PCLL Conversion Examination
June 2018
Examiner's Comments
Evidence

Question 1

This question required the candidates to deal with the area of identification evidence. Whilst most candidates were able to correctly identify the main case (i.e. *R v Turnbull* (1977) which was subsequently adopted in HK by the CA in *Chik Sui Wai & Another v The Queen* (1977)), most answers focused primarily on a summary of the Turnbull guidelines. The candidates discussed how the guidelines direct a judge on how to sum up to a jury in cases whenever the prosecution depends wholly or substantially on the correctness of one or more identifications of the accused which the defence allege to be mistaken. The guidelines relate to the special need for caution, the circumstances of the identification and the specific weaknesses in the ID evidence. They also highlight the issues related to recognition, identification evidence of good and poor quality, supporting evidence and false alibis. However, few candidates delved into a deeper discussion of the extent to which the guidelines have succeeded in resolving the previous issues with ID evidence or what some of those previous issues were. Even fewer candidates discussed some of the deficiencies in the area such as the fact that the guidelines focus primarily on the quality of the ID evidence rather than the existence of supporting evidence. In addition, research has shown that the Turnbull warning could at times lead to more convictions because by drawing attention to it, the judge may enhance the importance of ID evidence in the minds of jurors.

Question 2

Most candidates were able to highlight the main issues raised in this question. The question dealt with s 54(1)(f) of the CPO which provides a defendant a "shield" to protect him/her from being cross-examined on matters relating to character including previous convictions. The rationale of the prohibition is to prevent the prosecution from introducing prejudicial material which could mislead a jury into thinking that just because a person has a criminal record means that he/she is more likely to have committed the offence with which he/she has been charged.

Overall, most candidates stated that s 54(1)(f)(ii) contains two provisions by which this shield may be lost. One is where 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. However, when it came to the application of the provision to the facts, only a relatively small number of candidates were able to state the answer correctly. At first glance, it appears that Angel has lost her shield due to s 54(1)(f)(ii) because by accusing Candy of being a liar, her defence may have involved imputations on the character of Candy. However, the key issue the stronger candidates recognized was that Angel had chosen not to give evidence. According to *R v Butterwasser* (1948), the section has no application where the accused makes imputations against prosecution witnesses but does not himself/herself testify. In *Butterwasser*, Lord Goddard CJ held that "*I do not see on*

what principle it could be said, that if a man does not go into the box and puts his own character in issue, he can have evidence given against him of previous bad character when all that he has done is to attack the witnesses for the prosecution". Candidates who were familiar with the relevant cases therefore concluded that the prosecution would not be entitled to give evidence-in-chief of Angel's previous conviction.

Generally, the candidates did better when advising on Beatrice's situation. Most were able to state that the second way in which a defendant might lose his/her shield is where the defendant asserts his/her own good character. Whether the defendant has put his/her character in issue by giving evidence of good character is a matter of law for the judge to decide and any cross-examination on his/her previous convictions is always at the discretion of the judge. For cross examination as to character to be permitted, the evidence of good character must be put forward by the defence either by cross-examining prosecution witnesses or by giving evidence himself/herself. Also, a defendant cannot assert one part of his/her character as good without putting into question his/her whole character (*R v Samuel*). Several candidates mentioned *R v Ferguson*, in which the prosecution was held to be entitled to question the defendant as to his bad character after the defendant gave evidence that he was a religious man who had attended church services for several years. Similarly, in *R v Baker*, the defendant's assertion that he had been earning an honest living for a number of years was held to be an assertion of good character.

Applying the law to the facts, most candidates concluded that the judge would likely hold that Beatrice had put her character into issue by claiming to be an honest, religious person who had been truthful her whole life. However, the stronger candidates also mentioned that the judge has a discretion to exclude questioning permissible as a matter of law under s 54(1)(f)(ii). The discretion is to be exercised so as to secure a fair trial. As Beatrice's previous conviction was dissimilar to the present charge, the questioning would not be prejudicial to Beatrice and could be allowed. However, the judge could still exercise his discretion in not allowing cross-examination under the section because Beatrice's hysterical crying suggested she was under emotional strain at the time. Finally, very few candidates stated that even if the judge held that cross-examination as to her previous conviction were permissible, it should not be prolonged or extensive.

Question 3

This question required a discussion of the scope of legal professional privilege and it was generally well answered. Most candidates started the discussion by defining advice privilege and litigation privilege (which included a discussion of the dominant purpose test and the relevant cases such as *Waugh v British Railways Board* (1980), *Grant v. Downs* (1976) and *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* (1987)). Candidates also stated that there would be no privilege where communications or documents were 'made or brought into existence for the purpose of, or as part of the process of, crime, fraud, abuse of statutory powers or, in some circumstances, defeating or frustrating the administration of justice by the courts' (*R v Derby Magistrates' Court*, Ex., p. B. (1996) and *R v Cox and Railton* (1884)).

Candidates who scored high marks were able to state the main justifications for legal professional privilege in a clear and persuasive manner. Discussions in this part were centered on the fact that clients are entitled to a private and secure sphere in which to conduct their communications with their lawyers. Without a private and secure sphere for taking legal advice, citizens will lack a meaningful means of ascertaining what the law is and what their rights are. In addition, they will not be given an adequate opportunity to prepare their case for litigation, which is a fundamental constitutional right designed to promote the rule of law and fair trial.

