CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 6 - UNIT 18 – CRIMINAL LITIGATION

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers 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 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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

Overall, the approach of candidates has followed the recent trend. The majority of candidates have clearly used the opportunity given by the Case Study Materials to research matters such as whether the offence which has been or is likely to be charged is indictable only, either way or summary, and which category within the Sentencing Guidelines it is likely to fit having regard to the information on culpability and harm provided. In other areas there still seems to be a tendency to rely on rote learned general answers which are then reproduced without consideration of whether all the material is relevant and how the material should be tailored to have regard to the circumstances of the scenario. This results in answers which lack application. Examples of this are provided in the discussion of the individual questions.

Candidates generally seem not to fully grasp the distinction between the admissibility of evidence and factors relating to the weight to be attached to admissible evidence.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This question was generally well answered, and most candidates secured the majority of the marks. Since the scenario makes it clear that the client is in employment it was not appropriate to discuss passporting benefits (an example of rote learned answers) and a significant number of candidates failed to appreciate that, as robbery is indictable only, the merits test for a representation order is automatically satisfied.

(b)

Nearly all candidates were able to give a reasonable account of the VIPER procedure. The need to deal with the distinctive feature of the monobrow was acknowledged, but the code of practice clearly suggests that where the distinguishing feature is, as here, mentioned in the witness descriptions, it should be added to all images rather than being deleted from the suspect's. A few candidates still suggested a traditional live parade as an alternative, without demonstrating that they understood that this would also require the client's consent.

(c)

This is an area where candidates still tend to produce quite a lengthy generalised explanation of the merits and demerits of the legitimate approaches without necessarily identifying the features of the case which militate in favour of one or the other. Here, for example, the client is of previous good character, and accordingly unfamiliar with police tactics. This could be a reason to recommend a no comment interview with a prepared statement. The client has an alibi, although there is no witness who can fully support this. Nevertheless, it is a positive element which needs to be disclosed in order to avoid adverse inferences. There is also an explanation for the presence of DNA on the replica gun. The best answers used this information and focused on the two most relevant approaches, namely answering questions and providing a prepared statement.

(d)(i)

This question was answered surprisingly poorly. Far too many candidates, including some who correctly identified robbery as an indictable only offence earlier, failed to describe the initial hearing in the magistrates' court for the purpose of sending the case to the Crown Court. The defendant is identified, a date is given for the first appearance before the Crown Court (the Plea and Trial Preparation Hearing) and issues relating to bail, legal aid, and reporting restrictions can be dealt with. However, the defendant will not be asked to plead and there is no discussion of the facts and issues. Far too many candidates simply describe the standard Plea before Venue and Mode of Trial hearing as though it were an either way offence. A minority irrelevantly discussed the PTPH itself.

1d(ii)

There is here clearly an allegation of interference with a prosecution witness. As the client is currently on unconditional bail, this does not constitute a breach of bail conditions. While it could in principle give rise to an application for reconsideration under s 5B Bail Act 1976, as the client is due to appear in court within a very short time, it is more likely that an application will be made at that hearing. Most candidates identified that there would be an application in relation to withholding, or imposing conditions of, bail, and that the statutory ground for overriding the presumption of bail related to interference with witnesses. The detailed understanding of procedures and criteria was variable.

Question 2(a)

Most candidates realised that this question was primarily about disclosure. The level of detail varied considerably, with some candidates giving a clear explanation of primary and secondary disclosure, the implications of a defence statement and specific requests initially to the police and then to the court. However, the facts make it clear that the photographs have not been produced in primary or secondary disclosure. There is therefore little point in explaining what the police should have done and the relevant points are those in relation to seeking specific disclosure and identifying what issue the photographs are relevant to. Only a minority went on to consider whether there could be an application to stay the proceedings if the pictures were still not produced.

