CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 UNIT 18 – CRIMINAL LITIGATION

JUNE 2023

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Weaker scripts tended to produce rote learned or boilerplate answers to questions such as 1(b), 3(b) and 4(a) with little evidence of consideration how the rules and criteria apply on the facts. This was more apparent than in previous sittings.

The best answers clearly identified the key issues and placed them in an effective procedural context. Weaker answers struggled to come to grips with the specific issues, although these were nearly all clearly flagged in the Case Study Materials.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

A straightforward question and generally well answered. Better answers focussed on VIPER. Weaker answers did not do so, and, in particular, did not consider the implications of refusing VIPER.

(b)

Most answers appeared to be pre prepared and there was relatively little engagement with the facts, that the client was not used to police interviews, and that there was material he wanted to keep hidden.

(c)

Most answers covered the basics, that the client was present but not involved. Most referred in some way to another person with the same boots. This was not consistent with the client's instructions and was wrong. Some answers were too informal in tone.

(d)

Too many candidates answered by reference to the procedure for either way offences when this is an indictable only offence. Too few correctly outlined the progression to PTPH and possibly other interim hearings.

Question 2(a)

Too many candidates discussed specific disclosure, when the facts make clear it is not an available option. A minority correctly focussed on a stay for abuse of process, but very few actually understood what the criteria were for a successful submission.

(b)

Most recognised that he could not be compelled to testify, but that live video link was likely to be available. Coverage of hearsay could have focussed more clearly on s 116 CJA 2003.

(c)

Several very weak answers. Questions required detailed discussion of Turnbull and often got a rather limited tentative approach. If ID evidence is weak confirmation needs to be shown.

Only a minority referred to a Vye direction.

A number of candidates did discuss issues relating to footwear, the jacket and the missing CCTV, but sometimes struggled to reach a coherent conclusion.

Question 3(a)

This required discussion and application of the criteria for remand on bail. This was sometimes missed. It is clear that LAA is the first resort after bail. Several candidates suggested that LAA was inappropriate because the client is looked after. This is wrong. YDA is clearly a last resort and this did not always appear.

(b)

If the client is solely charged they will appear in YC and likely to stay there as SG suggest that, with the discount from adult tariff this is well within 24 month DTO maximum. No reason to allocate for trial or commit for sentence. These offences do not trigger dangerousness. Need to consider position if the adult is charged, but likely to stay in YC as progress would have been made.

(c)

Most recognised the ethics issue. A minority only advised on the benefits of a GP, which was not acceptable. In theory can act, but can only put pros to proof, so not plausible. Risk of misleading the court and not acting with integrity.

Withdrawal must respect client confidentiality, which was often missed.

Question 4(a)

Generally well handled on procedure. Weaker answers did not look at SG and other criteria, or at the most relevant factors if electing.

(b)

Generally good. Some missed that sending to CC automatically satisfies merits test and there was some confused expression.

(c)

Required, specifically, discussion of negotiating a basis of plea, or a Newton hearing. Very limited credit for other material on early GP.

(d)

Procedure generally sound (some candidates mentioned appeal from MC). Criteria for appeal less clearly stated.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 UNIT 18 – CRIMINAL LITIGATION

