
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

PLEASE READ THE FOLLOWING INSTRUCTIONS CAREFULLY

1. This written examination comprises one part of the assessment for higher rights of audience. There are 50 marks allocated for this examination.
2. Candidates may use their own copies of permitted materials. This is so even though they may contain annotations or highlighting provided this has been done in the ordinary course of use and reference. However, extra materials, for example, notes prepared specifically for this examination are not to be included. In the event of a dispute between the invigilator and a candidate, the decision of the invigilator shall be final.
3. Candidates must ensure that their answers provided in the examination scripts are legible to the examiners. If a candidate's handwriting is considered illegible, his/ her written examination script will be assessed on the basis of the legible parts only and the marks awarded accordingly.
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

You are a solicitor advocate briefed to represent John CHAN, aged 32, who has been charged with one count of rape contrary to section 118 of the Crimes Ordinance, Cap.200.

The case against your client is contained in the document below that is headed 'Summary of the prosecution evidence'.

His instructions are contained in the notes of a meeting that you conducted with him, those notes being headed 'Defence notes'.

Summary of the prosecution evidence

Factual background

On 30 December 2016 (Friday) at around 7 p.m., the complainant Mary KWAN ("the Complainant") and 2 of her friends went for drinks at Club Phoenix ("the Club") in Lan Kwai Fong, Central, Hong Kong. Inside the Club, the Complainant and her friends came to know the Accused John CHAN when he and a few of his colleagues had invited them to join their company's annual party at around 10 p.m. that night.

The group, including the Complainant and the Accused stayed at the Club till 2 a.m. in the morning (i.e. on 31 December 2016).

The Complainant left the Club with the Accused. She was drunk at that time.

At around 3:07 a.m. on 31 December 2016, the Accused brought the Complainant back to his rented flat at Flat G, 32nd Floor, Rosy Building, 3456 Nathan Road, Prince Edward, Kowloon, Hong Kong ("the Flat"). The Complainant was semi-conscious when she arrived at the Flat. Once they got into the Flat, the Complainant was taken into the bedroom. The Accused took off her skirt and underpants before he took off his own trousers and underpants. The Complainant saw the Accused take out a condom from the bedside cabinet. She was then raped by the Accused. It lasted for about 10 minutes. Due to her drunkenness, the Complainant was unable to resist or shout for help.

At about 4:15 a.m. on 31 December 2016, the Complainant left the Flat while the Accused had fallen asleep. She took a taxi home.

During a dinner party on 3 January 2017 (Tuesday), the Complainant told her friend Carol LAM ("Carol") of what had happened on 30 and 31 December 2016 including the rape by the Accused. She was advised by Carol to report the matter to the police.

On 5 January 2017 (Thursday) at around 3 p.m., the Complainant, accompanied by her fiancée Peter FAN, made a report of the rape at Central Police Station. The Accused was then put on the "Wanted and Watch" List.

The investigation

The Complainant was examined by a pathologist ("the Pathologist") at Queen Mary Hospital on 5 January 2017 at around 7:30 p.m. The Pathologist found no superficial injuries observed on the Complainant's vagina. The blood test result also showed no sign of drugs being used on her.

CCTV footages in the vicinity of Rosy Building and the Flat were obtained and reviewed.

The CCTV footage from the bakery at Rosy Building showed that the Accused and the Complainant alighted from a taxi outside Rosy Building at 3:04 a.m. on 31 December 2016.

Another CCTV footage from the lift of Rosy Building further showed that the Accused and the Complainant had entered into the lift and got out on 32nd Floor at 3:07 a.m. on 31 December 2016.

The arrest

On 6 January 2017 (Friday) at around 8:20 a.m., a team of four police officers (DSGT 111, DSPC 222, DPC 333 and DPC 444) attached to Central Police Station arrived at Rosy Building in an attempt to arrest the Accused. They had a search warrant Writ No.1234 of 2017 issued by Eastern Magistracy. The team of officers knocked on the door of the Flat for a few minutes but no one answered the door. The team then left at around 8:30 a.m.

At around 11:05 a.m. on 6 January 2017, the Accused was intercepted at Lo Wu Control Point when he was about to leave Hong Kong.

At around 12:45 p.m. (on 6 January 2017), DSGT 111 and DPC 333 arrived at Lo Wu Control Point when DSGT 111 declared arrest on the Accused for suspicion of rape. Under caution, the Accused said, "I did have sex with her and she agreed to it."

The Accused was then brought back to and arrived at Central Police Station at 1:52 p.m. (on 6 January 2017).

