

November 2013

**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

Please study the following materials about the case before going to the part on questions.

- I. Proof of evidence of Fong Wai Chi, Henry
- II. Proof of evidence of Yuen Chung Shum, Ricky
- III. Summary of the prosecution evidence

I. Proof of evidence of Fong Wai Chi, Henry

I am an immigration officer. I have been in the Immigration Service for five years. I am 25 years of age. I have been charged with one count of robbery. I am not guilty of the offence.

On 24 July 2013, I was on duty at the Lo Wu Border Crossing. My task that day was to check for contraband being carried across the border by travellers entering Hong Kong. I was working with a colleague, Yuen Chung Shum, Ricky.

At 4.30 pm that afternoon, a European male sought to walk through the Green Route. He appeared to be in his 60s. It seemed he had not shaved in several days, he was very thin and looked dishevelled, as a drug addict may look.

We decided to stop him. First, we asked to examine his passport. It was a British passport in the name of Leopold Sutton. In this statement I will call him 'Sutton'.

When we said that we wished to examine what he was bringing into Hong Kong, Sutton immediately became very defensive. He said that we had no reason to 'pick on him'. He said that he was a reputable businessman, a trader in rare items and antiques.

As he was speaking in a very loud voice and being abusive to us, we took him to an area away from the public. It is an open area next to our interviewing rooms.

Sutton put his suitcase on the table and said that we were welcome to examine. I searched the suitcase together with my colleague, Ricky Yuen.

There was nothing illegal in the suitcase. I noticed, however, that Sutton was carrying a male handbag, a leather one that looked very expensive. I asked him to place the handbag on the table so that we could examine its contents. He

then became very aggressive, saying this was an abuse of power on our part. After a lot of argument, he put the handbag on the table. I opened it and emptied its contents. There were a lot of pills in bottles. Sutton kept saying that the bag only contained his medicines.

While I was sorting through the items, he reached across and grabbed a small transparent plastic packet. Inside it were what appeared to be postage stamps. I asked him to let me see them. He refused. He said that these were very valuable and he did not wish to let them out of his possession. I asked him again to let me see them. I put out my hand. He then slapped the packet into my hand. There were three postage stamps in the packet. I examined them, put all three back into the packet and returned the packet to him. I remember that he kept the packet in his hand.

It is said that it was about this time that I must have robbed him of one of the postage stamps in that packet. The stamp is a United States postage stamp printed in 1918 which is known by the name of 'the Inverted Jenny' because a biplane in the centre of the stamp is printed upside down by mistake. I have been told that it is worth close to US\$1,000,000.

My father used to buy and sell stamps and so I do know something about stamps. But I am no expert. Until I was charged with robbery I had never heard of a stamp called 'the Inverted Jenny'.

While I was examining the postage stamps, my colleague, Ricky, found a round tin of tobacco together with a pipe. He opened the tin. He removed the tobacco and underneath it found a plastic packet that appeared to contain the drug 'ice'. It was later confirmed to be 'ice'; 10 g.

When Sutton saw that we had discovered the drugs, he tried to grab the packet. He was acting as if he was demented. A struggle took place. I assisted Ricky to bring him under control. We could see that he was old and frail. We did not want to hurt him. However, he still managed to bite Ricky on the arm and tore the pocket on my shirt. During this struggle neither of us did more than hold him. Sutton did not fall nor did he bang himself against any hard object.

When we had pacified him, Ricky arrested him for trafficking in suspected dangerous drugs. He cautioned him. Sutton said that we had planted the drugs on him. I remember he said that two could play at that game.

Ricky then escorted him into an interview room to record the formalities of the arrest.

I put the items back into the handbag. I took the suitcase and the handbag into the interview room. Then I left. I left because we were extremely busy that night.

I did not see or hear what happened in the interviewing room. About 10 minutes later, I am not sure of the time, Ricky called to me. He said that Sutton had collapsed and appeared to be unconscious. An ambulance was called. We learned about an hour later that Sutton had been declared dead shortly after arriving at the hospital.

My shift ended at midnight that night. As I was walking to my bus I was stopped by a team of uniformed police officers. I was arrested on suspicion of robbery. When I was cautioned, I remained silent. I was taken to the airport police post. At the police post I was searched. The postage stamp was found in my trouser pocket, 'the Inverted Jenny'. When it was discovered, I was cautioned again and asked if I had anything to say. Again, I remained silent. This time I was in complete shock. I did not know how the stamp could be found there.

