**CHAPTER 8**

**Question 1**

1a. It is likely that, on the facts, the evidential test under the 2018 Code is satisfied assuming the prosecution is satisfied that each witness is capable of giving reliable, independent evidence. A common defence submission in a historic sexual abuse case such as this is to challenge the reliability of the witness’s recollection of the incidents giving rise to the charges. The prosecution case may also be challenged by the possibility of collusion between the prosecution witnesses. If these potential difficulties are overcome, in view of the seriousness of the charges (and notwithstanding that there has been a long delay between the offence taking place and the date of any trial) it appears to be in the public interest for Gerald to be charged and prosecuted even after taking into account Gerald’s age. Gerald’s defence solicitor will want to draw the prosecution’s attention to the fact that Gerald has a serious heart complaint. If (as should be the case) medical evidence can be obtained which suggests that a trial probably would have a deleterious effect upon Gerald’s physical health, this may persuade the prosecution to re-consider whether it is in fact in the public interest to prosecute Gerald.

1b In Debbie’s case, the evidential test appears to be satisfied as the store detective will testify at trial and there is a security video tape of the alleged offence. It is difficult for Debbie to deny the actus reus element of the offence of theft, although she may have a defence based on a lack of mens rea. Debbie’s solicitor may, however, submit that given Debbie’s domestic circumstances, state of mental health, the fact that the offence is not particularly serious and that Debbie is of past good character, that it is not in the public interest for Debbie to be charged with theft. The prosecutor might consider that this is a case which could be disposed of by a simple caution or a conditional caution. However, to be eligible for either, Debbie would have to admit the offence.

1c. This is clearly a case of domestic violence as it comes within the term used to describe a range of behaviour often used by one person to control and dominate another, with whom they have or have had a close or family relationship. The offence includes physical, psychological and emotional violence on Patrick, by Frank, his father. It is also motivated by homophobic hatred. Even though Patrick does not want any further action to be taken against Frank, there might be a danger that if a prosecution is not undertaken, Frank may commit further serious offences against Patrick. It is difficult to see how Frank’s solicitor can argue against prosecution in these circumstances.

**Question 2**

To ascertain the disclosure requirements, firstly determine the classification of the offence Barry is charged with. Rape is an indictable-only offence.

The CPS will comply with its common law disclosure duties under DPP ex parte Lee (1999) to disclose anything that might reasonably assist the defence with the early preparation of their case or at a bail hearing. Following Barry’s initial appearance before magistrates’ court, his case will be sent forthwith to the Crown Court. Within 70 days of the case being sent the defence is entitled to disclosure of the prosecution’s case (used material). This is likely to comprise the witness statements of Tina, Kelly, Leroy, relevant staff at the care-home to whom she made the complaint, the medical and forensic evidence, the statement of the investigating officers, the record of interview with Barry and any items of real evidence.

Let us say that the medical/forensic evidence reveals traces of seminal fluid inside Tina and on her clothing. DNA extracted from the seminal fluid matches the known sample of DNA taken from Barry. The medical evidence also shows Tina to be eight weeks pregnant at the time when the alleged incident occurred.

On taking Barry’s further instructions in the light of this evidence, Barry now admits to his solicitor to having had sexual intercourse with Tina, but only with her consent and in return for payment in the public toilets. After having sex, Barry states Tina rejoined her friend, Kelly. Barry denies pestering Tina for sex. His reason for lying to you in the first place is that he is embarrassed to admit to having had under-age sex with the girl. He did not think she would make a complaint.

Having served the ‘case-sent bundle’, the CPS will provide the defence with a schedule of ‘unused’ material as defined under s. 3 CPIA. At this stage the prosecution discloses that Kelly, Tina’s friend, has a previous conviction for theft and that Leroy has previous convictions for public order offences and theft. Such information satisfies the test of evidence that might reasonably be considered capable of undermining the case for the prosecution.

The pre-trial disclosure of the evidence in this case has helped to narrow the facts in issue in that the act of sexual intercourse is admitted but what is in dispute is whether Tina consented.

As this matter is indictable only, Barry will need to file a defence statement (s. 5 CPIA). It needs to be drafted carefully (see Chapter 13). In his defence statement, Barry will indicate his intention to plead not guilty to rape on the basis that Tina consented to sexual intercourse and that sexual intercourse was offered to him by Tina in return for payment on one occasion only. He will deny any suggestion that he has been pestering Tina for sex. The defence statement will need to go so far as to suggest Tina is falsely accusing Barry of rape and that Barry believes she has made a proven false allegation against another male in the past. If the defence wants to obtain further disclosure on this, it needs to be articulated in the defence statement.

Service of the defence statement will cause the prosecution to look again at disclosure to see if there is anything that might reasonably assist Barry’s defence as articulated in his statement (s. 7A CPIA).

Barry’s defence statement clearly raises issues to do with Tina’s credibility. As a child in the care of the local authority there will be a social services file on her which should contain an account of the alleged incident involving the male care-worker together with an assessment of Tina’s personality. This is information which lies in the hands of a third party that you would presumably like to have access to. It may in fact be in the hands of the prosecution if the prosecution has sought access to it.

The prosecution and social services are likely to oppose disclosure on the ground of public interest immunity. The information is sensitive. It concerns a child and there are clearly issues of confidentiality. If the material is in the hands of the prosecution, it will need to apply to the court to sanction the withholding of such material. Notice of the application should be given to the defence to enable you to make representations. Representations may also be made by social services. Disclosure will be ordered if the judge concludes the information contained within the file would help to avoid a miscarriage of justice. If the material is in the hands of social services with disclosure being resisted, the defence will need to apply for a witness summons against social services. The same issues as regards public interest immunity will apply as in R v Brushett [2001] Crim LR 471.