

**LEVEL 6 - UNIT 18 – CRIMINAL LITIGATION
SUGGESTED ANSWERS – JANUARY 2018**

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 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 tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate performance in the examination.

Question 1(a)

This is a procedure which allows outstanding reported crimes to be disposed of in a relatively informal manner where they are similar in nature and not more serious. If the police are satisfied that Howard Groves is responsible for these additional matters, they can produce a schedule outlining the offences. If Howard Groves confirms that he is responsible for these the schedule will be drawn to the attention of the court when passing sentence.

No separate sentence will be given for these matters, although they may attract a compensation order but the overall sentence will reflect the fact that Groves accepts responsibility for them. Howard Groves benefits in that he can no longer be prosecuted for these offences, and the police benefit because they can record these matters as having been cleared up.

(b)

These are either way offences, so Howard Groves will appear for a plea before venue hearing in the magistrates court. He will be invited to indicate what plea he would enter, and in this case will indicate a plea of guilty. The court will proceed to treat that as an actual plea of guilty. The court then has to determine whether its powers of sentence are adequate, or whether it is necessary to commit Howard Groves to the Crown Court for sentence.

It will hear representations from the prosecution and from the defence. The sentencing guidelines for commercial burglary of this type indicate that, since there is nothing to indicate either higher culpability or higher harm, this will be a Category 3 offence with a sentencing range from a Band B fine to 18 weeks custody with an entry point of a medium level community order. Even though there are three offences, with others to be taken into consideration, it is unlikely that the magistrates will decline jurisdiction.

The court can proceed to sentence, or can adjourn for a presentence report. However, as the question paper makes clear, such a report can be obtained on the day on a "stand down" basis, particularly where the defendant is already known to the probation service.

1(c)

The key issue is that Howard Groves now accepts that he has a drug problem. The plea in mitigation should first of all emphasise that Howard Groves admitted these matters on the first available occasion, and also assisted the police by providing information which allowed a significant part of the property to be recovered. He is therefore entitled to full credit of one third for his early guilty pleas. The admissions interview and assistance also represent mitigating factors.

The plea should acknowledge that Howard Groves has previous convictions for similar offences, and should acknowledge that the court might conclude that the custody threshold had been crossed, although it may be that the court will not conclude that these matters are, in all the circumstances, so serious as to warrant a custodial sentence. In any event the sentencing guidelines clearly indicate that a community order with a Drug Rehabilitation Requirement can be an alternative to a short custodial sentence as well as being imposed on its own right. The mitigation should seek to persuade the court to impose such an order. It should also address the question of compensation, which can be ordered in preference to a fine, but this will be dependent on the client's means.

(d)

There is no suggestion that the sentence is wrong in law, so the appeal should be to the Crown Court: s 108 Magistrates Courts Act 1980. Notice of appeal should be given within 21 days. Grounds of appeal do not have to be specified. The Crown Court will commence the sentencing exercise afresh having regard to the submissions made to it. It can impose any sentence which the magistrates' court could have imposed, so there is a risk that the sentence may be increased.

Question 2(a)

VIPER is the preferred identification procedure (PACE Code D 3.14). It involves standardised moving video images of the suspect and at least eight comparators who must be broadly similar in appearance. Digital means may be used to neutralise features such as scars or tattoos. The suspect's solicitor will be entitled to see preliminary descriptions given by potential identification witnesses and can make representations as to the selection of images to ensure that these are a fair comparison. VIPER is regarded as the most objective identification procedure, reducing the possibility of false positive identifications.

(b)

Here Miranda Ojomoh is a known but not available suspect (PACE Code D 3.21). The identification officer could use any available video material, including material from the police station, or material obtained clandestinely to conduct a form of video identification or could conduct a group identification without consent. Failing this a confrontation can be arranged (PACE Code D 3.24). There are no real advantages for the defendant, and the disadvantage is that the procedure is less controlled, and therefore potentially may give rise to false positive identifications. Confrontation, in particular, involves the identifying witness being brought directly into contact with someone who they know is a suspect.

2(c)

A representation order will be granted on application online to the Legal Aid Agency. If the magistrates court allocates the case to the Crown Court, the merits criterion will be automatically met. If not, Miranda Ojomoh must demonstrate that she is at serious risk of losing her liberty, which is likely to be a case having regard to the nature of the allegation, or that she needs representation for other reasons. She must also satisfy the means criteria. As her gross income is less than £12,475 she satisfies the initial means test and will qualify for representation in the magistrates court and for representation with no income contribution in the Crown Court.

