CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

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 2021 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

When looking at the scripts overall, it is clear that candidates continue to make some of the same errors which have been flagged up in these reports for many years. There is still over reliance on pre learned set answers in certain areas. Weaker candidates generally, but also more able candidates still fail to apply the facts given in the case study materials, or in the rubric on the question paper when answering questions. Candidates have not necessarily engaged with materials such as sentencing guidelines. Some of the questions on this paper related directly to provisions of PACE, and too many candidates set out or paraphrased these provisions quite extensively. This is not necessary, and the examiner is aware that candidates have access to a statute book.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

This question can be dealt with as a whole. It was generally well answered and the difference between excellent and satisfactory answers was largely accounted for by greater application and focus.

Question 2

This question can also largely be dealt with as a whole. It was again generally competently answered with a similar observation to that for the last question to explain the difference between excellent and satisfactory answers. In (b) there was only limited accurate reference to the sentencing guidelines.

Question 3(a)

Most candidates recognise that this question required an explanation of the procedure under s8 PACE, although a minority wrongly looked at other irrelevant procedures. Most answers did not provide sufficient detail, based on the known facts, as to the basis on which the warrant would be applied for.

(b)

The rubric made it clear that the plea before venue and mode of trial hearing was taking place, and too many candidates started their answer inappropriately with a lengthy discussion of this. Again, too many candidates either failed to referred to the relevant sentencing guideline at all, or had reached a conclusion as to the classification of the offence which did not correlate to the known facts.

(c)

Candidates typically struggle with this type of question. In particular issues relating to the accomplice were poorly handled. It is clear that the prosecution intend to call him. He is a competent and compellable witness whose evidence, if accepted, is very damaging. Any discussion of his statement as a confession, or of hearsay in this context is irrelevant, and any suggestion that the evidence can be excluded as prejudicial is fanciful. Most candidates recognise the importance of bad character evidence, but the detailed explanation of which gateway was relevant and why was often missing.

Question 4(a)

It was surprising that very few candidates actually identified the two most likely mechanisms, namely using a video link and admission of the evidence as hearsay under s 116 CJA 2003. Where a hearsay solution was proposed there was typically very little detail in relation to the criteria under s 116. It is inherently unlikely that the prosecution would agree to admission under s9 CJA 1967.

4(b)

The format of this question appeared to take candidates by surprise. Far too many did not see the obvious reference to the legal adviser advising the

magistrates and misread the question as relating to the submissions to be made by the advocate. Those who did identify the nature of the question showed very little grasp of the elements of self-defence. Firstly, there is no burden on the defence other than making it a live issue. If self-defence is an issue it is for the prosecution to disprove it to the criminal standard. No candidate fully explained that self-defence requires the use of force which is no more than is reasonable and proportionate having regard to the situation as the defendant honestly believed it to be.

(c)

Questions on appeal always prove more troublesome to candidates than they should be. A significant number of candidates were not even able to identify that this was an appeal from the Magistrates Court to the Crown Court. Even those who did often failed to explain that the nature of an appeal against conviction to the Crown Court is a rehearing, and there was a lot of inaccurate reference to needing leave to appeal and to a rehearing being ordered. In this case an appeal by way of case stated under s 111 MCA 1980 is entirely inappropriate.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 18 – CRIMINAL LITIGATION

Question 1(a)

Pursuant to s 1 PACE 1984 a police officer may, in a public place, stop a person who s/he has reasonable grounds to suspect is in possession of a prohibited item, which includes an offensive weapon. This power must be exercised with due regard for the provisions of the PACE Code. This indicates that the reasonable grounds should be based upon intelligence, rather than stereotyping or other assumptions.

Here the officers are attending a live incident and have received apparently credible information from those present about the presence of an offensive weapon. It would appear that the power to stop has arisen and the officer may carry out a search, limited to outer clothing, and appropriate to the nature of the prohibited item in question. Here it would appear that all the prerequisites for a valid stop and search have been met. The officer should also have explained the basis of the stop and search to the suspect and made an appropriate record.

Police powers of arrest are largely governed by s 24 PACE. A constable may arrest an individual if he is committing or has committed an offence, or is about to commit an offence and if he has reasonable grounds to suspect that that individual is about to commit, is committing or has committed an offence, or that an offence has been committed and that the individual is guilty of it. However, an arrest condition must also be satisfied. These include the need to establish the identity and/or address of the suspect, preventing the suspect from causing injury or harm to himself or others and ensuring the prompt and effective investigation of the matter.

Here the information received from the bystanders, possibly coupled with direct observation by the officers, together with the finding of the knife,

creates a reasonable suspicion that offences have been committed. Arrest would appear to be necessary to prevent injury or harm to others and ensuring the prompt and effective investigation.

