CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

LEVEL 6 - UNIT 18 – CRIMINAL LITIGATION

JUNE 2019

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 June 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

There were 63 candidates for this paper with an overall pass rate of 58%. The overall pass rate is comparable to previous sittings and there appeared to be a larger number of scripts which were relatively strong, extending to the upper grade of passes. There were unfortunately again, a number of extremely weak candidates. One point which the examiner is pleased to note is that candidates, and those responsible for preparing them for the examination, have taken on board the comments that have been made previously in this report, that candidates do not seek to address the specific issues and circumstances. While there is still a tendency to produce standardised answers to certain questions, there is now significantly more attempt by candidates to recognise what facts in the scenario are relevant and how these influence the advice to be given or other steps to be taken. Candidates are more consistently researching sentencing guidelines and quite realistic in the categorisation of the offences in terms of seriousness classification.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

The overall marks for this question were good. Most candidates could give a clear and accurate account of the VIPER procedure. Some also gave quite unnecessary detail of a live parade. As this, like all Viper, requires consent, it is difficult to envisage circumstances where this would be withheld for VIPER but given for the live parade. More attention could have been given to the way in which identification is in practice carried out if VIPER is rejected; in particular the use of covert video material and group identification. Weaker candidates tended not to deal with the implications of refusal to participate and with the role of the legal adviser.

(b)

This is one of the questions for which candidates tend to produce a rote learned answer on the merits and demerits of the various strategies for dealing with the interview. However, there needs to be more of a focus on the particular situation. In this case there had clearly been very substantial disclosure so there was no basis for declined comment on the basis of inadequate information about the circumstances of the offence. The client has a considerable criminal record and will therefore be an experienced interviewee. Better candidates recognised that in asserting that he had lent the gloves, which were found at the scene, to an associate some months ago, by not being willing to identify this associate, there was a danger that if the client gave a full comment interview, he would be pressed on this point. This would result in selective answering. It is this isolation of why there is a problem with selective answering that distinguishes a good answer from one that merely states in the abstract and selective answering is not a good tactic.

(c)

Candidates confused a statement, produced at this stage, with the formal defence statement which has to be produced after initial disclosure by the prosecution. There is no prescribed format for a statement in lieu of interview answers. Many answers included too much material. Given that this statement is admissible in evidence, it should certainly contain no reference to the client's previous convictions. It should of course contain a clear denial of any involvement, a statement that the client was at work 30 miles away from the scene of the offence until after it appears to have been committed and there may be an alibi witness in this respect. It also needs to deal with the glove, but only needs to mention that the gloves were worn some months previously.

(d)

Most candidates appreciated that there were ethical issues here. It is not really an issue of a conflict of interest, since there is no suggestion that you are to act for James Quaide. It is clear from the content of the question that Quaide is now a witness seeking to retract a statement. Any issue is effectively one of potential witness tampering and the need to avoid any suspicion that this is occurring. While there is no property in a witness, it would clearly be highly dangerous in terms of potential conduct issues, to seek to interview Quaide without the police being present, and the likelihood of an interview with the

police present being achievable, is relatively low. The most effective advice is to tell Quaide to approach the police himself to make a fresh statement.

Question 2(a)

This question concerned, and only concerned, the Plea and Trial Preparation Hearing. A number of candidates omitted any reference to arraignment. Most candidates were able to give a reasonably clear account of the purpose of this hearing in relation to the case management, fixing of a trial date or window, making any case management decisions on disclosure et cetera, but some then went on to discuss the mechanism of disclosure which would take place at different times and is therefore not properly part of the answer to this specific question.

