



CHIEF EXAMINER REPORT

JANUARY 2024

LEVEL 6 UNIT 18 – Criminal Litigation

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the January 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed in the suggested points for responses or alternative valid responses.

Chief Examiner Overview

Generally, candidates appear to understand and be able to describe the various procedures from original apprehension to final disposal, but seem less confident dealing with issues of evidence and understanding the implications of developments as the case progresses.

Specific common errors included

- a failure to recognise that Q2 (a) involved a change of instructions that did not in itself create any ethical or conduct issues, but would require the defence statement to make specific reference to self defence and required consideration of possible adverse inferences.
- general poor handling of self defence. It is a defence not some form of mitigation. It does not involve a reversal of the burden of proof, but once raised must be disproved by the prosecution to the criminal standard. The judge must direct the jury to this effect and refer to the ingredients namely that self defence involves using reasonable force in the circumstances a defendant honestly believe them to be. As previously noted, there was material which could have been referred to in relation to this.
- inadequate consideration of available information such as the defendant's record and the categorisation for sentencing guidelines in relation to allocation
- failing to make use of the information provided in the question paper. In Q2 (c) there is no longer an issue as to whether the defendant was present, and so the identification evidence is no longer relevant and should not be discussed beyond noting this point.

Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking the Level 6 exams limits the scope for constructive feedback to be given and for firm conclusions to be reached. Therefore, feedback on candidate performance is limited.

Section A

Question 1a	8 marks
Most candidates secured high marks. Marks were lost for failing to describe the VIPER process effectively, explain the consequences of not consenting to the VIPER process and lack of application. The facts given suggested that the client was wearing distinctive clothing and steps should have been taken to ensure that this did not feature in his video sequence.	
Suggested Points for Response:	
<ul style="list-style-type: none">• Identification procedure required where there is a known suspect who denies involvement and witnesses who claim to be able to identify them.• Police may decline to undertake a procedure if it is considered inappropriate, but here there are independent eyewitnesses so this would seem unlikely.• VIPER/PROMAT is the preferred method as it is relatively easy to organise and regarded as the most reliable.• Standardised video images of the suspect taken and presented to witnesses together with images of comparators.• The process is in the hands of an identification officer who is independent of the enquiry into the offence.• The legal representative can view the initial descriptions and object to the inclusion of inappropriate comparators.• Many inappropriately distinguishing features can be electronically removed or replicated for all images.• The suspect must consent, but a refusal to consent may give rise to adverse inferences.• The police may then also move to alternative less desirable methods such as informal group identification, covert video or confrontation.	

Question 1b	7 marks
Most candidates were able to explain the possible approaches and their advantages and disadvantages in general terms. Marks were again lost for failing to consider the facts of the case.	
Suggested Points for Response:	
<ul style="list-style-type: none">• The interview will be under caution. It will be recorded. The officers should ensure that the interview does not extend to an excessive period without appropriate rest breaks.• The legal representative will be present and can object to any impropriety on the part of the police.• The suspect in effect has the option of answering all questions or giving a no comment interview. Selective answering may lead to adverse inferences if facts are omitted which are later relied on, and in any event gives a poor impression.• Here, the suspect denies any involvement, and being present at the scene. It would be possible to answer questions on that basis, although there is always a risk of self-incrimination if the suspect does not deal effectively with the questioning process.	

- A no comment interview avoids the risk of self-incrimination but does carry the risk of adverse inferences being drawn if facts are later relied on for the defence which could reasonably be mentioned in the interview.
- A prepared statement coupled with a no comment interview should ensure that adverse inferences are not drawn, but the statement must be consistent with the defence as later put.
- There does not seem to be any problem with the level of disclosure provided by the police.
- The decision is for Jayson Ferreira, but as he is in effect putting forward a complete denial of involvement either answering questions or providing a prepared statement, depending on how confident he feels in dealing with questioning would be appropriate options.

Question 1c	5 marks
<p>Some candidates failed to refer to the need for the application to be made electronically to the LA portal. There was sufficient evidence as to the clients means to determine that he did satisfy the means test for both magistrates and Crown Court. He would also satisfy the merits test for the magistrates' court on the recent loss of liberty.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • Application must be made electronically to the Legal Aid Agency using the prescribed electronic forms. • The application is means and merits tested. • Jayson Ferreira is in employment, so the standard means assessment will be applied. His earnings are below the limit for the initial means test so he should qualify for legal aid both in the magistrates court and if the case is sent there, the Crown Court. The Crown Court means assessment can also include capital, but this is not relevant here. • The merits test is automatically satisfied if the case is sent to the Crown Court. • If the case proceeds in the magistrates court must consider whether the interests of justice test is met. Jayson Ferreira has already lost his good reputation, but in view of the nature of the charges is clearly at substantial risk of a custodial sentence so the criterion of loss of liberty will apply. 	