The house search

The Accused was then escorted back to the Flat for a house search at around 3:55 p.m. on 6 January 2017. During the search, 5 new condoms were found inside the bedside cabinet in one of the two bedrooms, which were seized in the presence of the Accused. No other suspicious item was found. The search concluded at 5:10 p.m. The team (again consisting of DSGT 111, DSPC 222, DPC 333 and DPC 444) escorted the Accused back to Central Police Station for further investigation.

Post-Recorded Caution Statement and Video Recorded Interview (VRI) under Caution

From 8:15 p.m. to 8:35 p.m., DSGT 111 post-recorded a cautioned statement from the Accused in relation to his earlier arrest at Lo Wu Control Point.

At 9:56 p.m., DSPC 222 signed out the Accused from the Report Room for further investigation.

At 10:47 p.m., DSPC 222 issued and explained a Pol.153 to the Accused. The Accused signed to acknowledge receipt of its copy.

From 10:48 p.m. to 11:55 p.m., DSGT 111 and DSPC 222 conducted a video recorded interview with the Accused under caution. The highlights of the video recorded interview can be summarized as follows:

- (1) the Accused met the Complainant and her friend Carol for the first time during his company's annual party on 30 December 2016 at the Club;
- (2) the Accused and the Complainant left the Club at around 2 a.m.;
- (3) they went back to the Flat in a taxi;
- (4) it was his decision to go back to his flat as the Complainant was very drunk;
- (5) once they got into the Flat, he brought her into his bedroom;
- (6) he had sex with the Complainant;
- (7) during the sexual intercourse with the Complainant, he did put his penis into her vagina;
- (8) he did use a condom at her request;
- (9) he then flushed the used condom into the toilet afterwards;
- (10) he then fell asleep;
- (11) he only found out the Complainant had left the Flat when he got up the following morning;

- (12) he did not try to contact the Complainant as he did not have her mobile number;
- (13) he was due to go to Shenzhen on 6 January 2017 for a business conference when he was intercepted by immigration officers;
- (14) he was later arrested by the police for the present charge.

At 00:06 a.m. (on 7 January 2017), the Accused signed to acknowledge receipt of a DVD recording the VRI.

At 00:18 a.m., DSPC 222 handed over the Accused to the Report Room of Central Police Station for detention.

Defence notes

Family Background

John Chan was born in Hong Kong. He was 32 years old at the time of the alleged rape.

He obtained his degree in computer science from the University of Hong Kong when he was 22 years old.

His parents are now retired and live in a public housing unit. He has an elder sister who is married and lives with her own family.

Employment

The Accused first joined his current employer Techno IT Consultancy Company as a Technology Advisor in 2006 after he graduated from the University of Hong Kong.

He was promoted to different positions in the last 10 years. He is now the Sales Director of the company and held the same position at the time of the alleged offence.

His basic monthly salary is \$55,000.

Criminal Record

The Accused has a clear record.

The Plea and the Instructions

The Accused shall plead NOT GUILTY to the offence.

(1) *The night in question – 30 December/31 December 2016*

He admitted that he had sexual intercourse with the Complainant that night. She, however, did agree to it. It was in fact on her suggestion that they went back to the Flat after they left the Club.

His company was holding the annual party at the Club on 30 December 2016. He started drinking at around 7 p.m. The company had one part of the Club reserved for the party.

He noticed the Complainant and her friends arrived at the Club at around 9 p.m. They were not guests of the company but rather just customers of the Club. Being encouraged by his colleagues, he chatted up the Complainant and her friends. He invited them to join their party which they agreed. Throughout the night, they had been drinking Champagne, Whisky, beer etc.

As the night progressed, the Accused and the Complainant became intimate with each other. There came a point when they even started kissing each other inside the Club.

At around 1:45 a.m. in the morning, they were told by the manageress of the Club that they had to leave as the Club would need to close at 2 a.m. because of licensing conditions. They therefore drank up and left the Club at around 2 a.m.

Just before he left the Club, he did ask the Complainant where she lived with a view to sending her home. She then said that he would not want to send her home as her fiancée would find out. Instead, it was the Complainant who had suggested to go back to his flat.

It was not easy to get a taxi in Lan Kwai Fong when everyone more or less left at that time on a Friday night (Saturday morning). The Accused and the Complainant could only get a taxi when they walked all the way to somewhere in Sheung Wan.

While they were walking to Sheung Wan, he remembered someone had called the Complainant's mobile phone. He did not know who called her. He could not hear most of the conversation save the very last part when she said, "Don't worry! I will stay over at Carol's place tonight!"

