

November 2014

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.

Background Information

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

- I. The charges
- II. Your role
- III. A summary of the prosecution evidence
- IV. Defence proof of evidence

I. The charges

Ivan Hung has been indicted on one count of attempted murder, contrary to common law and section 159G of the Crimes Ordinance (Cap 200) and one count of robbery, contrary to section 10 of the Theft Ordinance (Cap 210). He is due to appear for trial in the Court of First Instance before a judge and jury.

II. Your role

You have been briefed as the solicitor advocate to represent Ivan Hung at trial.

III. A summary of the prosecution evidence

A few minutes before midnight on Saturday, 12 April 2014, Jasper Bling left the Exotic Asia Club in Wanchai. He had been celebrating a \$100,000 win at the horse races with friends. He had consumed several glasses of red wine followed by cognac. Jasper Bling walked along Lockhart Road looking for a taxi. A light drizzle was falling.

As he walked, Jasper Bling remembered a hand being placed on his shoulder and a man saying to him: "I think you need to share some of those quinella winnings." Jasper Bling remembered turning and seeing a man in his mid to late 20s. The man repeated what he had said. To the best of his memory, Jasper Bling told the man to "bugger off". He remembered that the man drew a knife from his clothing and then stabbed him in the chest. Jasper Bling remembered falling to his knees while the man went through his pockets, taking his wallet containing some of his winnings and an envelope containing the rest.

Mr Li Wai Sang, visiting from Malaysia, had also been at the Exotic Asia Club celebrating a business deal. He was not normally a drinker but had consumed a number of whiskeys and a number of alcoholic cocktails. He too walked along Lockhart Road looking for a taxi. Mr Li saw Jasper Bling some 40 or 50 metres ahead of him, apparently in conversation with another man. As Mr Li drew closer, it appeared to him that Jasper Bling and the other man were in some sort of scuffle. He saw Jasper Bling fall to his knees and

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saw the other man quickly take something from Jasper Bling's jacket. The other man then ran off.

When he witnessed the incident, Mr Li estimated that he was some 15 metres away. There was lighting from neon signs, the main one being a large red and green sign that blinked. There was also the drizzle.

After the other man ran away, Mr Li ran to Jasper Bling to help him. He saw blood on Jasper Bling's shirt and dialled 999.

At the scene, Mr Li described the other man as being European in appearance, tallish and athletic. He had short-cropped dark hair. He was wearing jeans, a white shirt and some sort of trainers. The police officer who took this description recorded Mr Li saying to him: "Sorry, that's the best I can do. It all happened very quickly."

Jasper Bling was taken to hospital by ambulance and operated upon for a stab wound to the middle upper chest. The wound was a deep one and close to the heart. The forensic pathologist said that he had received a life threatening injury and any closer to the heart would have been fatal.

Two days after his operation, Jasper Bling gave a statement to the police in which he said that he had won \$100,000 on a quinella at the races. He said that the only people he had spoken to about his win were his friends who joined him at the Exotic Asia Club. He had not spoken to anybody about his win outside the club. The man who attacked him must therefore have been in the club, he said, because he demanded a share of the quinella winnings.

In the early hours of the morning following the incident, a police officer went to the Exotic Asia Club where he took possession of CCTV film taken by a camera installed at the entrance to the club. The film showed Jasper Bling leaving the club at 23.51 hours followed 10 seconds later by a man in what appears to be a white, long-sleeved shirt and jeans. However, because of the poor quality of the film, and the fact that the man was looking down towards the ground, it was not possible to see his features. The man, however, turns in the same direction as Jasper Bling, following him.

On the night of 14 April 2014, 48 hours after the incident, police went to the Wanchai apartment of Ivan Hung. The defendant answered the door. He was alone in the apartment. The police, who were in possession of a search warrant, found \$75,000 in \$1000 notes in the defendant's bedroom under his pillow. On the side table next to the bed they found a black, crocodile-skin wallet bearing the initials JB. The wallet was empty. In the bathroom, the police found a white, long-sleeved shirt and a pair of jeans. Both were damp.

The wallet was later identified by Jasper Bling as being the wallet he was carrying on the night. It was a gift from his wife, he said, hand-made in Italy and very expensive.

On 21 April 2014, an identification parade took place at the Wanchai Police Station. The defendant was picked out by Mr Li who said: "Yes, that has to be him, I'm certain of it. Except he looks a bit more Chinese than I remember. But in those neon lights you can't pick out every last thing."

