CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2019

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 2019 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

Forty-six candidates attempted the paper. Of these 22 passed with one achieving Distinction and two achieving Merit. Four of the candidates who failed did so marginally, but there were some very deep fails achieving marks of under 20%. This indicates that these candidates were completely unprepared.

CANDIDATE PERFORMANCE FOR EACH QUESTION

The usual comments which have been made in these reports for a number of years need to be made again. This is a practice paper and therefore requires candidates to be able to identify the relevant procedures and legal rules and to apply the law and guideline such as sentencing guidelines specifically to the facts of the case. Too many candidates appear to prepare boilerplate answers on topics which they consider will come up and then reproduced these without any particular reference to the circumstances of the case. Some examples of these are given when considering individual questions in due course. Another general error is to confuse absence of evidence with evidence of absence. For example, if the materials are silent as to whether a caution has been administered at that particular stage, this should not be taken (without more) as indicating that no caution was administered. It is legitimate to raise the question of whether a caution was administered, but it should not be assumed that there is an irregularity.

Question 1(a)

This question was generally soundly answered, although most candidates omitted reference to advice at the police station being available to a volunteer, and many did not refer to the availability of a duty solicitor on the first court appearance. Since the facts clearly stated that the client was in receipt of universal credit which is a passporting benefit, there was no need to provide detailed information on the criteria for the means test. Given that the client was admitting the charge, it was not appropriate to refer to loss of good character/reputation as one of the criteria to satisfy the merits test.

(b)

This was a prime example of candidates producing a prepared answer with no, or very limited, reference to the circumstances. The documents make clear that the client fully accepts her guilt and wishes to make full admissions. It is therefore wholly inappropriate to discuss whether or not, adopting a particular line may lead to adverse inferences, if something is not disclosed or not fully disclosed at this stage. Many candidates answered this question in exactly the same way as they would have done if advising a client who indicated that they were not involved and wished to deny everything. It is legitimate to suggest that a prepared statement might be appropriate if the client is anxious or otherwise ill-equipped to answer questions, but the primary advice would be to answer all questions and make full admissions. Not all candidates referred specifically to the credit for making admissions at the earliest opportunity, and relatively few pointed out the possibility that additional credit might be available for giving evidence that would inculpate the co-accused. A few candidates did suggest that if there had been inadequate disclosure, it might be tactically wise to make no comment in the hope that the police would not be able to put together a case, but this is essentially a secondary point.

(c)

Nearly all candidates recognised that this question required consideration of the Plea before Venue procedure for an either way offence. Some answers deviated into discussion of allocation, and wrongly suggested that, even following a guilty plea, the client had the option of electing Crown Court. The main failing was that a large number of candidates did not refer to the

sentencing guidelines, or if they did, did not realistically place the offence in terms of harm and culpability.

1(d)

This question was generally well answered. Candidates recognised the salient features. Some candidates wasted time by including a general discussion of the purposes of the plea in mitigation, rather than focusing on the content of this particular plea.

Question 2(a)

Some candidates made the mistake of asserting that a breach of bail conditions constitutes an offence in its own right. Most candidates recognised that the court had jurisdiction to reconsider bail and re-grant, possibly with additional conditions or remand. Answers tended to be vague on the question of whether a remand would be to Local Authority Accommodation or Youth Detention Accommodation, and very few identified that the full criteria for the latter would not be made out.

(b)

Nearly all candidates correctly identified that the initial appearance would be in the Youth Court. The majority also identified that, while robbery is a grave crime, the circumstances of this offence are such that a custodial sentence in excess of the jurisdiction of the Youth Court is highly unlikely. Again, the detail of reference to the actual guidelines was variable, and often sketchy or inaccurate.

(c)

Most candidates recognised that this question related to prosecution disclosure obligations. Some simply described the prosecution obligations, while others focused on the specific point which the defence could flag up and deal with this particular piece of disclosure, including incorporation in the defence statement, an informal request to the prosecution and a formal request to the court. Only a minority went on to consider whether an application to stay the proceedings might be appropriate.