(d)

Failure to attend court when on bail without reasonable excuse is a criminal offence: s 6 Bail Act 1976. Miranda Ojomoh's mistake as to the date will not be a reasonable excuse. Arrangements should be made for her to surrender to custody at the earliest opportunity, and she will then appear in court. The court may then remand her in custody or may re-bail her on the same or more onerous conditions.

If there is no history of absconding or failing to comply with bail conditions, the court may be persuaded to give her a further opportunity. This is more likely to be the case if Miranda Ojomoh surrenders promptly to custody. She is likely to be charged with the additional offence, and, if she pleads guilty will be sentenced by the magistrates' court. If she pleads not guilty the trial will take place as soon as practicable in the magistrates' court.

Question 3(a)

The magistrates' court will have to consider which mode of trial is more appropriate. It will hear representations from the prosecution as to the nature and seriousness of the offence. The defence may make representations, but the court must proceed on the basis that the offences are at least as serious as the prosecution allege. There is a presumption that either way offences will be tried summarily, but the court must consider whether it has adequate power to deal with the offence. It will take account of the statutory criteria in s 19 Magistrates Courts Act 1980, namely the seriousness of the case and, in particular, whether it has adequate sentencing powers.

Here Miranda Ojomoh has a previous conviction for a similar offence which is relevant to the seriousness of the current offence. The injuries themselves do not seem to suggest higher harm, but there is higher culpability resulting from the use of an improvised weapon. So far as the sentencing guidelines are concerned, this is likely to be a Category 2 offence with a sentencing range of one to three years custody and an entry point of 18 months custody. It will therefore be beyond the magistrates' powers of sentence and is likely to be allocated to the Crown Court.

If it were categorised as a Category 3 offence the range is from a low level community order to 51 weeks custody. In this event the magistrates might well accept jurisdiction as the entry point is a mid-level community order. Miranda Ojomoh would be offered the opportunity to elect trial in the Crown Court. If given this opportunity, she would have to consider that the Crown Court has greater sentencing powers, including the power to impose costs orders, but anecdotally has better acquittal rates, and better procedures for dealing with

evidential issues, although this case does not appear to raise complex evidential issues.

3(b)

The defence statement must, pursuant to ss 5-6 Criminal Procedure and Investigations Act 1996, confirm the plea of not guilty. It must also address the following matters:

- the nature of the defence, which here is mistaken identity;
- the matters of fact on which Miranda Ojomoh takes issue with the prosecutor, namely that she is the person who committed the offence and that she does so because she asserts that the witnesses to the contrary are mistaken.
- the matters of fact on which Miranda Ojomoh intends to rely; here there are none as she is not asserting a positive case.
 - any point of law that Miranda Ojomoh wishes to take, namely the admissibility of the identification evidence.

(c)

In this case there is no alibi defence, and therefore no need to give particulars in relation to it.

The case turns substantially on disputed identification evidence. The judge will need to give a Turnbull direction in relation to the weight to be attached to the identification evidence. The purpose of the direction is to indicate to the jury that identification evidence may be mistaken and will draw their attention to the circumstances of the identification including such factors as the duration of the identification, the lighting conditions, and other relevant circumstances.

Here the alleged identification is in a crowded nightclub. It is likely that the lighting was not particularly good; there is the possibility that the identification witnesses were affected by alcohol. The jury will be directed that if they are satisfied that the disputed identification evidence is of good quality they can convict on it alone, but otherwise they should look for confirmatory evidence. The fact that there are multiple identifications can act as confirmation, as can evidence from the officer in the case as to the clothing worn by the defendant at the time and the CCTV coverage which, while not positively identifying the defendant, confirms the appearance of the perpetrator.

As Miranda Ojomoh gave a "no comment" interview, and there is no indication that she made a written statement, the prosecution may, with the leave of the court, seek to invite the jury to draw inferences from this: s 34 Criminal Justice and Public Order Act 1994. Such inferences cannot be the sole basis of a conviction, but may be additional confirmation to support the weak identification evidence.