(b)

This question clearly invited a discussion of an application at a preliminary hearing to exclude the evidence under s 78 PACE. A surprisingly large number of candidates wrongly considered that the police had in some way breached the identification Code of Practice, whereas the facts make it clear that the witness had been shown the photographs by her son on the day they were taken, and therefore some time before the robbery. While the Code does indicate that photographs must not be shown to witnesses when there is a known and available suspect, this only relates to official police photographs. The application would therefore be based, not on police non-compliance with the Code, but on the prejudicial effect of the witness having seen photographs which contained the client. It is somewhat doubtful whether this would in itself be sufficient to render the evidence inadmissible, since there is nothing to suggest that a VIPER procedure cannot be used where the witness has or may have had dealings with the suspect on a prior occasion. Some candidates focus their answers on submissions relating to the Turnbull guidelines. However, these are primarily concerned with the reliability and weight, rather than the admissibility, of the evidence in question. Even if the identification evidence were regarded as weak, there is still supporting material in the form of DNA. A submission of no case to answer is therefore unlikely to be successful on Turnbull grounds, but maybe appropriate if the identification evidence is excluded under s 78, as, at this point, the DNA is almost certainly not sufficient by itself to prove participation in the offence, given that it was found at the client's place of work and he has explained that he handled it there.

2(c)

Virtually all candidates correctly identified that the legal and evidential burden rested on the prosecution. A significant minority then went on to discuss exceptions to this rule which were not in any way relevant as the defence are not raising any positive defences other than alibi. More candidates should have specifically identified that the issue between prosecution and defence was not whether or not a robbery had been committed but whether or not the client was one of the perpetrators.

It is at this point that the identification issue should have been discussed, with full consideration of the Turnbull guidelines and application to the circumstances. Again, there is now significant supporting evidence, but the defence can make submissions as to the likelihood of the witness making a false positive identification based on having seen the photographs earlier as well as the usual issues relating to the circumstances, in particular that the offender's face was partly covered.

Issues relating to the way in which the evidence of the co-accused would be dealt with were generally poorly handled and some candidates barely referred to what is extremely strong evidence for the prosecution. The scenario makes it clear that the co-accused is expected to plead guilty. At that point he will become a competent and compellable witness for the prosecution and there is no reason to suggest that they will not call him. While it is true that his confession is, under normal circumstances, evidence only against him, this is of no particular significance since his evidence in court will clearly implicate the client. No information is given about whether the co-accused is bad character. This should be explored and, if appropriate an application made to admit this as relevant to an issue between the parties. A record including dishonesty would clearly be relevant to credibility and therefore whether he is telling the truth about the client's involvement.

The evidence that the client was unable to settle the debt for a period before the offence and was in funds to do so shortly afterwards is circumstantial evidence. However, if the explanation given by the client about his bonus is correct it should be possible to obtain evidence from the employer confirming this payment thus significantly reducing any impact.

The client is putting forward an alibi, namely that he was at home ill at the time of the offence. There will no doubt be a record of his call to his employer and evidence relating to this needs to be obtained. It is some support for the alibi, but not independent. The girlfriend does not provide direct cover for the time of the robbery, but again a statement should be obtained, and she can testify to the client's state of health in general terms. The prosecution cannot rely on the evidence of the jeweller as to the identity of the person who tried to sell him the jewellery so there is no need to provide an alibi for this time. Too many candidates spent considerable time discussing evidence relating to the jeweller without appreciating that it was of minimal significance to the prosecution case.

As the client is of good character, he is entitled to a full Vye direction as to credibility and propensity. Surprisingly few candidates mentioned this although it is a significant part of the material available to the defence.

This question does require candidates to spend some time to identify how the various evidential and other issues fit together. It is not clear that enough

candidates adopt this approach, as many answers are disjointed and read as if the candidate is identifying points as they go along.

Question 3(a)

Virtually all candidates identified that this raised an ethical issue in relation to a potential conflict-of-interest. The level of detail provided varied, and not all candidates explained that if the second client were taken on and the conflict became apparent later, it would be necessary to cease acting for both as there would be confidential information relating to each in the possession of the firm.