Question 3(a)

This question required candidates to consider whether the arrest was lawful. It is clear that words of arrest were used, and reasons given. Some candidates assumed that as a caution was not mentioned it had not been administered – as stated earlier, this is not a justifiable inference, although comments that it was not clear if there had been a caution were legitimate. The need to verify personal details was clearly available as an arrest condition. The reasonable grounds for suspicion probably exist, based on the description, the location and the demeanour of the suspect, but it could be argued that as the description was very general, this could be stereotyping. The search was clearly lawful, as the mother gave consent as occupier. Again, many asserted that she had not given written consent, but the documents are silent as to this. In any event, while consent should normally be in writing, this is not a legal requirement. The search could also be lawful under s 18 (5) PACE, even without the consent of an inspector, if taking the suspect to his home was necessary for the effective investigation of the offence. This would justify the

suspect being taken home rather than immediately to the police station. Some answers went on to discuss issues at the police station, but these are not the responsibility of the arresting officer, so were outside the scope of the question.

3(b)

A full explanation of the Turnbull direction was expected; here the circumstances of the identification by the eye witness could lead to a conclusion that it is weak. Support could come from the demeanour of the accused at the time of arrest, the finding of the laptop bag (circumstantial even without the direct link through forensic evidence) and admission of his character as evidence of propensity. Relatively few candidates referred to the possibility of the brother being the culprit, but none then pointed out that this could only be suggested to the police if the client consented.

Question 4(a)

This required a full account of the allocation procedure, including the handling of the linked summary offence. Again, far too many candidates did not discuss the specific sentencing guidelines and the aggravating features that are present. These suggest that the case should probably be allocated to the Crown Court.

(b)

Most candidates realised there was an ethical/conduct issue, but only a proportion correctly identified the specific issue as potential witness tampering, rather than a conflict of interest.

(c)

Surprisingly few candidates were able to give a detailed answer. Both either way offences carry mandatory disqualification and the sentencing guidelines suggest significantly longer than the minimum 12 months. An extended retest is also mandatory, and this prevails of the young new driver rules.

(d)

As on previous occasions, a surprisingly large number of candidates were unable to identify the appropriate appeal procedure, to the Court of Appeal (Criminal Division) and that the only basis for appeal against conviction is that the conviction is unsafe, or how that might be established here. There was more awareness of the criteria for appeal against sentence. This appears to be an area that candidates do not study or revise effectively.

Question 1(a)

Mandy Prichard is entitled to advice at the police station under the police station duty solicitor scheme, which applies to those attending voluntarily. This is free and is not subject to any means or merits test, although personal attendance is only available where justified. Kempston's can provide this advice as own solicitors provided it is notified to the Duty Solicitor Call Centre. Non-means tested advice may also be available in relation to the first appearance through the Court Duty Solicitor Scheme.

Mandy Prichard may also apply electronically for a representation order which will be granted if she satisfies the means test (which she will as Universal Credit is a passporting benefit) and the merits test, which will be automatically satisfied if the case is allocated to the Crown Court and will be satisfied if the case is dealt with in the magistrates court if she is assessed as being at risk of loss of liberty, which is likely in view of the breach of trust.

(b)

As Mandy Prichard is admitting the offences but will wish to explain that she played a subordinate role and was recruited by her manager, it would be in her interests to answer all questions. This will enable her to get her side of the story onto the record at the earliest opportunity. By giving full admissions at the earliest opportunity, she will also get the maximum credit for a guilty plea and for assisting the police.

It is not clear whether the manager has already been interviewed or with what result. Giving full details of his involvement may earn further credit for assisting the police in their enquiries.

If Mandy Prichard is particularly nervous and feels unable to present a coherent account, it would be possible to give a no comment interview but present a full written confession by way of a prepared statement.

(c)

Theft is an either way offence. The initial appearance at the magistrates court will be for plea before venue. Mandy Prichard will be asked to indicate what plea she would enter. She will indicate a guilty plea. The prosecution will then outline the circumstances of the case and the court will consider whether it has sufficient sentencing powers to deal with the case. In doing so it will consider the magistrates court sentencing guidelines, which incorporate the substantive guideline for theft.

This is an offence in breach of trust, which indicates high culpability, but she played a subordinate role which indicates lesser culpability. The overall assessment might be group A or B. In relation to harm, the theft is of medium value but not against a vulnerable victim or involving any additional harm. It appears to fall in category 3. The magistrates could impose a sentence of twenty-six weeks' imprisonment. The starting point for theft in category 3A is

twelve months imprisonment, but for category 3B a high-level community order.

