

**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, including those computer printed hard copies. 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.
5. Candidates must not remove this question paper from the examination room.

**The Case**

Tom, Dick and Harry 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 case against the defendants is contained in the document below that is headed "Summary of the prosecution evidence."

The instructions of the defendants are contained in the notes headed "Defence notes".

## **Summary of the Prosecution Evidence**

### **Factual Background**

Frank is a member of staff at the Central branch of the Rise and Shine Jewellery Group. On 7 January 2019 at 11am, Frank opened the shop for business as usual.

At or around 11:45am, Frank noticed three men standing outside the store talking:- one had short black hair, one had bleached blond hair and one had red hair. They were talking for around 15 minutes. Then two of the men – black hair and bleached blond – entered the store whilst the third man with red hair stood outside the store smoking. The Prosecution alleges that the third man was acting as a “look-out” for the other two.

As the two men entered, the man with short black hair shouted, “I am robbing you”. Frank immediately crouched down behind a counter. He then heard a gunshot and a thud on the floor. When he looked up from behind the counter, he saw the branch manager Mike bleeding in the stomach and a gun on the floor. Frank then saw the two men putting jewellery pieces into a black bag.

A pedestrian outside the store saw the robbery and reported the case to the police, who arrived 2 minutes later at or around 12:05am, whilst the two men were still inside the store. Mike, who by this time was lying on the floor, was severely bleeding. He said to a police officer DPC 9898, “it was my cousin’s boyfriend Tom who shot me”. He then fell unconscious. The police also managed to capture the third man outside, who attempted to run away. Before the Police arrested and cautioned the three men, the man with the short black hair shouted, “Dick shot the manager!”

At or about 12:12pm, DPC 9898 arrested the three men Tom, Dick and Harry for robbery. Under caution, at this stage all 3 remained silent. They were taken by a police van to the Central Police Station.

### **At the police station**

At or about 12:30pm, on arrival at the police station, Tom, Dick and Harry were taken into separate rooms for interviews.

Under caution, Tom and Dick made no admission.

Under caution, Harry eventually made an admission and said, "yes alright we were robbing the store." Unusually, he was released from the police station (on police bail) at the conclusion of an interview which concluded shortly after 9:30am the following morning.

### **The investigation**

Identification parades were conducted for all three men. Frank positively identified Tom as the man with short black hair, Dick as the man with bleached blond hair and Harry with red hair.

An ambulance brought Mike to the Queen Mary Hospital. Police officers visited Mike later on with a view to obtaining a statement from him. However due to the huge loss of blood and the shot wound in the stomach, he has been in a coma since 7<sup>th</sup> January 2019. He will not be able to attend court as a witness.

At the scene of the jewellery store, the gun was seized as evidence. Forensic examination shows the fingerprints of both Tom and Dick on the gun.

The police tried to obtain the CCTV footage of the jewellery store at the time of the offence, however there was a malfunction with the CCTV system with the result that what happened at the time of the offence was not recorded.

**Defence notes - Tom**

**Family Background**

Tom was born in Hong Kong. He was 35 years old at the time of the alleged offence.

He obtained a degree in Civil Engineering from the University of Hong Kong when he was 23 years old.

His parents live and work in Taiwan. He is an only child.

**Employment**

After graduation in 2007, he worked as an entry level engineer at Union Group, a well established civil engineering firm in Hong Kong and remained there for the next 10 years. He earned HK\$60,000 per month. However, due to financial struggles of the firm, Union Group had to terminate a huge number of staff – and Tom was one of them.

From 2017 to 2019, Tom looked for work, but the competitiveness of his field meant that he could not find employment. He remained unemployed since the termination. However, during these two years, he joined the Hong Kong Shooting Club. He holds a licence for a gun that he owns. Normally he keeps it locked away in the Shooting Club. As he is an esteemed member of the club, he is sometimes allowed to take the gun away and keep it at his home.

**Criminal Record**

Tom has a clear record.

**The Plea and the instructions**

Tom intends to plead NOT GUILTY to both offences.

**(1) The evening of 6<sup>th</sup> January 2019**

Tom first met Dick at a party in Lan Kwai Fong in 2014. They soon became best friends and have been living together in Central for 5 years. In the evening, they were at home watching a thriller involving 3 robbers.

During the course of watching the film, Dick said to Tom that he wanted to propose to his girlfriend. Tom suggested they go to the Rise and Shine Jewellery store down the street managed by his girlfriend's cousin to look at rings the next day at or around 12 noon, but Tom told Dick that he could not stay with Dick for very long because he was planning on meeting some other members of the Shooting Club at their practice grounds at 1pm.

