HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CRIMINAL PROCEEDINGS

THE PRACTICAL ASSESSMENT

INSTRUCTIONS TO CANDIDATES

Introduction

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

Tom (1st Accused), Dick (2nd Accused) and Harry (3rd Accused) are jointly charged with one count of robbery contrary to section 10 of the Theft Ordinance (Cap. 210) and one count of shooting with intent to do grievous bodily harm contrary to section 17(b) of the Offences Against the Person Ordinance (Cap. 212).

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 **only on behalf of Harry**:

1. To make or oppose an application for no case to answer by the defence; **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 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 your argument must be limited to the authorities which are attached.

It is very important that you 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 p.m. of 15 May 2019 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 a ruling of no case to answer is made by defence counsel and opposed by prosecuting counsel after the conclusion of the Prosecution case when the 3 prosecution witnesses Frank, Penny and DPC9898 have given evidence.

For the purpose of this application, it is noted that the 3 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. Frank
2. Penny
3. DPC 9898

(3) Defence witnesses

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

1. Harry, 3rd Accused
2. Arsène

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 against the interim application for no case to answer.

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 and 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 2019*, 4-152

B. PRINCIPLE

R v Galbraith

4–152 The principles governing the issue of whether or not there is a case to answer are set out in *R v Galbraith* (1981) 73 Cr App R 124, CA and are as follows:

> "(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty – the judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury [per Lord Lane CJ at 127]."

The Lord Chief Justice then observed that borderline cases could be left to the discretion of the judge. For an example of the approach of the Court of Appeal to the exercise of this discretion, see *R v Lesley* [1996] 1 Cr App R 39, CA. The principles in *R v Galbraith* are regarded as authoritative in Hong Kong: *Att-Gen v Li Fook Shiu Ronald* [1990] HKLY 185; *HKSAR v Ling Kam Wah* (unrep., CACC 88/01). The test was reaffirmed in *Varlack v DPP* [2008] UKPC 56. In that case the Privy Council distinguished between cases where there was direct evidence against the accused and those where the evidence depended on inference. In the latter, the test required consideration of whether the evidence was capable of proving guilt. The test is the same regardless of the form or nature of the evidence presented by the prosecution: *R v Prasad* (1979) 2 A Crim R 45; *R v Billick & Starke* (1984) 11 A Crim R 452; *A-G v Li Fook-shiu* [1990] 1 HKC 1; *Re Case Stated by DPP* (1993) 70 A Crim R 323; *DPP (NSW) v JMR* (1991) 57 A Crim R 39; *HKSAR v Chang Che Wei* [2012] 2 HKLRD 1151.

The legal position can be summarized as follows: (1) In all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the "classic" or "tradition" test in *Galbraith*. (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against an accused from a combination of factual circumstances based upon the prosecution evidence, the exercise of deciding that there is a case to answer *does* involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to draw that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not, it must be withdrawn from the jury: *R v Goddard and Fallick* [2012] EWCA Crim 1756, [36]; [2013] Crim LR 678.

In cases of conspiracy, problems arise where there is evidence to infer an agreement, but the evidence supporting an intention by all conspirators to carry out the object of the agreement is equivocal. A submission of no case to answer cannot be rejected on merely finding some evidence of an agreement. The judge must also examine the prosecution evidence to see whether or not there was evidence from which a reasonable jury could infer (on one possible view of that evidence) that each accused intended to carry out the object of the agreement: *R v Goddard and Fallick* [2012] EWCA Crim 1756, [37]; [2013] Crim LR 678.

In a case dependent on circumstantial evidence, the judge is not required to withdraw the case if some inference other than guilt could reasonably be drawn from the facts proved; he should only withdraw it if he considered it unsafe for the jury to conclude that the defendant was guilty on the totality of the evidence: *R v Goring* [2011] Crim LR 790, [37].

In *R v Shippey* [1988] Crim LR 767, Crown Court, Turner J held that the requirement to take the prosecution evidence at its highest did not mean "picking out all

the plums and leaving the duff behind". The judge should assess the evidence and if the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness. His Lordship did not interpret *Galbraith* as meaning that if there are parts of the evidence which go to support the charge then that is enough to leave the matter to the jury, no matter what the state of the rest of the evidence is. It was, he said, necessary to make an assessment of the evidence as a whole and it was not simply a matter of the credibility of individual witnesses or of evidential inconsistencies between witnesses, although those matters may play a subordinate role. In *Brooks v DPP* [1994] 1 AC 568, 581, PC, it was said (in the context of committal proceedings) that questions of credibility, except in the clearest of cases, do not normally result in a finding that there is no *prima facie* case.

As to the evidential value of the accused's statements for the purposes of a submission of no case, see §15–98, below.

Judge to re-consider no case submission

4–152A Even where the no case submission was rejected, if after all the evidence had been heard, the judge considered that no reasonable jury with proper direction could safely convict, he should voice that opinion before counsel without the jury present and invite representations. If, after counsel had been given the opportunity to make representation, the judge still believed that the jury could not safely convict, he should withdraw the case from the jury: *R v Brown (Jamie)* [1998] Crim LR 196; *R v Brown (Davina)* [2002] 1 Cr App R 5.

C. MAGISTRATES' COURTS

4–153 In their summary jurisdiction, magistrates are judges both of facts and law. Where at the close of the prosecution case, or later, there is some evidence which, if accepted, would entitle a reasonable tribunal to convict, they nevertheless have the same right as a jury to acquit if they do not accept the evidence, whether because it is conflicting, or has been contradicted or for any other reason.

In committal proceedings the question to be determined by the magistrates, in the event of a submission of no case being made, is whether such evidence is sufficient to put the accused upon his trial for an indictable offence, or whether the evidence given raises a strong or probable presumption of the guilt of the accused: s 85(2) of the Magistrates Ordinance (Cap 227). Essentially this requires consideration of whether there is a prima facie case: *Cheung Ying-lun v Government of Australia & Lai Chi Kok Reception Centre* [1990] 1 WLR 1497; *Chan Tit Shau v SJ* [2004] 1 HKLRD 801; *HKSAR v Chan Chun Chuen* [2012] 3 HKLRD 265. There is some authority for the proposition that Magistrates are not obliged to give reasons for rejecting a submission of no case: *Harrison v Department of Social Security* [1997] COD 220, DC. However, this may not accord with modern views. But see also *In Re Att-Gen's Reference* [1988] 1 HKLR 375; *Chan Tit Shau v SJ* [2004] 1 HKLRD 801.

D. PARTICULAR APPLICATIONS

Evidence equivocal as to which of two people, jointly indicted, committed the offence

4–154 If two people are jointly charged and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, a verdict of not guilty is appropriate in the case of both: *R v Abbott* [1955] 2 QB 497, 39 Cr App R 141, CCA; *Collins & Fox v Chief Constable of Merseyside* [1988] Crim LR 247, DC (§22–118, below); *Swallow v DPP* [1991] Crim LR 610, DC and *HKSAR v Siu Mo Nor* [2005] 3 HKC 130.

The principle has been considered on a number of occasions in the context of acts of violence committed by one or both parents on a child in the home: see *R v Gibson & Gibson* (1984) 80 Cr App R 24, CA; *R v Lane & Lane* (1986) 82 Cr App