

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CRIMINAL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

The practical assessment is focused on a criminal trial before a judge and jury in the Court of First Instance.

Tom is charged with one count of forcible detention of person with intent to procure a ransom contrary to section 42 of the Offences Against the Persons Ordinance (Cap. 212). Harry and Sally are each charged with one count of dealing with property known or believed to represent proceeds of an indictable offence contrary to section 25(1) of the Organized and Serious Crimes Ordinance (Cap. 455).

The indictment can be found in the attached 'Bundle of Evidential Material'.

In order to complete the practical assessment, candidates will be required to do the following:

1. To make or oppose an application for the admissibility of dock identification evidence relating to Tom; **and**
2. to participate in a mini-trial.

The material upon which the practical assessment will be conducted

All the material upon which the assessment will be conducted is contained in,

1. the evidential material presented in the written assessment papers (attached at Annexure A); and
2. the 'Bundle of Evidential Material' (attached at Annexure B).

Your role as solicitor-advocate

When you receive these instructions, you will at the same time be advised whether you will appear as counsel for the prosecution or counsel for the defendant.

As prosecuting counsel, of course, you will rarely, if ever, have sight of the proof of evidence taken from a defendant by his legal representatives. For the purposes of this practical assessment, however, the defence materials are made available to you. This is because there is a limited time within which the required exercise (including examination-in-chief and cross-examination) is to be conducted. Accordingly, it is to be assumed that all witnesses, both for the prosecution and the defence, have given evidence in accordance with their statements except where in examination-in-chief they have diverged from or contradicted those statements. Should there be any such divergence or contradiction, for the purposes of the practical assessment, it is to be taken that they have arisen in the course of the witness's testimony. In cross-examination, therefore, it will be put to the witness that one part of his or her testimony has been contradicted by another part.

Dress

You will be expected to dress appropriately, that is, a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate being given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court or to the jury must be structured and succinct, getting to the heart of the matter without delay.
- It is to be assumed that the court or jury have a very good understanding of the background facts and accordingly, while arguments must of course be put into a proper factual context, there is no need for long, time-consuming recitations of the background facts.
- Remember, in addressing the jury it is not the role of a solicitor-advocate to instruct them on the law. That is the function of the judge.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You have been advised separately which party this is.

The Skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12-point font, single spaced).

You may refer to the attached authorities as you think appropriate. You do not need to attach them to the skeleton argument.

Please note that for the purpose of this assessment, your argument must be limited to the authorities which are attached.

You must email your skeleton argument in MS Word format to the Secretariat of the Higher Rights Assessment Board at info@hrab.org.hk by **no later than 3:00 pm of the Wednesday prior to the day of the assessment**.

Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. You will therefore understand that, if you submit your skeleton argument late, it may not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the Interim Application

The application for the admissibility of dock identification evidence related to Tom is made by prosecuting counsel and opposed by defence counsel.

For the purpose of this application, it is noted that the prosecution witnesses gave evidence in accordance with their witness statements and that no defence witnesses have been called.

THE CONDUCT of the mini-trial

(1) Witnesses

Only one prosecution witness and either the accused or the defence witness will attend the mini-trial. You will be advised of the identity of the witnesses by the Secretariat on the day of the assessment itself when you arrive and register.

You must therefore be prepared *in a structured and analytical manner* to examine and cross-examine all relevant witnesses.

(2) Prosecution witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the prosecution:

1. Barry
2. Lionel Chan
3. John
4. Frank
5. Raymond

(3) Defence witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the defence:

1. Tom
2. Harry
3. Sally

DURING the mini-trial

You can assume:

1. The witnesses will appear at the trial in the order listed above; and
2. For the purposes of the mini-trial, it is to be assumed that the evidence of all witnesses, other than those called, is to be, and has been, fully in accordance with their statements.
3. The Judge has ruled in favour of the interim application for dock identification of Tom.

Opening Speech

If you are allocated the role of prosecuting counsel, you will be expected to make a brief opening speech to the jury. It will last a maximum of 5 minutes.

If you are allocated the role of defence counsel, you will be expected to make a brief speech to the jury at the opening of the defence case. It will last a maximum of 5 minutes.

Conduct of the examination-in-chief/cross-examination

If you are allocated the role of prosecuting counsel, you will be expected to conduct an examination-in-chief of one prosecution witness. It will last a maximum of 10 minutes. If you are allocated the role of defence counsel, you will be expected to conduct a cross-examination of that witness. It will last a maximum of 15 minutes.

If you are allocated the role of defence counsel, you will be expected to conduct an examination-in-chief of either the accused or the defence witness. It will last a maximum of 10 minutes. If you are allocated the role of prosecuting counsel, you will be expected to conduct a cross-examination of that witness. It will last a maximum of 15 minutes.

Interventions/Objections

You are also required to

- deal with any interventions/objections made by the advocate representing the opposing party;
- take any objections, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party; and
- deal with any judicial interventions/questions as and when they arise.

Case law

The following authorities that the candidates may find useful for the interim application are attached.

