

**LEVEL 6 - UNIT 18 – CRIMINAL LITIGATION
SUGGESTED ANSWERS – JANUARY 2017**

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 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 students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

Question 1(a)

There is clear evidence that the client may be suffering from mental illness. You must ensure that the police have carried out a proper assessment and that the client has been medically examined. Examination of the custody record should reveal whether appropriate steps have been taken. If the client is to be interviewed, an appropriate adult (normally a psychiatric social worker) must be present.

You must also assess the client to see whether, in your opinion, his condition is consistent with the custody record. In addition to this you must carry out the normal procedures, confirming that the client does wish you to represent him, and that other requirements of PACE and the Codes have been complied with.

1(b)

There are three viable options. The first is to answer all questions, but this may be inadvisable here because of the client's vulnerability. There is a clear risk that he may incriminate himself. The second option is to give a 'no comment' interview. This avoids the possibility of self-incrimination, but raises the possibility of inferences being drawn from silence under s 34 Criminal Justice and Public Order Act 1994. A third option is to give a written statement. There is a potential danger if the statement is inconsistent with the case put by the defendant at trial, but it avoids the client being tripped up in questioning.

The statement must be as comprehensive as possible. Here, it should at least indicate that the client believes that he has an alibi in relation to certain dates, but that he is not yet in a position to provide particulars in support of an alibi. It is a matter of judgement whether reference should be made to the earlier complaints and the circumstances in which they arose. However, since the client is unlikely to be relying on material relating to this, omission of any reference in the statement may not have any adverse consequences.

1(c)

The material available makes it clear that the client is not insane in the legal sense. The court could proceed to sentence Delap on the normal principles relating to the gravity of the offence and any mitigation. As the case was allocated to the magistrates court this indicates that the value exceeded £5,000, so, according to the Magistrates Courts Sentencing Guidelines, the custody threshold has been crossed, with a range of six to 26 weeks custody, and the possibility of consecutive sentences up to 52 weeks. However, the court is likely to consider whether a disposal which takes account of the recommendation in the psychiatric report is appropriate.

The options available to the court include a hospital order, provided that two medical practitioners endorse this and an appropriate placement is available. This is intended to be a diversion from the criminal justice system in appropriate cases. A prison sentence may be combined with a hospital direction, and the distinction is that Delap would remain within the criminal justice system. A further option would be conditions attached to a suspended custodial sentence, or a community sentence requiring appropriate treatment.

Question 2(a)

A representation order can be granted following electronic submission to the Legal Aid Agency Portal of eForm CRM14, if Swift meets both the means and merits criteria. Since we are informed that he is in receipt of Income-related Jobseekers Allowance, he is passported in relation to the means test.

If an application is made while the case is pending before the magistrates, the merits test will be satisfied because having regard to the nature of the offences, there is a clear risk of a custodial sentence. If the application is made when the case has already been allocated to the Crown Court, the merits criterion is automatically fulfilled. It is therefore highly likely that Swift will be entitled to a representation order, provided he completes the application form.

2(b)

A constable may, pursuant to s 7 Bail Act 1976, arrest a person on reasonable suspicion that he has breached conditions of bail, and must produce him before a court within 24 hours. If the court is satisfied that the breach is established, it may remand in custody, or re-bail on the same or different conditions.

In this case, provided that it can be established that what Swift has told you is correct, the court is likely to accept that this was not a wilful disregard of the bail conditions. Your submissions should focus on the fact that this was a family emergency, and that under normal circumstances it would not have resulted in a breach, and while the breach is not one that is beyond Swift's control, it is nevertheless one which the court should be prepared to view leniently.

It may be appropriate to stress the salutary nature of the experience of being arrested and detained before being produced at court, since this would have been a novel experience for Swift.

2(c)

The prosecution must follow the advance disclosure with service of a full case file, and must also comply with initial disclosure under the Criminal Procedure and Investigations Act 1996. Not less than four weeks after service of the full file

there will be a Plea and Trial Preparation Hearing (PTPH). This affords the defence an opportunity to tender pleas to all or some of the charges, and any plea offered will be recorded, even if not accepted by the prosecution. The judge will also deal with scheduling of the trial and any necessary directions. The defence must also serve a full defence statement, and if necessary make any applications for further specific discovery. However, in general, interlocutory matters that are not dealt with at the PTPH should be dealt with without a hearing.