Bearing in mind the discount on sentence for an early guilty plea (which specifically justifies retention in the magistrates court in appropriate circumstances, see E 3 of the Guideline on Reduction of Sentence for a Guilty Plea) and the fact that Mandy Prichard is of previous good character, the magistrates court is likely to retain jurisdiction. It can proceed to sentence immediately if it has all the information necessary, including a presentence report. Alternatively, the case can be adjourned for sentencing.

1(d)

The plea in mitigation should emphasise that Mandy Prichard was recruited to the dishonest activity by her manager. It was not her idea, and she played a subordinate role. She has lost her good character and is unlikely to be able to continue in employment or obtain similar employment as a result of a conviction for dishonesty. She has cooperated fully with the police and made full admissions at the earliest opportunity. If it is the case, reference can be made to the assistance given in completing the police case against the manager. She is entitled to the full one third discount for an early guilty plea.

It should be submitted that in all the circumstances the custody threshold has not been crossed. Alternatively, in all the circumstances a custodial sentence could be suspended. Reference should be made here to the fact that Mandy Prichard is a single parent of two young children who would be adversely affected if she had to serve an immediate custodial sentence. The presentence report is likely to indicate appropriate elements which could form part of a community order and the plea in mitigation should, subject to the client's instructions, focus on what would be an appropriate community order.

Question 2(a)

There is a power of arrest under s 7 Bail Act 1976 in relation to a breach of bail conditions. Ashwell Sinclair must be brought before a justice of the peace as soon as practicable and in any event within twenty-four hours. If the breach is admitted or established (and here there seems clear evidence of breach) the court has power either to re-bail on the same or additional conditions, or to remand into local authority accommodation, or youth detention accommodation pursuant to Chapter 3 of Part 3 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The presumption of bail applies, and bail can only be refused if the court is satisfied that Ashwell Sinclair would otherwise fail to surrender, commit further offences or interfere with witnesses. Here, the emphasis is likely to be on commission of further offences as he entered the area where the alleged offence was committed.

Representations would focus on the fact that the breach is due to a genuine misunderstanding as to the scope of the condition, and that the experience of being arrested and brought before the court will ensure that there will be compliance in future. Remand to local authority accommodation would normally follow where there is no stable home environment or a need for closer supervision, neither of which appear to be made out.

There would certainly not appear to be any requirement to remand Ashwell Sinclair into youth detention accommodation as this would not be necessary as a last resort to protect the public from serious harm or to prevent him

committing imprisonable offences (s 98 LASPO) and there is no history of absconding (s 99 LASPO). In all the circumstances, it is likely that the court will re-bail Ashwell Sinclair on the same or similar conditions.

2(b)

Ashwell Sinclair is a juvenile and appears to be solely concerned in this matter. He will therefore initially appear in the Youth Court. While there is a strong presumption that he will be tried and sentenced there, as this court is specially intended to deal with the specific requirements of juveniles (R (H, A and O) v Southampton YC (2004)), robbery is a grave crime for the purposes of s 91 Powers of Criminal Courts (Sentencing) Act 2000, as it is a violent offence carrying life imprisonment for an adult. The Youth Court does therefore have power to allocate this case to the Crown Court for trial. If it is appropriate to consider this, a mode of trial hearing will be held. Ashwell Sinclair may make representations as to venue but has no right of election.

The Guidelines on Sentencing Children and Young People make clear that although there is a power to commit for trial for both grave crimes and in relation to dangerous offenders (and robbery is a specified violent offence under the Criminal Justice Act 2003 (s 224)), it will not usually be possible to ascertain at the outset whether the dangerousness criteria are satisfied or alternatively the sentence for the offence will fall clearly outside the sentencing powers of the Youth Court. There is power to commit for sentence in each case and the Guidelines indicate that committal for trial should be the exception. The court must be satisfied that the likely sentence would significantly exceed the maximum sentence available to the Youth Court, namely a twenty-four-month Detention and Training Order.

The robbery sentencing guidelines for young offenders now indicate that custody is a last resort. In this case no weapon was used, and the victim does not appear to be vulnerable. The only aggravating feature is the previous record. In the adult robbery guidelines this would appear to be a category 3B offence with an entry point of two years custody, but the young offender guidelines indicate that this should be reduced by one half to two thirds in the case of an offender aged 15 to 17, so it falls well within the sentencing powers of the Youth Court.