- Extracts of *Archbold Hong Kong 2020*, 14-18

experience an obvious advantage, there is no need to attribute to a police witness any greater degree of observation or ability to identify a person than other witnesses.

Surveillance Operations

If the surveillance images are of insufficient quality to identify the suspect, then the proper course is to hold a formal identification parade for each and every officer who took part in the operation and in respect of each suspect: *HKSAR v Yip Wai-leung* (unrep., CACC 430/2004, [2005] HKEC 833). The Court of Appeal also commented that steps should be taken to properly identify suspects where officers have allocated "nicknames" to them, in order to ensure that such names refers to the respective suspect.

14-13

Identification of companions

Where the identification evidence includes not only identification of the offender but also someone who was with him at the time (not necessarily charged), a *Turnbull* warning should also be given in respect of that person. Where the identification of the other person is not challenged then a *Turnbull* warning is unnecessary: *R v Bath* [1990] Crim L R 716, CA.

14-14

Identification of motor cars and other inanimate objects

It is not necessary to give a *Turnbull* warning where identification evidence relates not to a person but to a car or other inanimate object. This is because a car or inanimate object, is unlikely to change colour, shape or size whereas a person may change facial expression, bodily position or appearance. The judge should however draw the jury's attention to: (a) the opportunity that each witness had to identify the car; (b) each witness's apparent ability to distinguish between makes of car; and (c) how far each witness can be relied on as to what he remembered: *R v Browning* (1992) 94 Cr App R 109, CA. An example of a practical modified approach to *Turnbull* depending on context.

14-15

Identification by clothing

The recognition of clothing can be supportive of an identification. The judge should make it clear that the fact that someone was dressed in a particular manner did not preclude the probability that someone else may have been dressed similarly: *R v Hickin* [1996] Crim L R 584, CA.

14-16

C. RECOGNITION

The evidence of a witness who recognises a perpetrator is likely to be more reliable than the witness who identifies a stranger, the judge must still remind the jury that mistakes can be made even where the perpetrator is a close relative or friend: *Beckford*.

14-17

Recognition evidence of police officers who have identified a suspect after seeing video images of the crime is no less admissible than if they had been present at the scene of the crime at the time of the offence. The fact that such recognition arises as a result of the perpetrator's previous criminal history does not make such evidence inadmissible but should be adduced with particular sensitivity so that no reference is made to the manner in which the officers have come to know the defendant for police officers meet many law-abiding citizens as well as those who are not: *R v Caldwell & Dixon* [1994] 99 Cr App R 73, 77.

D. DOCK IDENTIFICATION

The *Devlin* Report, (1976) HC, 338, commented that identification of the defendant from the dock was undesirable. It favoured the use of the identification parade procedure and this is the course consistently adopted by the CA.

14-18

A witness should not be asked to make an identification for the first time in court. *R v Hunter* (1969) Crim L R 262; *R v Howick* (1970) Crim L R 403; *The Queen v Hoang Duc Hoa* [1997] HKLRD 12. This is because being in the dock makes it almost impossible for the witness to fail to identify the accused and there is no means of checking the accuracy of the identification. Although it is undesirable and should be avoided: *R v Cartwright* (1914) 10 Cr App R 219, it is nevertheless within the courts' general discretion to disallow a dock identification on the basis that its prejudicial effect would outweigh its probative value: *R v Horsham Justices* (1982) 74 Cr App R 291. If relevant, they are legally admissible: *R v Watson* (1817) 2 Stark 116; *The Queen v Hoang Duc Hoa*, above; *Tido v The Queen* [2011] 2 Cr App R 23. The decision whether to admit such evidence is to be taken in the light of all the circumstances of the case: *Neilly v The Queen* [2012] 2 Cr App R 20, PC. Where a dock identification is made without prior opportunity of a parade or none held the proper directions to deal with possible dangers of such evidence are essential. Its admission must be conditional on a consideration of whether a fair trial would be affected. See *Grieves* above.

14-19

In *Holland v HM Advocate* (2005) 1 SC (PC) 3 the Privy Council considered whether dock identification was inconsistent with the appellant's right against self-incrimination, under Art 6(1) of the European Convention on Human Rights and Fundamental Freedoms, because it compelled the appellant to assist the Crown case against himself by exhibiting himself. It was decided that there was no infringement of the appellant's Art 6(1) right against self-incrimination. The proper approach was not to consider this matter in isolation but rather to consider whether, having regard to all the elements of the proceedings (including the way in which the identification evidence was obtained), the accused had a fair trial under Art 6 and that issue would be for the appeal court to determine after considering all the aspects. First-time identifications have been upheld where a defendant refused to take part in an identification parade: *R v John* [1973] Crim L R 113; where a defendant was of unusual appearance: *R v Hunter*, or where a parade was impracticable: *R v Horsham JJ*.

The relevant circumstances should be considered in exercising the discretion to allow dock identification including the reason why an identification parade was not held: *Tido v The Queen* [2011] 2 Cr App R 23; [2012] 1 WLR 115; *HKSAR v Medina and Diaz* (unrep., CACC 296/2007, [2012] HKEC 124), at [14]. So, for example where the police have, quite properly, carried out a group identification but not followed it up with a formal identification parade, it is not appropriate to ask the victim to make a dock identification: *HKSAR v Tang Chun Yu* (unrep., HCMA 761/2005, [2005] HKEC 1909).

