CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 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 September 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

The principal distinction between good and bad scripts continues to be the extent to which candidates use the material in the Case Study and Question Paper to identify the precise factual circumstances. Weaker scripts still contain significant quantities of material which has been rote learned and reproduced when a question in the general area is asked. This is done whether or not this material is remotely relevant. Weaker scripts also show little evidence of engagement with relevant materials such as sentencing guidelines which enable more precise and targeted explanations and advice to be given.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

As VIPER is now the preferred identification procedure, there is little point in providing detailed information on other methods, except in the context of the use of covert or group identification when consent to VIPER is withheld. There

is no indication in the materials that the suspect has any distinguishing features, so a detailed discussion of the way in which these are dealt with is unnecessary.

Question 1(b)

Many candidates did not make any reference to the role of the appropriate adult and of the legal representative in ensuring that the client is aware that the appropriate adult is not bound by confidentiality. Nearly all candidates were able to explain the various options for approaching the interview, but there were still a number who did not contextualise their advice by referring to the particular issues which were relevant, in particular that the client had an explanation which really needed to be put on the table at this stage to avoid adverse inferences but did not wish to disclose the identity of the other perpetrators. These specific factors are more significant than general ones such as whether or not he is likely to be confident enough to deal with questioning.

Question 1(c)

There is nothing in the facts to suggest that at any stage any other defendant is before the court. Anything other than a passing reference to the possibility of a juvenile appearing in the Magistrates Court if jointly charged with an adult is therefore inappropriate. Most candidates did identify that while arson is a grave crime the sentencing guidelines in the circumstances clearly indicate a sentence well within the jurisdiction of the Youth Court, so that allocating the case to the Crown Court for trial is highly unlikely.

Question 2(a)

This is a very straight forward question which was generally well answered, although some candidates went into unnecessary detail, particularly in relation to the means test, given that the client is expressly stated to be in receipt of a passporting benefit.

Question 2(b)

The materials make it entirely clear that the client is pleading not guilty. While it is appropriate to refer briefly to the plea before venue procedure, it is wholly unnecessary to discuss the consequences of a plea of guilty at that stage. It is the sentencing powers of the magistrates which will determine whether or not they accept jurisdiction, and there were still too many answers which did not consider the relevant sentencing guidelines at all. There were also some which adopted slightly extreme views as to how those guidelines would be applied.

Question 2(c)

Most candidates recognised that this was an apparent breach of bail conditions and dealt effectively with the procedure for dealing with this. Weaker answers failed to appreciate that the breach might not be established or alternatively that if it was established it was likely to be treated with great seriousness.

Question 2(d)

Very few candidates appeared familiar with the form of a defence statement. Some identified elements that should appear such as the alibi, that the issue was one of mistaken identity and that the defence took issue with the prosecution as to whether the client was present at the scene of the offence and whether or not the eyewitness identification was correct.

Question 3(a)

Most candidates appreciated that the co-accused was now a competent and compellable witness for the prosecution, but an unfortunately large number then sought to argue that his evidence should be excluded because he was of bad character. This is unrealistic. The real issue is the weight to be given to this evidence.

The whole issue of bad character needed to be dealt with. The prosecution will almost certainly seek to use the bad character of the client to establish propensity. It is true that he will put his character in issue by raising the bad character of the co-accused, but this is unlikely to be of real significance.

Several candidates suggested that there was some irregularity with the identification process in relation to the eyewitness. The materials deal with this briefly, but do not suggest that there was anything irregular about the positive identification made. It is interesting that some candidates who showed little effort to engage with the real problematic issues raised by the materials were prepared to engage in unnecessary speculation in this respect. What was really required here was a clear statement of the Turnbull guidelines and detailed application to the circumstances.

Quite a number of candidates missed the potential adverse inferences which could be drawn in relation to the alibi, as it was apparently not mentioned in interview.

More positively, there seemed to be more candidates who had made a genuine effort to understand the issues in the case and develop a reasonably coherent case theory.

Question 3(b)

This question was very poorly answered, which is inexcusable for such a basic topic. A significant minority of candidates answered by reference to an appeal from the Magistrates Court to the Crown Court, although the materials make it very clear that the trial took place in the Crown Court.

The materials made clear that this is an appeal against sentence only. Too many answers focused on matters which were only relevant to an appeal against conviction. Only a relatively small minority recognised that the essential issue was whether the disparity between the sentences of the client and the co-accused meant that the client's sentence was manifestly excessive, while quite a number talked about the criteria for appeal against sentence in general terms without identifying the specific argument which could be made.