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	Craig Sadler is an available witness and it appears that the identity of the offender is in dispute. The identification procedure of preference is VIPER/PROMAT. This involves the witnesses being shown a standardised video sequence of the suspect together with eight comparators. It is considered the most objective procedure and least likely to produce false positive results. Craig Sadler must consent, but if he does not, evidence of this may be given and adverse inferences may be drawn. The police may also proceed to alternative procedures which are less objective, such as the use of covert video material or a group identification. The defence representative will ensure that the procedure is properly undertaken, in particular by checking the initial descriptions given by witnesses and ensuring that the comparator images do resemble the suspect.	7
1(b)	The interview will be conducted under caution and will be recorded. The defence representative will be present and can intervene if the interview is being conducted oppressively. The police appear to have made reasonable disclosure of the material available to them. Craig Sadler is of previous good character and therefore not used to the interview process. Craig Sadler could adopt a strategy of answering police questions, but this runs the risk of self-incrimination. Furthermore, as he does not wish to disclose the identity of his associate who was wearing boots with the same distinctive tread pattern, there is a clear danger that he will be selectively silent. This is generally seen as an unconvincing approach to adopt. Giving a no comment interview avoids the risk of self-incrimination or otherwise being surprised by the line of questioning, which gives rise to the possibility of adverse inferences. This can be avoided to some extent if a prepared statement is produced. In this case any prepared statement would not identify the alternative suspect, and if the case advanced at trial differs from it, this in turn can lead to adverse inferences being drawn. Ultimately the choice of tactics is for the client.	6
1(c)	I, Craig Sadler, make this statement in relation to allegations arising out of an incident on North Quay yesterday. I attended the Europa league football match earlier yesterday together with a number of friends from my hometown of Cradley Heath. I was in the North Quay area at approximately 9.30pm. I took no part in any disorder, and in particular did not kick or assault anyone at this time. Any person who states that I was involved in any such assault is mistaken.	7

1(d)	As this is an indictable only offence the principal purpose of the hearing is to send the case to the Crown Court. The magistrates' court can also deal with issues of bail, legal representation and reporting restrictions. If sent in custody there will be an early Crown Court hearing to consider bail. There will then be a Plea and Trial Preparation Hearing at which the defendant will be arraigned. If the plea is guilty the defendant may be sentenced or sentencing adjourned for a pre-sentence report. If the plea is not guilty a trial date will be fixed having regard to witness availability and other considerations. There may be a further preliminary hearing if, for example, an issue of admissibility of evidence is identified.	8
		Question 1 Total:28 marks
Question Number	**Suggested Points for Responses**	**Marks (Max)**
2(a)	The application would be to stay the proceedings as an abuse of process. The primary basis is that it can be argued the defendant would not receive a fair trial. This is based on the loss of the CCTV evidence which it was the responsibility of the prosecution to retain and preserve: R (Ebrahim) v Feltham Magistrates' Court (2001). A stay is to be granted on this basis only in exceptional circumstances: DPP v Fell (2013). In particular, account must be taken of the extent to which the defence can argue that the absence of the evidence can be used to raise a doubt as to the cogency of the prosecution case. Here, the distinctive jacket and discrepancy in numbers might have been used in this way. It is unlikely that the alternative basis that it would be unfair to try the defendant will succeed. It would be necessary to conclude that allowing the prosecution to proceed would offend the court's sense of justice.	8
2(b)	He may be willing to attend voluntarily to give evidence. He cannot be compelled to attend by a summons. It is probable that arrangements could be made for his evidence to be given by live video link as provided by s 32 Criminal Justice Act 1988. His evidence could otherwise be given as hearsay pursuant to s 116 Criminal Justice Act 2003 as he is outside the United Kingdom, if it is not practicable to secure his attendance. The court must be satisfied that it is in the interests of justice, in particular fairness to the parties, for the evidence to be admitted.	6
2(c)	The prosecution bears the full legal and evidential burden. The defendant is not putting forward any specific defence, so does not bear any evidential burden. The strategy of the defence is likely to be to raise doubts as to the cogency of the prosecution case. The prosecution case rests on identification evidence from Hans Stein and evidence that the injuries were inflicted by boots with the distinctive tread pattern of those worn by the defendant.	14

