# CHIEF EXAMINER REPORT

**JUNE 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 June 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

This was a small cohort.

In terms of areas for improvement, it was clear that some candidates had not carried out all the preparation that is expected of them following receipt of the Case Study Materials. In particular, candidates are expected to research how the sentencing guidelines will or may apply to the various potential offences. This information can be deployed at various stages.

It was clearly relevant to the allocation decision for either way offences, and also in relation to the venue for sentencing of juveniles and preparing pleas in mitigation. There were several other instances where the information provided should have informed the answer. Some candidates had a tendency to invent or embroider facts.

Not all candidates appreciated the significance of the significant facial scar, or of the information about the character traits in relation to Levi Carter. Candidates did not use the available information effectively when assessing whether there was any possible defence to the Bail Act offence.

Another area for improvement would be in relation to the question on how to address the issues at trial. Candidates should appreciate from the marks allocated that there are a number of issues which need to be discussed, and not confine themselves to a single issue.

Finally, candidates appeared to be unfamiliar with the prescribed format for a Defence Statement. Many of the attempts at setting out a plea in mitigation consisted of valid points but in a random order, showing a lack of clarity of what outcome the mitigation was intended to achieve.

## 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 may be limited.

| Question 1a | 8 marks |
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| This question requires consideration of all modes of public funding, namely the duty solicitor at the police station (including mention of the use of an own solicitor under the scheme), the duty solicitor at the magistrates court, and the procedure and criteria for applying for a representation order. A number of candidates only focused on either police station advice or the representation order, and some answers lacked detail. | |
| Suggested Points for Response: | |
| • All suspects under arrest at a police station are entitled to legal advice which is not means or merits tested. It may be given by a duty solicitor, or by an own solicitor if a request to this effect is passed through the Duty Solicitor Call Centre. This will extend to advice on identification procedures, interviews and other issues.<br>• On a first appearance in court the services of a court duty solicitor will be available. The duty solicitor can advise as to plea, conduct a plea in mitigation or advise in relation to an allocation hearing. This is also not means or merits tested.<br>• An application can be made to the Legal Aid Agency using the electronic portal for a representation order in relation to not guilty pleas or more complex guilty pleas which cannot be dealt with on the first hearing. If the case is allocated to the Crown Court there is no further merits test. If the case is proceeding in the magistrates court the merits test will be satisfied if the defendant is at significant risk of the loss of liberty, at risk of the loss of his reputation, if the case is complex in legal and evidential terms and if legal representation is desirable in the interests of others, e.g. a vulnerable victim.<br>• There is a means test. In the magistrates court, this is a relatively straightforward procedure, looking at income only. In the Crown Court, capital is also considered. Those in receipt of certain benefits, such as Universal Credit, are passported for the means test. This will apply to Levi Carter. | |

| Question 1b | 7 marks |
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This was a fairly standard question on identification procedures, and most candidates recognised the need to focus on the VIPER procedure. One or two candidates failed to do so and as a result concentrated on forms of identification procedure which were highly unlikely to be deployed. There was sometimes insufficient attention to detail, such as the full implications of refusing to collaborate with a VIPER procedure and the role of the defence representative in checking initial descriptions and the suitability of comparator videos (including dealing with the obvious distinguishing scar).

Suggested Points for Response:

- Where, as here, there is an available suspect, who denies involvement, and a witness who claims to be able to make an identification, an identification procedure should be undertaken unless the police are satisfied that it is impracticable to do so.
- The preferred procedure is the VIPER/PROMAT video identification procedure. A short video showing Levi Carter going through a standard series of movements will be taken. This will be shown to the witness together with similar videos from eight comparators.
- Where, as here with the facial scar, the suspect has a distinctive feature, the digital images must be modified to remove this if it is not referred to in the description given by the witness, or to add equivalent scarring to the images of the comparators if it is referred to.
- As legal representative you are entitled to see the initial description given by the witness, and also to review the proposed comparators to ensure that they are a suitable match.
- The procedure is under the control of a separate senior officer with no other connection to the investigation.
- VIPER/PROMAT is generally considered the most appropriate procedure as it is less likely to produce false positive identification. However the suspect must consent. If consent is not forthcoming this will be noted, and adverse inferences can be drawn at trial. Furthermore the police can then move to other procedures, such as the use of covert video which may be less advantageous.