Question 4(a)

Virtually all candidates identified that this was a conduct issue. A large majority recognised that it related to a potential conflict of interest. The best answers explained exactly how the conflict of interest could arise and what the implications would be if the firm commenced to act for both clients and then found themselves embarrassed.

Question 4(b)

This question required a detailed discussion of the procedures for giving effect to the client's wish to plead guilty on a limited basis. The first step to be taken was to invite the prosecution to agree a basis of plea. If so, the client would be entitled to some, but not full, credit for the guilty plea. If the prosecution were not prepared to agree, a Newton hearing would be necessary, at least if the court considered that it would impact on the sentencing decision. Failure at a Newton hearing would result in the loss of any credit for the guilty plea. Far too many answers did not identify these were the areas that needed to be addressed and simply engaged in inconsequential discussions relating to pre-sentence reports and the sentencing procedure generally. A small minority even suggested that the change in plea in itself constituted a conduct issue, which is not the case.

Question 4(c)

This was generally well answered up to a point, with candidates identifying the various elements of personal mitigation - good character, remorse, impact on employment and on the daughter. The need to mitigate towards a community order or at worst suspended sentence was generally clearly understood. However far too many answers suggested that there should be credit for a guilty plea, although the materials make it crystal clear that the client lost at the Newton hearing. This also means that it is not possible to argue for the client's limited role in the offence as the court has already rejected this.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 18 – CRIMINAL LITIGATION

Question 1(a)

Here, Jack Hill is a known and available suspect. Pursuant to PACE Code D 3.14 the preferred identification procedure is a VIPER video identification using standardised moving images of the suspect and eight comparators taken from the national database and selected to be similar to the suspect in appearance and station in life. The procedure is under the supervision of an independent identification officer.

The defence representative will have access to the initial description provided by the potential identification witness and will be able to make representations about the inclusion of potential comparators. Furthermore, the images can be digitally manipulated to deal with any distinctive features, although it is not suggest that there are any here.

Jack Hill may refuse to cooperate with the VIPER procedure, but if he does, adverse inferences may be drawn, and the police may choose to adopt an alternative procedure, such as a group identification, or the use of video material obtained in other ways, such as CCTV images at the police station.

It is generally considered that VIPER is the fairest and most objective procedure and does not produce false positive identifications in many cases.

Question 1(b)

The first point to note is that as Jack Hill is a juvenile, the police will arrange for an appropriate adult to be present at the interview. Given that Jack is being looked after by the Local Authority, the appropriate adult may be one of his foster parents, or a social worker. In either case, while the appropriate adult is supposed to have regard to the welfare of the juvenile and ensure that he can fully participate in the procedures, the appropriate adult is not under any duty of confidentiality, and in principle could disclose anything said in the absence of the police to them.

Subject to this, Jack Hill is in the same position as any interviewee. There are a number of relevant points emerging from the known facts. Jack Hill is not denying being present at the scene. He could therefore account for being identified by the eyewitness on his way to the marina, and for the presence of his fingerprints on the gate of the marina, by admitting that he was involved in an activity which was perhaps antisocial, as it involved trespassing at the marina and underage consumption of alcohol, but is not seriously criminal.

It is likely that the police would ask him to account for the presence of the fingerprints and his presence on the road leading to the marina under s 36 Criminal Justice and Public Order Act 1994. He does not wish to identify his associates, but he will need to put forward the fact that he dissociated himself from them as soon as they suggested causing criminal damage.

The options available are to cooperate by answering questions in interview or to give a no comment interview which may be accompanied by a written statement. While answering questions may indicate a willingness to cooperate, there is a danger of self-incrimination, and as Jack Hill will wish to decline to answer questions concerning identity of his associates, he will create a mixed interview and his refusal to answer certain questions is likely to be damaging. He is also young and may not be sufficiently robust to deal with the police questions.

In the circumstances, it would be preferable to give a no comment interview but to avoid any adverse inferences under s 34 CJPOA resulting from silence or under s 36 CJPOA arising from failing to account for presence or the fingerprints by dealing with these matters in an appropriately worded statement. This avoids any pressure to identify his associates and the possibility of self-incrimination under pressure. However, the final decision is for the client.

