
**HIGHER RIGHTS OF AUDIENCE ASSESSMENT
IN RESPECT OF CRIMINAL PROCEEDINGS**

THE WRITTEN EXAMINATION

Question paper

Time allowed: 2 hours 30 minutes

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Permitted materials

- Archbold Hong Kong – Criminal Law, Pleading, Evidence and Practice
- The Hong Kong Solicitors' Guide to Professional Conduct (Vol.1) published by the Law Society
- The Law Society's Code of Advocacy for Solicitor Advocates
- Code of Conduct of the Bar of the Hong Kong Special Administrative Region

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1. This written examination comprises one part of the assessment for higher rights of audience. There are 50 marks allocated for this examination.
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4. If, in answering any question in this examination, a significant ignorance of the code of ethics governing solicitors and/or solicitor advocates is revealed, the Higher Rights Assessment Board may determine that it should result in a failure of the overall assessment irrespective of the candidate's marks otherwise.
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The Case

Clarke is charged with one count of murder contrary to Common Law and punishable under section 2 of the Offences Against the Person Ordinance (Cap. 212).

Summary of the Prosecution Evidence

1. John was having dinner alone at Golden Dragon Restaurant situated at Nos. 46-54 Nathan Road, Mongkok, Kowloon (the “Restaurant”) in the evening on 4 April 2023. The Restaurant was full of patrons during the whole evening. Simon, an off-duty police officer, was among the patrons.
2. At about 20.25 pm when John was finishing dinner with dessert served, a man suddenly walked over to him and attacked him with a sharp object from behind, leaving John with head wounds and blood streaming down his face, soaking his shirt. After the attack, the man ran downstairs at speed.
3. As Simon was having his food, he heard someone yelling in pain. He saw John, who was a couple of tables away, bleeding and was in pain. Simon went up to John and saw someone leaving John’s table in a hurry. Simon tried to pursue that person downstairs but lost his balance and fell. He nevertheless got up immediately and continued his pursuit. Downstairs he saw two men in front of him on the pavement outside the front door of the Restaurant. One of the men then ran to Simon’s right and out of his view. The other man looked at him and made off to his left.
4. At this point Simon was helped by PC David, who was a uniformed police officer patrolling the streets outside the Restaurant. Simon revealed his police identity and asked PC David aloud to follow the man to Simon’s right while he followed the other man to his left. As Simon got on to the road, he saw the man to his left about 10 metres ahead of him, running quickly. He did his best to follow him, but that man was a faster runner. By the time the man reached the end of the road at a junction, Simon was 15 metres behind him. As he ran up the street towards the road junction, Simon saw the man in front of him throw an object from his hand on to the roadside. He briefly broke off from chasing him to recover the object which he identified as a chopping knife with blood stains.
5. Simon saw the man turn left and disappear into the crowds. He followed him into the crowds for a few metres. As Simon could not see the man, he decided to make an entry in his notebook there and then, describing the man. His note reads as follows: “He was about 5’ 6” tall and of stocky build. He was aged in his early 30’s. His skin colour was South Asian. He had a heavy stubble. He was wearing blue jeans, white trainers with dark blue stripes and a dark leather jacket. He was bare headed. He spoke simple English with a South Asian accent.”
6. Simon then made further attempts to find the man. He looked down the street and saw the man outside a noodle shop. He rushed to him and said: “You are the man I saw running down the stairs at Golden Dragon Restaurant just a while ago and was escaping. I am arresting you on suspicion of involvement in the wounding of a person there”. Under caution, the man made no reply except to admit he was called Clarke.
7. Later, a police car arrived, and Clarke was driven away to the Police Station.

8. PC David also caught up with the man running to the right and had a brief conversation with him. He spoke broken English and is of South Asian descent. He said he was Derek. He told PC David he had intended to have dinner at the Restaurant, but he had been unable to get a table because the Restaurant was full. PC David body-searched Derek and found nothing incriminating on him. As PC David found no grounds for detaining Derek, he made a note of Derek's identity card number and mobile phone number and allowed him to leave.

9. PC David was unable to give a description of Derek's clothing but said he was over 5' 5" tall, with a stocky build and had facial hair. He was in his early 30's. He spoke with a South Asian accent.