(b)

Candidates generally approach a question on the legal issues in the case with some concern. It is important to make sure that all the relevant issues are identified and dealt with fully. This is not the same thing as producing a generalised list. There is limited credit for a generalised statement about the burden of proof being on the prosecution, but credit can be given here for recognition that the issue between the Crown and the defendant is whether the defendant participated in a burglary. There appears to be very little doubt that the burglary itself took place. One area that needs to be considered is of course disputed visual identification, and a full explanation of the Turnbull direction and how it will apply in the circumstances of this case is required. There is no direct alibi evidence, but evidence confirming that all the work, required of the client at the hotel, had been completed will be of some weight in supporting his assertion that he was working until after the time of the offence. The DNA evidence from the glove has some weight, and the explanation is not wholly convincing, but the weight of the evidence is significantly reduced by the presence of another source of DNA. The prosecution is likely to seek leave to introduce the bad character of the defendant in any event, as it may demonstrate propensity to commit offences of this kind. What is more significant is that a co-accused is now apparently prepared to give evidence for the prosecution. While any confession he has made is not evidence itself, as he can give evidence in the witness box, efforts must be made to minimise the impact of this. This is a separate basis for bad character to be introduced.

(c)

Some candidates continue to be confused and uncertain as to the procedure for appeal. In this case it is an appeal to the Criminal Division of the Court of Appeal. Most candidates who identified the correct procedure were able to give an account of that procedure, but often introduced irrelevant material relating to appeal against sentence and did not properly explain the criteria which the court would apply when deciding whether or not to allow an appeal against conviction.

Question 3(a)

As Ashwini Sodha is a juvenile, is not jointly charged with an adult, and is not charged with an offence which is a grave crime, she will initially appear in the Youth Court. Given the sentencing guidelines for the offences in question and the sentencing powers of the Youth Court, while there would need to be an allocation hearing, it is difficult to imagine circumstances in which the Youth Court would relinquish jurisdiction at any stage, and this needed to be emphasised. Too many candidates tried to demonstrate their knowledge of all the theoretical possibilities without focusing on those which were live possibilities in the circumstances. Candidates who suggested that the offence was robbery were ignoring the specific statements in the Case Study and Question Paper and receive no credit.

(b)

Most candidates correctly identified that this was a breach of bail conditions which gave the police a power of arrest and required Ashwini to be presented to the court within 24 hours but did not constitute a separate offence. Most candidates acknowledge that there was a clear breach and that the excuse offered was a lame one. The court would inevitably be concerned that the objective was intimidation or retribution of some kind. If the evidence suggested that there was a lack of structure or control in her home life, a remand to Local Authority accommodation was a live possibility. Better candidates did recognise that the formal criteria for remand to Youth Detention Accommodation were not met for either set of criteria, so it was not necessary to consider whether this form of remand was necessary to protect Ashwini or the public. Representations should have focused on the absence of any concrete evidence of intimidation or retribution, the prima facie right to bail, particularly important for a juvenile, and the possibility of imposing more restrictive bail conditions.

(c)

Most candidates were able to explain that the burden of proof lay on the prosecution in respect of all elements of the offence and that the standard was that of beyond reasonable doubt or being satisfied so that the court was sure. Very few candidates correctly identified that while the defence had an evidential burden, this was simply to raise the issue of dishonesty so that it became a live one. It is not a formal burden and is certainly not a matter which the defence is required to satisfy the court on the balance of probabilities. Strictly speaking the question did not call for a discussion of the substantive direction on dishonesty, but it was noteworthy that a number of candidates who did include this element appeared unaware that the Ghosh test for dishonesty has now been modified by the decision in Ivey v Genting Casinos.

Question 4(a)

Most candidates were able to give a reasonable account of the allocation procedure, including plea before venue and the actual mode of trial or allocation decision in an either way case. There was still something of a tendency to produce a general all-purpose description without necessarily focusing on what was directly relevant. In particular many candidates did not utilise the information given to reach a realistic assessment as to whether or not the magistrates sentencing powers would be sufficient. The likely

allocation in relation to culpability would be band B, since although there is breach of trust there appears to be no other significant feature. Harm is clearly in band 3. If the offence is categorised as B3 the starting point is a high-level community order and the upper limit is 36 weeks custody, so clearly within the magistrates' court overall sentencing powers of 12 months for two either way offences. Even if categorised as A3 with a starting point of 12 months custody and an upper limit of two years, it is still likely that the magistrates would retain jurisdiction as they are aware that the defendant is of good character and the totality principle will apply so consecutive sentences are unlikely. There do not appear to be any other considerations which need to be considered when deciding on allocation. It is therefore likely that the defendant will need to be advised as to whether or not to elect trial. Most discussion on this issue was fairly generic with little attempt to tailor it to the circumstances.