Question 1(c)

A juvenile will normally make his or her first appearance in the Youth Court. In this case there is no co-accused, so there is no basis for this first appearance to be in the magistrates' court. There is a strong presumption that juveniles should be dealt with in the Youth Court and tried and sentenced

there. The Youth Court is specifically designed to provide an appropriate environment and specially trained magistrates and District Judges.

Arson is a grave crime for the purposes of s 91 of the Powers of Criminal Courts (Sentencing) Act 2000 as it carries a potential life sentence in the case of an adult. It is also a specified offence in relation to dangerousness pursuant to Part 12 Chapter 5 Criminal Justice Act 2003. The Youth Court could therefore conduct a mode of trial hearing to determine whether or not to send the case to the Crown Court.

In this event, the defendant can make representations as to venue but has no right of election. However, consistent case law suggests that the Youth Court should only send a case to the Crown Court for trial where it is clearly beyond their sentencing capacity of a 24-month Detention and Training Order. Furthermore, since the Youth Court can commit to the Crown Court for sentence, it can retain the case for trial, securing the benefit of the juvenile friendly environment of the Youth Court.

The normal position in regard to dangerousness is that this can only be assessed once the trial is complete and with the benefit of a presentence report. This again will operate in favour of the case being retained in the Youth Court for trial. Given the nature of the fire damage which constitutes the arson, it is highly unlikely to attract a sentence beyond the jurisdiction of the Youth Court (It is likely to be no higher than category B2, with a range maximum of 18 months custody for an adult). There is also nothing at present to suggest that dangerousness will become an issue. It is therefore highly likely that the case will be retained in the Youth Court for trial and sentence as there is nothing to suggest that the circumstances merit anything approaching a 24-month DTO, let alone a more severe sentence.

Question 2(a)

Applications for criminal legal aid are made electronically to the Legal Aid Agency using eForm CRM14. The applicant must satisfy a means and merits test. In this case the means test will be satisfied as Danny Wykes is in receipt of a passporting benefit namely income-based jobseeker's allowance. The merits test will be automatically satisfied if the case is sent by the magistrates' court to the Crown Court. However, if this does not occur it will be necessary to demonstrate that one or more of the criteria set out in the merits test is met. In this case given the nature of the offence, there is clearly a risk of a custodial sentence, thus satisfying the criterion that the applicant is at risk of loss of liberty.

Question 2(b)

On the assumption that advance disclosure has been provided, the court will conduct the Plea before Venue procedure on the first appearance. The charge will be read and Danny Wykes will be invited to indicate how he proposes to plead. In this case he will indicate a plea of not guilty and the court will move to the Mode of Trial procedure.
The court must consider whether the case is one which is within their jurisdiction or whether it is one which they must send to the Crown Court. It will consider representations by the parties but must proceed on the basis that the case is at least as serious as represented by the prosecution. The court will have regard to the statutory criteria set out in s 19 Magistrates

Courts Act 1980 and to the mode of trial guidelines set out in the Criminal Procedure Rules.

In most cases the most important consideration will be the sentencing guidelines referred to in the CPR and contained in the Magistrates Court Sentencing Guidelines issued by the Sentencing Council. The court may also consider other factors including the antecedents of the defendant, and also any apparent legal complexities or novel legal issues raised by the case.

In this case the principal consideration will be whether their sentencing powers are adequate. Here, there is no breach of trust, and it is not entirely clear exactly how far the prosecution are alleging Danny Wykes is responsible for the organisation of the offending. It is however not a case where it can be confidently said that he was pressured into offending or played a purely subordinate role. It is likely to be in culpability band B. The value of the property is high but there are no additional harm features. Overall the case appears to fall within category 2B.

There are no other factors which would seem to significantly influence the sentencing bracket. The starting point for this category is 12 months custody with a range of six months to 2 years and six months. This would appear to put it beyond the jurisdiction of the magistrates' court. However, if the culpability were in band C the starting point is a high-level community order and the magistrates would probably accept jurisdiction.

In that case Danny Wykes would be put to his election. At this point he would have to consider that while the Crown Court anecdotally has a higher acquittal rate, and certainly benefits from the improved procedures for dealing with evidential and procedural issues, it is more protracted, attracts a higher level of publicity, and has higher sentencing powers. The magistrates would be unlikely to commit for sentence having accepted jurisdiction, unless there were a very major change in circumstances.

