

## Chapter 11: Mixed Questions

### Question One

Pat is facing a charge of assaulting her former lover Ronald at his office where he was working late one evening. Ronald was found by the security guard at the office at midnight bleeding heavily and barely conscious and taken to hospital. He told the security guard, Albert, that Pat had burst into the office and hit him over the head with a paper weight. At the hospital Ronald told the doctors who examine him that he had been hit by a former girlfriend. He did not then name Pat. Ronald was hospitalised and, although he survived surgery, he did not regain consciousness. Three months later he died.

On the night of the assault Tania, Pat's flat mate, noticed that Pat came back home very late. There were specks of blood on her dress. She said to Pat that it looked as if she had been involved in a fight but Pat did not reply. Tania found the dress in the flat's rubbish bin next morning. Police arrested Pat and took her to the police station for questioning. She was granted access to a solicitor. She told the police that she did go to Ronald's office to see him because he had refused to answer her phone calls or emails and he owed her money. However when she got there she claimed she found him slumped with his head on his desk, wounded and bleeding and she panicked. She claims that some-one else, possibly an intruder, must have hit Ronald. Police later find Pat's finger prints on the paper weight in Ronald's office. Pat plans to state at the trial that she had picked up the paper weight from the desk next to Ronald's head but had immediately put it back. Pat has a conviction for receiving stolen goods.

Advise Pat on evidence.

### Answer guidance

The question covers character, confessions, hearsay and silence as evidence of guilt. One issue is the effect on the defendant under s101 (1) (g) of making an attack on another person's character, namely the dead alleged victim. Section 100 CJA should be considered also. Discuss hearsay in relation to the statement to the security guard and specifically s116 Criminal Justice Act 2003 (CJA). The statement to the doctors suggests consideration of s117 CJA. The finger print evidence suggests the need for a forensic expert. The common law position on silence endorsing an accusation is relevant and *R v Christie* should be cited [1914] AC 545. Note also s82 PACE, since the destruction of the dress maybe relevant as behaviour suggesting possible inference of guilt post crime. Discuss s34 Criminal Justice and Public Order Act and *R v Argent* [1997] 2Cr App R 27. The admission of being at the scene of the crime raises the possibility of considering mixed statements, see *R v Sharp* [1988] 1WLR 7. Discuss whether such a statement is admissible by the defence and the prosecution, see *R v Tine* [2006] EWCA Crim 1788.

## Question Two

Stephen left *The Spaniel* public house after enjoying Sunday lunch there with his wife Nesta. The pair were followed out by a group of young men who were all wearing identical baseball kit. One of the men asked Nesta to lend him £5 for the fare home. When she refused somebody cut the strap of her bag from behind and ran away with it while another of the group knocked Stephen to the ground. The group then ran off. After the incident Stephen and Nesta went back into the public house and asked for help. The publican telephoned the police who came and took statements from Nesta and Stephen. They then took them both in the police car to see if they could find the youths. They came across the group playing baseball in the park. Nesta identified Colin as the person who had approached her and Stephen identified Anthony as his assailant. Colin and Anthony were both arrested and taken to the police station for interview. They both asked for a solicitor. Colin is told that one is not available and that since this is a minor offence it is better that he 'gets it over with' and he will only get a small fine. Colin, who is anxious to get home to care for his elderly mother, then admitted taking the bag. Anthony is told that a solicitor would cost him money. He agrees to be interviewed without a solicitor and tells police he was in the group outside the public house and had asked Nesta for some money but that he had nothing to do with the assault on Stephen nor the taking of the bag. He says that he saw Colin throw Nesta's bag into the park lake. Police later find the bag in the lake.

Colin is charged with the theft of the bag and Anthony with assaulting Stephen. Colin wishes to retract his confession and claims now that he had nothing to do with asking Nesta for money, taking the bag or assaulting Stephen. Both plan to plead not guilty. They both ask for a video identification procedure but are refused.

Advise on evidence.

