CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

LEVEL 6 UNIT 18 – CRIMINAL LITIGATION

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 January 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

A total of 26 candidates attempted the examination. Some of the weakest candidates omitted some whole questions and part questions altogether and were clearly well short of proper preparation in terms of knowledge and understanding. Weaker candidates tended to produce quite generic answers (which sometimes seemed to have been rote learned) which did not utilise the information provided in the Case Study Materials or the Question Paper about the client and the alleged offences. This is a point which has been made many times in relation to previous sittings. In particular there seemed to be fewer candidates who had taken the trouble to get to grips with the detail of the sentencing guidelines for the various offences.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

A relatively straight forward question. Most candidates were able to identify the various options and, in general terms, advantages and disadvantages of each. A minority of candidates deviated into discussion of arrangements for the interview which were not asked about. Generally, marks were dropped by candidates who made no effort to apply the information about the client and the offence but simply provided generic responses.

1(b)

Another straight forward question, and generally well answered, although some candidates did not discuss how the merits test would apply in the Magistrates Court, or alternatively in the Crown Court. A minority discussed irrelevant issues such as advice at the police station or the court duty solicitor scheme when the question was clearly focused on representation orders.

1(c)

Some candidates did not appreciate that failure to appear in court was an offence, and not simply a breach of bail. Insufficient emphasis was placed on the need for the client to surrender as soon as possible in order to preserve the defence of reasonable excuse, and some candidates did not consider the likely implications at the next hearing.

1(d)

Most candidates were able to give a reasonable account of the procedure at a Plea before Venue/Mode of Trial/Allocation hearing. Weaker candidates did not discuss where the offence fell in terms of the sentencing guidelines, and therefore whether the magistrates would decline jurisdiction, or discuss in any depth the tactical considerations if the client had an election. This is a further example of the inability of such candidates to recognise the importance of answering the questions in the light of all the information available as to the circumstances of the offence and the client.

Question 2(a)

Most candidates recognised that this was the Plea and Trial Preparation Hearing and dealt with arraignment and some or all of the procedural issues which were likely to arise. Marks were lost for lack of detail in this respect. Occasional candidates overfocused on issues relating to disclosure.

2(b)

Virtually all candidates recognised that the issue here was conflict of interest, although not all recognised that it was a potential conflict rather than an established one at this stage. Most candidates recognise that it would not be appropriate to act for the second potential client although the clarity of explanation was sometimes lacking.

2(c)

Nearly all candidates recognised the fact that this question related to deficiencies in the disclosure process. Some provided too much on the ordinary process of disclosure. An informal approach to the prosecution in relation to specific disclosure was mentioned less frequently than was anticipated. Candidates who did refer to the formal application to the court for specific disclosure did not, generally, explain the criteria which the court would use when deciding whether to grant that application. A minority of candidates recognised that there was the possibility of an application to stay proceedings as an abuse of process, but there was little recognition that this was likely to be successful only where the missing material was of considerable significance.

Question 3(a)

The crucial point is that Lewis is now a competent and compellable witness for the prosecution, although his original confession is evidence only against himself. If he gives live evidence, and this is believed, the defence position, namely that Shaw was unaware of the dishonesty and criminality, is fatally undermined. A few candidates suggested, quite unrealistically, that they could seek to have this evidence excluded when there is no conceivable basis for this. Not enough candidates pursued the more reasonable lines of seeking evidence of bad character to undermine the credibility of Lewis, and/or cross-examination on the basis that he was lying to get his customers dragged down with himself.

3(b)

Some answers focused on bad character rather than good character. Only a minority of candidates appreciated that while Shaw was not of absolute good character, he would probably benefit from a qualified good character direction on both credibility and propensity pursuant to Vye.

3(c)

This question required consideration of the burden and standard of proof. Some candidates appeared confused over whether any burden rested on the defence and failed to appreciate that once dishonesty had been made a live issue the legal and evidential burden was on the prosecution. Only a minority explained the correct approach to identifying dishonesty as set out in Ivey v Genting Casinos. There was very little effort to apply that approach to the facts of the case.