The Accused did not keep track of the time but agrees that they would have arrived at the Flat at around 3 a.m. in the morning. It is also of no surprise to him that the CCTV footages would have captured him and the Complainant going back to the Flat at around that time.

Once they got into the Flat, he brought the Complainant into his bedroom. They kissed each other for a minute or so. She then took off her skirt and underpants while he took off his trousers. Whilst it is true that he never asked if she would consent to sexual intercourse, it just happened naturally. He remembered that the Complainant did ask him to stop once when he was about to insert his penis into her vagina. He was not wearing a condom at the time. She therefore asked him to stop and to use a condom; which he did. They continued to have sex until he ejaculated. They then fell asleep.

When he woke up at around 10 a.m. the next morning, he discovered that the Complainant had already left the Flat. As he had not asked for the Complainant's mobile number or other contact details, he therefore never called or contacted the Complainant after that day.

(2) *The arrest – 6 January 2017*

The Accused only resumed work on 6 January 2017 when he was due to see a potential client in Shenzhen.

He arrived at Lo Wu Control Point at around 11 a.m. that day. As he was going through the necessary procedures in one of the E-Channels, he realized that the gate did not open. Within seconds, an Immigration Officer arrived and told him that he could not leave Hong Kong.

He was then taken into a room of the Immigration Department where he was detained. He was simply told by another officer that his name had been put on some kind of a "Stop List".

Nonetheless, he met with a team of police officers an hour later. He was shocked when he heard that he would be arrested for rape. He said to the police officers that he had nothing to say and would want to see his lawyer.

(3) *The house search*

The condoms found by the police belonged to him.

(4) *Post-recorded Caution Statement*

The Accused maintains that he had said nothing except to ask to see a lawyer at the time of the arrest.

The Accused accepts that he did sign on the statement later in the evening after he was taken back to the police station. However, it was only after DSGT 111 had said to him that the police would have no choice but to charge him if he was to remain silent. DSGT 111 further added that it would do him no harm by admitting that they did have sex with the consent of the Complainant.

It was in those circumstances that the Accused had agreed to, and did, sign on the Post-Recorded Statement.

(5) *Video Recorded Interview Under Caution*

With what DSGT 111 had said to him, the Accused therefore agreed to be interviewed. As he does not want to explain much in the interview, he also decided not to talk about the telephone call that he had overheard. Instead, he simply said that it was his idea to go back to his flat.

Questions

Question 1

[5 marks]

On his first appearance at the Eastern Magistrates' Court on 9 January 2017, the case was adjourned for 6 weeks pending further investigation. The presiding magistrate refused John Chan's bail application.

- (1) Advise John Chan as to his right to be heard on any subsequent bail application at the magistrates' court. **[3 marks]**
- (2) Is there any other option to apply for bail other than to a magistrate, and if so, on what basis? **[2 marks]**

Question 2

[15 marks]

After numerous adjournments, the case has progressed and a Return Day, i.e. 15 June 2017 has now been appointed under section 80A of the Magistrates Ordinance (Cap.227).

John Chan is considering to plead guilty to the charge.

Your advice is now sought in relation to discount in sentence of an early plea.

What is your advice and why?

Question 3

[6 marks]

How would you advise John Chan as to whether or not he should elect to have a preliminary inquiry?

Question 4

[10 marks]

On the Return Day, John Chan pleaded not guilty and elected not to have a preliminary inquiry. The case was committed by a magistrate to the Court of First Instance for trial upon his plea of not guilty.

Trial dates have now been fixed by the Listing Judge for August 2018.

John Chan now decides to plead guilty to the offence.

What procedural steps would need to be taken following his change of instructions on plea, and why?

Question 5

[7 marks]

John Chan's main defence is consensual sexual intercourse at the time of the offence.

During pre-trial discussions, you are informed by the prosecution that they will seek to adduce and rely on both (i) the post-recorded caution statement and (ii) the video recorded interview under caution at the trial.

- (1) What is your position insofar as the post-recorded caution statement is concerned? **[4 marks]**

Assume for this question that a *voire dire* is held to determine the admissibility of the post-recorded caution statement and the video recorded interview under caution. John Chan has decided to give evidence. Prosecuting counsel puts the following question to John Chan in the context of the accuracy of the post-recorded caution statement:

"But you did have sex with the Victim, didn't you?"

- (2) Is this question objectionable, and why? **[3 marks]**

Question 6

[7 marks]

The prosecution seeks to adduce evidence of recent complaint in respect of the conversation between Mary Kwan and Carol Lam on 3 January 2017.

What is your advice on admissibility of such evidence, and why?

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