10. On PC David's way back to the pavement outside the front door of the Restaurant, he noticed some blood droplets on the ground near where Derek had been standing when he first saw him. Subsequently, the senior forensic pathologist found some blood stains on the door frame of the front door of the Restaurant. The blood samples recovered therefrom matched the blood samples of John.

11. John collapsed at the scene and was rushed to the hospital. He was certified dead on arrival.

12. On the same day of the attack, Hobson, a waiter of the Restaurant told the Police investigating the case that two days before the attack, he overheard John having an argument with another patron who spoke with a South Asian accent. Hobson said he had the impression that they had an argument about certain business dispute because he heard the man say to John, "I lost millions of dollars. How you can't do anything about it. How you can't get my money back. What I DON'T HEAR is the SOLUTION about the dying business!"

13. Clarke was interviewed under caution at 9.30 am on 5 April 2023 and he gave a statement which reads as follows:

"On the 4th of April 2023, I was on my way to Golden Dragon Restaurant to have dinner alone. I had just reached the pavement outside the restaurant when a man came running out of the front door and came straight up to me. He shouted something along the lines of "Here mate, take a hold of this" and put a chopping knife in my hand. I had no idea what was going on. Another man suddenly appeared and came towards me as well. In my confusion, I ran up the road away from him. I didn't think it was a good idea for me to keep the knife in my hand so I threw it away as I ran up the street. I deny that I was involved in wounding anyone at Golden Dragon Restaurant; I went there to have dinner. I had never seen the man who put the knife in my hand before."

14. Police subsequently sent the chopping knife to the Government Chemist for analysis. A senior forensic pathologist examined the chopping knife and the wounds on John. He found that the latter were compatible with having been caused by the use of the former.

End

Defence notes – Clarke

Family background

Clarke was born in Hong Kong. He was aged 40 at the time of the offence.

He completed his secondary education in Hong Kong.

His parents are now retired. He is the only child in the family.

Work

After secondary education, he worked as a construction worker in a construction company, earning around \$22,000 per month.

Criminal Record

In 1999, he pleaded guilty to shoplifting.

In 2001, he was on trial for shoplifting and was convicted.

In 2003, he was convicted after trial of wounding under section 19 of the Offences Against the Person Ordinance, Cap 212. On this occasion, he was wrongly identified by members of a triad society as a debtor and they used violence against him. He raised the defence of self-defence at trial but was convicted. Clarke still maintains that he acted in self-defence. He was sentenced to 18 months' imprisonment.

In 2004, Clarke pleaded guilty to two charges of assault occasioning actual bodily harm for which he was sentenced to a total of 6 months' imprisonment.

Between 2019 and 2022, he had 3 convictions of careless driving.

Lifestyle

He is a part-time coach of a local boxing club. He boasts that he is good at knife fights.

In the last decade, he was addicted to gambling, and was from time to time in debt with loan sharks. He says that his debts could sometimes be waived by rendering “special” service to his loan sharks but declines to elaborate further.

The plea and the instructions

Clarke intends to plead NOT GUILTY to the count of murder. He maintains that he told the truth at his cautioned interview.

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CRIMINAL CASE NO. [10] OF 2023

HKSAR

V

Clarke

Accused

Charged as follows-

STATEMENT OF OFFENCE

Common Law
and Cap. 212
Sec. 2

Murder, contrary to Common Law and punishable
under section 2 of the Offences Against the
Person Ordinance, Cap. 212.

PARTICULARS OF OFFENCE

Clarke on the 4th day of April 2023 at Golden
Dragon Restaurant, 46-54 Nathan Road, Mongkok,
Kowloon, in Hong Kong murdered John.

(Signed)

Senior Assistant Director of Public Prosecutions
For and on behalf of the Secretary for Justice

Date: 27th October 2023

To: Clarke (The accused)

TAKE NOTICE that you will answer to the
Indictment whereof this is a true copy at the
High Court, Queensway, Hong Kong, on the 3rd
November 2023.

.....
Registrar

List of Prosecution Witnesses

<u>Number</u>	<u>Name</u>	<u>Role</u>
1	PC Simon	Arresting Officer
2	PC Peter	Exhibits Officer
3	Dr Lee	Government Chemist

STATEMENT OF WITNESS

STATEMENT OF Simon

Age of witness (if over 18, enter “over 18”): over 18

This statement (consisting of 3 pages) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false, or do not believe to be true.