3(d)

Nearly all candidates recognised that this was an appeal to the Court of Appeal (Criminal Division), and most recognised that the test to be applied was whether the conviction was unsafe. Explanations of what unsafe might mean were less forthcoming, and not enough candidates mentioned that allowing the appeal would not necessarily result in an acquittal but might result in an order for a retrial.

Question 4(a)

Most candidates were able to identify that this case would start in the Youth Court and would probably stay there for trial notwithstanding that robbery is a grave crime. There was good recognition that the Youth Court can now commit for sentence, but there was very patchy use of the relevant sentencing guidelines, including the percentage reduction to be applied to a 16-year-old.

4(b)

The available options are conditional bail, remand to local authority accommodation, or remand to youth detention accommodation. The latter is only to be used as a last resort. Some answers focused excessively on YDA, without necessarily being able to identify whether either set of conditions were met in this case.

4(c)

It is clear from the facts that the officer did not comply with the requirements of s 2 (3) PACE in this case and as a result, although he undoubtedly had reasonable grounds under s 1 to undertake a stop and search, the stop and search actually undertaken is unlawful. The main consequence of this is that he is not acting in the execution of his duty, and the prosecution for police obstruction will therefore fail. In this situation it is not really exclusion of evidence which should be the focus. A number of candidates failed to spot the breaches of PACE at all, which is concerning.

4(d)

The client is offering to plead guilty to a lesser charge. The obvious action is to invite the prosecution to agree to this. It is not technically a basis of plea, although the prosecution will go through the same process of considering whether the evidence in their possession is sufficient to justify continuing with the original charges. The client could indicate his willingness to plead to the lesser charge in court. This is not a suitable case for a *Newton* hearing as it is not a difference between prosecution and defence over the extent of responsibility for the same offence but a form of plea bargaining.

SUGGESTED POINTS FOR RESPONSE

JANUARY 2023

LEVEL 6 UNIT 18 – CRIMINAL LITIGATION

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	All decisions in relation to the interview are those of Tony French. The legal adviser can merely advise as to the implications. The legal adviser will satisfy himself that the client is in a fit state to be interviewed (there is no suggestion to the contrary here). The interview should be recorded. One available option is to answer all questions. This has the advantage that, provided any defence put forward at trial is consistent with the answers given, there can be no adverse inferences drawn. It may also lead magistrates or a jury to the view that the defendant has been candid and open. However, there is a risk of self-incrimination. There is no suggestion that there is any lack of information from the prosecution here which could justify not answering questions. A specific issue here is that Tony French does not wish to identify the friend he has referred to. If he is questioned about his associates, this will put him in difficulties. If he declines to answer questions which might involve reference to the friend, he is in effect giving a mixed interview and selective silence is generally regarded as essentially suspicious. If Tony French simply gives a no comment interview, he cannot incriminate himself or anyone else, but if you subsequently wish to put forward a positive defence relying on facts which would have been in his knowledge at this point adverse inferences may be drawn. This possibility can be avoided to some extent by presenting a prepared statement which can confine itself simply to those matters which Tony French wishes to disclose at this stage.	**7**
1(b)	A representation order is granted following electronic application to the Legal Aid Agency. Tony French must meet a means and merits test. Initially a means test based on adjusted income is applied and, as Tony French has income of less than £12,475, he satisfies the test for the magistrates' court and also for the Crown Court, with a nil contribution. If the case is allocated to the Crown Court, the merits test is automatically satisfied. If the case remains in the magistrates' court, the test is whether one or more of a range of criteria are satisfied. Here there is clearly the risk of loss of liberty through a custodial sentence as the guidelines indicate a sentence of up to 12 months for this category of offence. Tony French is no longer of good reputation, and it is unclear whether his livelihood is at risk. There do not appear to be any complicating features requiring the grant of legal aid.	**5**