| Question 1c | 7 marks |
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This was again a fairly standard question, and virtually all candidates were able to explain the options of commenting, going no comment with or without a prepared statement. There was limited recognition of the characteristics of the defendant and the circumstances of the alleged offences. Not all candidates recognised that the question also required some discussion of the format of the interview, e.g. recording, the presence of and role of the defence representative.

Suggested Points for Response:

- The interview will be recorded. The legal adviser is entitled to be present and can object to improper questioning or ask for the interview to be suspended. Rest and refreshment breaks should be provided in the course of a lengthy interview. The suspect should be fit to be interviewed and not suffering from ill health or be under the influence of drink or drugs. Again the legal adviser can bring to the attention of the custody officer any concerns in this respect.
- It is for the suspect to decide how to respond in the interview. The legal adviser can indicate whether the police have provided sufficient disclosure so that the suspect is aware of the case against him. The adviser can also indicate what might be an appropriate approach and the advantages and disadvantages of each.
- There is no obligation to answer questions, so the suspect can give a no comment interview. This avoids potential self-incrimination, but raises the possibility of adverse inferences at trial if the defence subsequently relies on matters which could and should have been raised at interview.
- A written statement can be provided in conjunction with a no comment interview, and this will avoid adverse inferences, but has to be carefully drafted so as not to disclose matters which the suspect does not wish to disclose, and must cover any points which are going to be raised by way of defence.
- The suspect can answer all questions. This avoids the risk of adverse inferences, and may make a favourable impression. If the suspect does have a clear and cogent explanation, giving it may lead the police to discontinue the investigation.
- The selective answering will nearly always make a very poor impression, suggesting that the suspect has something to hide.
- In this case, while Levi Carter has considerable experience of criminal investigation, the information about his inarticulacy, misunderstandings and tendency to become agitated suggests that he would not cope well with answering questions.
- There are a number of points which could be raised at this stage, including that he has lost his driving licence and that he does not know any of the co-accused. However, these do not represent a positive defence, failure to disclose which would give rise to adverse inferences.

| Question 1d | 8 marks |
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Candidates generally recognised that this required discussion of Plea before Venue and Mode of Trial/Allocation. The procedures were usually described accurately, although not always in full detail. Not all candidates actually considered what the likely sentencing options were based on the information provided and consideration of the Sentencing Guidelines.

Suggested Points for Response:

- Burglary is an either way offence. The initial appearance will be in the magistrates court and will commence with Plea before Venue. The defendant will be asked to indicate a plea and be informed that if the indication is a plea of guilty, it will be taken as such and the court will then proceed either to sentence (with or without an adjournment for reports) or commit for sentence to the Crown Court if its sentencing powers are insufficient.
- Where, as here, the plea is one of not guilty (or if no plea is entered) the court will consider allocation of the case in a Mode of Trial Hearing. There is a presumption in favour of summary trial. The procedure is governed by s 19 Magistrates Courts Act 1980. The prosecution will make representations as to the nature and seriousness of the offence. The court must treat the offence as being no less serious than the prosecution allege. The court will also have details of the defendant's criminal record. The principal consideration will normally be whether the court has sufficient powers of sentencing. It can impose six months custody for one offence.
- This offence would appear to fall within B2 of the burglary guidelines. There is a significant degree of planning, but no other serious aggravating features. The value of the property is not particularly high, but is significant. The victim was not present, while some damage was done it does not seem particularly significant. As the starting point for this level is 18 months custody, it is likely that the court will decline jurisdiction and allocate the case to the Crown Court. In that case Levi Carter will not have any option.
- If the court did consider that the case was within its jurisdiction, Levi Carter will be informed that the case can be heard in the magistrates court, although he could still be committed for sentence if convicted. He has the option of electing trial in the Crown Court on indictment. In his case, cost is not a major consideration, although he could be ordered to pay prosecution costs in the Crown Court. Anecdotally juries in the Crown Court may be more sympathetic. This case does not seem to have evidential issues which would be better dealt with by the procedures in the Crown Court. The Crown Court can impose a significantly higher sentence.