The following day I was granted bail. Both Ricky and I were suspended from duties. However, a day later we were called to headquarters and told that we must make witness statements as to the events. We were instructed that we must do it because, as officers of the service, even though we were interdicted, it was necessary for us to assist in a full investigation of what happened. For that reason only I made a witness statement.

At the time I made it, I was afraid that if I mentioned anything about my examination of the postage stamps it would be bad for me. In my statement, therefore, I said that I knew nothing about any postage stamps in a plastic packet. I also forgot to mention that Sutton had threatened us, saying that we had planted the drugs on him and that two could play at that game.

Sutton must have used the struggle as a cover in order to push the postage stamp into my pocket. It must have been his intention to later accuse me of stealing the stamp.

Finally, I should mention that two years ago I was charged with theft, that is, shoplifting. However, after trial I was found not guilty.

II. Proof of evidence of Yuen Chung Shum, Ricky

I am an immigration officer. I have been in the service for five years. I am 26 years of age. I have been charged with one count of culpable homicide.

On 24 July 2013, I was on duty at Lo Wu Border Crossing together with my colleague Henry Fong. Our task was to check for contraband being carried across the border by travellers entering Hong Kong.

At about 4.30 pm, a European male came through the Green Route. He looked dishevelled and ill. He was carrying a British passport in the name of Leopold Sutton. In this statement I will call him 'Sutton'.

When we asked to examine his luggage, he became abusive. He said he was an honest businessman and we had no reason to stop him. Because he was causing a disturbance, we took him to an area away from the public, an open area next to our interviewing rooms. There were a couple of tables there where we could conduct examinations of luggage.

First, we searched his suitcase. Then we asked to examine the leather handbag that he was carrying. My colleague, Henry Fong, asked him to put the bag on the table so that we could look at its contents. He then became very defensive and abused us even more. However, he did put the handbag on the table so that the contents could be examined.

My colleague had a discussion with Sutton about the contents of a small transparent plastic packet found in the bag. It seems that it may have contained postage stamps. But I paid no attention to this as I was going through all the bottles of pills and other medication.

I saw a tin of tobacco. There was a pipe too. I decided to open the tin. It appeared to be full of tobacco but when I took away the top layer I could see a plastic packet underneath. As soon as I took the packet out of the tin, Sutton tried to grab it from me. He was shouting. A struggle took place. He was very violent and bit me on the arm. Having regard to his age and the fact that he looked very sick, Henry Fong and myself attempted to pacify him with the minimum of violence. I just grabbed him around the arms and held him until he quietened down.

During the struggle, Sutton did not fall nor, to my knowledge, did he hit himself against any hard object.

Once Sutton had quietened down, I arrested him for possession of suspected illegal drugs, namely 'ice'. I recall him saying something to the effect that in his condition he would never come out of prison alive. Then, without warning, he

became very angry again. He accused the two of us of planting the packet of drugs on him. He said something about two being able to play that game.

I then escorted Sutton into the nearest interview room, room 101. I remember that Henry Fong brought in Sutton's suitcase and handbag and put them on a side table. Then he left.

I took some paper and told him that I was now going to record the fact that I had arrested and cautioned him and that I would record his answer. Sutton stood up, saying that he needed to get some medicine from his bag. The next thing I knew, he threw a bottle of pills at me, saying that I had destroyed his life. He tried to throw another bottle but I managed to grab hold of him. There was a short struggle.

I did not deliberately hit him. However, I may have caught him with an elbow or something like that. However, I recall that he did fall backwards against a wooden chair and in the struggle hit his head against the side table. He then collapsed at my feet.

I tried to rouse him but he appeared to be unconscious. That was when I raised the alarm. Sutton was taken to hospital by ambulance. Later, before completing my shift, I learned that he had died.

The following day I was suspended from duties. The day after that Henry Fong and I were called to headquarters and were instructed to make witness statements. I knew that Henry had already been accused of robbery. I had not been accused of any criminal offence but I was very worried that I might be. I did not want to make a statement. We both asked if we could get legal advice first. We were told no, as officers of the service we had an obligation to assist the Immigration Department in its enquiries.