I am PC Simon and an officer of the Mongkok Police Station.

I was on my weekly leave on 4th April 2023. On that evening, I went to my favourite Cantonese restaurant, Golden Dragon Restaurant at 46-54 Nathan Road, Mongkok, Kowloon for dinner. I am a regular customer and had been to the restaurant many times.

There is street lighting along Nathan Road. The light nearest to the front door of Golden Dragon Restaurant is on the other side of the road and is directly opposite the pathway which leads to the front door. The street lighting provides an adequate level of light for pedestrians and motorists.

A person looking to the left from the front door of Golden Dragon Restaurant would see the road coming to an end after about 75 metres at a T junction of which the road forms the lower vertical part. To the left and right is an area with shops, pubs and restaurants which is usually well filled with members of the public during the day and the early evening. I myself live not very far away and I remember being surprised at how very busy it was that night.

I just showed up at the restaurant around 19.30 pm on that day without a reservation. Fortunately, a small table was available for me at the second floor although the restaurant was pretty full at that time.

I ordered the food and finished them around 20.25 pm. While I was prepared to order some dessert, I heard someone yelling in pain. I looked around and I saw a man, later known as John, was attacked by another man, whose description I will set out later. The man, who was just a couple of tables away from me, was bleeding with blood all

over his face and the shirt he was wearing. I shouted at the other man “Stop” and he immediately glanced at me and then quickly turned towards the staircase.

I ran after him. Unfortunately, in my haste I lost my footing and fell to the floor. By the time I got to my feet, he had reached the pavement outside the front door of the restaurant.

As I emerged from the front door of the restaurant, I saw two men in front of me on the pavement. One had his back to me and was obscuring my view of the other man. I had a strong impression that one man was passing an object to the other man but I was unable to see what it was.

One of the men then went to my right and out of my view. The other man, whom I now know to be Clarke, looked at me and made off to my left.

At this point I was joined by PC David, a uniformed patrol officer. I shouted to PC David to follow the second man while I followed Clarke. I cannot remember what I said but it was to the effect that I was going to follow the man who had come to the door.

As I got on to the road, I saw Clarke about 10 metres ahead of me, running quickly. I did my best to follow him but he was a faster runner than me and by the time he reached the end of the road at a junction, I was 15 metres behind him. As he ran up the street towards the junction, I saw him throw an object from his hand on to the roadway. I briefly broke off from chasing him to recover the object which I now identify as a chopping knife.

I saw him turn left and disappear into the crowds. I followed him into the crowds for a few metres but was unsuccessful at this stage in seeing him. I decided that it would be prudent for me to make an entry in my notebook at this stage, describing the man.

My note reads as follows: “He was about 5’ 6” tall and of stocky build. He was aged in his early 30’s. His skin colour was South Asian. He had a heavy stubble. He was wearing blue jeans, white trainers with dark blue stripes and a dark leather jacket. He was bare headed. He spoke with a South Asian accent.”

I then had one more attempt to find the man.

This time, I was successful in observing him. He was standing in the Middle Lane outside a noodle shop. I rushed to him and said to him: “You are the man I saw running down the stairs at the Golden Dragon Restaurant just a while ago and was escaping. I am arresting you on suspicion of involvement in the wounding of a person there”. Under caution, the man made no reply except to admit he was called Clarke.

Later, a police car arrived, and Clarke was driven away to the Mongkok Police Station.

I subsequently sent the chopping knife to the Government Chemist for analysis. A senior forensic pathologist examined the chopping knife and the wounds on John. It was found that the latter were compatible with having been caused by the use of the former.

I have made a rough sketch of the area, which I produce as Exhibit P1.