Question 2(c)

The prosecution will no doubt allege that Danny Wykes is responsible for the communication with the witness which would constitute a breach of his bail condition. This does not constitute an offence, but under s 6 Bail Act 1974 (BA) Danny Wykes can be arrested and under s 7 BA brought before the magistrates' court. As he denies being responsible for the contact, the court will have to consider whether the prosecution has established that he is. The strict rules of evidence do not apply and the court will consider any material which it considers relevant. If satisfied Danny Wykes is responsible the court may remind him in custody pending trial or re-bail him on the same or more stringent conditions. Our representations will initially deal with the denied allegations and subsequently seek to secure re-bailing with appropriate conditions. One specific point is that the fact of arrest and his appearance in court will have brought home the seriousness of his position to Danny Wykes and will deter him from any repetition.

Question 2(d)

The defence statement should, pursuant to s 6A Criminal Procedure and Investigations Act 1996 and Part 22 of the Criminal Procedure Rules, identify the defendant and court and give the case reference number. The substance is as follows: –

Part 1 The defendant confirms that he pleads not guilty to the single count in the indictment.

Part 2

(a) The nature of the defence: Mistaken identity. The defendant had no involvement in the offence. Alibi – see (e) below.
(b) The matters of fact on which the defendant takes issue with the prosecutor, and in respect of each why: Whether the defendant was the person identified as participating in the offence. The witness to the contrary, Derek Slater, is mistaken.
(c) The matters of fact on which you intend to rely for the purposes of your defence: None.
(d) Any point of law that the defendant wishes to take, including any point about the admissibility of evidence or about abuse of process, and any authority relied on: The Turnbull guidelines in relation to the evidence of Derek Slater.
(e) Particulars of Alibi: At the time of the offence, and specifically from 9 pm on 2 May to 9 am on 3 May 2020 the defendant was at his home 50 Springfield Avenue Pulrose Bedford MK44 7GZ. The witness in support of this alibi is Donna Short of the same address date of birth 18 June 1997.

Question 3(a)

The prosecution bears the legal and evidential burden of proving to the criminal standard all the elements of the offence and that the defendant was a perpetrator. Here, there is no doubt that the offence of theft of the motorcycle has been committed. The issue between prosecution and defence is whether the prosecution can prove that Danny Wykes was one of those who was involved in the theft.

The evidence available to the prosecution comprises a number of elements. The first is the eyewitness identification evidence of Derek Slater. All eyewitness identification evidence is subject to the Turnbull guidelines. The judge is obliged to warn the jury that such evidence is fallible and that an honest and convincing witness may nevertheless be mistaken. If the judge is satisfied that the evidence is strong, it can be left to the jury but if he considers that it could be regarded as weak, he should draw to the attention of the jury matters which they could treat as confirming it. In this case the circumstantial evidence that the arrangements for the shipping container were made in the name of the defendant's grandfather but without his knowledge could be seen as such evidence, as could the evidence of Aaron McManus, if believed. The jury should be advised to consider the circumstances of the identification, and here it was a relatively brief observation of a stranger at night with some artificial lighting but clearly far from ideal conditions. There is no information as to whether Derek Slater has any visual impairment.

The second major element is the evidence of the co-accused Aaron McManus. As he has pleaded guilty and been sentenced he is a competent and compellable witness for the prosecution. Any admissions that he has made are evidence only against himself, but it is clear from the witness statement that he proposes to give oral evidence which directly implicates Danny Wykes. If believed, this will be very damaging. There is of course evidence from the

antecedents that the two are known to each other and have been involved in offending together.

Accordingly, it is not feasible to challenge this evidence on any basis other than that McManus is lying, either because he gave this information prior to sentencing in the hope that it would secure him a more lenient sentence or that he is lying to protect his real accomplice or some combination of the two. Such cross-examination will inevitably focus on his bad character including convictions for dishonesty. As this is a challenge to his character it puts Danny Wykes' character in issue also.

In any event Danny Wykes' character is likely to be in issue because the prosecution would have sought to introduce it on the grounds that it is relevant to an issue between the parties namely the propensity of Danny Wykes to commit offences of this kind, given that he has previous convictions for the same type of theft.

There is no indication of any forensic evidence, but this does not really disadvantage the prosecution as its absence may be explained by the care taken by the perpetrators to avoid leaving traces of DNA or fingerprints.

