearsay rule applied in sex cases and cases involving young children. As such, where a complaint was made at the first reasonable opportunity after the offence, the evidence of the person to whom it was made of the fact that it was made and as to its terms is admissible. Such evidence of recent complaint is admissible not as evidence of the facts complained of but only as evidence of the consistency of the complaint‘s conduct with his or her testimony. In short, such evidence is only relevant to the credibility of the complainant and would serve to buttress it. See *White v The Queen* [1999] 1 AC 210 at 215F-H. Evidence of recent complaint is admissible only as evidence of the consistency of the complainant's conduct, not for the purpose of negativing consent. In *Leung Chi Keung v HKSAR* (2004) 7 HKCFAR 526 at 537 H to 538 B, paragraph 21, Li CJ: In cases where consent has been in issue, there are statements which can be read as suggesting that evidence of recent

complaint is also admissible for the purpose of negativing consent. But it should be regarded as settled that this does not afford a second and independent ground of admissibility. Where consent is an issue, evidence of recent complaint is admitted not as evidence of whether there was consent. Its purpose is merely to show consistency in the complainant's evidence that would include any evidence as to lack of consent. See *Kilby v The Queen* (1972-3) 129 CLR 460 at 469

Re the second part of the question, the answer was blindingly simple and far too many students simply had no idea about this. In short, if the complaint is one to the *emergency services* it may have been recorded, and the recording itself may constitute primary evidence of the complainant's condition.

Question 4 concerned the topic of good/bad character generally and this question was done quite well overall. **Bonnie** - She has prior good character. But she has admitted an offence during the course of the proceedings. *Aziz* suggests that a modified *Vye* direction should be given – i.e. both limbs of the direction, but with some qualification added to take account of the guilty plea. However, it should be noted that there have been inconsistent approaches to this exact situation in the UK - *Teasdale* (full *Vye* direction given) and *Challenger* (no direction permitted) may be mentioned and contrasted. But in Hong Kong guidance as to the ambit of the discretion of the judge differs somewhat to UK in that to give a credibility and a propensity direction whenever a defendant has testified or made pre-trial answers or statements – see the Court of Final Appeal in *Tang Siu Man v HKSAR* No. 2 [1998] HKCFAR 107. At the end of the day, a summing-up will be looked at by the appellate courts to see if it is fair and balanced. That is the ultimate test. Wherever there is any doubt as to whether both limbs of the character direction apply, or wherever it is thought that it may be necessary in the particular circumstances to modify a character direction, it is desirable to canvass the proposed direction with counsel before their closing speeches. In *R v Durbin* [1995] 2 Cr App R 84, 91, the court laid down guidelines for cases in which it might be appropriate to give a modified direction. The court stressed the importance of the principle that the jury should not be directed to approach the case on a basis which ... is artificial or untrue. Generally, however, this direction should not be watered down. **Albert** - Firstly has he cast an imputation against the police? By stating that they have a grudge he may be implying that they have charged him improperly. It will be for the judge to decide if this is sufficient in the circumstances (*Goodwin*). Note the judge should warn D if his line if questioning puts him at risk of losing his shield, but a failure to do so is not a ground for appeal (*Selvey v DPP*). If Albert is deemed to have cast an imputation then s.54(1)(f)(ii) will apply and his previous convictions are technically admissible. However, the previous convictions for road traffic offences will probably be deemed to have no evidential value given the current charges (*Timpson*) and there is also the fact they are spent (*Rehab Offenders Ordinance*). If this is accepted by the court Albert will be treated as good character and may get a full *Vye* direction subject to *Tang Siu Man* above. **Russell** - vigorously denying the offence does not mean Russell is claiming the police are lying (Selvey v DPP) so s.54(1)(f)(ii) has no application. However, his previous convictions could be admissible under the similar fact evidence rule (*DPP v P*). The operation of this area of law may be briefly discussed and the fact that his previous conviction will be admissible as evidence of *propensity* mentioned.

Question 5 was a straightforward question on voir dire/voluntariness. As in past papers, students tend to 'understand' this issue and questions were generally answered well. The statement made by Alex is clearly a confession as in incriminates him in the offence charged. It could be said that it is a mixed statement as he claims that Bruce was the mastermind and this could be argued to be partially exculpatory. If it is a mixed statement then the principles in *Aziz* apply. The confession was made to a person in authority, defined as anyone who (may reasonably be supposed by the accused to have or who) has authority or control over the accused or over the proceedings or prosecution against him *Deokinanan v R* [1969]. A police officer is clearly a person in authority so we must consider whether the confession was voluntary or not.

Chau Ching Kay, Nauthum v HKSAR [2003] 1 HKLRD 99; (2002) 5 HKCFAR 540. It is settled law that a confession statement may be admitted in evidence if it was made voluntarily in the sense that it has not been obtained from an accused either by fear of prejudice or hope of advantage excited or held out by a person in authority or by oppression. *Secretary for Justice v. Lam Tat Ming & another* (2000) 3 HKCFAR 168*; Ibrahim v. R.* [1914] AC 599; *DPP v. Ping Lin* [1976] AC 574; and *R. v. Lam Yip Ying* [1984] HKLR 419.

Central cases to mention were *SJ v Lam Tat Ming and Anor* [2000] 2 HKLRD 431; (2000) 3 HKCFAR 168 Inducements? Defined in *Ibrahim v The King* [1914] a statement would not be voluntary if it was caused by "fear of prejudice or hope of reward excited or held out by anyone on authority." Also *DPP v Ping Lin* [1976] Oppression? Oppression means "conduct which tends to sap, and has sapped, the free will of the accused so that he speaks when otherwise he would have remained silent." The failure to provide a solicitor is a serious matter, but is probably not enough by itself to engage the notion of oppressive behaviour by the police. Fraud? The police lied about Dave's confession and this directly caused S to confess. There might be a possible argument here and the confession may well be excluded on this basis-*Ajoda v The State* [1982]. Substantial breaches of the *1992 Rules and Directions for the Questioning of Suspects* can amount to unfairness. Here the failure to provide legal advice (unless the denial of a solicitor really was justified- R v Samuel [1988]) combined with the lie about Dave's confession could be deemed sufficient to warrant the exercise of the residual discretion.