	The identification evidence of the doorman is circumstantial, as it is not in dispute that Craig Sadler was present in the area and at the time when the offence took place. It is not clear whether the defence is now in a position to put forward a specific case that there was another person present at the time wearing boots with the same tread pattern. It is unclear whether such evidence would be consistent with the defence statement, but it is certainly not consistent with what was provided at interview. There is thus the likelihood that the prosecution will apply to the court for a direction that adverse inferences may be drawn from the failure to mention this at an earlier stage. As the prosecution case depends to a significant extent on identification evidence, the judge should give a Turnbull direction to the effect that identification of other human beings is not straightforward and that an honest and convincing witness may nevertheless be mistaken. The direction should also deal with the circumstances of the identification, which in this case involves the identification of a stranger, over a relatively short period of time, and extremely stressful circumstances, and probably in poor lighting conditions. However even if this is regarded as poor quality identification evidence it can nevertheless be supported by other evidence, such as the identification by the doorman. A submission may be made that Craig Sadler was wearing the jacket with the distinctive pattern, and that if the CCTV evidence had been available, it would have confirmed or denied whether a person wearing such a jacket was involved in the assault on Hans Stein. It can be suggested that the assailant was one of the two persons apparently shown on the first set of CCTV images, but not on the second. Craig Sadler is of previous good character, so is entitled to a full Vye direction as to propensity and credibility.	
	Question 2 Total: 28 marks	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
3(a)	The court may remand Alexa Sanchez on unconditional or conditional bail or to local authority accommodation, and conditions can also be attached in this case: ss 91-93 Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). There is a prima facie right to bail, but it can be withheld, or appropriate conditions imposed where this is necessary in order to ensure that the defendant surrenders to custody, does not commit further offences on bail, interfere with witnesses or otherwise interfere with the course of justice and for her own welfare. In this case the primary concern would appear to be the commission of further offences, given that a large number of offences are alleged to have been committed over a short period of time, and Alexa Sanchez has committed similar offences on earlier occasions. Electronic monitoring may also be considered: s 94 LASPO. A remand to youth detention accommodation may be considered.	7

	Alexa Sanchez satisfies the age, legal representation and offence conditions for the first set of such conditions under s 98 LASPO, and may satisfy the sentence condition if it is considered very likely that a Detention and Training Order will be imposed, and the necessity condition if only youth detention accommodation will prevent the commission of further offences and the risks posed by her cannot be safely managed in the community. Alexa Sanchez does not satisfy the history condition in the second set of conditions: s 99 LASPO.	
3(b)	At present as the only defendant, Alexa Sanchez will appear in the Youth Court. There is a strong presumption that she will be tried and sentenced in that court as it is a specialist court for dealing appropriately with juvenile offenders. The Youth Court could consider sending the case to the Crown Court for trial but is unlikely to do so because of the presumption. Upon conviction, the Youth Court could commit to the Crown Court for sentence pursuant to s 16 Sentencing Code (SC) as dwelling house burglary qualifies as a serious offence under s 249 SC. This would be where the Youth Court considers that its powers of sentencing, namely a 24-month Detention and Training Order, would be inadequate and the Crown Court should sentence under s 250 SC. According to the 2022 Sentencing Council guidelines for domestic burglary the starting point for an adult for the most serious category is three years custody. These cases do not involve violence, property damage or other aggravating features other than the presence of the victims and the previous history of similar offending. Even allowing for the large number of offences, since a substantial discount from the adult tariff should be applied to a juvenile, it is highly unlikely that the Youth Court would consider that its own sentencing powers were inadequate. Committal for sentence pursuant to s 17 SC is not appropriate as this form of dwelling house burglary is not a specified offence for the purposes of s 306 SC. It is possible that if the adult offender is traced and charged, it might be considered in the interests of justice for both defendants to be dealt with together, although this is unlikely as it is probable that significant progress would have been made in the case of Alexa Sanchez which it would not be appropriate to interfere with.	8
3(c)	Representing Alexa Sanchez by leading evidence or making submissions on the basis that she is not guilty of offences she has admitted to you she is guilty of would amount to misleading the court and be a breach of Para 1.4 of the SRA Code of Conduct for solicitors. It would also amount to putting forward statements and submissions which are not properly arguable in breach of Para 2.4. In theory it would not be misleading the court to conduct the defence in the usual way in relation to the charges which Alexa Sanchez continues to deny, but in practice it would not be possible to disentangle the two groups of charges during the trial process.	5