1(b)

In addition to the normal requirement to assess the situation, inform the suspect of his rights, and determine whether detention is justified, the police will be aware, at the latest when so informed by you, that this suspect has mental health issues. A full risk assessment should therefore be undertaken, and the suspect should be medically examined and the position with regard to medication ascertained.

It is highly likely that he will be regarded as vulnerable, so arrangements should be made for an appropriate adult to be present. There may be an appropriate family member available, but it is more likely that the appropriate adult will be a medical social worker. Your representations will focus on ensuring that the police are aware of the mental health issues and are responding appropriately.

(c)

I, Anton Reynolds, make the following statement in relation to the incident which occurred earlier today near the home of my former partner. I had split up from my partner a few weeks ago. I went back to live with my parents. Two days ago I contacted my ex-partner to arrange to collect a number of items of my personal property which were still at her house. She told me that I could come to the house today and collect these items.

However, when I arrived at the house and rang the bell, she shouted through the closed door that she did not want me to come into the house. I tried to reason with her but without success. I realised a crowd had assembled. They started to shout at me. I felt they were threatening me. Some of them were telling me to go away. I moved towards them to try and explain that I was simply trying to get hold of my own property, but they continued to shout at me.

I accept that I had a small paring knife in my pocket. I had been using this at home earlier, and forgot that I still had it with me. I did not produce it at any time or threaten anyone with it.

(d)

Representation at the police station is available to all and is not means or merits tested. Given his vulnerable status, Anton Reynolds would probably be entitled to representation in person. As he is pleading not guilty he will be entitled to apply for a representation order.

He is in receipt of a passporting benefit, namely Universal Credit, so he will automatically satisfy the means test. He is likely to satisfy the merits test. If the case is allocated to the Crown Court by the magistrates court, he will automatically do so. If the case is retained in the magistrates court there is a likelihood of loss of liberty, and representation may be desirable having regard to his mental health issues.

Question 2(a)

When, as here, there is an available suspect, and there are witnesses who claim to be able to make an identification which is disputed, the preferred identification procedure is VIPER. An independent police officer will select eight comparators from an extensive police database. These should resemble the suspect in age appearance and station in life. If the suspect co-operates she will be asked to participate in a short standardised video clip showing a range of movements. In order to make representations as to the suitability of comparators the defence is entitled to sight of the initial descriptions given by the eyewitnesses.

This method is considered to be not only the most efficient, as there is no need to arrange a live parade, but is also seen as the most objective and least likely to produce a false positive identification. Sophie Smith must consent, but if she does not do so this will be noted and adverse inferences can be drawn at trial. Furthermore, the police can move to other, potentially less objective forms of identification such as the use of video footage from the police station or a group or street identification.

The defence representative can, as stated, make representations about comparators and is entitled to see the records of the process. If there appears to be any irregularity in the procedure this can be challenged with a view to excluding the evidence.

(b)

Sophie Smith is a juvenile and is not jointly charged with an adult so her first appearance will be in the Youth Court. There is a strong presumption that juveniles will be dealt with in this court, as it has facilities and procedures specifically geared to the needs of juveniles. However, robbery is classified as a grave crime, as it carries a maximum life sentence in the case of an adult, for the purposes of s 91 Powers of Criminal Courts (Sentencing) Act 2000. It is therefore possible for Sophie Smith to be committed to the Crown Court for trial.

However, there is clear guidance that this should only be considered if the likely sentence will clearly exceed the 24- month Detention and Training Order available to the Youth Court. Furthermore, following an amendment made by s 53 Criminal Justice and Courts Act 2015, the Youth Court may commit for sentence following conviction. The current guidance is therefore to retain the case in the Youth Court. Sophie Smith does not have any election, although if the court is considering whether to allocate the case to the Crown Court she may make representations.

Robbery is also a specified offence for the purpose of considering dangerousness pursuant to Part 12 Chap 5 Criminal Justice Act 2003. However, the guidance is that this should normally only be considered following conviction when any issues relating to dangerousness will have become clearer.

The Sentencing Council guidelines specifically related to sentencing juveniles for robbery place great emphasis on avoiding custody where possible. There are some aggravating factors present, including the previous record for similar offences, the threat to use a bladed article, even though not produced, and the leading role apparently played by Sophie Smith. If a custodial sentence is

considered necessary it should be discounted by up to one half from that recommended in the sentencing guidelines for adults.

As there is no suggestion that there has been any significant harm sustained by the victims it would appear to be in category B3. The entry point for adult is two years custody, so with the discount would be well within the Youth Court powers. It is therefore highly likely that the trial will take place in the Youth Court, although there is a possibility of committal for sentence if, at that stage, there are significant additional aggravating features present or any issue of dangerousness arises.