The defence must also indicate which witnesses it intends to call and provide details. A trial date will then be set and the defendant remanded in custody or on bail. There is an expectation that information will be exchanged electronically in nearly all cases.

2(d)

Initially, the prosecution case against Swift was largely circumstantial. A vehicle linked to Swift appears to have been used in at least some of the offences. Swift admits lending this vehicle to his co-accused. His fingerprints have been found associated with the driver's seat, which is not of itself particularly significant, but the fingerprints of his co-accused have been found associated with the front passenger seat only. This is some evidence that he was not driving.

There was no positive identification of Swift by the petrol station cashier. There is nothing in the documentation to suggest that Swift has managed to find a positive alibi in relation to any of the offences. Although unemployed, he has spent a substantial amount of money on a car.

However, his co-accused has now pleaded guilty and is an available competent and compellable witness for the prosecution. His guilty plea in itself and his original out-of-court admissions, if any, are not evidence against Swift, but if he does give evidence at the trial and implicate Swift, this is potentially compelling evidence.

Swift is of good character, and so is entitled to a full Vye direction as to credibility if he gives evidence and as to propensity in any event. It also means that he can attack the character of Lee in any way his advocate considers appropriate without incurring a risk of his own character being put in evidence.

Evidence from the casino can be admitted. It may be possible to arrange for a live video link, or alternatively an application to be made to admit the evidence under s 116 (2) (c) Criminal Justice Act 2003 as the witness is outside the United Kingdom and it is not practicable to secure their attendance.

Question 3(a)

As this is an either way offence, there will initially be a plea before venue hearing in the magistrates' court under s 17A Magistrates' Courts Act 1980 (MCA). Jones will be asked how she would plead. If she had indicated a guilty plea that would have been recorded and the magistrates would then proceed to sentence or committal to the Crown Court for sentence if they were satisfied their powers were inadequate. Since she is pleading not guilty, the magistrates must first of all consider which court is more suitable.

The prosecution will make representations outlining the circumstances of the case and may suggest an appropriate allocation. The defence may also make

representations, but the magistrates must treat the offence as being at least as serious as it appears from the prosecution representations.

They must initially decide whether the case is more suitable for trial on indictment or summarily. They will consider the statutory criteria in s 19 MCA, but the principal consideration will be whether their sentencing powers are adequate, for which purpose they will refer to the mode of trial guidelines in the Criminal Procedure Rules 2015 and the Magistrates' Court Sentencing Guidelines.

In this case we have a theft from a house where the value of the property is low, in monetary terms, but it is of sentimental value. This appears to place the case in category three in the Sentencing Guidelines. There is an element of breach of trust, and if this is seen by the magistrates as a high degree of breach of trust, this will amount to high culpability, although the court may conclude that it is overall medium culpability in all the circumstances.

The starting point for sentencing for a category three theft with high culpability is 12 months imprisonment and for one with medium culpability is a high-level community order. It is therefore possible that the magistrates will decline jurisdiction, but equally possible that they will accept jurisdiction.

If they do, Jones will be put to her election (s 20 MCA), and she can elect trial at the Crown Court. If she does have this opportunity she should be advised that a Crown Court trial may attract greater publicity, and will be more formal and stressful. It may also take longer to resolve. A trial in the Crown Court will involve trial by jury, with the judge ensuring that any issues of law and evidence of properly dealt with.

There is anecdotal evidence that the acquittal rate in the Crown Court is higher. The costs will be higher which will be an issue if Jones is being expected to contribute to the cost of her legal aid. A magistrates' court trial will be quicker, cheaper and less formal, but there is anecdotal evidence that magistrates and District Judges can become "case hardened" and less receptive to defence arguments.

3(b)

There is no property in a witness. As the complainant, the grandmother has given a statement to the police and will no doubt be a witness the prosecution intend to call. It is, in theory, permissible to seek to obtain a statement from her, however, it would be inappropriate to do so without notifying the prosecution and giving them the opportunity to be present at the time of any interview.