| Question 2a | 8 marks |
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Candidates did not always recognise that there had been an offence of failure to surrender, and that there was also a breach of bail conditions, which would undoubtedly come to light on the next appearance. Several candidates suggested that there might be a reasonable excuse for failure to surrender, but the facts did not disclose anything of the sort. In general answers tended to focus on one aspect, rather than covering all the required material, namely the fact of and consequences of the offence, the fact of and consequences of the breach and the role of the defence representative in making representations in favour of the defendant being re-bailed.

Suggested Points for Response:

- It would appear that Levi Carter is in breach of the bail condition of residence, as he appears to have moved to another town. If the police become aware of this, they can bring it to the attention of the court.
- Of more immediate concern, failure to attend court without reasonable excuse is a criminal offence. Making a mistake as to the date of the appearance is not a reasonable excuse.
- The court is likely to issue a warrant, not backed for bail, for the arrest of Levi Carter.
- Levi Carter should be advised to surrender himself to the police at the earliest opportunity. He will then be brought back before the court. The prosecution will decide whether to prefer a further charge of failure to surrender.
- The court will have to consider whether to re-bail Levi Carter, possibly on more stringent conditions, such as the use of an electronic tag, or to withhold bail and remand him in custody; it would be possible at this stage to apply for a variation of the bail condition to permit him to reside at his new address.
- In general, the defence will seek to persuade the court that it is appropriate to grant further bail. Subject to instructions, possible further conditions, such as reporting, could be suggested.

| Question 2b | 5 marks |
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The points which should have been made were that this was potentially relevant evidence of alibi. The potential witness was competent and compellable, so if unwilling, a summons could have been applied for, but that there were technical risks as she might be unfavourable, or even hostile. Limited credit was given to reference to using a statement as hearsay evidence, since it was not clear that she was willing to cooperate even to that extent.

Suggested Points for Response:

- In principle the evidence could be put before the court as it is relevant. It would be evidence of an alibi. This should be included in the defence statement.
- There is nothing in the documentation which suggests that Levi Carter mentioned this alibi evidence when he was originally arrested. Since he gave a no comment interview, there is every likelihood that the prosecution will seek permission to invite the jury to draw adverse inferences from the failure to refer to the alibi at that stage.
- Even though the witness is not prepared to give evidence voluntarily, a witness summons could be applied for to compel her to give evidence. There is however the danger that she will not give evidence which supports the alibi. She is unlikely to be a cooperative witness, and may even become hostile.
- Tactically it may not be appropriate to seek to adduce this evidence, as there is a danger that it will be counter-productive.

| Question 2c | 5 marks |
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| Candidates seemed unaware of the proper format for a defence statement. Most identified the need to indicate what was in dispute, in particular the identification evidence, but several tried to refer to alibi when it was clear that the potential alibi witness was not going to be called. | |
| Suggested Points for Response: | |
| • I Levi Carter confirm that I intend to plead not guilty to the charge against me.<br>• The nature of my defence is that the prosecution have not produced evidence to establish to the criminal standard my involvement in the offence.<br>• I take issue with the evidence of identification as the driver of vehicle YS67TTT on the ground that the witness is mistaken in her identification.<br>• I take issue with the evidence linking me to the said vehicle, and in particular the presence of a photo copy of my driving licence on the file relating to the hiring on the ground that I lost my driving licence several months prior to this. It must have been used by some third party.<br>• I do not intend to rely on any matters of fact in support of my defence.<br>• I do not intend to rely on any specific defence.<br>• As indicated above I put the prosecution to prove of all matters necessary to establish my involvement in the offence. | |