Question 1d	10 marks
<p>Most candidates were able to give a reasonable description of the plea before venue and allocation procedure. When considering how the magistrates would deal with allocation, there was insufficient application, and a number of candidates did not appear to have considered the sentencing guidelines, and some who had done so had not located this offence as B3. There was limited consideration of the position if the magistrates accepted jurisdiction, and any discussion of election tactics was very limited and formulaic.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • Assuming that Initial Details of the Prosecution Case have been provided, the first hearing in the magistrates court will be Plea before Venue followed by an allocation hearing. • At Plea before Venue Jayson Ferreira will indicate a plea of not guilty. • The magistrates court will then determine whether it is prepared to retain jurisdiction of the case or considers that the case must be sent to the Crown Court for trial. • The court will hear representations from the prosecution as to the previous convictions of the defendant, the circumstances of the offence and where the prosecution recommend the case be tried. The court may also hear representations from the defence but must accept that the offence is at least as serious as alleged by the prosecution at this stage. • The court will consider whether they have sufficient power to deal with the offence having regard to the criteria in s 19 Magistrates Courts Act 1980. The presumption is in favour of summary trial, and the primary consideration is whether the sentencing powers of the magistrates will be adequate. • If the court concludes that it does not have power to deal with the matter the case will be sent to the Crown Court. • If the court concludes that it does have jurisdiction, the defendant will be informed that he nevertheless has the right to elect trial in the Crown Court. Here, the sentencing guidelines for grievous bodily harm would put this offence into category B for culpability and 3 for harm. This is because a weapon was used, and while the incident was brief, there would appear to be some degree of premeditation and Jayson Ferreira is alleged to have taken a leading role in group activity.. The degree of injury is at the lower end of the range for grievous bodily harm now that the feared permanent damage to eyesight no longer applies. The starting point is therefore in 12 months custody. The fact of the criminal record is an aggravating feature, although few others if any seem present. • Highly likely that the court will decline jurisdiction. If Jayson Ferreira is offered an election, he should consider that, while it is possible for the magistrates court to permit the sentence after a summary trial, it is nevertheless likely that if convicted he would receive a sentence within the six month maximum available to the magistrates for a single either way offence. There do not appear at this stage to be legal or procedural issues which would be better dealt with in the Crown Court. Anecdotally acquittal rates may be higher in the Crown Court, but there is a risk of a significantly higher sentence there. • Summary trial is likely to be quicker, less stressful and attract less publicity. • Crown Court trial carries a risk of a higher costs order. 	

Question 2a	5 marks
<p>Only a minority of candidates recognised that the changing instructions did not in itself create any ethical or conduct issues. The firm could continue to act and would not be limited to putting the prosecution to prove. There was little reference to how the new instructions should be reflected in the defence statement, and whether there would be problems with adverse inferences.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • This change in position does not necessarily affect your ability to act for Jayson Ferreira. • Continuing to act will not involve any breach of the SRA Code. • You do however have to consider whether the changing instructions undermines the necessary relationship confidence between solicitor and client. • The Defence Statement will now need to give appropriate details of the defence of self defence which is now being relied on. • There is now a significant risk of an application by the prosecution to allow adverse inferences to be drawn from the fact that reference was not made in interview to the presence of Jayson Ferreira at the scene and that he was acting in self defence. • Conversely there is now no issue as to identification. 	

Question 2b	5 marks
<p>Some more limited responses failed to appreciate that the witness could give evidence of what he had actually perceived and that the conduct issue would arise only if the client wanted him to give the problematic evidence.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • You cannot be party to misleading the court as this would be a breach of SRA principles 1 and 5, and paras 1.4, 2.2 and 2.4 of the Code. • In this case you cannot put the witness forward to give evidence of the conversation which he has told you he did not hear. • If Jayson Ferreira insists that the witness should give this evidence you could no longer act on that basis. The witness can give the more limited evidence which he has stated to be truthful, although it will be of lesser significance. • If you are required to withdraw from the case due to professional embarrassment, you must do so in a way which does not compromise client confidentiality or prejudice the position of Jayson Ferreira. 	

