

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. 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.
4. Candidates must not remove this question paper from the examination room.

The Case

You are a solicitor advocate briefed by legal aid to represent a 30-year-old woman, Cindy Chan, who has been charged with two counts of trafficking (importing and dealing) in a dangerous drug (heroin) and one count of attempted murder. The case against Cindy is contained in the document below with the heading summary of the prosecution evidence. Her defence is contained in the notes of a meeting that you have conducted with her, the notes being headed defence notes.

Summary of the prosecution evidence

On 25 January 2015, Constable Wong was on foot patrol with Constable Ma in Hill Street, Saikung, New Territories. Hill Street is on the edge of the town in a hilly, wooded area. At about 21:30 hours, Constable Wong saw a white Volkswagen Golf, registration number SN87943, come to a halt in a no stopping zone on a blind corner. He saw a young girl get out of the front passenger seat of the vehicle. She was carrying a bag. There were no other pedestrians in sight and no vehicles on the road. The white Volkswagen remained stationary for approximately 2 minutes. Constable Wong then heard the young girl call to the driver of the vehicle in Cantonese: there is nobody here, auntie.

Constable Wong walked towards the vehicle in order to tell the driver that it was dangerous to stop on a blind corner in a no stopping zone and that she should move on. When he got to approximately 20 m from the vehicle, the driver, a female, saw him and looked very startled. He heard the driver shout to the young girl in Cantonese to run.

At about the same time, the Volkswagen lurched forward, increasing in speed. Constable Wong will say that the vehicle headed directly towards him. In order to avoid being hit, he will say that he ran towards the centre of the road. The vehicle changed course towards him. The constable will say that, in order to avoid being hit, he threw himself to one side but was still given a glancing blow by the vehicle as it went past him, knocking him to the ground.

Constable Wong will say that the vehicle continued for another 30 m or so before mounting the pavement and hitting a tree. He will say that he managed to get to his feet. He instructed the driver of the vehicle to make sure that the engine was turned off and then instructed her to climb out of the vehicle.

The woman who was driving the vehicle was the only occupant. Her identification card revealed her to be the defendant.

Constable Wong arrested the defendant for the offence of dangerous driving. As he was in considerable physical distress he then telephoned for an ambulance.

At that time, Constable Ma returned with the young girl who said that her name was Winnie Mok. When asked, the girl said that she was 13 years of age and that the driver of the vehicle was her aunt. When asked what was in the shopping bag she said that she did not know.

Having checked the welfare of his companion and having assured himself that the defendant was not injured in any way, Constable Ma asked the defendant whether the contents of the shopping bag belonged to her. The defendant did not reply. The Constable then searched the bag. Inside, wrapped in newspaper, he found a tin box sealed with adhesive tape. He asked the defendant what was inside the box. She did not answer. The constable opened the box and saw that it contained a block of white powdery substance wrapped in cellophane. It was later analysed as being heroin. The details of the amount and the purity value are set out in the indictment.

At this stage, seeing the contents of the box, the defendant said: "Is it heroin? I thought at worst it would be cannabis."

The woman was then arrested by Constable Ma for possession of dangerous drugs for the purpose of trafficking. When cautioned, she did not answer.

At the police station, the defendant was interviewed under caution. The interview was video recorded. At the beginning of the interview, the defendant asked if she could wait for the interview to commence until her lawyer arrived. The interviewing officer said that her solicitor was on his way and would be at the station within a matter of minutes. He said it was now very late, about 02:00 hours and suggested that they start so that the solicitor could join in when he arrived. After a pause, the defendant replied, saying: "yes, that's okay. I am happy to start now." The interview then commenced.

During the interview, before the arrival of her solicitor, the defendant said that earlier in the week she had been in Zhuhai on a photographic modelling assignment. During the shoot she had been approached by a man who said that he was a shareholder in the fashion house commissioning the assignment. He called himself JJ. The defendant said she never learned his full name. One thing led to another and they spent the night together in his hotel room. That night, she said, when they went to his room JJ smoked a cigarette which appeared to be hand-rolled and which she believed was cannabis. But she could not be certain.