1(c)	Failure to surrender to custody without reasonable excuse is a criminal offence: s 6 Bail Act 1976, and even if there is a reasonable excuse it is still an offence if the defendant fails to surrender to custody as soon as practicable. Here, the accident and medical treatment resulting would appear to be a reasonable excuse, provided suitable evidence is presented. Tony French should therefore surrender to the magistrates' court, or to the police as soon as possible. He will be brought back before the court for the question of bail to be reconsidered, but if he has a reasonable excuse and acted promptly, he is likely to be re-bailed.	**6**
1(d)	The primary function of the hearing is Plea before Venue and allocation, as wounding contrary to s20 of the Offences Against the Person Act 1861 is an either-way offence. The court may also deal with any issues of bail or reporting restrictions which may arise. At Plea before Venue the clerk of the court will invite the defendant to indicate a plea. Where, as here, that indication is not guilty, the court will proceed to deal with the question of allocation. There is a presumption that either-way offences are to be dealt with in the magistrates' court unless the magistrates decline jurisdiction. The court must have regard to any previous convictions disclosed by the prosecution. Prosecution and defence may make representations as to the appropriate venue, and the court must treat the offences being at least as serious as represented to be by the prosecution. Pursuant to s 19 Magistrates' Courts Act 1980 the court must take into account its sentencing powers in relation to the offence and any guidelines as to allocation. This offence appears to fall into the category B3. Culpability appears to be category B because of the use of a weapon, and harm is category 3 because the injury appears to be relatively minor. The entry point according to the sentencing guidelines is 26 weeks custody with a range of a mid-level community order to 12 months custody. In the absence of any particular aggravating features, it is likely that the court would accept jurisdiction, as it has the power to impose a 12 month sentence for any one either-way offence. If so, the court must advise Tony French that he has the right to elect trial on indictment in the Crown Court. In favour of the Crown Court is its superior procedures for handling points of law and procedure such as admissibility of evidence, and the presumed greater willingness of juries to at least extend the benefit of the doubt to defendants thus increasing the chances of acquittal. In favour of the magistrates' court is speed, and lesser formality, not being exposed to the possibility of a high prosecution costs order, and probable lesser publicity.	**10**
		Question 1 total:28 marks

2(a)	Plea and Case Management Hearing. Arraignment. Indication of any preliminary issues. Relevant disclosure issues. Estimated duration and listing issues. Electronic case management form.	**6**
2(b)	Cannot act for two clients if there is or may be a conflict of interest. SRA Code 6.2. If both PNG on same basis unlikely to be conflict. SB possibly PG = possible conflict. Use of confidential information. Sufficient danger of conflict that instructions should be declined.	**6**
2(c)	Standard disclosure (initial, defence and secondary) is complete. No suggestion defence statement inadequate. Informal request for disclosure. Application for specific disclosure: s 8 CPIA. Information in possession of prosecution, and Relevant and proportional. If not disclosed, consider seeking stay. Unlikely to meet criteria that fair trial not possible.	**8**
		Question 2 total:20 marks
3(a)	KL is no longer a co-accused. As he has been convicted, he becomes a competent and compellable witness. Earlier admissions evidence only against him. Live evidence clearly relevant and admissible. Evidence potentially damaging – undermines defence case that legitimate commercial transaction. Can be cross-examined as to motive. Is he seeking to minimise his role and therefore sentence? Important to shake the cogency/credibility of evidence in cross-examination.	**6**
3(b)	GS is not of absolute good character, having regard to his earlier convictions. These are some 20 years ago, so may justify a decision that GS is of 'qualified or effective' good character. Decision for the trial judge. Character witnesses may also be called. If of good character entitled to a full Vye direction. Covers propensity – is it likely GS would commit this offence. If GS gives evidence, it also covers credibility – is GS likely to be a witness of truth. Ultimately for the jury to assess – but must take the direction into account.	**6**