Where an identification is made for the first time in the dock, the court should warn itself of the danger of relying on it if the accused was a stranger and not well known to the witness: *R v Kwan Cho Kit* [1989] HKLR 604; *Aurelio Pop v The Queen*, [2003] UKPC 40.

Provided that a jury is properly directed that they must be sure from any photographic evidence that the person in the photograph is the same person as the one sitting before them in the dock, then no injustice arose from allowing an alleged offender to be identified in the dock from evidence of photographs taken at the time of the alleged offence and put before the jury: *R v Dodson and Williams* (1984) 79 Cr App R 220 and *Murphy*, at 329B-C.

14-20

Dock identification is permissible in a true recognition case: *R v Hoang Duc Hoa*, *supra*; *HKSAR v Ning Renzhong* (unrep., HCMA 1151/2005, [2006] HKEC 88).

Where in a trial a witness identifies the person in the dock as the perpetrator, then evidence of a previous identification by him of that same person on an earlier occasion may be given by independent eye witnesses as to that identification as primary evidence, even though the witness himself was not examined upon it: *R v Christie* [1914] AC 545. This is so because it would have been permissible to examine the witness upon the point and to adduce evidence from the independent witnesses to rebut any suggestion that the identification was an afterthought or a mistake, per Lord Haldane LC, p 551. A dock identification is admissible where the witness has previously identified the defendant at the scene even though no subsequent formal identification procedure was carried out: *HKSAR v Lau Man Shing* (unrep., HCMA 85/2002, [2002] HKLRD (Yrbk) 248).

However evidence of "past identification" can prove difficult where the witness in court:

- (1) is unable to identify anyone in the dock and cannot remember having made a previous identification;
- (2) remembers having previously identified someone but does not think that that person is in the dock;
- (3) remembers having made a previous identification but cannot remember who he identified.

If the witness in court correctly identified the person in the dock as the same person whom he had identified on previously as the perpetrator then there would be no difficulty in calling other independent evidence of the earlier identification following the principles set out in *R v Christie*. In *R v Osbourne* [1973] 1 QB 678. The court allowed evidence to be called of the previous identification where the witness could not remember having made the earlier identification but that earlier identification had been made after a properly held identification parade, *cf* where the witness denies having made any earlier identification at all: *R v Lam Wai Ming* (unrep., CACC 454/1986, [1987] HKLY 196). Where the witness fails to make a dock identification, and there is independent evidence of an earlier identification, the difficulty arising from such inconsistency is a matter of weight not admissibility: *Lam Tsz Wah v R* [1984] HKLR 54.

E. IDENTIFICATION PARADES

The Hong Kong Code of Practice on Identification Parades includes the following significant paragraphs: 14-21

"Paragraph 3 ... You are not obliged to attend a parade. If you decline to do so, this fact may be given in evidence at any subsequent court proceedings at which time a witness may be given the opportunity of identifying you. It will also be open to the police to make alternative arrangements before any court proceedings, to test whether the witness does identify you as the person who he saw on the occasion in question. It should be pointed out to you that neither identification in court nor identification under whatever other arrangements the police may make, may be as fair to you as a formal identification parade. You are entitled to request a formal identification parade rather than any other method of identification if you so prefer.

Paragraph 6 ... You are asked to sign the form below to indicate whether or not you are willing to attend a parade. If you are not willing to attend you are not obliged to give your reasons, but any reasons you do give will be recorded and may be given in evidence at any subsequent court proceedings."

It would therefore not be right to ask the accused for such reasons in trial: *R v Ip Lai-sheung* (unrep., Crim App 351/1988, [1988] HKLY 229).

The Hong Kong Code of Practice on Identification Parades is not issued pursuant to any statute, therefore non-compliance with the code is not an automatic basis to exclude such evidence. However failure to comply with the "Code" may reasonably have a bearing on the "weight" to be placed on the result of the parade. Whether a breach or non-compliance with the code warrants making identification parade evidence inadmissible depends upon the nature of the breach and the particular facts relating to the holding of the parade: *HKSAR v Lo Ho Chung* [2001] 3 HKLRD 274. 14-22

A breach of the accepted procedure does not necessarily exclude other identification evidence which may be compelling and untainted: *R v Forbes*.

It is entirely a matter for the police to decide the composition of the parade: *R v Thorne* (1981) Crim LR 702.

Where a parade is held, it is advisable that the officer in charge be cognisant of the evidence of identification already given by the witness so as to ensure that the appearance and apparel of the suspect and witnesses are not inconsistent with one another: *HKSAR v Wong Chi Kwan* (unrep., CACC 340/2005, [2006] HKEC 380). This would include other identification evidence, for example video evidence indicating the suspects wore clothing like a uniform. 14-23

On parades it is permissible to have words and phrases uttered for voice identification. Care needs to be taken that it is only used to identify through the timbre of the voice, intonation, accent, pronunciation and other features sufficient to identify an