Indeed, it may be appropriate to invite them to re-interview her since it appears she is departing from her initial statement to them. You cannot therefore simply accede to the client's request to interview her grandmother. There is a danger that allegations might be made that pressure has been put on her and you cannot be associated for professional reasons with any such suspicion.

3(c)

There are two quite separate procedures for appeal from the magistrates' court. Where the appeal is in respect of a matter of law, as appears to be the case here, either party may, within 21 days, apply to the magistrates to state a case for the opinion of the High Court under s 111 MCA. The magistrates will summarise the evidence they heard on the points in question, the submissions

that were made, the findings of fact they made and the reasons why they reached their conclusion in law.

The High Court will then consider whether the magistrates correctly understood and applied the law. It may dismiss the appeal, allow it and refer the matter back to the magistrates for further action in accordance with its ruling, or declare the law without requiring the matter to be reopened in the magistrates' court, although that would be unlikely in this case, since if there were a significant error of law there would be a wrongful conviction.

The other form of appeal, under s 108 MCA, is to the Crown Court. It is only open to the defendant, and the time limit is again 21 days. Where, as here, the appeal is against conviction, the appeal takes the form of a complete rehearing before a Crown Court comprised of a Recorder or Circuit Judge sitting with magistrates.

They hear the witnesses (and different evidence can be given without restriction) and may allow or dismiss the appeal. If the appeal is dismissed they can impose any sentence which the magistrates could have imposed. Following the conclusion of this appeal, either party may again ask the Crown Court to state a case for the opinion of the High Court.

Question 4(a)

All the defendants in this case appear to be juveniles. They will therefore appear initially before the Youth Court. There is a strong presumption that cases involving juveniles will be heard in that court, as it has been specifically established with the jurisdiction and facilities to meet their needs: R v Southampton YC (2004). The offence of robbery constitutes a grave crime: s 91 Powers of Criminal Courts (Sentencing) Act 2000. The Youth Court therefore has a discretion to allocate the case to the Crown Court for trial.

However, it should only do this if the sentence that is likely to be imposed significantly exceeds its own maximum powers of sentencing, which in this case is a 24 month Detention and Training Order. The overarching principles in the Sentencing Guidelines for young offenders indicate that the primary objective is rehabilitation. The Sentencing Guidelines indicate that for a 17-year-old who pleads not guilty the starting point where a weapon is produced is three years detention, and the fact that there is a group of offenders would be an aggravating feature.

However, Enda is significantly younger and the Guidelines indicate that this should significantly reduce the likely duration of a sentence. It is possible, but perhaps unlikely, that the court could reasonably decide to allocate the case to the Crown Court. The defendants may make representations but have no right of election, so the issue of allocation is for the court alone.

4(b)

There are several options. Enda could offer a basis of plea which might be acceptable to the prosecution. He could (as appears to have happened) tender a plea of guilty to theft in relation to the robbery count.

If there is a significant disparity between the prosecution and defence versions, and the court indicates that this would be significant in terms of sentencing, a Newton hearing could be held. This carries the risk that if the prosecution version

is accepted, any credit for a guilty plea will be reduced. However, this will not be applied as rigorously in relation to a young offender.

4(c)

The realistic disposals are a custodial sentence in the form of a Detention and Training Order (which can be for one of a number of specified periods from four to 24 months, 50% of which will be spent in custody and 50% under supervision in the community) and a Youth Rehabilitation Order, which is a community order for a maximum of three years. This can include a number of requirements.

The focus of the mitigation will be to persuade the court that the custody threshold of "so serious" has not been crossed. There is clear evidence of genuine remorse, and the offences date from some months ago. There is clear evidence that Enda has turned his life around in the meantime, and reference should be made to the positive relationship with his foster parents and his educational progress.

A custodial sentence would clearly disrupt this progress and be counter to the overarching requirement to pursue rehabilitation. The seriousness of the matters can be marked by requirements such as unpaid work or a curfew. It is likely that Enda will be seen as being at a low risk of reoffending so the Rehabilitation Order will be a standard one focused on repairing the harm caused by the offences.