The defence is essentially requiring the prosecution to prove the participation of Danny Wykes, rather than putting forward a positive defence. The one exception to this is the alibi and the witness evidence of Donna Short in support. It is not clear whether Danny Wykes provided a written statement at the same time as he gave his no comment interview, and if so whether this touched on the alibi. If not, there is a potential adverse inference to be drawn under s 34 CJPOA. Furthermore, if Danny Wykes elects not to give evidence, adverse inferences might be drawn under s 35 CJPOA.

Question 3(b)

Appeal against sentence lies to the Court of Appeal (Criminal Division) pursuant to s 9 Criminal Appeal Act 1968. An application for leave to appeal must be lodged within 28 days pursuant to s 11 CAA. The application will come in the first instance before a single judge, and if refused by him may be renewed before the full court.

The sentence is clearly not unlawful, so the grounds for appeal will be that it is manifestly excessive and/or wrong in principle. The sentence is well within the sentencing guideline for an offence of this category. The only arguable basis for an appeal is disparity with the co-accused. The eight-month sentence imposed on Aaron McManus after his timely guilty plea appears to indicate a starting point of 12 months. The information that we have clearly indicates that Aaron McManus was more heavily implicated in the planning and organisation of the offence. Both defendants appear to have similar criminal records. Even if the starting point adopted in the case of McManus was too low, the sentence of 18 months imposed on Danny Wykes appears to be significantly disproportionate. There is no basis for adopting a higher starting point.

Question 4(a)

The relevant professional conduct rules are contained in the Code of Conduct for Solicitors 2019. A solicitor may not act where there is, or is the significant risk of, a conflict of interest: para 6.2. Here there is a clear conflict of interest.

At present Joanna Kramer is pleading guilty and appears to have implicated Maryam Abbas. If Kempstons were to act for Joanna Kramer they would come into possession of confidential information and would therefore hold confidential information in relation to both clients and would not be able to maintain that confidentiality contrary to para 6.6 of the code.

Ideally, Kempstons should identify this before taking any instructions or obtaining any information and decline to act for Joanna Kramer. There should be systems in place to identify such potential conflict. If these have failed, it may be necessary to decline to act further for Maryam Abbas.

Question 4(b)

A change of instructions of this kind from a client does not in itself create any professional conduct issue. It should be noted that Kempstons could not revert to acting for Maryam Abbas on the basis that she is wholly innocent if the attempt to agree a basis of plea fails. They could still act on the basis of putting the prosecution to proof, but would be misleading the court, contrary to para 1.4 of the Code of Conduct for Solicitors if they positively asserted her innocence.

The first step to take would be to approach the prosecution to see whether they would agree a basis of plea in accordance with your current instructions. If so, this basis should be reduced to writing and the case should be listed before the court.

If the prosecution is not prepared to agree this basis of plea, the case could be listed for a Newton hearing. It seems clear that the sentencing options would be different, as the offence appears to fall within category 3B if Maryam Abbas is an equal partner in the enterprise, but within category 3C if her basis of plea is accepted. The difference is between a community order with the possibility of a custodial sentence on the one hand and a fine with the possibility of a community order on the other. The Newton hearing would involve the judge hearing evidence in the absence of the jury. It would be for the prosecution to prove to the criminal standard that the involvement of the defendant went beyond her admitted involvement. Having resolved the issue, the judge will then sentence on the basis of the outcome, but if he finds the prosecution have proved their case, Maryam Abbas will lose the benefit of her discount for a guilty plea.

Question 4(c)

Maryam Abbas is a woman of previous good character, and she has lost this character as a result of this conviction. While it is accepted that she will not obtain any credit for her guilty plea in light of the outcome of the Newton hearing, it is clear from the presentence report that she does show genuine remorse. The process of appearing in court and her conviction will have had a salutary effect on her. She is described as being at a low risk of reoffending. In terms of her personal situation, she is now unemployed, and in view of this conviction will find it difficult to find further work in the retail sector. She has relatively recently been widowed and is responsible for bringing up her daughter single-handed. She is also suffering from depression. In all the circumstances, the court is invited to impose a community order with appropriate requirements which may enable her to come to terms with her depression and which may also enable her to make reparation through unpaid work or other activity. It is submitted that the custody threshold has not been

reached in this case, particularly having regard to her previous good character. If the court is minded to impose a custodial sentence, it is submitted that this could be suspended, particularly having regard to Maryam Abbas' parental responsibilities as a custodial sentence would have a disproportionate impact on her daughter.