IV. Defence proof of evidence

Ivan Hung is 33 years of age, born in Hong Kong, his father being Chinese and his mother Russian. He gave a short statement under caution to the police on the night of his arrest. In it he said:

“I am a gym instructor. By 11.30 that night I was home, waiting for my girlfriend. I was nowhere near Lockhart Road. My girlfriend’s name is Patricia Azabel. She works for an escort agency. That crocodile-skin wallet is a present from her. She gave it to me last night. She got it off a grateful client. On the night you are interested in she got home just before dawn. As for the money, that was given to me by my late mother before she left Hong Kong three or four months ago. I suppose you could call it my inheritance. She was dying of cancer and wanted to be back in Russia where she was born and grew up. She’s dead now. You can confirm that with the authorities in Russia. She gave me the money in cash so I’ve got no banking records to prove it came from her.”

A certified death certificate has been received from Russia. It is not disputed that the particulars do refer to the defendant’s mother.

When questioned by the police, the defendant’s girlfriend, Patricia Azabel, made a short witness statement concerning the crocodile-skin wallet. She said: “Just like my boyfriend says, I gave it to him as a gift. I got it off a client. Lots of clients give things to me. I don’t remember when it was given to me. When you take the stuff it is often early in the morning and you’ve had a bit to drink. I don’t remember who it was who gave it to me. These men all blur into one.”

The questions

In answering the following questions, assume that you have been briefed as the solicitor advocate to represent the defendant at his trial in the Court of First Instance before a jury:

Question 1 (9 marks)

On the morning of the trial, the defendant informs you that he has now remembered that at the time when the attempted murder and robbery took place he was not at home alone. An old girlfriend (named Starry) had returned to Hong Kong after a long absence and came to his apartment to spend several hours with him. They were intimate together, he said. He therefore has an alibi. When you speak to Starry alone, she says nothing about being away from Hong Kong and tells you that she and the defendant had a cup of coffee and talked, that was it. The defendant is anxious for you to call Starry as a defence witness.

In light of these instructions and what has been said to you by Starry, what will you do and why?

Question 2 (10 marks)

In addition, on the morning of the trial, the defendant tells you that his friend Tom told him that the prosecution witness, Mr Li, has a criminal conviction for perjury in Malaysia in respect of which he received a suspended sentence of six months. The perjury arose out of a civil trial in which Mr Li testified for the plaintiff company. The defendant is anxious that you use this in cross-examination of Mr Li.

What advice would you give to the defendant in this regard? What would you do if you put the conviction to the witness and he denies it?

Question 3 (5 marks)

That same morning, the defendant asks you the following questions: "Speaking hypothetically only, would you still be able to represent a client if he told you that he was in fact guilty but still wanted to plead not guilty? And, if you could still represent him, would you be limited in any way by what you could do and say?"

What advice would you give in answer to that question?

Question 4 **(6 marks)**

At lunch on the first day of the trial, you are walking through a restaurant when you hear the judge who is presiding over the trial make the following remark to his table companions: "I started an attempted murder case this morning. The defendant is as guilty as sin, that's obvious. I'm looking forward to seeing him going down –"

The judge then sees you and immediately stops speaking. However, when you return to court that afternoon, the judge continues as if nothing had been said.

What, if anything, do you do?

Question 5 **(4 marks)**

On the morning of the trial, you notice that the defendant has a very pronounced stammer and also a nervous tic at the corner of his mouth. He tells you that, when he is under stress, he always gets this stammer and the tic. He is anxious not to give evidence as he is afraid that the stammer and the tic will be misunderstood by the jury as an indication that he is not telling the truth. You, however, believe that it is important that he does give evidence. What steps do you take to ensure that the defendant is not prejudiced by his stammer and nervous tic?

Question 6 **(5 marks)**

In the course of the trial, the defendant tells you that one of the jurors has been falling asleep. He wants you to ask immediately for the jury to be discharged. What do you do?

Question 7 **(5 marks)**

In his summing up to the jury, what would you expect the trial judge to say in respect of Mr Li's evidence?

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In answering the following two questions, do so on the basis that you have been briefed on fiat to appear at the trial as prosecuting counsel.

Question 8 **(2 marks)**

At the end of the first day of the trial, you are approached by defence counsel. He tells you what he heard the judge saying earlier that day in a restaurant. He tells you that he does not know what to do for the best. He asks you whether the two of you should see the judge in his chambers immediately, tell him what was overheard and ask him to consider recusing himself. What would be your answer and why?

Question 9 **(4 marks)**

Mr Li, your principal prosecution witness, telephones you from Malaysia where he lives to say that he is frightened of returning to Hong Kong to give evidence for the prosecution. He has heard that the defendant has a bad criminal background, that he is a tough guy and clearly, from what he witnessed, is not afraid to commit acts of gross violence. He asks if his witness statement can be used as his evidence. If not, he asks if he can give evidence by video link from Malaysia.

What do you advise him in respect of these two questions and, more generally, as to the steps that can be taken to ensure his protection.

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