In my statement, I mentioned everything that I have mentioned here except for the fact that there was a struggle in the interview room. I simply said that Sutton had collapsed. It was foolish of me, I know, but I was afraid that, if I mentioned a struggle, I might be accused of killing him.

III. Summary of the prosecution evidence

The two defendants are jointly charged.

First defendant, Yuen Chung Shun, Ricky, is charged with one count of manslaughter, contrary to common law in that on 24 July 2013, in the Immigration Section of the Lo Wu Border Crossing, he unlawfully caused the death of Leopold Sutton.

The second defendant, Fong Wai Chi, Henry, is charged with one count of robbery, contrary to section 10 of the Theft Ordinance Cap. 210 in that on 24 July 2013, also in the immigration section of the Lo Wu border crossing, he robbed Leopold Sutton of a valuable collector's item, namely, a United States postage stamp bearing the date 1918 known by the name of an 'Inverted Jenny', the stamp being valued at HK\$7,500,000.

In respect of the robbery, the prosecution case is to the following effect. The two defendants, both immigration officers and on duty at the time, stopped Leopold Sutton ('the deceased') in order to search him. The deceased objected and there was a disturbance.

The two defendants took the deceased to a private area in the immigration section where they searched his suitcase and then searched the contents of his male handbag.

At that time, sitting in interview room 102, was John Apple, an Australian citizen, who had earlier been the subject of a search. No contraband had been found on him and he had been told that he could leave. He was in the process of re-packing his suitcase when he saw the two defendants searching the suitcase of the deceased.

Apple will state that although the search was taking place about 30 feet away, the door to interview room 102 was sufficiently open to give him a view of the search. He could also hear what was said.

Apple will state that he heard the second defendant, the shorter one wearing glasses, demand that the deceased hand a plastic packet to him. He heard the deceased reply, saying that the packet contained very valuable postage stamps and there was no reason why he should hand them over. Apple then saw the second defendant grab the packet. When the deceased tried to prevent him from doing so, the second defendant punched him in the chest.

Apple saw the second defendant examine the contents of the plastic packet and hand it back to the deceased. A second or two later, Apple saw the second defendant put his hand into his trouser pocket. He could not see whether the

second defendant had anything in his hand at that time but the second defendant's actions made him suspicious.

Apple will state that he waited until he was sure he would not be seen by either of the two defendants. He then made his way into the public area and reported to a senior police officer that the deceased was assaulted and may have been the victim of theft.

Apple will say that, having made the report he went to a nearby hospital to be treated for a bad migraine. Apparently, he suffers from migraine when placed under stress.

Later that night, when the second defendant was leaving his place of work, he was stopped by the police. He was later searched and the postage stamp described in the charge was found in his right trouser pocket.

In respect of the charge of culpable homicide, the prosecution case is to the following effect.

After the deceased had been robbed of the postage stamp, Apple will state that he continued to watch events. He saw a struggle take place when a packet was found in the deceased's tin of tobacco and he was accused of dealing in drugs. Apple will describe the struggle as being very brief; he could see no punches being thrown and nobody fell to the ground. However, the first defendant, the much taller immigration officer, accused the deceased of biting him on the arm.

Apple will say that he heard the deceased accusing the officers of planting the drugs on him.

Apple saw the deceased being escorted into the first interview room (room 101). He then saw the second defendant leave the area. Shortly afterwards he left the area himself to make his report.

At 5:15 pm the first defendant reported that the deceased had collapsed in interview room 101. Attempts were made to resuscitate the deceased without success. An ambulance conveyed the deceased to hospital where, upon examination, he was pronounced dead.

On 26 July 2013 an autopsy was conducted. The autopsy report states:

“The deceased was a type-2 diabetic with chronic renal failure. There was evidence of advanced heart disease. Cause of death was myocardial infarct [a heart attack].

Three contusions, inflicted no more than an hour before death, were found to the upper chest, back of the neck and left temple. Having regard to the very poor

state of health of the deceased, it is possible that these injuries may have precipitated the deceased's heart attack."

James Sutton, the brother of the deceased, will say that he had been in Shanghai purchasing stamps and antique porcelain with the deceased. They flew back together to Hong Kong. Sutton will say that he went to the toilet and that is why he and his brother were separated. He will say that his brother was a very sickly man and that, as a result, he was very careful to avoid injury. On the day of their departure from Shanghai to Hong Kong, he will say that the deceased made no complaint of injuring himself in any way.