(b)

Candidates should have identified that the offence of inflicting grievous bodily harm with intent is indictable only, while violent disorder is either way, although the old sentencing guidelines, which are taken to be the basis of the question under the six month rule, make it clear that Crown Court is the appropriate venue in the circumstances outlined in relation to these offences. The question did not directly call for a detailed discussion of the sentencing guidelines, but credit was given for a concise and accurate reference to the point above. The main thrust of the question was about the mixture of adults and juveniles. The juvenile charged with GBH with intent is jointly charged with an adult and is also charged with a grave crime which is also a specified crime for the purpose of dangerousness. The court may, but is not bound to, commit to the Crown Court for trial either on the basis that it is overall in the interest of justice and the witnesses for the trial to take place there for both defendants, or because a sentence clearly in excess of the maximum 24 months Detention and Training Order is in prospect. Dangerousness is not normally considered until after conviction. The initial appearance will of course be in the magistrates' court for the adult to be sent and mode of trial considered for the juvenile. If he is not committed for trial, he will be remitted to the youth court.

The adult offenders will appear in the magistrates' court for Plea before Venue and Mode of Trial those who plead not guilty are likely to be committed for trial and those who plead guilty are likely to be committed for sentence. The juveniles may, but are not bound to, appear with them in the magistrates' court or may appear initially in the youth court. The juveniles who plead not guilty may be committed for trial as they are jointly charged with adults, but the only relevant consideration will be whether this is in the interests of justice as the offence is not a grave crime and dangerousness will be considered at a later stage. The juveniles who plead guilty will be remitted to the youth court for sentence.

This is another question which required an element of consideration before starting the answer, and not all candidates appear to have sorted out the implications. Too many answers focused on the adults rather than the juveniles, although the various options in respect to them are considerably more complex.

3(c)

This question clearly required initial consideration of agreeing a basis of plea with the prosecution, if possible, and seeking a Newton hearing, if not, it would be relevant to mention the reduced discount for a guilty plea at this stage, probably 25%. Some candidates missed this altogether and exclusively discussed issues relating to a plea in mitigation, which was clearly not what this question was seeking. The agreed basis of plea was generally better understood and explained that the Newton hearing with too many candidates failing to make the point that the judge would hear the evidence relating to the matters in dispute in order to determine whether or not the prosecution had proved these.

Question 4(a)

This case required a discussion of the Mode of Trial procedure on the basis of a not guilty plea. In particular candidates should have formed a view as to which category the offences came into. Culpability is probably category B as there is a breach of trust involving vulnerable victims, but it is clear from the evidence of the co-accused that the client played a subsidiary role. Harm is likely to be category 2. The value is relatively limited, but there is the issue of sentimental value. The court will also take into account the client's good character. As the starting point is 12 months custody the magistrates are likely to accept jurisdiction bearing in mind the matters above and the totality principle. Not enough candidates provided a clear discussion of the points above. Some indicated a category without properly explaining what factors had been taken into account, and others did not discuss the sentencing guidelines at all. Most candidates did discuss the factors for and against election for trial but generally in a way that strongly indicated that this was a generic rote learned response with no real attempt to identify factors of particular relevance to the particular client. Given that some candidates only made a perfunctory attempt to explain the procedure and the range of criteria to be taken into consideration by the court, there were very few very strong answers to this question.

(b)

While the previous good character of the client is a relevant consideration, any reference to a Vye direction at this stage of the proceedings is completely out of place. As the client has been convicted following a trial, there is no question of any discount in relation to her current acceptance of responsibility and remorse. Apart from these solecisms which were relatively frequent, most answers correctly identified the majority of the points, in particular the impact on the children, which would be the focus of a plea in mitigation.