Signed: Simon (witness)

Date: 5th July 2023

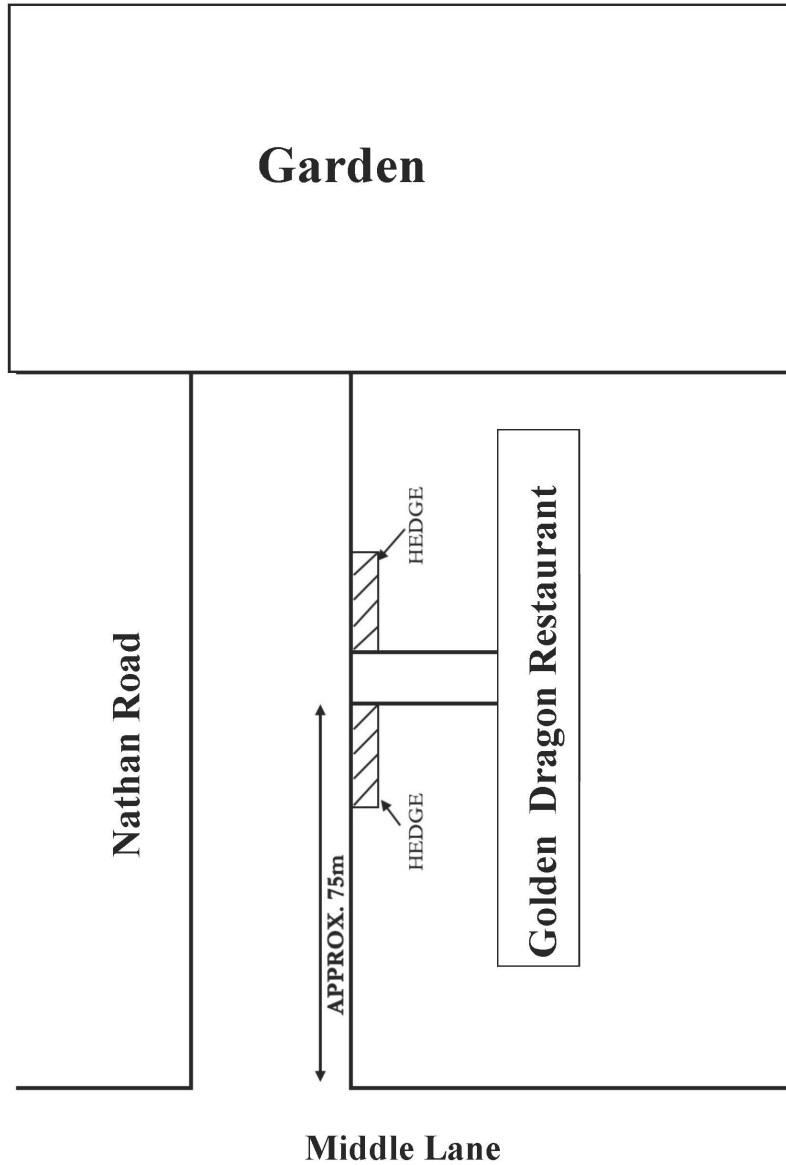


Exhibit P1

Unused Material

A police report, disclosed to the defence as unused material, contains the following:

Police obtained a description from Hobson of the man who attacked John on 4 April 2023. Hobson said that he wasn't good at remembering that sort of thing. But he did remember that the attacker was wearing non-descript white jeans, blue Adidas trainers with white stripes and a dark brown faux leather jacket. He was bare headed. He spoke with a South Asian accent.

The Questions

Question 1

- a) Clarke is charged with the murder of John. You are contacted by Paul of Fishy & Co Solicitors acting for Clarke. Paul asks you to represent Clarke.

As a recently qualified solicitor-advocate, you have not acted for any defendant charged with murder. However, you are a solicitor of 10 years' standing having a mixed practice that includes acting as instructing solicitor in murder trials.

You accept the case and ask for a fee of HK\$2,000,000 to be paid on delivery of the brief.

What are the ethical considerations when deciding to accept the brief to act for Clarke? Please support your answer with justifications. **[6 marks]**

- b) During lunch break on the 2nd day of the trial, the Prosecuting Counsel (who is a member of your firm) chats with you over a sandwich on a "Counsel-to-Counsel" basis. He says that his next witness, who was an important eyewitness, is the victim of a serious assault a few weeks ago. He is suffering from such post-traumatic stress disorder that brings him periods of blackout and amnesia. He thinks that the witness will be in difficulty when testifying, and that you should "go easy" on him.

What, if anything, would you do with this information? Please explain. **[4 marks]**

Question 2

After the Prosecution has closed its case, you intend to make a submission for Clarke, arguing that the Judge should withdraw the case from the jury and direct a verdict of NOT GUILTY. You can assume that Clarke's cautioned statement has been ruled inadmissible.