**(2) On 7<sup>th</sup> January 2019**

Tom and Dick left their apartment to walk over to the Rise and Shine Jewellery store as planned at around 11:45am. They saw their friend Harry walking down the street and stopped outside the jewellery store for a chat.

As Tom and Dick entered the store, Dick pulled out the gun that Tom kept in his jacket pocket and shot the manager of the store in the stomach.

Dick went over to a counter to put jewellery pieces into his black bag. At this point, Tom froze and did not know what to do. Dick saw this and said to Tom, "well come on then!" Tom then proceeded to help Dick with the jewellery pieces.

The police arrived shortly. As Tom was pushed down to the floor by the police officer, he shouted, "Dick shot the manager!" The police then arrested Tom, Dick and Harry.

**(3) At the police station**

When Tom arrived at the police station at 12:30pm, he was taken to a report room for an interview to be conducted by a police officer DPC7654.

Tom remained silent and did not answer any questions. Despite Tom's silence, DPC7654 kept firing questions at him and kept him detained.

At 6pm, DPC7654 became impatient and punched Tom in the head 4 times. He also hit Tom on the back with a chair. Tom continued to remain silent. The interview ended at 9pm.



**Defence notes - Dick**

**Family Background**

Dick was born in Hong Kong. He was 30 years old at the time of the alleged offence.

He started his tertiary education at the University of Hong Kong studying Biology. However he was always more interested in his music. He played in a hugely successful band Amplify, but as he was always touring around the world, he could not catch up with his studies. Eventually he quit university in 2009 after 2 years of his degree at 20 years old.

His parents live in America. He is an only child.

**Employment**

After he quit university, he committed to his band Amplify as a full time musician and has been touring the world in promotion of the albums that they release. However, in light of the increase in illegal downloads of music, Dick's revenue has significantly declined since 2015. As a result, he has had to play gigs at the Blue Bar in Central to support his living.

**Criminal Record**

Dick has a clear record.

**The Plea and the instructions**

Dick intends to plead NOT GUILTY to both offences.

**(1) The evening of 6<sup>th</sup> January 2019**

In the evening, they were at home watching a thriller involving 3 robbers. Tom then said to Dick, "what if we tried this out ourselves on the jewellery store down the street?"



**(2) On 7<sup>th</sup> January 2019**

Tom and Dick left their apartment to walk over to the Rise and Shine Jewellery store as planned at around 11:45am. They saw their friend Harry walking down the street and stopped outside the jewellery store for a chat.

As Tom and Dick entered the store, Tom pulled out the gun in his jacket pocket and shot the manager of the store in the stomach. He then threw the gun on the floor.

Tom snatched the black bag out of Dick's hand and went over to a counter to put jewellery pieces into the bag. At this point, Dick froze and did not know what to do. Tom saw this and said to Dick, "well come on then!" Dick then proceeded to help Tom with the jewellery pieces.

The police arrived shortly. As Dick was pushed down on the floor, he heard Tom shout, "Dick shot the manager!" The police then arrested Tom, Dick and Harry.

**(3) At the police station**

When Dick arrived at the police station at 12:30pm, he was taken to a report room for an interview to be conducted by a police officer DPC1234.

Dick remained silent and did not answer any questions from him.

The interview ended at 9pm.

**Defence notes - Harry**

**Family Background**

Harry was born in Canada. He was 29 years old at the time of the alleged offence.

He graduated from the University of Toronto in 2014 with a degree in finance.

His parents and younger brother live in Canada.

**Employment**

After his graduation, he came to work in Hong Kong. He was offered a position at the Fast Forward Investment Bank in 2014 and has been working in their Central office since.

He earns \$100,000 per month for his job, but the workload is highly demanding and he is often under extreme stress.

**Criminal Record**

Harry has a clear record.

**The Plea and the instructions**

Harry intends to plead NOT GUILTY to both offences.

**(1) On 7<sup>th</sup> January 2019**

In the morning at 11:30am, Harry successfully closed a \$30million deal on behalf of Fast Forward Investment Bank. This was a deal that Harry had been working on for over 2 months, so he felt extremely relieved when the deal completed. He decided to leave the office for an early lunch.

As he was walking over to his favourite restaurant, he bumped into Tom and Dick on the way, outside the Rise and Shine Jewellery store. He met Tom and Dick at a party in Lan Kwai Fong in 2014 when he first came to Hong Kong. The three of them grew very close until 2 years ago when Harry received a promotion, which led to him becoming very busy. As a result, he lost contact with Tom and Dick.