(c)

Appeals seem to be difficult for many candidates. Far too many failed to appreciate that the appeal was once again sentence only so any discussion of procedures relating to appeal against conviction was unnecessary, and also that the trial had taken place in the magistrates court so the appeal was heard by the Crown Court within 21 days and that the notice of appeal did not need to state grounds. There would not be a full retrial, but the court would consider material relevant to sentencing and consider whether in all the circumstances the sentence was excessive. Even those answers which did correctly identify

the form of appeal did not really provide sufficient detail as to the criteria to be applied.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 18 – CRIMINAL LITIGATION

Question 1(a)

Currently, Gary Fox will benefit from the scheme for advice by a duty solicitor at the police station. This is not means or merits tested and, given the seriousness of the offence with which he is charged, covers advice in person at the police station.

If Gary Fox is charged with an offence, he can be advised on similar terms by a duty solicitor at court in relation to his first appearance. However, if he is charged with robbery, he can immediately apply online for a representation order. As this offence is indictable, only the merits test is automatically satisfied.

Financial eligibility is determined by using the full means test and where, as here, his disposable income exceeds the lower limit of £3,398, but does not exceed the upper limit of £37,500, he will have a contribution to pay representing 90% of his disposable income for a period of six months. If he is ultimately acquitted, this contribution will be returned together with interest at 2%.

(b)

The VIPER identification procedure is the preferred procedure used when the police consider that an identification procedure is appropriate. It involves creating a series of standardised moving images of the suspect and at least eight others selected from a national database who resemble the suspect. Where, as here, the suspect has a distinctive physical feature, here his "monobrow", the images will be digitally manipulated. This may be to remove the distinguishing feature from the suspect or to add it to all images. As the identifying witnesses appear to have described the monobrow in their initial descriptions, the police are likely, in so far as they cannot find suitable comparators who already possess this feature, to digitally add it as necessary.

Our role as legal representative will include checking the initial descriptions and ensuring that all comparators are consistent with these, and scrutinising the images proposed to be used and making any necessary representations.

Gary Fox can refuse to participate in the VIPER procedure. However, he should be advised that if he does so, this refusal can be recorded and may be given in evidence. In addition, the police can proceed to other, less controlled, and therefore less reliable identification procedures such as a group identification or the use of covertly obtained video footage. Given the distinguishing feature of the monobrow, and the unlikelihood of there being others in a group identification scenario such as a shopping centre with that feature, the chances of positive identification are significantly increased.

1(c)

Gary Fox has in effect three options. He can answer all questions put to him in interview or give a no comment interview with or without proffering a written statement. Selective answering of questions is never advisable as it always gives the impression that the suspect has something to hide.

As Gary Fox is denying all involvement, it would be possible for him to answer all questions. He could put forward his partial alibi, although this is of limited importance since the period for which his girlfriend can allegedly account is that covered by the attempted sale of jewellery, and that witness has not identified Gary Fox.

He can account for the telephone call to his employers, and if this is corroborated by them it is some evidence that he was at home ill but is in no way conclusive. He can also give an account of the way the toy gun was used at his place of employment. This approach has the advantage that he has given a full account at the earliest opportunity and no adverse inferences can be drawn provided he remains consistent. He would be advised not to make any reference to his presence at the motor enthusiasts' event, as this will not form part of any positive case he is putting forward.

The level of disclosure by the police seems adequate, but there is always the risk that the interviewing officers will produce additional information or will pursue questioning in such a way that Gary Fox becomes confused and will either incriminate himself or make inconsistent and/or unhelpful statements otherwise. This is more likely to be the case because Gary Fox has no previous experience of dealing with police questioning.

A no comment interview avoids any risk of self-incrimination or disclosure of information inappropriately. However, if Gary Fox subsequently puts forward matters in his defence which he could have relied on at this stage adverse inferences can be drawn. This would apply to the alibi.

Providing a written statement, if this is complete and accurate, avoids the risk of self-incrimination when answering questions and also removes the risk of adverse inferences. It may be the most appropriate way of dealing with this particular interview, but the final decision is for the client.

(d)(i)

As this offence is indictable only, the primary function of this initial hearing before the Magistrates Court is for the magistrates to send the case to the Crown Court for trial and fix a timetable for the Plea and Trial Preparation Hearing. If necessary, issues relating to bail, legal aid and reporting restrictions can also be dealt with.