4(b)

This question required consideration of the criteria for legal aid in the Crown Court. It is not entirely clear whether the magistrates have allocated the case to the Crown Court, in which case the merits criterion would be automatically satisfied as they are clearly anticipating a custodial sentence. Some consideration therefore needed to be given to the merits criteria as it was possible that the allocation was on the basis of the defence's election. So far as the means test was concerned, the information given should have made it relatively easy to conclude that there was no contribution required from income. However, there was clearly capital in excess of £30,000 which would need to be taken into account.

(c)

This question was generally well handled, although some candidates talked about a plea in mitigation rather than outlining the content. The relevant factors were:

- the guilty plea which would attract a reduced discount on sentence because of its timing, but which, together with the reparation already voluntarily made indicated acceptance of responsibility and remorse;
- the very significant impact on the defendant. He was at risk of being dismissed from the Territorial Army and also being disqualified for pursuing a career in teaching as a result of the conviction;
- aiming to secure a non-custodial sentence, or at the very least suspension of any custodial sentence.

Question 1(a)

The preferred identification procedure is VIPER, which is a process whereby witnesses will be invited to view standardised video images of the suspect and eight comparators. The comparators should be physically similar. The images are drawn from a very large central database.

The suspect must consent to this and also to the alternative of a physical identification parade. If George Dixon refuses consent, the police can proceed to other methods of identification, including the use of covert video images, or a group identification in a public place.

Neither of these provides the same controlled environment and procedural safeguards of VIPER. A refusal to cooperate can be given in evidence and may be the subject of adverse inferences.

The defence representative will be entitled to see the initial descriptions given by the identification witnesses, so as to ensure that the comparator images are appropriate. He can also object to the inclusion of any particular image, thus ensuring the integrity of the process.

(b)

It is never advisable to answer some questions and refuse to answer others, as this is likely to lead the bench or jury to conclude that the defendant is being evasive. If the suspect gives a no comment interview but later raises matters which could have been raised at this stage, adverse inferences may be drawn under s 34 Criminal Justice and Public Order Act 1994. However, giving such an interview avoids the risk of self-incrimination, or being caught out by unexpected questions.

Adverse inferences can be avoided by providing an appropriately detailed written statement, but if this differs materially from the case put by the defence at a later stage, this will also create a risk of adverse inferences. By answering all questions, the suspect can put forward his version of events, but does run the risk of self-incrimination etc.

In this case, it is clear that George Dixon has considerable experience of criminal proceedings. There is nothing to suggest that he is in any way unfit for interview. It is likely that he could withstand any pressures associated with accounting for events. However, although there has been substantial disclosure by the police, it is not entirely clear that they have provided all the information at their disposal, and there is therefore a risk that there may be questions for which Dixon will be unprepared, and this could lead to him incriminating himself or giving answers which are inconsistent with the case which he actually wishes to put. Furthermore, he is not yet in a position to say whether there is any witness who can support the alibi he has put forward.

It may therefore be appropriate to give a no comment interview but provide a written statement setting out the potential alibi and dealing with the gloves.

1(c)

I, George Dixon, make this statement in relation to the allegation that I was responsible for a burglary which allegedly took place at King Charles Building Supplies in the early hours of 19 May 2019. I categorically deny any involvement in this matter. At the time of the alleged offence I was at work at the Topham Hotel in Luton, which is 30 miles away from the scene of the alleged offence. I was at work from 8 pm until 2 am. For the last two hours or so I was the only one in the kitchen as other employees had finished work. It is possible that the night porter at the hotel can confirm the precise time at which I left, but I do not currently recall whether or not he was present in the reception area when I left.

I have been informed that my DNA has been found on a glove which is associated with the offence. Some months ago, I gave an old pair of gloves to an acquaintance because he was working outdoors during a period of bad weather. I do not know what then became of those gloves.

I have been informed that a van associated with the alleged offence is connected to Carole Wiggins who is the wife of Terry Wiggins. I accept that on several occasions I have been convicted of offences jointly with Terry Wiggins, but I have had nothing to do with him since 2014.