The following day, she said, she slept in late. She received a telephone call from JJ who apologised for leaving so early, saying that he had to return to Hong Kong for an urgent business meeting. He said that he had left a box in his hotel room which was a present for a friend. He asked if she could bring it to him in

Hong Kong. She agreed to do so. During the interview, the defendant admitted that she was concerned it might contain cannabis. However, she said, she was very attracted to JJ and agreed to bring the box to him in Hong Kong.

When she returned to Hong Kong, she telephoned JJ. She made it plain that she would like to continue seeing him. He said that he was married and they could not meet again. When she questioned him, he became very angry. He said that she must just deliver the box and they need never meet again.

The defendant said that she threatened to throw the box away. JJ then told her that he had triad connections, that he knew exactly where she lived and that unless she brought the box to him she would regret it. Being very afraid, she said, she did as instructed.

As to her reaction when she saw the two police officers approaching her car, the defendants said that she had never been convicted of a criminal offence and was terrified of going to jail because she suspected that the box contained cannabis. In her panic, she said, she told her niece to run away and tried herself to escape in the car.

When asked in the interview if, as she drove away, she had intended to hit Constable Wong, she replied that she was in a terrible state of panic at the time and did not know what she was thinking.

At this stage of the interview, the defendant's solicitor arrived. After a brief conversation with the defendant, the solicitor said that his client did not wish to say anything more. He also complained that the police had not waited.

The young girl, Winnie, was interviewed in the presence of her mother and father the following morning after she had had an opportunity to sleep. Because she was so traumatised, the parents did not agree to her being interviewed. However, as she left the interview room, the young girl said: "Auntie Cindy just asked me to come for a ride so that I could give a bag to a nice man who was a friend of hers."

Constable Wong was admitted to hospital where he remained for 10 days. As a result of being hit by the wing mirror of the vehicle, he suffered an open wound which required the removal of his spleen. He also suffered two broken ribs and a broken collarbone. The doctor who carried out the operation to remove the spleen has given a report in which he said that the injuries sustained were life threatening. He went on to say that if the constable had been hit more full on by the vehicle, it was evident from the speed at which the vehicle must have been travelling that his injuries may well have been fatal.

Defence Notes

The defendant told me that, when she was taken into the interview room for her video recorded interview, at first she wanted to wait until her lawyer arrived. However, it was very late at night and she believed that if she told the truth everything would be alright. She thought about it for a moment or two and then agreed to the interview going ahead without the presence of her solicitor.

When I suggested that we might challenge the admissibility of the video-recorded cautioned statement, she said that she would leave that to me; I was the lawyer. She said that the statement was true.

As to the box found to contain the heroin, she told me that, when JJ asked her to bring it into Hong Kong, she believed it contained cannabis. She said that, when JJ said he did not wish to see her, she had the firm intention of throwing the box away into a rubbish bin. It was only when he threatened her that she agreed to deliver it to him at the spot where the police found her.

She told me that other prisoners in jail had told her that she had a good defence of duress, one that should result in her acquittal, and she wanted me to run that defence.

She said that she was too frightened to say anything about the identity of JJ. The day following her video-recorded interview under caution she had been asked by the police if she would be prepared to look at certain photographs to see if she could recognise JJ. She refused. She did so, she said, because she was frightened that, if she pointed the finger at JJ, he would find out that it was her and harm her.

As for the involvement of her niece, the defendant told me that it would look more innocent if a young girl was standing by the side of the road. That, she said, was why she asked her niece to come for a ride with her.

In respect of the attempted murder charge, she told me that she was in a blind panic at the time and would have told the police that she had no intention of running down the police officer if her lawyer had permitted her to do so. One other matter she would have raised, she said, was that, as she started to drive away, her high heel shoe got caught between the accelerator and the brake pedal and that was why she lost control.

I suggested to her that she plead guilty to dangerous driving and she agreed to do so. The prosecution, however, said that this was not acceptable.

The Questions

Question 1

[5 Marks]

On the evidence contained in the cautioned statement, assuming it is not contradicted by other evidence at trial, what would be your advice to the defendant as to her chances of acquittal on the drug-trafficking charge if the defence is based on duress?