(c)

In all cases the prosecution must give primary disclosure of any unused material which might undermine the prosecution case: s 3 Criminal Procedure and Investigations Act 1996 (CPIA). If Ashwell Sinclair elects to make a defence statement, the prosecution must then give disclosure of any material which may support the defence disclosed: s 7 CPIA.

Thereafter, Ashwell Prince can also apply to the court for further disclosure if he considers the prosecution hold material which might assist the defence, and which has not been disclosed: s 8 CPIA. If the material is still not produced, and is of substantial significance, an application can be made to stay the prosecution on the grounds that a fair trial is not possible if this evidence is not available. The stay will be granted if the court is satisfied that there has been a substantial failure to comply and that this cannot be remedied, e.g. Boardman (2015).

Question 3(a)

A police officer is entitled to approach a member of the public and ask questions, including name and address, but the person approached is under no obligation to comply: Rice v Connolly (1966). There is no suggestion that the officer was considering exercising stop and search powers. The officer had a power of arrest if he reasonably suspected that Ashwell Sinclair had committed an offence: s 24 PACE. The officer had intelligence relating to the commission of the offence and a description of the perpetrator. Ashwell Sinclair answered that description, at least in general terms.

The officer had seen him acting in an apparently suspicious manner at the same location as the offence was carried out. This would appear to be enough for reasonable suspicion. The officer then acted properly in using words of arrest and giving reasons.

Under s 18 PACE a constable may search premises occupied or controlled by a person under arrest. This search must ordinarily be authorised in writing by an inspector but may be undertaken without that authority if it is necessary for the effective investigation of the offence. In addition, premises may be searched with the permission of the occupier (Sinclair's mother) and anything found which is of evidential value may be seized: s 19 PACE. There appears to be nothing to suggest that the officer has abused his powers and therefore there will be no impact on the proceedings.

(b)

While the prosecution must prove all the ingredients of the offence and that the defendant committed it, there appears to be little doubt that a robbery took place. The essential issue is whether the prosecution can establish beyond reasonable doubt that Ashwell Sinclair was the perpetrator. The legal burden is on the prosecution in this respect. As Ashwell Sinclair is not asserting any positive defence, he has no evidential burden, but clearly if the defence can adduce evidence which casts doubt on his participation, this may create a doubt such that the court cannot be satisfied so as to be sure that he is the perpetrator.

The victim can give evidence that the robbery took place and can confirm that the laptop bag recovered is his. He does not assist on the key issue of identity as he did not make a positive identification. The second eyewitness did make a positive identification. As this is disputed, a Turnbull direction as to the fallibility of eyewitness evidence, and as to the factors which should be considered when assessing the strength of the evidence will be required. Here this must be given by the legal adviser and the court must direct itself as to whether the identification evidence is to be seen as strong or weak.

PC Khan's evidence is circumstantial but may be seen as supportive of the identification evidence. The same can be said of the finding of the laptop bag at Sinclair's home, but not in his room. There is no suggestion of any forensic evidence, and the evidence from the mobile phone is inconclusive. This is not a case where the prosecution could invite adverse inferences from the no comment interview, as no positive defence is being put forward. As Sinclair has convictions for similar offences, it is possible that the prosecution will seek to admit his bad character as relevant to an important matter in issue, namely his propensity to commit offences of this kind: s 103 Criminal Justice Act 2003.

The defence might wish to explore the possible involvement of Sinclair's brother, but could only do so if he gives instructions to this effect, and it appears he does not wish to pursue this line. There appears to be no positive case which can be put, as there is no material to substantiate Sinclair's account of his movements.

The defence will, essentially, be limited to seeking to undermine the various elements of the prosecution case and submitting to the court that they cannot be sure of the defendant's involvement. It will be necessary to consider whether or not the defendant should give evidence. Generally, if there is nothing to suggest that he will not come over effectively in giving evidence, and will withstand cross-examination, giving evidence may suggest that he has nothing to hide, but ultimately it is for Sinclair himself to decide whether or not to give evidence. Again, there is no real room for adverse inferences to be drawn if he does not.