On 26 July 2013, the first defendant made a statement at the headquarters of the Immigration Department. In that statement he said that, after he had escorted the deceased into interview room 101, he was writing out a record of the arrest when the deceased, without warning, collapsed.

In his statement, the first defendant has written: "I sat behind the desk and began writing. The deceased sat on a straight-backed wooden chair. I heard him let out a small cry and hold his chest. He then fell to the floor. At no time while we were in the interview room together prior to the deceased's collapse did I have any reason to be in physical contact with him."

By deduction, the blunt-force injuries to the back of the neck and left temple, being caused so shortly before death and there being no other time when those injuries could have been caused, it must follow that they were inflicted in the interview room by the first defendant. The autopsy report, as cited above, confirms that those injuries caused the deceased's fatal heart attack.

QUESTION 1
(5 marks)

Prior to arraignment would there be any grounds to challenge the charge of culpable homicide?

QUESTION 2
(5 marks)

The two defendants tell you that they do not have enough money to go to separate lawyers. They want you to represent the two of them trial as their solicitor-advocate.

What will you advise them? Do you foresee any difficulties representing the two of them?

QUESTION 3
(4 marks)

The first defendant, Ricky Yuen, tells you privately that he does not wish to be tried with Henry Fong. He is of the opinion that the evidence against Henry Fong is so strong that he will be found guilty of robbery and this he says will unfairly rub off on him, turning the jury against him.

What will you advise him and how likely is it that your advice will be successful?

QUESTION 4
(3 marks)

On the second day of trial, during the prosecution case, a senior immigration officer, in the course of his testimony, states that several years earlier Ricky Yuen had been charged with theft and acquitted.

As defence counsel, what action would you take, if any, and why? Would you oppose a suggestion by the judge of a suitably worded direction to the jury?

QUESTION 5
(10 marks)

First, in respect of Ricky Yuen and second, in respect of Henry Fong, set out the following:

- (i) Whether you would challenge the admissibility of either statement made by them and, if so, why? (1 mark)
- (ii) In your opinion, how likely is it that the challenge/challenges would be successful? (1 mark)
- (iii) How, and to what extent, would you seek to undermine the evidence of the prosecution witness, John Apple? (4 mark)
- (iv) Would you advise either or both defendants to give evidence in their own defence? Briefly, what factors would influence you in respect of your advice? (4 mark)

QUESTION 6
(6 marks)

Assume, for the purposes of this question only, that Henry Fong, the one charged with robbery, wishes to plead guilty but only on the basis that he did not inflict physical violence during the commission of the offence. He maintains that he merely threatened Sutton, saying: “give it to me or I’ll hurt you”. The prosecution is unwilling to agree this version. Henry Fong wants to know:

- (i) What is likely to happen if he pleads guilty but denies punching Sutton? (2 mark)
- (ii) Whether he will get a full one-third discount of sentence for his guilty plea in light of the contested basis of his plea? (4 mark)

What is your advice?

QUESTION 7
(5 marks)

During the trial, you happen to see prosecuting counsel engaged in a conversation lasting two or three minutes with John Apple, the prosecution witness, during a break in Apple’s testimony. What should you do in these circumstances?

QUESTION 8
(8 marks)

During the judge’s summing up, you notice two things. First, the judge makes an error, clearly a slip of the tongue, in setting out the essential elements of the offence of culpable homicide. Second, in recalling the facts of the case, the judge makes an error, which, in your opinion, appears to assist the defence.

What should you do in the circumstances? Give reasons for your answer.

QUESTION 9
(4 marks)

For the purposes of this question only, assume that Ricky Yuen fails to appear at trial on the second morning. The judge agrees to adjourn for an hour so that you can telephone him to find out why he is not at court. When you contact Ricky Yuen, he is in a bad way. He tells you that he is very depressed at the possible outcome of the trial. He explains that he stole a couple of bottles of wine from a supermarket and is now in no fit state to come to court. He says to you, "Tell the judge I have a bad cold and cannot attend court today. However, I hope to be able to attend court tomorrow." When you return to court, the judge asks: "why is your client absent?"

- (i) What do you tell the judge and why? (2 mark)
- (ii) Before returning to court to face the judge, what do you advise your client as to the judge's likely response? (2marks)

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