I have been informed that a former employee of the company where the alleged offence took place has stated that he had a conversation with me in which I pressed him to provide details of security procedures and other matters related to the company. I also understand that he purports to have identified me as the person with whom he had the conversation. I categorically deny being the person involved in this and assert that his identification must be mistaken.

I have also been informed that a member of the public claims to have seen two men in the vicinity of the place where a van taken in the burglary was later found burned out, and who got into the van connected with Carole Wiggins. I also understand that this individual purports to have identified me as one of those men. I categorically deny being that person and assert that his identification must be mistaken.

(d)

There is no property in a witness. However, there are strong reasons for not agreeing to initiate contact with James Quaide. If he does give a statement which contradicts what is already included in statements to the police, there is a significant risk of allegations that the witness has been tampered with. Witness tampering is a breach of the SRA Code of Conduct: IB(5.11).

In theory, it would be possible to arrange to speak to James Quaide with the police also present, but in practice this is unlikely to be feasible. The only contact you can properly have with James Quaide is to inform him that if he wishes to modify the evidence, he has given to the police he should contact them for this purpose.

Question 2(a)

This will be a Plea and Trial Preparation Hearing which is normally scheduled 28 days after the case has been sent for trial. Prior to the hearing the prosecution should have made full disclosure. There is an ongoing duty on both parties to communicate on an ongoing basis: CrimPR 3.3. The defendant will be arraigned.

If there is a guilty plea the court may proceed to sentence. Otherwise the court will fix a trial date, having regard to witness availability, seek to identify the issues between the parties and give any other directions which may be necessary. This will be done using the Digital Case System where all documents are uploaded in electronic form and are accessible to all parties.

(b)

The prosecution must prove beyond reasonable doubt that George Dixon committed the burglary. There appears to be ample evidence that a burglary was committed, so the issue between the parties is whether or not George Dixon participated in it. The evidence available appears to be:

- Terry Wiggins has pleaded guilty and made a statement implicating George Dixon. If he were to give evidence for the prosecution, this is admissible evidence that George Dixon was a participant, as he is no longer a co-accused. George Dixon alleges that Terry Wiggins is lying on this point. Both are clearly of bad character, and the allegation of lying clearly puts George Dixon's character in issue. The fact that there is a history of them committing offences together would be a further reason for the prosecution to seek to admit George Dixon's previous convictions, as it is at least circumstantial evidence to support his involvement on this occasion.

- George Dixon has asserted an alibi, but the potential witness in support of it cannot provide the necessary support. Nevertheless, the fact that his normal hours of work would cover the time of the offence is material which could be put before the court, even in the absence of an independent corroborator.

- An independent eyewitness has identified George Dixon as being one of two men he saw on the morning after the offence entering a vehicle which is linked to Carole Wiggins. He has also identified the other man as Terry Wiggins. This evidence is disputed, so the judge will be required to give a Turnbull direction. The witness is a retired police sergeant, but we have been given no information as to his age, state of health, eyesight et cetera. The direction should point out that an honest witness may nevertheless be mistaken and that the ability of individuals to identify each other is problematic. It should also deal with any relevant issues relating to the circumstances of the observation. Although there does not appear to be any issue as to the quality of the light, it is not clear exactly what the distance between the witness and the men he observed was, or how long he had them under observation.

- James Quaide has asserted that he was encouraged to provide information useful to the burglars and has also identified George Dixon

as the person with whom he was dealing. This raises similar issues, and a Turnbull direction will be needed in the same way.

- Since George Dixon appears to have been consistent and the defence being put forward is in accordance with the original written statement, there would appear to be no adverse inferences to be drawn.

- Despite the CCTV footage showing the burglary taking place, this does not assist the prosecution with the key issue of the identity of the perpetrators.

- George Dixon has given an explanation of how his DNA came to be on the glove recovered from the getaway vehicle. Given that there is other DNA present, the DNA is not conclusive evidence that George Dixon was the person who left the glove in the getaway vehicle. Failure to identify the person to whom the glove was allegedly given does not raise adverse inferences as such. However, the jury may treat it as a reason to give less weight to George Dixon's evidence on the subject.