Question 4(a)

Dangerous driving and aggravated vehicle taking are both triable either way. At the first appearance the court will deal with plea before venue, and Michael Jones will indicate not guilty pleas. There will then be a mode of trial hearing to consider allocation. The prosecution will outline the facts of the case and may indicate where they consider the case should be heard. The defence may also make representations, but the court must consider that the offences are at least as serious as the prosecution alleges them to be. The court will then consider whether there are grounds not to adopt the default position of summary trial. The principal consideration will be whether their sentencing powers will be adequate, although other factors such as complexity and novelty are considered in relevant circumstances. This does not appear to be a novel or complex case.

In relation to both dangerous driving and the aggravated vehicle taking, the sentencing guidelines indicate that where there is excessive speed and showing off, the starting point is eighteen weeks custody with a range of 12 to 26 weeks. Here there is a further aggravating feature that the driver was warned to desist. Depending on the precise circumstances, the magistrates could come to the conclusion that this amounted to prolonged bad driving involving deliberate disregard of the safety of others, for which the sentencing guidelines indicate allocation to the Crown Court.

However, as the magistrates have the power to impose a total of twelve months custody, they may form the view that their sentencing powers are adequate and will indicate that they are prepared to retain jurisdiction. If so the defendant will be put to his election. The Crown Court has power to impose a higher sentence, and might do so if, after having heard the evidence, the judge formed the view that the matter did fall into the highest level of seriousness. Against this, there is anecdotal evidence that a jury is more likely to acquit. The magistrates court trial will usually be quicker and involve lower costs. If the case is allocated to the Crown Court, the offence of driving without insurance, although summary only, may also be allocated: s 41 Criminal Justice Act 1988. However, the Crown Court can only deal with the matter on the basis of a guilty plea.

4(b)

There is no property in a witness. However, given that Junior Moray has already made a statement to the prosecution, and they have indicated that they are calling him as a witness, it would not be appropriate to speak to him in the circumstances. It would expose Kempstons to an allegation that they were tampering with evidence and/or seeking to influence the witness to depart from his existing statement. This would be inconsistent with IB(5.11) of the SRA Handbook and would be unprofessional conduct. You should not discuss the matter with the witness but explain to him that if there has been any change in his position he should contact the police. Strictly speaking, it would be possible to make arrangements to speak to the witness in the presence of the police, but this is unlikely to be a practicable solution.

(c)

Both dangerous driving and aggravated vehicle taking involve obligatory disqualification. There is no suggestion of any circumstance which might persuade the court not to take this action. The minimum disqualification period is twelve months, but the sentencing guidelines indicate that for more serious cases a longer period disqualification should be considered.

If a custodial sentence has been imposed, the disqualification should be adjusted to ensure that it continues to have an impact after release. In relation to dangerous driving the court must disqualify until the defendant has taken an extended driving test. If the driving without insurance is also taken into consideration, a concurrent disqualification would be appropriate.

(d)

Appeal lies to the Court of Appeal (Criminal Division), with leave, under the Criminal Appeal Act 1968 (CAA). Notice of appeal must be given to the registrar within twenty-eight days, setting out the grounds. Normally counsel instructed at trial will settle grounds of appeal if he is of opinion that they exist.

The application for leave to appeal will normally be considered on the papers by a single judge, but if leave is refused the application may be renewed at a hearing. The sole ground of appeal against conviction is that the conviction is unsafe: s 2 CAA. In practice this may involve an allegation of an error of law or procedure by the trial judge resulting in the matter not being put fairly to the jury. An error in handling an allegedly hostile witness could constitute such an error of law or procedure. The court will consider whether there was such an irregularity, but even if one is found, the court may nevertheless conclude that the conviction is safe and reject the appeal.

A successful appeal will result in the conviction being quashed, but the court can order a retrial if it is satisfied that a jury could have found the defendant guilty, but it is not clear whether they did so for a legitimate reason.

The grounds for appeal against sentence are that the sentence was wrong in law or manifestly excessive. There is no suggestion that this sentence is wrong in law. The court will normally respect sentencing guidelines, but recognises that sentencing is not a precise science, and that not all circumstances can be fully dealt with in the guidelines.

The court will therefore consider the sentencing exercise as a whole and will only intervene if the sentence is manifestly excessive. The court cannot increase the sentence on appeal but can direct that time served shall not count towards the sentence if the appeal is considered to be without merit.