## Answer guidance

One issue in the question is identification evidence and whether the correct procedure has been followed under PACE Code D 3.2. Police should take details of the alleged assailant before conducting identification procedures. Consider also Code D3.12 on the request for an identification procedure. If the suspect disputes being the person whom witness claims to have seen procedure should be held D3.12. *Turnbull* Guidelines should be applied and also consideration of whether the evidence should be excluded. Another issue is the admissibility of the confessions. Reference should be made to possible exclusion under PACE s76(2)(b) and s78 on grounds of improper exclusion of solicitors under s58 PACE and apparent inducement. Consider whether a confession is only evidence against the person who made it, *R v Spinks* [1981] 74 Cr App R 263 but also the effect of *R v Hayter* [2005] 1WLR 605. PACE s76(4) may also be engaged.

### Question Three

Jennifer, aged nineteen, reported to police that she had been sexually assaulted while she stayed at the house of her friend, Angela. She stated she was awoken to find a man in her room trying to pull her clothes off. She screamed and the man ran off. She was not able to identify her attacker in the darkness. The police interviewed the men who were in the house on the night in question. The suspects were Angela's brother Gerry, aged seventeen and her step-father, Tony. There was no forensic evidence collected at the scene. Tony was arrested and charged with the offence. In a private interview with his solicitor he admitted to having entered Jennifer's room but he says she had invited him and that he left immediately when she asked him to. He claimed that she reported the incident as an attack because she felt embarrassed about inviting him to her room. At the trial Tony pleaded not guilty and was acquitted. Gerry was subsequently arrested for the attack and cried out to police on arrest, 'I had nothing to do with this'. Gerry was charged with the assault on Jennifer and plans to plead not guilty. He suffers from severe depression and was very anxious about appearing in court. His defence counsel wishes to call expert evidence that Jennifer showed symptoms of delusions and paranoia. Gerry has learnt from Angela about Tony's admission to his solicitor that he had entered Jennifer's room and he wants to admit evidence of this statement as part of his defence. Gerry also wishes to call a school friend, Arthur, as a witness. Arthur is prepared to state that a year earlier Jennifer had accused him of spying on her while she undressed in the changing rooms of the school swimming pool and she threatened to tell their teacher. However he firmly denied the offence and no further action ensued. Later, Arthur claimed, Jennifer sent him a text saying, 'I am very sorry I made up the story.' Arthur has a copy of the text on his phone.

Advise Gerry on evidence.

### Answer guidance

Since this is a case involving a sexual assault, Special Measures Directions may be available for the complainant under YJCEA ss16-31. The statement to the lawyer exonerating another party raises the issue of legal professional privilege, see *R v Derby Magistrate's Court ex p B* [1996] AC 487. In relation to the defendant's fear of testifying, note that there are limited Special Measures Direction (SMD) available for vulnerable defendants see YJCEA ss33A and BA. Consider the admissibility of a previous consistent statement made on arrest, covered by common law. On whether expert evidence of the psychiatrist is admissible concerning the complainant see *Toohy v MPC* [1965] AC 595 on abnormality of the mind. The question is raised whether the defence is making an allegation about the sexual behaviour of the complainant. See s 41 YJCE and case law including *R v MH* [2002] 1WLR 632. The allegation of lying on the part of the complainant means the defence may need to seek leave under s 100 CJA 2003. The relevance of the text message and whether it is admissible as hearsay suggests an assessment of the inclusionary discretion under s114(2) CJA 2003.

#### Question Four

Hillary is an environmental activist and a pacifist. She is a member of the environmental group Protect our Flora and Fauna Society (PFFS). She is facing two criminal charges of under the Criminal Damage Act. It is alleged that she glued large posters on the walls of the office of a company involved in fracking, which she opposed on environmental grounds. The second charge concerns damage to the perimeter fence of the airfield of a military barracks. She is alleged to have clipped the wire meshing and tied banners to the fence as an expression of opposition to environmental damage caused by planes. An undercover agent, Gillian, had infiltrated the PFFS and she had warned the police that that the attacks on the properties were likely to take place and where. However Gillian was not able to name the likely perpetrator. The police had set up watch at an observation post based on the details of the whereabouts of the likely attack on the properties given by the undercover agent. As a result Hillary was identified as the suspect and she was later arrested. Hillary found out about the observation post and wishes to cross examine the officers since she contests the identification. The police refuse to give details of the undercover activity or the identity of the officers who were operating the observation post.