- a) What is the position in law on a submission of no case to answer in Hong Kong? **[3 marks]**
- b) What are the grounds for the submission of no case to answer for Clarke? **[7 marks]**

Question 3

Clarke was charged with one count of murder. At the trial before the Court of First Instance, Clarke testified. In the course of his examination-in-chief, he gave evidence as to his background. The essence of what he told the jury was that he was a construction worker and had worked from an early age. He told the court that he had some minor traffic convictions. He was a religious person and went to church regularly. He maintained that he was innocent and repeated his story made in his cautioned statement on 5 April 2023 (para. 13, Summary of Prosecution Evidence)

As the solicitor-advocate for the Prosecution, you seek permission from the Judge to cross-examine Clarke on his assertion in defence that he is of good character apart from one or two minor traffic convictions based on Clarke's previous convictions of wounding as set out in the Defence notes of Clarke. Counsel for Clarke objected to the application and submitted that there is a danger of undue prejudice if the jury were to learn of Clarke's convictions at this stage.

- a) What are the grounds for your application for leave to cross-examine Clark by revealing his previous convictions. **[3 marks]**
- b) What are the guiding principles for determining the application? **[7 marks]**

Question 4

You are the solicitor-advocate acting for Clarke at the trial. You have previously applied to the Judge to conduct the hearing in Chinese. The Judge refused your application and insisted that you ask questions in English. The court however provided interpretation for you during the entire trial. You feel hampered in the phrasing of the questions using English instead of Chinese.

At the end of the trial, Clarke was convicted of the charge. He now seeks your advice on possible grounds of appeal against his conviction. **[5 marks]**

Question 5

Assuming that there was a struggle between John and Clarke in the course of Clarke's attack on John, and some blood stains were found on the shirt worn by John at the time.

The blood stains were examined by Government Chemist for establishing the DNA types. The results of the examination were used to compare with the DNA types of Clarke's blood.

The Government Chemist found a DNA mixture in the blood stains collected at the scene of crime. That mixture is likely to have originated from two individuals.

It is the Government Chemist's opinion that both John and Clarke could be the possible contributors of the DNA mixture. Based on the database that is available to him, the Government Chemist calculated statistically that there is a likelihood ratio of 2.54×10^{28} to 1, meaning it is about 2.54×10^{28} more likely that the DNA mixture examined being a mixture originated from John and Clarke than if it was originated from John and an unrelated individual selected at random from the local Chinese population. This provides strong support for the proposition that both John and Clarke were the contributors to the DNA mixture.

The Defence was provided with a witness statement of the Government Chemist who performed the blood-stain examination and comparison exercise. At the close of the second day of trial after the first prosecution witness had completed his evidence, and in the absence of the jury, the Prosecution indicated to the trial judge that the Government Chemist (i.e. the intended expert) was not available as he passed away the previous day in a traffic accident.

The Defence objected to the production of the expert evidence without the Government Chemist being available for cross-examination by the Defence.

- a) As the solicitor-advocate appearing on behalf of the Prosecution, how would you deal with the situation in order that expert evidence on DNA may be admitted to prove the presence of Clarke at the scene of the murder at the material time? **[5 marks]**
- b) As the solicitor-advocate for the Defendant, you saw in the witness statement of the Government Chemist that he expressed his opinion that Clarke was the person who attacked John and injured himself and John in the course of doing so. Should the Government Chemist, acting as an expert, be allowed to express such an opinion in his evidence-in-chief? If not, based on what grounds would you object a question at examination-in-chief that seeks to elicit such an opinion? **[5 marks]**

Question 6

The trial has been fixed for 10 days. During the lunch adjournment on day 5, solicitor-advocate for the Prosecution saw the police exhibit officer speaking to one of the jurors at the far end of the High Court canteen. He went up to stop them. The solicitor-advocate for the Defence was informed of the matter before the court resumed in the afternoon.

As solicitor-advocate for the Defence,

- a) what course of action should you take in such a situation **[3 marks]**; and
- b) what are the factors relevant for considering how to deal with the situation. **[2 marks]**

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FROM THE EXAMINATION ROOM**