Question 2c	15 marks
<p>Several candidates appeared to believe that self defence created a reverse burden. There was no consideration of whether the evidence was likely to support self defence with no reference to the independent witnesses describing the victim as having behaved aggressively before being hit. Candidates did generally mention the burden of proof on the prosecution, and made sensible comments in relation to bad character and adverse inferences.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • Normally, the prosecution bears the legal burden of proving all the elements of the offence to the criminal standard of proof and the evidential burden in relation to this. • There is no longer any issue as to whether Jayson Ferreira was the person involved in the incident with Lebron Renton, so no issues as to identification are now relevant. • The defence has asserted that Jayson Ferreira was acting in self defence in the Defence Statement, and this will no doubt also be raised in the course of the trial. The independent prosecution witnesses have stated that a person we can now safely identify with Lebron Renton did step forward aggressively before being hit. The defence will no doubt wish to bring this point out. While the defence bears no legal or evidential burden in relation to self defence it clearly makes sense to bring out any favourable material. • Jayson Ferreira cannot be compelled to give evidence, but the defence will probably wish to see him put forward his version of events as this may influence the jury. He already faces the likelihood of an application for adverse inferences to be drawn from his failure to raise self defence in his original interview, and further inferences could be drawn if he fails to testify. There may also be a separate application in relation to the steel tube, if he was questioned on this in interview and failed to account for his possession of it. • There appears to be no forensic evidence linking the steel tube to the offence. • In relation to self defence the judge must direct the jury that the prosecution must satisfy them so they are sure that the defence does not apply. The direction should make it clear that a person is entitled to use reasonable force in the circumstances as he honestly believes them to be. When considering whether to accept what the defendant says as to his belief, the jury is entitled to take into account the reasonableness of the belief: s 76 (4) Criminal Justice and Immigration Act 2008. Even if the belief of the defendant is mistaken, the reasonableness of the force must be assessed having regard to the circumstances as he mistakenly believes them to be. Here the possible use of the steel tube needs to be weighed against the assertion that Renton had a knife. 	

Question 3a	5 marks
<p>This was a straightforward question requiring a description of the function and procedure at a Plea and Trial Preparation Hearing. It was generally reasonably handled, although some answers lost marks by lack of detail.</p>	
<p>Suggested Points for Response:</p> <ul style="list-style-type: none"> • This will be a Plea and Case Management Hearing. • The defendant will be arraigned. • If there is a plea of guilty the court will proceed to sentence, or adjourn for presentence reports. • If there is a plea of not guilty, the court will use the electronic case tracking system to establish a timetable and trial window. The court can deal with any evidential or procedural issues which arise, including any issues in relation to disclosure. • If the case is not concluded the court will consider whether to grant bail. 	

Question 3b	7 marks
<p>Most candidates recognised that failure to surrender was an offence. It was generally recognised that the client might have a reasonable excuse for not surrendering at the appointed time, and better answers explained that he should nevertheless surrender as soon as possible. Better answers also advised him to get evidence to support the reasonable excuse.</p>	
<p>Suggested Points for Response:</p> <ul style="list-style-type: none"> • As Maxim West was on unconditional bail there is no breach of bail conditions to consider at this stage. • Failure to surrender to custody without reasonable cause is an offence contrary to s 6 Bail Act 1976. • Even if there is reasonable cause it is still an offence if the defendant does not surrender at the appointed place as soon as practicable. • In this case the emergency affecting the two year old son appears to be a reasonable cause, but Maxim West must nevertheless surrender to custody as soon as someone else can take over care of the son. • Representations to the judge may lead to him agreeing to stand the case over, particularly if independent evidence supporting this can be obtained in the shape of an email from the hospital • Maxim West should be advised to obtain confirmation from the hospital of the circumstances and the necessity for him be there with his son, and to surrender to the Crown Court as soon as possible. • The case may be further adjourned and the court can issue a bench warrant which will be backed for bail if the court accepts the explanation and not backed for bail if not. 	

Question 3c

10 marks

Most candidates identified some of the necessary elements, but there were very few answers which identified all of them and dealt with them effectively and coherently. The client was entitled to credit for another early guilty plea, but only 25% as it had not been tendered at the earliest opportunity. The offence falls within category A3 with a starting point of three years custody and a range of 18 months to 4 years. Effectively mitigation should be against immediate custody and for a suspended sentence, and the interests of the child are significant here. One point which was not identified was that the client could have sold his car in order to make partial restitution.