(ii)

The information provided suggests fairly clearly that there has been an attempt at witness tampering. As Gary Fox is currently on unconditional bail he is not in breach of any condition and retains the *prima facie* right to bail. The prosecution may seek to persuade the magistrates that the situation has changed. They will make representations in relation to the alleged tampering.

The rules of evidence do not apply to such applications, but the magistrates will need to be satisfied that there is a prima facie case of tampering. This would justify the imposition of bail conditions and, in principle, bail could be withheld, as one of the grounds for doing so is the likelihood of interference with witnesses. It is not clear what Gary Fox's reaction is.

The most likely outcome is that he will be released on bail subject to conditions designed to minimise the possibility of future tampering, such as a condition not to contact or associate with Neil Simpson or any other prosecution witness.

Question 2(a)

It is clear that the prosecution is aware of these photographs and there is no reason in principle why they should not be disclosed. An application for specific disclosure can therefore be made, and the court will consider whether the photographs are material.

As Gary Fox admits being present at the event, if he does appear with any prominence in these photographs, it is arguable that, as we know that Pamela Simpson looked at them on the evening in question, this may have influenced her when making her identification. It is likely that disclosure will be ordered even if the prosecution objects.

(b)

If Gary Fox does appear reasonably prominently in the photographs, an application could be made to exclude this evidence under s 78 Police and Criminal Evidence Act 1984 on the grounds that its admission would have such a prejudicial effect on the proceedings that it should not be admitted. The argument would be that the VIPER identification has been compromised.

The PACE Code on identification makes it clear that photographs should not be shown to a witness who is going to be participating in a VIPER. While the circumstances are not identical, this is a persuasive argument for excluding this evidence. If, for any reason, the photographs were not produced, an alternative application would be for a stay of proceedings on the ground Gary Fox cannot receive a fair trial because of the failure: Ebrahim (2001), but such applications on the basis of lost or non-disclosed evidence will succeed only in exceptional circumstances: Fell (2013).

(c)

Generally, the prosecution bears the legal and evidential burden and must satisfy these to the criminal standard so that the jury are satisfied so that it is sure of guilt. The *actus reus* of robbery is the appropriation of property belonging to another accompanied by the use of force or the threat of force putting another in fear immediately before or at the time of the theft. The *mens rea* is dishonesty and intention permanently deprive and to create fear by the use or threat of force. There is little doubt, having regard to the testimony of Pamela Simpson, that three persons committed this offence. The principal issue between the prosecution and the defence is therefore whether or not the prosecution could satisfy the jury beyond reasonable doubt that Gary Fox was one of those three people.

The primary pieces of evidence on which the prosecution will rely on are the identification evidence of Pamela Simpson, and the testimony of Stephen Richards. On the assumption that he has pleaded guilty at the earliest opportunity as suggested, he now becomes a competent and compellable witness for the prosecution and his evidence incorporating Gary Fox is of substantial weight.

There is further circumstantial evidence which, without directly establishing guilt, assists in creating a picture indicating how Gary Fox was involved. This will include evidence of his presence at the motor enthusiasts' event, the evidence of Andrew Martin that he was pursuing him for an outstanding debt which was then settled the day or two after the offence took place and the toy gun. The presence of DNA from Gary Fox on the gun is not conclusive as other males have contributed to the DNA detected, but it is consistent with him having used the gun at the time of the robbery.

The defence will seek to minimise the impact of the identification evidence by inviting the judge to give a Turnbull direction. This reminds the jury that human beings are notoriously fallible in identifying each other. They will be directed to consider the circumstances identification. It is a relatively short duration, but in circumstances where the witness had a good opportunity to observe those involved, and there is nothing to suggest any issues with light conditions or any obscuring of the view.