In a separate operation, the police search the offices of PFFS in a lawfully authorised search. They find posters in the office identical to the ones pasted on the wall of the fracking company. Hillary's fingerprints are on the box containing the posters. They do not find any evidence linking Hillary to the damage to the fence. The prosecution wish to call Nina, Hillary's civil partner. They live together. Nina had made a statement to the police that on the night of the alleged offences, Hillary had arrived home late and that she had been carrying a bag containing posters and banners. Hillary burnt the bag in the garden incinerator. Nina is refusing to appear as a witness. Hillary is suffering from bipolar disorder and is very anxious about testifying. The defence have discovered that police have been monitoring emails exchanged between Hillary and her solicitor.

Advise Hillary on evidence.

#### Answer guidance

The question requires a consideration of the legal position on the disclosure of the identity of undercover agents and whether the prosecution are likely to claim public interest immunity. *Marks v Beyfus* [1890] 25 QBD 494 and *R v Rankine* (1986) 83 Cr App R 18 are relevant. The House of Lords considered the question of the balance between the public interest in protecting police sources and the fair trial rights of the defendant in *R v H*, *R v C* [2004] 2AC 134. Note also the possibility of witness anonymity for the police agents under the Coroners and Justice Act 2009. You need also apply the law relating to expert opinion, s30 CJA 2003 and the Criminal Procedure Rules. On the question of no case to answer on the damage to the fence, see *R v Galbraith* [1981] 1WLR 1038 setting out the relevant test. Under section 80 PACE civil partners are not compellable for the prosecution except for 'specified offences'. Note *R v L* [2008] 2Cr App R 18 in relation to the admissibility of a pre-trial statement of a non compellable spouse or civil partner under s 114 (1)(d) CJA 2003. Additional areas to explore are the possibility of improperly obtained prosecution evidence which could be excluded under s78 or lead to a stay of prosecution, see *R v Looseley*

[2001]UKHL 2003. Note also the question of legal professional privilege, see *R v Derby Magistrates Court ex p B* [1996] AC 487 and *Re McE* [2009] UKHL 15.

### Question Five

John is an inmate of a hostel for young stable-hands employed by Harry who owns a farm for training riding horses. Harry has provided a hostel which he owns and manages as accommodation for his staff. Ann, the residential worker at the hostel has, unknown to Harry, been allowing the residents to watch 'pirate CDs' which she has bought online. A quarrel broke out one evening in the hostel recreation room while the residents were watching a violent video which Ann had brought in. John, sickened by the violence, wanted the video to be turned off so he could play snooker but Ann refused. A scuffle ensued and John was poked in the eye by Fred, another employee living at the hostel. Fred was holding a snooker cue which was broken in the turmoil. It later becomes apparent that John had been blinded in one eye and he began civil proceedings against Harry for negligence and Fred for assault. After the incident the snooker table was removed from the hostel. Harry offered John £5,000 compensation for his injury 'without prejudice'. John rejected the offer as too low. Harry wrote to Sally his solicitor, after the incident between Fred and John, enclosing Fred's job application which revealed he had been sacked from a previous post for being violent to fellow workers. Harry also sent the broken snooker cue to the solicitor for 'safe-keeping'. Ann is worried about appearing as a witness at the forthcoming trial.

Advise on the evidential issues involved.

### Answer guidance

There are a number of evidential areas to cover. The removal of the snooker table calls for a discussion of the relevance of changes subsequent to the incident which is the occasion for the suit. *Hart v Lancashire and Yorkshire Railway Company* (1969) 21LT 261 should be referred to. Discuss *Miller v Minister of Pensions* [1947] 2All ER 372 in relation to the standard of proof in civil cases and for the particular issue of quasi-criminal allegations such as assault see *Re H and Others* [1996] AC563 and *Re B(Children Sexual Abuse; Standard of Proof)* [2009] 1AC 61. In a civil case a witness may refuse to answer questions that may incriminate her, see Civil Evidence Act 1968 s14(1)(a) and *Blunt v Park Lane Hotel* [1942] 2KB 253. In relation to 'without prejudice offers' see *Rush & Tomkins Ltd v Greater London Council* [1989] AC 1280, RSC Order 22 r 14 and *Calderbank v Calderbank* [1976] Fam 93. Legal professional privilege is at issue in relation to material objects and also documents which did not arise in the course of the client/lawyer relationship, see *R v King* [1983] 1WLR 411. The job application should be considered as potential similar fact evidence. Cases to cite are *Mood Music Publishing Co v de Wolfe* [1976] Ch 119 and *O'Brien v Chief Constable of South Wales Police* [2005] 3ALL ER 93.