- The jury must be satisfied so that they are sure that George Dixon is guilty. Counsel will no doubt seek to raise doubts. He can suggest that Terry Wiggins has selfish reasons to implicate George Dixon and is not a witness of truth in this respect. If there is any basis to raise the issue of whether James Quaide was prepared to change his evidence, this can also be raised in an attempt to minimise the impact of his evidence. It would be unwise to challenge the good faith of Barry Corkish, but there may be an opportunity to shed doubt on the quality of his evidence.

2(c)

An appeal may be made to the Court of Appeal (Criminal Division) under the Criminal Appeals Act 1968. As counsel has advised that there are grounds for appeal, she will have settled these as part of her work on the trial. Notice of appeal must be given within 28 days. Unless the trial judge has given leave to appeal, leave must be sought from the Court of Appeal. Initially an application will be considered on paper by a single judge, but if leave is refused the application can be renewed before the court.

The sole ground of appeal is that the conviction is unsafe: s 2 Criminal Appeal Act 1968. In effect, the appeal is not against the verdict of the jury itself but seeks to demonstrate that that verdict has been vitiated, and one of the commonest bases for this is that the trial judge misdirected the jury and as a result they considered their verdict under a significant misapprehension. In this case, even if the court is persuaded that there was a material misdirection and the verdict is unsafe, while they may quash the conviction, this is not the equivalent of a ruling that the defendant is not guilty of the offence. If the court considers that a jury properly instructed might have convicted a retrial can be ordered.

The court may also rule that a misdirection does not affect the safety of the conviction and dismiss the appeal on that basis. A further appeal lies at the instance of either party to the Supreme Court, with leave, but only where the Court of Appeal certifies that a point of law of general importance is involved.

Question 3(a)

Ashwini Sodha is a juvenile, and she will appear in and be tried by the Youth Court unless one of the exceptions applies. There is no suggestion that she is jointly charged with an adult. The offences with which she is charged do not constitute grave crimes as defined in s 91 Powers of Criminal Courts (Sentencing) Act 2000.

The Youth Court is specially constituted to provide an appropriate venue for the trial of juveniles. Although the offences are triable either way in the case of an adult, there is no allocation procedure, and no right of election in the case of a juvenile. Furthermore, there is no power to commit for sentence, since although the Youth Court does have such a power it only applies in the case of grave crimes.

(b)

There has been a prima facie breach of the bail condition not to go within a 400-metre radius of the park. This gives rise to a power of arrest pursuant to s 7 (3) Bail Act 1976. The breach of bail conditions does not amount to an offence, but the court is entitled to consider whether or not to re-bail on the same or varied conditions or to withhold bail.

The reason given by Ashwini Sodha, that she forgot that she was subject to the condition, is unlikely to impress the court. The court will undoubtedly be concerned that the presence of Ashwini Sodha with a number of associates might well have been to seek retribution against or intimidate the complainant. In the circumstances the court may well be reluctant to re-bail, even on more stringent conditions.

The defence will make representations that the arrest and appearance in court has had a salutary effect, and that more stringent conditions of bail, including a curfew, would ensure that there would be no repetition. There is nothing concrete to suggest failure to surrender for trial or the commission of further offences. The default position where bail is refused is that Ashwini Sodha will be remanded to local authority accommodation: s 91 Legal Aid Sentencing and Punishment Act 2012 (LASPO), and conditions equivalent to bail conditions can be imposed: s 93 LASPO. A remand to youth detention accommodation is possible where the conditions set out in ss 98-102 LASPO are met. Such a remand should be a last resort having regard to the fact that the welfare of the juvenile should be considered as a paramount consideration.

In this case, while Ashwini Sodha meets the age and legal representation conditions in both sets of criteria, these are not violent or sexual offences, do not carry a sentence of 14 years for an adult and there is no recent history of absconding, committing offences while remanded to the care of the local authority or in youth detention accommodation, or a recent history of serious offending. Remand to youth detention accommodation is therefore not available, even before considering whether the necessity condition of protection of the public is met.