2(c)

The information given to the police indicates that a serious breach of bail conditions has occurred. The police have a power of arrest under s 7 Bail Act 1976, although breach of conditions is not in itself an offence. Sophie Smith must be brought before the court within 24 hours. The court must establish whether it is satisfied that a breach has occurred. The rules of evidence do not apply, and the court considers any material it considers fit. Here, your instructions suggest that Sophie Smith is admitting a breach of bail conditions by entering a prohibited area, but denying the more serious elements of the breach.

You would make submissions to persuade the court to accept this version of events. The court will have to determine whether they are satisfied that the prosecution version is correct. If a breach has been established the court can re-bail on the same, or more restrictive, conditions or remand the defendant. If the court is only satisfied that Sophie Smith entered prohibited area you would submit that she could be re-bailed, possibly with more stringent conditions, and that the experience of appearing in court has brought home to her the seriousness of the matter and the importance of complying with conditions.

If, however, the court indicates that it is satisfied that there was an attempt to intimidate the complainants, it is likely to conclude that bail should not be granted because if it is granted there are substantial grounds to believe that Sophie Smith would continue to interfere with the complainants or witnesses (Sched 1, para 2 (1) Bail Act). In the case of a juvenile this is regulated by Part 3 Chap 3 Legal Aid Sentencing and Punishment of Offenders Act 2012 and would normally involve a remand to local authority accommodation: s 91.

However, the court may also consider a remand to youth detention accommodation where additional criteria are met and it is considered absolutely necessary. A remand to local authority accommodation may include electronic tagging and other conditions analogous to bail conditions, since it is not envisaged that the juvenile will necessary be actually incarcerated. For the first set of conditions for youth detention accommodation under s 98, the age condition (over 12) the offence condition (an offence punishable with more than 14 years in the case of an adult) and the representation criteria are met. The court would also have to be satisfied that a remand was necessary to prevent the commission of further imprisonable offences or death or serious personal injury by Sophie Smith. The second set, under s 99 is not relevant as there is no recent history of absconding or offending on bail.

Realistically, submissions here would be addressed to persuading the court to remand to local authority accommodation and to any conditions which the prosecution are proposing.

2(d)

A firm of solicitors may not act for more than one client in relation to the same matter if there is a conflict of interest between them or there is a realistic prospect of a conflict. This is because information provided to the solicitor by the client in the form of instructions is confidential to that client, but the solicitor is also under a duty to the other client. As a result, the solicitor becomes professionally embarrassed and is obliged to discontinue acting for both parties. The position is regulated by the SRA Code of Conduct for Firms 2019, and specifically paragraphs 6.2 and 6.5.

At present, Kempstons holds no information in relation to Karleen Ebanks. While it would be theoretically possible to represent her on a guilty plea without compromising the position in relation to Sophie Smith, there is clearly the potential for conflict. For instance, Karleen Ebanks might require you to include in her plea in mitigation material adverse to Sophie Smith. In all the circumstances, the only proper course is to decline to act for Karleen Ebanks.

Question 3(a)

Applications for search warrants under normal circumstances are governed by s 8 PACE. A constable must make an application to a justice of the peace who will issue a warrant, which will normally authorise a single search of specified premises, where the justice is satisfied that an indictable offence has been committed, that there is likely to be material on the relevant premises which is relevant evidence of substantial value to the investigation, and which does not constitute privileged or other sensitive material. The justice must also be satisfied either that the persons entitled to permit and effect access to the premises cannot be contacted, that entry will not be granted without a warrant, or, most likely here, that the purpose of a search may be frustrated or seriously prejudiced unless a constable can obtain immediate access.

The constable applying for the warrant would need to satisfy the justice that the burglary had been committed, that Carl Rogers and Andrew Hawkins respectively were implicated, that significant evidence, namely the proceeds of the burglary, was likely to be found and that without immediate access to the premises any incriminating material was likely to be disposed of.

(b)

Commercial burglary is an either way offence. Andrew Hawkins will appear before the magistrates court. He will initially be asked to indicate how he would plead. On indicating a plea of not guilty the court will proceed to the Mode of Trial or allocation hearing. There is a presumption that either way offences will be dealt with in the magistrates court unless there are good reasons for declining jurisdiction and allocating the case to the Crown Court.

The court will have regard to the general and specific guidelines contained in the Criminal Procedure Rules and in particular the relevant sentencing guidelines, since the principal factor will normally be whether the magistrates court has adequate sentencing powers to deal with the matter before it. Other

factors such as legal complexity may also be relevant. This consideration takes place within the framework of s 19 Magistrates Courts Act 1980.