3(c)	The prosecution bears the legal and evidential burden of showing that GS was dishonest. Evidence will be led as to what GS knew about the background to the transactions. Prosecution will seek to demonstrate that GS knew KL and Meatforce were operating fraudulently, and GS went along with this. Defence will seek to show that GS only aware of facts pointing to a legitimate business. The judge will give a direction based on the Supreme Court in Ivey v Genting, as confirmed in R v Barton, R v Booth. The jury should be directed to consider what relevant facts the defendant was aware of. This may involve assessing what evidence on these matters is to be accepted. Was the behaviour of the defendant, in light of those facts, dishonest according to the standards of ordinary decent people. The members of the jury represent ordinary decent people for this purpose.	**8**
3(d)	Unless the trial judge grants leave to appeal, leave must be sought from the Court of Appeal (Criminal Division) within 28 days. Grounds must be provided, but if trial counsel considered grounds existed they should draft these. Application considered by single judge on the papers. Application can be renewed to the full court. Sole basis of appeal is that conviction is unsafe. Misdirection by the judge may render conviction unsafe. Conviction may stand despite misdirection if other elements of the case justify this. If appeal allowed, a retrial is the likely outcome.	**6**
		Question 3 total:26 marks
4(a)	Initial appearance for juvenile not charged with an adult will be Youth Court. Youth Court will also handle allocation (no right of election). In principle juveniles should be tried and sentenced in the Youth Court which has appropriate procedures and personnel. No real reason to allocate to Crown Court for trial, as Youth Court can commit for sentence anyway. Committal for trial possible as robbery is a grave crime, and also a specified offence for dangerousness. Dangerousness can usually only be determined at the conclusion of proceedings. This appears to be a category A3 robbery – high culpability for use of a knife, low harm as no evidence of significant impact on victims. Adult starting point is 3 years, slightly aggravated by the record. Youth robbery guidelines indicate custody or a Youth Rehabilitation Order with Intensive Supervision and Surveillance. The adult sentence should also be discounted by 1/3 to ½.	**8**

	The Youth Court can impose a 24 month Detention and Training Order, so unless JP is assessed as dangerous no need to commit to Crown Court for sentence.	
4(b)	Court can bail with or without conditions. If not satisfied that this will (e.g.) prevent further offences can remand to local authority accommodation (here of the authority which is looking after JP). Conditions equivalent to bail conditions may be attached. Remand to Youth Detention Accommodation is available only as a last resort and where one or other (or both) of the statutory sets of conditions in ss 98/99 LASPO 2012 are satisfied. JP is over 12 and legally represented; a custodial sentence is highly likely. For the first set the offence is both violent and carries a sentence of more than 14 years for an adult. For the second set the offence is imprisonable, but there does not appear to be a recent and substantial history of absconding or offending on bail.	**6**
4(c)	To effect a stop and search pursuant to s 1 PACE the officer must have reasonable grounds (based on specific intelligence or observation, and not on stereotyping) to believe that the suspect is in possession of stolen or prohibited articles. Here PC Rathore acted on the basis of specific intelligence linking JP to the robberies, which appears to amount to reasonable grounds. PC Rathore was obliged to comply with the requirements of s 2 PACE to provide specified information. He has not apparently done so. If so, the stop and search is not lawful: Fennelly; Osman. As a result, he is not in the execution of his duty. The offence of police obstruction requires the officer to be in the execution of his duty. Although the officer has been obstructed, the offence is not made out.	**6**
4(d)	Invite the prosecution to proceed on the lesser charge and on an agreed basis of plea. Prosecution will review how sound their case is. If successful, limited credit for a late guilty plea. Not appropriate for a Newton hearing. This is relevant only if a defendant is pleading guilty to a given charge, but wishes to assert a factual basis at odds with the prosecution case.	**6**
		Question 4 total: 26 marks