Question 2

[9 Marks]

In her cautioned statement, the defendant said that when she was asked by JJ to bring the box back to Hong Kong „she was concerned it might contain cannabis“. In respect of the drug-trafficking charge –

- a. Taken on its own, would you advise the defendant that this was sufficient to enable the prosecution to prove the necessary element of knowledge on her part? **[6 marks]**
- b. What other evidence do you think exists, either on its own or in combination, to assist the prosecution in proving the necessary element of knowledge? **[3 marks]**

Question 3

[3 Marks]

Assuming that the quantity of heroin found in the box would attract a 21 year prison sentence, if the defendant pleads guilty or is convicted after trial, what relevance, if any, do you believe the following matters would have in assessing sentence –

- a. the fact that the defendant brought the drugs into Hong Kong from Zhuhai, and **[1.5 marks]**
- b. the fact that the defendant took her niece in the car to deliver the drugs, giving her the shopping bag containing the drugs ? **[1.5 marks]**

Question 4 **[7 Marks]**

The following two matters arise out of the process of empanelling the jury –

Before the empanelling process begins, the defendant tells you that she does not want any young women on the jury, she would much rather have middle-aged men who will be sympathetic to her and admire her beauty. What advice would you give to her?

After you have made four challenges without giving any reason, a middle-aged man is chosen by ballot. He has cerebral palsy which gives him a bad stammer and occasional involuntary movements of his arms. His data card shows that he is a university graduate. The defendant instructs you to challenge him. When you ask her why, she says that, if she has to look at him during the trial it will distress her too much. What advice would you give her, both as to her position in law at that moment and as to the best tactical way forward.

After all the jurors have been chosen, each takes an oath of office. You notice that one of the jurors is stumbling over reading the oath in English but manages it in the end. The prosecutor does nothing nor does the judge. Would you do anything and, if so, why?

Question 5 **[10 Marks]**

The defendant has told you that her video-recorded cautioned statement was true. She has also told you that, when asked to commence the statement before the arrival of her solicitor, she thought about it and agreed. In light of this –

- a. Would you challenge the admissibility of the statement? If so, in looking to how you intend to conduct your defence, give brief reasons why. **[5 marks]**
- b. By what method and on what grounds would you be able to challenge admissibility? **[5 marks]**

Question 6 **[6 Marks]**

During the course of the trial, as you are leaving court at the end of the day, you notice that prosecuting counsel who is walking out ahead of you has dropped a sheet of paper from his file. You pick it up in order to give it to him. You notice that it is from the Office of the Commissioner of Police and is marked confidential

and titled advice. It states that PC Wong has been investigated on suspicion of exaggerating his evidence to the extent of perjuring himself in two trials. Both matters have been investigated and in both matters the enquiries have been closed with no findings of culpability. During the course of the day, PC Wong has been giving evidence in respect of the charge of attempted murder, namely, that the defendant had deliberately attempted to kill him by running him down. You have just begun your cross examination, suggesting that his evidence has been pitched too high. What should you do? Give reasons for your answer.

Question 7 **[6 Marks]**

Assume that the defendant is found guilty on both counts. She instructs you to settle Grounds of Appeal against conviction asserting that the summing up by the judge was partial and amounted to a direction to the jury to convict her. You take the view that the summing up by the judge was reasonable and fair (even though there may have been errors of law). What will you do? Give reasons for your answer.

Question 8 **[4 Marks]**

The trial judge used to be a senior prosecutor in the Prosecutions Division of the Department of Justice. Assume for the purposes of this question that the defendant was arrested a week before the judge retired as a prosecutor just over a year ago. At the beginning of the trial you are informed that the judge has no memory whatsoever of this matter. You are further informed that the judge has caused a check to be made to see if his signature appears on any documents in the prosecution file. The check has been made and there is no evidence of any counter signature by him or any other evidence to the effect that he has appraised himself with the contents of the file. After the conclusion of the trial, however, when you are considering drafting your Grounds of Appeal, a friend in the Department of Justice tells you that the clerk who was given the job of checking the file has been guilty of an oversight. In fact, the judge had countersigned one document. That document was a recommendation that senior counsel at the private bar be briefed to determine whether a charge of attempted murder was a suitable charge in the case. The brief from senior counsel was returned well after the judge had retired from his office in the Prosecutions Division. In such circumstances, would you advance this matter of oversight as a ground of appeal? Give reasons.

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