Suggested Points for Response:

- According to the Crown Court sentencing guidelines for fraud offences these offences would appear to fall within culpability category A as there is abuse of a position of trust and evidence of significant planning (whether or not the fraud is particularly sophisticated) over an extended period of time. It will fall within harm category 3 as the amount involved is within that range. As the amount involved is £50,000 the court will use the starting point in the guidelines which is three years custody. The indicated range is 18 months custody to 4 years custody.
- A custodial sentence would appear inevitable. The mitigation should focus on securing the minimum length of sentence, and if possible a suspended sentence.
- There appear to be no additional aggravating factors other than those already accounted for in the guidelines.
- The court is likely to require a presentence report and this will give indications of the extent to which Maxim West has accepted responsibility for his offending and demonstrates genuine remorse. It should contain recommendations for activities to be associated with a suspended sentence.
- Maxim West is entitled to a discount for a guilty plea. It does not appear that he has entered such a plea at the earliest opportunity, namely at the Plea before Venue hearing in the magistrates court so he will not get the maximum discount, but as he is pleading guilty on arraignment and no trial has been scheduled, he should be entitled to a 25% discount.
- If the client agrees he could demonstrate a willingness to make recompense by selling his car and paying the proceeds to his employer.
- Maxim West has through these offences lost his good character and his employment. He is likely to have considerable difficulty obtaining comparable employment, or indeed any employment.
- The court should be invited to take account of the impact on the son. It appears that Maxim West is his principal carer, and it may be that it will be difficult to make appropriate arrangements if he is subjected to an immediate custodial sentence. It is likely to have a knock-on effect on the husband who may have to seek less well-paid work in the UK.
- The main thrust of the mitigation should be to persuade the court that the appropriate custodial sentence is not more than two years and that it can properly be suspended in all the circumstances.

Question 4a	6 marks
Candidates did recognise that this was potentially alibi evidence. Only a few then went on to consider how this could be used in procedural terms by reference to the defence statement.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • This is evidence in support of an alibi. If, as asserted by the accused and apparently corroborated by Caleb Watson, the accused were with Watson from a point in time an hour earlier, this would mean that they were not involved in the police chase. • If disclosed early enough this should have been referred to in the Defence Statement and details of Caleb Watson given as particulars of alibi. • If disclosure was only made later a revised Defence Statement will be required. • There is no property in a witness, and the prosecution have made Caleb Watson available to the defence so there are no conduct issues. 	

Question 4b	6 marks
Most candidates correctly identified that the children were prima facie competent and could give any sworn evidence, but that their ability to recognise the need to tell the truth and give comprehensible evidence might need to be considered when they gave evidence. Most candidates also identified the special measures to be taken, although not always focusing on those which were most likely to be applied.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • Children of this age are presumed to be competent to give truthful evidence, although it will be unsworn. • If there is any doubt as to their capacity to understand the importance of telling the truth and giving comprehensible evidence the prosecution must demonstrate that they have capacity. • Special measures will be taken pursuant to Part 2 Youth Justice and Criminal Evidence Act 1999. • Evidence in chief is likely to be by way of an ABE recording. Any cross examination is likely to be by video link. • Wigs and gowns will be removed. 	

Question 4c	6 marks
Better answers did identify that the former co-accused was now competent in a parole for the prosecution, and is evidence might be quite weighty. There was some reasonable consideration of the implications of attacks on character.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • Haynes becomes a competent and compellable witness for the prosecution as he is no longer a co-accused. • His statement is a confession admissible only against himself. • He can give evidence in court and if he does implicate Shahid Masood this is likely to be of considerable weight. • The evidence can be challenged but it is unclear whether there is any obvious motive for Haynes to lie. • Both Haynes and Masood have significant previous convictions and are therefore of bad character. This bad character is likely to have been put in evidence as evidence of propensity, but if not the defence risks Masood's character being put in evidence if the character of Haynes is impugned in cross examination. 	

Question 4d	5 marks
most candidates did correctly identify the relevant procedure and were able to describe it. A better answer recognised that a misdirection might result in the conviction being unsafe, and also recognised that the outcome might be a retrial.	
Suggested Points for Response:	
<ul style="list-style-type: none">• The defence must apply for leave to appeal to the Court of Appeal (Criminal Division) within 28 days.• Trial counsel should have settled draft grounds for appeal.• The application will be considered by a single judge, and if refused by him may be renewed to the full court.• The sole ground for appeal is that the conviction is unsafe.• A material misdirection may render the verdict unsafe, but the appeal court may consider that the conviction is nonetheless safe having regard to all the other evidence.• If the appeal is allowed a retrial is likely to be ordered.	