	It would be permissible within the Code to put the prosecution to proof of their case, but that is not what Alexa Sanchez is suggesting. If Alexa Sanchez maintains this position, it will be necessary to withdraw from the case, although the reason for doing so must not be disclosed in order to respect the duty of confidentiality to the client under Para 6.4 of the Code.	
		Question 3 Total:20 marks
Question Number	**Suggested Points for Responses**	**Marks (Max)**
4(a)	The initial appearance, on the assumption that Initial Details of the Prosecution Case have been served, will be for Plea before Venue followed by an allocation hearing. Initially Naseer Afzal will be asked to indicate what his plea would be to the charge. If he were to indicate a plea of guilty this would be accepted and the court would proceed to sentencing or consider committal for sentence to the Crown Court. Where, as here, the indicated plea is not guilty, the court will consider whether to accept jurisdiction or send the case to the Crown Court, as dangerous driving is an either way offence. The primary consideration of the court is whether it has adequate sentencing powers having regard to relevant sentencing and allocation guidelines and other official guidance including the presumption for summary trial. The court will accept the prosecution view of the seriousness of the offence. The court can also take into account other considerations raised by prosecution or defence. The sentencing guidelines for dangerous driving indicate that only the most serious cases should be sent to the Crown Court. These include prolonged bad driving involving deliberate disregard for the safety of others, and racing is an aggravating feature. Even with the availability of a 12-month custodial sentence, the magistrates' court might decline jurisdiction. If the magistrates' court accepts jurisdiction, Naseer Afzal will be put his election. There do not appear to be any legal issues for which Crown Court procedures would be preferable. A jury may be more receptive or sympathetic to the defence case. A Crown Court trial is likely to attract more publicity, will be more formal and stressful, and carries the risk of an adverse costs order. The Crown Court could also impose a somewhat higher custodial sentence.	8
4(b)	An application must be made electronically to the Legal Aid Agency. As the case has been sent to the Crown Court the interests of justice test is automatically satisfied. On the information available, Naseer Afzal would appear to satisfy the means test with a nil contribution from income. We are not told of any capital assets which should be taken into account.	5

4(c)	The defence could seek to agree a formal basis of plea with the prosecution. If the prosecution will not agree to this, consideration should be given to a Newton hearing. The judge will agree to this if satisfied that the difference between the prosecution and defence versions is sufficiently significant to affect sentencing. The judge will hear the evidence and decide whether the prosecution have established the more serious version of the facts which they allege. If not, the defendant will be sentenced on the basis of his version of the facts with limited credit for a late guilty plea. If the prosecution version of the facts is accepted the defendant will be sentenced accordingly and will lose any credit for a guilty plea.	6
4(d)	Appeal lies to the Court of Appeal (Criminal Division) with leave of the trial judge or the Court of Appeal: ss 9, 11 Criminal Appeal Act 1968 (CAA). Notice of appeal, with grounds, must be filed within 28 days. Draft grounds will be settled by trial counsel if satisfied that such exist. Applications are initially considered by a single judge on the papers, but if leave is refused at that stage the application may be renewed to the full court. An appeal will be allowed if the sentence imposed was wrong in law or was manifestly excessive so as to be wrong in principle. The Court of Appeal will re-sentence the defendant if the appeal is allowed but cannot increase the sentence above that passed in the Crown Court. It is not suggested in the facts that the sentence is unlawful. The Court of Appeal will consider any guidelines it has itself given in earlier sentencing decisions, and also the guidelines issued by the Sentencing Council. A significant departure from these may indicate that the sentence is wrong in principle, but sentencing is not a precise exercise and the sentencer has some margin of appreciation.	5
		Question 4 Total: 24 marks