The court will be aware of any previous convictions. It must treat the offence as being at least as serious as the prosecution represent it to be. The court will take account of any representations made by the parties. Here there is nothing to suggest any particular complexity and so the issue turns very much on the general and specific guidelines. This offence appears to fall within Category 2. There is greater culpability because of the use of a vehicle and an apparent element of planning as a duplicate key appears to have been procured in some way. However, there is lower harm as the total value stolen does not indicate a significant degree of loss, particularly as the loser is a company.

Andrew Hawkins has a record for similar offences which will be an aggravating factor but it appears to be the only one. As the starting point is a custodial sentence of 18 weeks with a range from a community order to 51 weeks custody, the court is likely to include that it has sufficient sentencing powers and will accept jurisdiction.

Andrew Hawkins will then be put to his election. The case does not appear to raise any particularly complex issues for which trial by judge and jury in the Crown Court would be more appropriate. Cost is unlikely to be a factor, although there is a possibility of a costs order in the Crown Court. Andrew Hawkins is unlikely to be concerned about publicity, the greater stress of Crown Court proceedings or delay. He may consider that the greater sentencing powers of the Crown Court could be disadvantageous, since, although the magistrates could commit for sentence, they are unlikely to do so having accepted jurisdiction unless significant new material comes to light. Against this there is the anecdotal evidence that acquittal rates are higher in the Crown Court.

3(c)

The legal burden of proof is on the prosecution to demonstrate to the criminal standard that the relevant offence was committed and that Andrew Hawkins participated in it. There appears to be no doubt that a burglary took place. The primary issue is whether Andrew Hawkins can be proved to be a participant in it. The prosecution also has the evidential burden.

Any admission or confession made by Carl Rogers is evidence against him alone, but he is now a competent and compellable witness for the prosecution, and if he gives evidence implicating Andrew Hawkins, this is likely to carry weight.

In addition, there is clearly material tying the Ford van YS06CVZ to the offence, and also linking it to Andrew Hawkins. This is significant circumstantial evidence. The DNA also links the vehicle to Andrew Hawkins, but it may lack weight due to the presence of DNA contributed by another unknown male.

It is likely that the prosecution will seek to adduce evidence of Andrew Hawkins' bad character as a matter in issue between the prosecution and defence pursuant to s 103 Criminal Justice Act 2003 as demonstrating a propensity to commit offences of this kind.

Andrew Hawkins is now asserting an alibi. Particulars of this alibi and the witness in support, namely Jenna Roberts should be included in a defence statement. This is optional in the magistrates court, but important in this case. The prosecution may ask the court to draw adverse inferences from the failure to mention the alibi at interview. Similar consequences may flow from any assertion at trial by Andrew Hawkins that he lent the vehicle to an unidentified third party.

It will be necessary to cross examine Carl Rogers on the basis that he is deliberately and maliciously implicating Andrew Hawkins. If Carl Rogers has previous convictions, raising them will constitute an attack on his character and would put Andrew Hawkins' character in issue under s 108 CJA 2003 but as it is likely to be in issue anyway, this may be of no significance.

The defence is likely to draw attention to the fact that no stolen property was found in the search of Andrew Hawkins' house.

Question 4(a)

It is not possible to compel the attendance of the witness, as she is outside the jurisdiction. She may be prepared to attend the trial voluntarily and give oral evidence. It may be practicable to arrange for her to give evidence by video link from Germany. Failing this, if she is prepared to make a written statement, this could be adduced as hearsay pursuant to and subject to the conditions of s 116 CJA 2003, provided the court is satisfied that it is not practicable to secure her attendance. It is probably unlikely that the prosecution would admit the statement by consent.

(b)

Once self-defence is raised it is for the prosecution to disprove it. If the defendant was, or may have been, acting in lawful self-defence, he is not guilty.

Lawful self-defence involves the defendant:

having an honest belief that he was under attack or was about to be attacked so that he needed to defend himself. The fact that his belief was mistaken does not deprive him of the defence; and

using force that was no more than reasonably necessary to repel the attack or threatened attack: acknowledging that in the heat of the moment the defendant may not be able to judge exactly what force is necessary.

A defendant's honest belief that he did no more than necessary is strong evidence that the force was reasonable.

(c)

Prakash Sharma may appeal against conviction to the Crown Court pursuant to s 108 Magistrates Courts Act 1980. Notice of appeal must be given within 21 days of conviction. No grounds for appeal need be specified.

The appeal will take the form of a complete rehearing before a Crown Court comprising a judge sitting with (normally) two justices of the peace. As it is a rehearing, the new witnesses may be called to give evidence. The Crown court

will determine, on the basis of the evidence, whether or not Prakash Sharma is guilty of the offence.

If the appeal is dismissed, the Crown Court can, if it sees fit, impose any sentence which the magistrates court could have imposed. This applies whether or not there is an express appeal against sentence: s 9 Courts Act 1971.