| Question 2d | 12 marks |
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Candidates should have appreciated from the marks allocated that there were a number of issues to be discussed. Few actually identified the full range of issues, namely the disputed identification with consideration of Turnbull, the potential DNA evidence, and the position with regard to the former co-accused Aslan now being a competent and compellable prosecution witness. This also requires consideration of bad character. Many candidates focused purely on the issues relating to Aslan.

Suggested Points for Response:

- It is not in dispute that this burglary occurred. The issue is whether the prosecution can establish to the criminal standard that Levi Carter was one of those responsible for it. They have both the legal and evidential burden in this respect.
- The independent identification evidence is significant, as it links Levi Carter to the vehicle involved in the burglary. It is disputed identification evidence and a Turnbull direction is therefore required. The judge should advise the jury that visual identification is fallible and that an honest witness may nevertheless be mistaken.
- The judge should remind the jury of the circumstances of the observation. There is no issue of lighting, and the witness was at close quarters with the person in question. It was an encounter which would not normally have made a significant impression, but the witness refers to a specific conversation which would mean the individual made a greater impression on her. The original description was relatively generic, and it does not appear that she referred to the facial scar.
- The judge should direct the jury to consider whether they regard this evidence as being strong, in which case they can rely on it, or whether they regard it as being weak, in which case they should not rely on it unless it is supported by other evidence. In this case the evidence that the beanie hat with the DNA of Levi Carter was found in the same vehicle could be seen as giving this support, although the presence of other DNA means that it is not particularly strong support.
- Levi Carter has previous convictions for similar offences of dishonesty. The prosecution are likely to apply for leave to adduce evidence of this bad character as being relevant to propensity to commit offences of this kind.
- The evidence of Sean O'Rourke does not appear to incriminate Levi Carter in any direct sense, although it is part of the circumstantial background.
- Mohammed Aslan is a competent and compellable witness for the prosecution. His evidence clearly implicates Levi Carter and if accepted by the jury is highly damaging.
- Mohammed Aslan has previous convictions for dishonesty. An application could be made for these to be admitted on the basis they demonstrate that he is not a credible witness. Although in principle this opens up the character of Levi Carter, as indicated above this is already likely to be in evidence.
- It is likely that Levi Carter will have to give evidence, in particular to account for the presence of the beanie hat in the vehicle and his driving licence particulars in the vehicle hire files.
- The overall strategy of the defence would seem to be to seek to discredit Mohammed Aslan, limit the significance of the identification evidence and generally seek to persuade the jury that the evidence does not establish a case against Levi Carter to the criminal standard.

| Question 3a | 5 marks |
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All candidates recognised that there was a professional conduct/ethics issue. The client and her witness have given evidence which is consistent. It is not for the legal representative to decide whether or not they are telling the truth. There is no reason why the client cannot maintain a not guilty plea and why the representative cannot act, although tactically it would be proper to warn the client that her evidence and witness may not be credible. Some candidates seemed to recognise this but not articulate it, but a number wrongly saw a reason why they could no longer act at this stage.

Suggested Points for Response:

- It is the responsibility of a legal representative to act on the instructions of the client unless this involves a breach of the representative's duty to the court. It would be a breach of that duty to mislead the court by putting forward evidence which is known to be untrue or misleading (SRA Code 1.4).
- Whatever your personal suspicions, the client and her witness have been consistent, and there is no clear and objective basis for concluding that they are attempting to mislead the court or that you could be complicit in this.
- There is therefore no reason not to act, and no breach of Part 2 of the Code.
- You could properly advise the client that the evidence of her brother, as it stands, may not be seen as cogent and convincing. What would be a breach of Part 2 would be any attempt to tamper with the evidence as it stands.

| Question 3b | 8 marks |
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Most candidates recognised that this question required an attempt to negotiate a basis of plea and/or a Newton hearing. The level of detail varied, and couple of candidates missed the point entirely.