The other justifications that were listed were that legal professional privilege enhances the right of access to justice and ensures equality of arms. To be able to adequately meet the case of an opponent who is well versed in the law, or who is represented by a lawyer, a litigant may need professional legal assistance, which, again, can only be secured in conditions of complete and inviolable confidentiality. The vast majority of candidates concluded that legal professional privilege is a fundamental right of significant constitutional implications and that the arguments for the privilege are convincing.

Question 4

Most candidates were able to grasp the issues in the question and the constituent parts were generally well answered. For question a(i), most candidates stated that witnesses could refresh their memory by looking at their witness statement before going into court (*R v Richardson*) because testimony in a witness box is not a memory test and to refuse access to statements could lead to difficulties for honest witnesses. Some candidates mentioned that the usual practice in Hong Kong is to show prosecution witnesses their statements before they go to court. For a(ii), the stronger candidates mentioned *R v Da Silva* (1990) and the fact that witnesses may be allowed to refresh their memory from their witness statements while in the witness box. In *Da Silva*, the CA stated that a witness can refer to a document made at the time of the events in question even though the statement may not fall strictly within the definition of "contemporaneous". The requirements are that the judge should be satisfied that the witness cannot recall the details because of the lapse of time; that the witness made a statement closer to the actual time of events and the contents of the statement represent his recollection at the time it was made; that he had not read the statement before coming into the witness box and that he wished to have an opportunity to read the statement before he continued to give evidence. Once the witness has read the statement made earlier, it should be taken away before he resumes his evidence.

Although part (b) was not answered as well as part (a), the candidates who recognised the hostile witness issue did quite well. In (b)(i), candidates had to discuss that the circumstances suggested Eason may be a hostile witness (a person not desirous of telling the truth to the court at the insistence of the party calling him or one who is deliberately withholding material evidence). Alison's counsel could therefore consider making an application to the judge to have Eason treated as hostile since he was showing animosity against Alison and that he was refusing to give responses to the questions put to him. In (b)(ii), some of the candidates correctly stated that the judge could first explore other ways to encourage the witness to co-operate (by allowing Eason to refresh his memory

from an earlier statement) but that if it appeared Eason was unwilling to tell the truth (either by showing animosity against the party calling him, by refusing to answer non-leading questions or giving evidence wholly inconsistent with an earlier statement), the judge could make a ruling and declare Eason as hostile. Finally, in (b)(iii), if leave were given, the party calling the witness could conduct the examination-in-chief by way of cross-examination. This would allow Alison's counsel to put leading questions to Eason and if his testimony was inconsistent with a previous statement, the previous statement could be put to Eason to show that his story in court was different. Few candidates mentioned that Alison's counsel would not be able to cross-examine as to Eason's character or his previous conduct or convictions.

Question 5

While the first part of this question was answered satisfactorily by most candidates, many candidates found the second part more challenging. In (a), candidates were expected to discuss how in exceptional situations, similar fact evidence could be used to prove the guilt of a defendant. Most candidates started their discussion by citing cases such as *Makin v AG for NSW* (1894) (which held that in general, mere evidence of propensity was not admissible) and *DPP v Boardman* (1975), in which it was stated that no matter how many times a person may have committed previous offences, it did not prove that he may have committed the offence he was presently charged with. Candidates also mentioned that oftentimes, even if the evidence of propensity was probative, its prejudice outweighed any probative value. However, most candidates also stated that these decisions did not mean that this was an absolute rule. In *Boardman*, it was held that there could be instances when evidence was so relevant that to exclude it would be an affront to common sense. The more persuasive answers made a clear argument that there could be instances when the evidence was not being used to show a general disposition but was relevant for another reason and would have sufficient probative value to be admitted despite the prejudicial effect of admitting the evidence. These candidates mentioned the modern test in *DPP v P* [1991] 2 AC 447 in which it was held that the admissibility of the evidence is dependent on the probative value (See also *HKSAR v Zabed Ali* [2003] 2 HKLRD 849).

Part (b) of the question was based on the facts of *Noor Mohamad v The King* [1949] AC 182. In that case, the defendant was charged with murdering his wife by cyanide poisoning. While there was no evidence that the defendant had administered the poison, the prosecution sought to adduce evidence that the accused had a previous wife who had died as a result of poisoning in circumstances which suggested that the defendant had lured the wife into taking poison as a cure for a toothache. The defendant was convicted but on appeal, the appeal was allowed on the grounds that the evidence admitted by the trial judge was very prejudicial to the defendant.

Although few candidates mentioned the above case, the stronger candidates did state the proposition that a judge has the discretion to exclude otherwise admissible evidence if its prejudicial effect on the minds of the jury outweighs its probative value. Applying that to the facts of the question, these candidates concluded that the evidence of Cindy's death was more likely to be more prejudicial than probative and would likely be held

inadmissible because it appeared to show Alvin to be more likely to have committed the offence but was of otherwise no real substance.

The stronger candidates also mentioned that the question did not state whether Alvin had been charged or convicted for Cindy's death (it appeared that he had not). However, this by itself would be no bar to the admissibility of similar fact evidence.