Furthermore, if Miranda Ojomoh gives evidence, the prosecution can invite the jury to infer that this does not represent the truth as the matters in question were not mentioned in interview: s 35 Criminal Justice and Public Order Act 1994.

If Miranda Ojomoh merely asserts that the prosecution witnesses are mistaken, she will not put her character in issue. If she alleges that they are lying for ulterior reasons, the prosecution may seek leave to adduce her previous conviction, although as this is not for an offence of dishonesty, the court may

consider that it is not in the interests of justice to admit it. Alternatively the prosecution may seek to adduce evidence of this conviction as evidence of propensity under s 101 (1) (d) and s 103 Criminal Justice Act 2003.

Question 4(a)

At the present time we have only third-party instructions. We need to ensure that these are confirmed by Paul Craig and that he wishes us to represent him. He will be entitled to legal representation under the advice of police station scheme which is neither means nor merits test. As Paul Craig is a juvenile the custody officer will need to arrange for an appropriate adult. You should make the custody officer aware that you do not consider the parents to be appropriate adults in view of the estrangement between themselves and Paul.

Delia Craig would be an appropriate adult, but if she is not available arrangement will be made for a social worker to fulfil this role. You should ensure that Paul Craig is aware that the appropriate adult is not bound by any duty of confidentiality. While there is nothing to suggest that there has been any irregularity in the arrest or detention, you should of course check the custody record and ascertain that there are no health or welfare issues which require attention.

(b)

You should advise Paul Craig that he has in effect three options. He can answer all the questions put to him, or he can give a "no comment" interview with or without a written statement. Here it would not be advisable to answer questions. Paul Craig does not wish to answer questions about the other perpetrators, and thus would be answering selectively which is never advisable.

A "no comment" interview avoids any risk of disclosure, or indeed of self-incrimination. However it creates a risk of adverse inferences if Paul Craig subsequently gives evidence in his defence covering matters which could have been raised at this stage. A written statement, provided it is comprehensive, and consistent with the case presented at trial would avoid such inferences being drawn, and Paul should be advised that this is the preferable course of action although it is ultimately a matter for him.

(c)

Paul Craig is a juvenile, and at the moment is not jointly charged with anyone else. He would thus initially appear in the Youth Court. There is a strong presumption that his case will be dealt with there, as the Youth Court is specifically equipped to deal with juveniles: R v Southampton YC (2004). The Youth Court may have the option of allocating the case to the Crown Court. It may do so if it is dealing with a grave crime: s 91 Powers of Criminal Courts (Sentencing) Act 2000. Robbery is a grave crime as it carries a potential life sentence in the case of an adult.

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 (DTO). The overarching principles in the Sentencing Guidelines for young offenders indicate that the primary objective of sentencing for juveniles is rehabilitation. The Sentencing Guidelines indicate that for a 17-year-old who pleads not guilty the starting point

for an offence of robbery where a weapon is produced is three years detention and the fact that there is a group of offenders would be an aggravating feature.

The Youth Court could also allocate the case to the Crown Court if it had evidence to suggest that Paul Craig was a dangerous offender. However, it is more usual for a decision on this issue to be left until after conviction and the production of a presentence report. Paul Craig could still be committed to the Crown Court for sentence at that stage of dangerousness was considered to be an issue.

Paul Craig is significantly younger than 17. The sentencing guidelines indicate that this is a factor which should result in a lesser sentence. Taking this into account, even on the prosecution version of the facts, according to which Paul Craig is the principal offender, the appropriate sentence may not clearly exceed a 24 month DTO. The Youth Court may therefore retain jurisdiction. Whilst Paul Craig can make representations as to venue, he has no right of election. There is no suggestion that Paul Craig can be dealt with in the magistrates' court as he is not appearing jointly with an adult.

(d)

The nature of the role played by an offender may make a difference at the sentencing stage. Being a subordinate member of a group of offenders may result in a lower sentence than that given to the ringleader. If so instructed, you could invite the prosecution to accept a written basis of plea to the effect that Paul Craig accepts guilt as a participant but not as the principal offender.

If this is not acceptable, a Newton hearing could be held. The court would hear evidence and decide whether the prosecution version of the offence was made out beyond reasonable doubt. If not, Paul Craig would fall to be sentenced on his version of the circumstances. An unsuccessful Newton hearing might result in the loss of the discount for a guilty plea.