Suggested Points for Response:

- In the first instance, an approach could be made to the prosecution to see whether they would be prepared to accept a basis of plea in accordance with the instructions.
- The prosecution may be unwilling to do this as it appears to have evidence of significantly greater involvement. However, it will be aware that the co-accused may be seeking to transfer the blame, and may give some weight to the evidence about the origin of the funds provided by Jan Gnatek. It also has to consider whether it is in the public interest to proceed with a trial.
- If a basis of plea can be agreed this should be reduced to writing. The client will be entitled to limited credit for a late guilty plea.
- If the prosecution is not willing to agree a basis of plea, consideration should be given to a Newton hearing. The judge will hear the evidence and decide whether the prosecution has established the full extent of involvement that it has alleged. If so, the defendant will not receive any credit for a guilty plea. If the judge determines that the prosecution has not established that full extent of involvement, the defendant will be sentenced on her version of her involvement and will get limited credit for the late guilty plea.

| Question 3c | 7 marks |
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| Most candidates identified individual points, such as previous good character, the limited nature of the involvement, and the impact on the children. Only a few candidates seem to have given proper attention to the likely disposal, so many answers did not really focus on whether it was mitigation against imposition of a custodial sentence as opposed to a community order or whether the defence representative should be arguing for a custodial sentence to be suspended. | |
| Suggested Points for Response: | |
| • There will be a presentence report. Reference should be made to this in relation to what is said as to the extent to which Marie Novotna has expressed remorse and also in relation to what is said as to available community orders.<br>• Marie Novotna falls to be sentenced on the basis that there was a significant breach of trust, but that she was not the instigator but was recruited by others and benefited to a limited extent. This would appear to indicate a B2 or B3 offence depending on the extent of the benefit. The starting point for these is one years custody and a high range community order respectively. However, the range for B3 extends to 36 weeks custody.<br>• Marie Novotna will be entitled to a limited discount for the late guilty plea it will be not more than 25% and not less than 10%.<br>• Marie Novotna has lost her good character as a result of this conviction, and will certainly have difficulty in securing similar employment. She will be at a considerable disadvantage on the labour market.<br>• The primary submission will be that the custody threshold has not been crossed in all the circumstances, and that a community order including punitive elements such as unpaid work would be sufficient.<br>• Alternatively, if the custody threshold has been crossed, the sentence should be suspended.<br>• A particular argument here is the interest of the children. There appears to be no one else available to look after them. | |

| Question 4a | 6 marks |
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Most candidates recognised that there was a presumption that this matter would be dealt with in the Youth Court. A minority wrongly suggested that the initial appearance would be in the magistrates court. The level of understanding of the circumstances in which the case might leave the Youth Court was variable. Some candidates seemed unaware that there is no need to commit for trial as there is an unfettered power to commit for sentence. The fact that dangerousness could only be properly assessed after trial was also overlooked. Not all candidates considered what the likely disposal might be and those that did were often quite unrealistic, failure to take any account of the discount on adult sentencing levels for juveniles, and also missed categorising the offence.

Suggested Points for Response:

- Louise Thornton is a juvenile. As she is the only defendant in this case, she will initially appear before the youth court. This is a specialised division of the magistrates court which is staffed by specially trained magistrates and District Judges.
- The strong presumption is that juveniles will be dealt with throughout in the youth court, unless they are charged with homicide.
- Wounding with intent carries a potential sentence of life imprisonment for an adult. The youth court can, following plea before venue and mode of trial, send the case to the Crown Court for trial. It should only do so if the likely sentence significantly exceeds the 24 month Detention and Training Order which is the maximum sentence available to the youth court. This case appears to fall within category B 2 of the sentencing guidelines. The starting point for an adult would be four years custody. This is substantially discounted in the case of a juvenile, so a sentence in excess of a 24 month DTO is unlikely, even having regard to Louise Thornton's previous record.
- The youth court now has power to commit for sentence, so the expectation is that the trial would take place in the youth court, and if a sentence in excess of that available is considered appropriate, or Louise Thornton is considered to be a dangerous offender (which is better assessed after the trial), committal for sentence would be the appropriate outcome.
- This approach retains cases in the youth court so far as possible.