When Harry saw Tom and Dick, they were about to go into the store but stopped when they saw him. Outside the jewellery store, Tom and Dick

caught up with Harry on their lives. They talked about Dick's band Amplify, Tom's constant hunt for a job in the civil engineering field and the deal that Harry just closed. Harry asked Tom and Dick if they would like to join him for lunch. Tom then said to Harry, "Dick and I are going to rob the store. Just wait here and let's go for lunch after we are done." Harry thought Tom was joking. Harry then took this opportunity to have a cigarette outside the store as Tom and Dick went inside.

As Harry was having a cigarette, his back was against the shop and he was looking out onto the busy road. On the day, there were two musicians singing on the street with microphones and amplifiers. As he was smoking and listening to their music, he began reminiscing about the times when he would attend the concerts held by Dick's band Amplify. Suddenly he heard a gun shot behind him in the store. He turned around and saw Tom throw a gun to the floor. He then saw a man in store uniform bleeding in the stomach. At this time, he saw Tom standing over a counter in the middle of the store putting jewellery pieces in a black bag. He also saw Tom muttering something to Dick. Dick then started helping Tom with the jewellery pieces.

Harry did not know how to react when he saw this scene. He did not know if he should go inside the store and talk to Tom and Dick or stay outside the store. As he was pondering, he saw police officers arriving at the jewellery store. In a moment of panic, he began running. An officer saw this, outran him and captured him.

The police then arrested Tom and Dick inside the store and Harry outside.

## **(2) At the police station**

When Harry arrived at the police station at 12:30pm, he was taken to a report room for an interview to be conducted by a police officer DPC9898.

Harry remained silent and did not answer any questions from him.

DPC9898 refused to provide Harry with any food and drink. Harry asked to see a lawyer, but this was refused by DPC9898. Under these conditions, he was detained for 20 hours until 8:30am the next day.

At 8:30am, DPC9898 told Harry that if he gave the police some information, they could turn Harry into a prosecution witness instead of being a defendant and he would get bail. Under caution, Harry made an admission and said, "yes alright we were robbing the store."

The interviewed ended an hour later at 9:30am.

Questions

*You are the solicitor advocate briefed to represent Tom.*

**Question 1**

**[8 marks]**

Mike has been in a coma since 7<sup>th</sup> January 2019 and cannot testify. Can what he said to the Police as to being shot by Tom be admitted in the trial as part of the Res Gestae? If so, are there any other reasons (specific to the circumstances of this case) in addition to the principles of Res Gestae that would justify admissibility?

**Question 2**

**[5 marks]**

During trial, Tom gave evidence in the witness box. Given that Tom has a clear record, is he entitled to a good character direction? Under which limb can he get a direction?

*You are the solicitor advocate briefed to represent Harry.*

**Question 3**

**[7 marks]**

If it is established in evidence that Harry in fact *knew* that Tom and Dick were going to rob the jewellery store and that he did not think that Tom was joking in his comment, what are Harry's chances of conviction for the offence contrary to section 17(b) under the principles of joint enterprise in Hong Kong, given that Harry claims to have no knowledge of the gun nor is there any other evidence of such knowledge? What is the test to be considered?

**Question 4**

**[11 marks]**

The admission made by Harry at the police station:-

- (a) Can the admission made at the police station by Harry be excluded as evidence against him? If so, on what grounds? **[7 marks]**
- (b) In any event, would this statement made by Harry be admissible against Tom and Dick? **[4 marks]**

**Question 5**

**[7 marks]**

In the event that Harry is acquitted for both offences, can he apply for his legal costs?

*You are the solicitor advocate briefed to represent Dick.*

**Question 6**

**[2 marks]**

The case is set down for trial. Dick decides on the day of the trial before its commencement to plead guilty to both offences. Given the recent development in discounting, how would this affect his sentence?

**Question 7**

**[8 marks]**

Before the mitigation hearing, Dick gave information to the police about a large scale drug dealing operation which resulted in the arrest of 3 major dealers. This deal involves transactions of a huge amount of money and Dick is a close friend of one of the dealers arrested, whom he came to know from the music business. If it became known that he was the person who gave information, he would be seriously at risk.

- (a) To what extent will this assistance be relevant to his sentence? **[4 marks]**
- (b) Given the sensitivity of Dick being the person who gave information, how should this part of the mitigation be conducted before the Judge? **[4 marks]**

**Question 8**

**[2 marks]**

Can Dick be given a suspended sentence?

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