If the evidence is regarded as being of good quality, the jury may rely on it without supporting evidence, but if it is regarded as being of poor quality, they should be directed to look for such support. Here, it would clearly come from the evidence of Stephen Richards, but could also come from the other circumstantial evidence referred to above. The defence can also seek to argue that the identification is unreliable because of the viewing of the photographs, even if these have not been produced.

There is little that can be done to deal with the evidence of Stephen Richards, save to put it to him in cross-examination that he is lying in order to protect others. It will be necessary to obtain details of any previous convictions he may have in order to make an attack on his character to undermine his credibility, if appropriate.

In this respect it should be noted that Gary Fox is entitled to a full Vye direction in relation to his good character, which goes here both to his credibility and his lack of propensity to commit an offence of this kind.

Evidence should be sought confirming the payment of an annual bonus at the end of October in order to explain why Gary Fox was able to make a payment to Andrew Martin in early November.

As noted above, the alibi evidence is of less significance, as the prosecution is unable to establish that it was Gary Fox who tried to sell items from the robbery to the jeweller. Nevertheless, evidence should be sought from his employers to confirm that he did report sick. A proof of evidence should be taken from his girlfriend confirming that she did visit him later in the morning and what his state of health appeared to be.

Question 3(a)

It is a cardinal principle that you may not act for two or more clients where there is an actual or potential conflict of interest between them: SRA Handbook O(3.4). Here, Luigi Daniele is an established client. The information you have relating to Shaun Smith does not clearly indicate any conflict. He merely indicates that Luigi Daniele was present at the scene of the incident. Daniele does not deny this.

However, given the nature of the incident, and the possibility that when you start to investigate further Smith may implicate Daniele to a greater extent, and the further possibility that Daniele may implicate Smith, the possibility of conflict is so great that it would be appropriate to decline to act for Smith. If you take instructions, you will be in a situation where you have received confidential information from to clients and this may put you in a position where you have to decline to act for either of them in order to protect this client confidentiality.

(b)

The offence of grievous bodily harm with intent is indictable only in the case of an adult and carries life imprisonment. So far as the juvenile defendant is concerned, this constitutes a grave crime as it is punishable with life imprisonment. The offence of violent disorder is an either way offence for an adult carrying a maximum of five years imprisonment. The Magistrates Court Sentencing Guidelines indicate that violent disorder will nearly always be allocated to the Crown Court. However, so far as the juvenile defendants are concerned, it is not a grave crime.

The adult defendants will appear in the Magistrates Court for an allocation hearing in relation to violent disorder and for sending to the Crown Court in relation to grievous bodily harm with intent. All are likely to be dealt with in the Crown Court.

This is one of the exceptions to the principle that juvenile defendants should appear in the Youth Court. They are jointly charged with adults and could properly appear with them in the Magistrates Court in the first instance. The juvenile charged with grievous bodily harm with intent could be committed for trial to the Crown Court, either on the basis that the interests of justice require him to be tried together with the adult, or that the court has concluded that the sentence to be imposed is likely to be substantially in excess of the maximum available to the Youth Court, namely a 24 month Detention and Training Order.

We have not been given full information as to the nature of the injuries, or the age of the juvenile defendant, but if the injuries are serious, and have been inflicted with weapons, this points to at least a Category 2 offence for which the sentencing range for an adult is 5 – 9 years custody, so even with the reduction in sentence length applicable to a juvenile it may well appear to the court that the powers of the Youth Court will be insufficient. This offence is also a serious specified offence, but issues of dangerousness will not normally be addressed until the sentencing stage.

The juveniles who plead guilty to violent disorder will certainly be remitted to the Youth Court, and it is almost inevitable that those who plead not guilty will also be so remitted, since it is highly unlikely that the court will conclude

that it is in the interests of justice that they be tried together with the adult defendants.

3(c)

There is a significant difference between the likely sentence to be imposed on someone who is treated as a prime mover in the offence who was actually used violence involving weapons and someone who is merely peripherally involved. Furthermore, a guilty plea will attract a discount on sentence. A guilty plea tendered after the first opportunity but before the commencement of the trial may attract a discount of 25%, but this may be reduced to reflect the precise timing and circumstances. It should not be less than 10%, which is the discount normally applicable to a change of plea at the start of the trial.