### Question Six

Tanya witnessed a break-in at an off-licence and claimed she saw a car speed away from the scene. She phoned the police and dictated the car registration number to PC Ford who wrote it down in his notebook. Tanya also wrote down the number in her diary. PC Ford found a cigarette lighter with the initials RS on it at the scene of the break-in. The car is traced to Richard Smith who claims it was taken that day without his permission by his neighbour Harold and that he himself had nothing to do with the offence. The prosecution had obtained evidence from a customer, Joan, who claims to have seen the attempted break-in at the off-licence. Joan described the driver of the car which sped away as 'an old man with white hair'. Richard Smith is thirty years old and has red hair. The prosecution has decided not to call Joan as a witness since they believe she is unreliable. Richard claims that Harold confessed to him that he, Harold, had taken Richard's car on the day of the break-in. Harold denies he said this. Richard has been charged with the burglary.

Advise on evidence.

### Answer guidance

The issues to cover here are firstly the possibility of witnesses refreshing their memory from the witness box, covered by s139 Criminal Justice Act 2003. Real evidence is an issue in relation to the lighter and whether the initials constitute hearsay, see *R v Rice* [1963] 1QB 857. On another aspect of hearsay, Harold's alleged statement to Richard, consider *res gestae* s114 (1)(b) and the inclusionary discretion under s114 (2)(a) –(d). However note *R v Blastland* [1986] AC41 in relation to third party confessions. A further issue is disclosure in relation to the defence, see Criminal Procedure and Investigations Act 1996 s3(1)(a) as amended by the Criminal Justice Act 2003. This imposes a duty to disclose prosecution material which might reasonably be capable of undermining the case for the prosecution against the accused or of assisting the case for the accused. Identification evidence should also be discussed.

### Question Seven

Damien and Jill are joint owners of a furniture design workshop. They have been charged with two unrelated offences. The first is that they stole plans for dining room furniture from Leonardo, a local artist. He has found the plans are missing and told police he suspected Damien and Jill. The prosecution claim that Jill took the designs when she went to a party at Leonardo's studio. When first interviewed by police, with a solicitor present, Jill denies she was at the party but the studio lost property log book records that cleaners the day after the party found a library ticket with her name on it. When interviewed for a second time, again with a solicitor present, Jill admitted she had lied but says she did so since she had told her husband she was working late the night of the party and she feared his reaction if he found out she went to the party. The detective interviewing Jones then said, 'You might as well own up to the theft and we can guarantee only a fine.' Jill confessed to the theft and added that Damien had nothing to do with it. Damien's apprentice Joan, made a telephone call before the theft was made public. She allegedly said to Gary, Damien's assistant, 'I am worried what Damien is up to, he has hidden some plans in the cellar. He did not know I saw him do it'. Joan says she is too fearful to appear as a witness for the prosecution since she is worried she will lose her job.

Advise Damien and Gary on evidence.

### Answer guidance

The issues to address include the admissibility of the library ticket as either real evidence or hearsay under s117 or s114 Criminal Justice Act. In relation to a defendant's lies as evidence consider *R v Lucas* [1981] QB 720. The lost property log also raises the question of the admissibility of business records under s117. The confession evidence raises the question of section 76 (2)(b) PACE and the possibility of exclusion on grounds of potential unreliability. Review also the possibility of applying section 76A to admit the exoneration of a second defendant. A spouse or civil partner is not compellable for the prosecution except for specified defences. First hand oral hearsay is admissible under s116 if there is a reason for not calling the witness. Fear of financial loss is a statutory reason under s116 (2)(e).