3(c)

The legal adviser should advise the bench that the legal and evidential burden of proof rests on the prosecution. The bench must be satisfied so that they are sure that Ashwini Sodha was dishonest. While there is no burden of proof on the defence, it is for the defence to put forward information which makes dishonesty a live issue.

In this case the assertion that she was recovering property which had previously been stolen in order to restore it to the true owner is sufficient to raise the issue. In order to find dishonesty, the bench must first determine what the actual state of Ashwini Sodha's knowledge or belief as to the facts of the situation was and then determine whether her actions were dishonest applying the standards of ordinary reasonable people to that state of affairs: Ivey v Genting Casinos (2017).

Question 4(a)

Kevin Brown will appear before the magistrates' court. The court will conduct a plea before venue hearing and then move into a mode of trial or allocation hearing, provided that sufficient disclosure has been made. The legal adviser will invite the defendant to indicate what his plea would be. In this case Kevin Brown will indicate a plea of not guilty. The court will then move to the mode of trial stage. The prosecution will outline the circumstances of the case and may make representations as to where the case should be tried. The defence may also make representations, but the magistrates must accept the prosecution version of the seriousness of the case.

The magistrates will then consider the statutory factors in s19 Magistrates Court Act 1980, in particular whether they have adequate sentencing powers and any relevant allocation or sentencing guidelines including those contained in the Criminal Procedure Rules. In this case there do not appear to be any other factors which might influence the decision. The sentencing guidelines for theft identify features relating to culpability and to harm. In this case culpability could be seen as high, in that these are offences in breach of trust, as Kevin Brown was entrusted with responsibility for the financial operations of the bar. There may also be a degree of planning in the way that the offences were concealed by false records. The level of harm appears to fall in category three as the value is medium and there appear to be no other aggravating features.

The sentencing guideline for an offence with high culpability and category three harm indicates an entry point of a one-year custodial sentence and a range of 26 weeks to two years, but the court can take into account the fact that Kevin Brown has no previous convictions. The court could take the view that their sentencing powers are inadequate but would probably take the view that they are adequate, as they could impose up to 12 months as there are two indictable offences, and they would then retain jurisdiction.

If the court indicates that it is prepared to retain the case, Kevin Brown has the right to elect trial on indictment. In doing so he should be advised that there is significant anecdotal evidence to suggest that a jury may be more sympathetic to the arguments of the defendant, although this is more likely to be the case where the prosecution evidence is largely given by the police.

Accepting summary trial provides some assurance that he will not receive a sentence outside the magistrates' court sentencing maximum, since, although the court could commit for sentence, it will not normally do so unless new circumstances emerge. A magistrates' court trial is likely to be quicker and less stressful and may well attract less publicity. The costs associated with a magistrates' court trial are also significantly lower.

The information provided does not suggest that there is any significant advantage in electing the Crown Court in order to take advantage of its superior procedures for handling disputed evidential issues.

4(b)

Legal aid is available to defendants who satisfy both the means test and merits test. Kevin Brown is likely to satisfy the merits test. This will be automatic if the case is proceeding in the Crown Court because he was sent there by the magistrates, and in any event, he is at significant risk of a custodial sentence, which is one of the criteria.

His means are such that he will automatically satisfy the income part of the means test, but he clearly has relevant capital in the form of his inheritance. The first £30,000 of this is disregarded, but he will be liable to make a contribution towards his costs from the balance.

(c)

Kevin Brown is entitled to credit for his guilty plea. He will not get full credit because of its timing. He is a person of previous good character, and the conviction deprives him of this good character. The conviction will also have significant effects on him in other respects. It may affect his ability to pursue a career in teaching and may result in the termination of his engagement in the Territorial Army. These would have a significant financial impact on him as well as preventing him from continuing with his chosen career and involvement with the public service.

He is also entitled to credit for the actions he has taken to reimburse the club for the loss sustained. This clearly indicates that he has fully accepted his responsibility. In all the circumstances, it is submitted that the custody threshold has not been crossed, and the matter can be dealt with by way of an appropriate community penalty. If the custody threshold has been crossed, the court should consider suspending the sentence to minimise the extent to which Kevin Brown's life is disrupted. He does not appear to be at high risk of further offending.