In the first instance, we will approach the prosecution to see whether they will accept a basis of plea, reflecting our new instructions. If so, Luigi Daniele will fall to be sentenced on that basis, with an appropriate discount. If not, application should be made for a Newton hearing. This will take place before the judge who will determine whether the factual basis alleged by the prosecution has been made out or whether the defendant is entitled to be dealt with in accordance with his basis of plea. If the judge finds against the defendant, he will lose the discount which he would otherwise have benefited from. The judge may also decline to hold a Newton hearing if he is of the opinion that there would be no difference in sentence whatever the outcome.

Question 4(a)

The court will take into account the factors listed in s 19 Magistrates Courts Act 1980. It will also take account of the relevant sentencing guidelines and the provisions of the Criminal Procedure Rules. While both prosecution and defence may make representations as to the more appropriate venue, the court must treat the offence has been at least as serious as the prosecution allege. A further factor to be taken into account is the fact that Rosie Jones is of previous good character.

In a marginal case this may persuade the court to retain jurisdiction. The presumption is that the Magistrates Court will retain jurisdiction unless the factors indicating trial on indictment are predominant. Here, the offence appears to fall within category 2B. The items stolen are of medium value but, at least in respect of the jewellery, the sentimental value represents additional harm. Rosie Jones was not the prime mover and appears to have played a limited role but has acted in breach of trust. Whilst the starting point is one year in custody, the Magistrates Court is likely to reduce its assessment of the likely sentence because of the defendant's good character and, although there are two offences, the totality principle means that they will not be fully aggregated.

There are no factors appearing from the information given to suggest that there is any particular legal or other complexity justifying allocation to the Crown Court. It is therefore likely that the Magistrates Court will agree to retain jurisdiction. Rosie Jones will then be put her election as to whether she wishes to accept the Magistrates Courts jurisdiction order elect trial by jury at the Crown Court.

Anecdotal evidence is that the acquittal rate at the Crown Court is higher, but this largely relates to offences where the evidence is largely presented by

police officers, and this is not case here. As Rosie Jones is in receipt of income-based Job Seeker's Allowance she will satisfy the means test for legal aid in either court. She is likely to satisfy the merits test on the basis that she is at risk of a custodial sentence. She may face higher prosecution costs in the Crown Court. Proceedings in the Crown Court are more formal and more likely to attract publicity.

4(b)

The defendant has lost her good character and will accordingly find it difficult to obtain employment in any position involving a degree of trust. While she is not entitled to any credit for accepting responsibility before the trial, it is clear from the pre-sentence report that she does now accept responsibility for what she has done, and she deserves credit for this.

She is the sole carer for two dependent children. A custodial sentence would have very significant impact on them. While it is accepted that she has acted in a way which deserves punishment, there are constructive ways in which this punishment can be imposed without causing undue disruption to the family. A community order incorporating unpaid work requirement would involve constructive reparation and the other requirements suggested will assist the defendant in putting her life back on track and, in particular addressing issues of her employability.

It is submitted that the custody threshold has not, in all the circumstances been crossed, having regard to the subsidiary role played by the defendant and the limited benefit she obtained from the offences. If this submission is not accepted, it is submitted that any custodial sentence could properly be suspended. This would prevent the inevitable disruption to the family unit caused by an immediate sentence of imprisonment and is justified in the interests of the dependent children.

(c)

The appropriate appeal is to the Crown Court under s 108 Magistrates Court Act 1980. As this is an appeal against sentence only, it does not amount to a full rehearing. Notice of appeal should be given within 21 days. The Crown Court will sit as a judge accompanied by two magistrates. The court will hear submissions relevant to the sentencing decision. The court can impose any sentence which was open to the magistrates and can therefore increase a sentence if it considers it appropriate. The court will consider the appropriate sentencing guidelines and will re-sentence in accordance with these and the material presented to it.