| Question 4b | 8 marks |
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Most candidates had some idea that the court would need to be advised as to whether it was proper in all the circumstances to draw inferences from silence, given that the defendant had not had the benefit of legal advice, and that the appropriate adult had given what appeared to be inappropriate advice. The self defence aspect was much less well handled, with virtually no candidates giving a proper direction which dealt adequately with the relationship between honestly and reasonableness. The prosecution must prove to the criminal standard that the defendant did not use reasonable force in the circumstances which he honestly believed to exist, although the reasonableness of her belief as to the circumstances could be used to establish the honesty of the belief.

Suggested Points for Response:

- If the defendant has raised the issue of self-defence so it becomes a live issue, it is for the prosecution to satisfy you to the criminal standard that the defendant was not acting in self-defence. The prosecution bears both the legal and the evidential burden in this respect.
- Self-defence involves the use of reasonable, i.e. proportionate, force in the circumstances as the defendant honestly believed them to be. The reasonableness of the belief is relevant to whether it was honestly held, and the proportionality of force used may not be capable of being assessed in the heat of the moment: s 76 Criminal Justice and Immigration Act 2008.
- Adverse inferences cannot form the basis of the case against the defendant. You must be satisfied that there is a prima facie case on the basis of the other evidence. Adverse inferences may only be used to convert a prima facie case into proof to the criminal standard.
- In order for you to consider accepting a submission that adverse inferences can be drawn, you must be satisfied that the defendant failed to mention in interview something which they are now relying on and which they could reasonably have disclosed at the interview stage.
- The assertion that the defendant was acting in self defence is one which could have been disclosed at that stage as it was a matter which was within the knowledge of the defendant.
- The defendant did not have the benefit of legal advice. The defendant now asserts that the reason for nondisclosure was advice given by the appropriate adult.
- The application relating to adverse inferences should not be accepted if it was reasonable for the defendant not to disclose the facts in question. There is case law where the defendant claimed to be relying on legal advice. The questions you should ask yourselves are whether the defendant genuinely relied on advice from the appropriate adult and whether it was reasonable to rely on this.

| Question 4c | 6 marks |
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| Most candidates did give a reasonable account of an appeal pursuant to s 108 MCA to the Crown Court. Only a minority recognised that as this would appear to be a point of law, an appeal by way of case stated pursuant to s 111 MCA could also be pursued instead of or subsequent to the appeal to the Crown Court. A further minority wrongly described the process of appeal from trial on indictment at the Crown Court to the Court of Appeal (Criminal Division). | |
| Suggested Points for Response: | |
| • The youth court is a magistrates court so there are two possible routes to appeal in this case.<br>• A defendant can appeal under s 108 Magistrates Courts Act 1980 to the Crown Court against conviction. This is an appeal by way of rehearing. It is available as of right and notice of appeal should normally be given within 21 days. A court comprising a judge and two magistrates from the youth court panel will hear the evidence afresh. If they uphold the conviction they can impose any sentence available to the youth court.<br>• The defendant and prosecutor can appeal to the Administrative Court by way of case stated under s 111 Magistrates Courts Act 1980. This is an appeal on the basis that the youth court made an error of law. Such an appeal can also be made from the Crown Court following an appeal to that court.<br>• For there to be an appeal by way of case stated, a specific error in applying substantive law or evidential law must be identified. The court is asked to state a case indicating what facts were found, and how the law was then applied to those facts. | |