

GUERNSEY BAR EXAMINATION

9:30AM, 29 April 2015

PAPER 2

CRIMINAL PRACTICE AND PROCEDURE

THREE HOURS

CANDIDATES ARE REQUIRED TO ANSWER ALL QUESTIONS.

THE MARKS AVAILABLE FOR EACH ARE SHOWN. NOT ALL QUESTIONS CARRY EQUAL MARKS.

PLEASE WRITE LEGIBLY AND ENSURE THAT YOU ANSWER EACH QUESTION ON A SEPARATE SHEET OF PAPER. PLEASE WRITE ON ONE SIDE OF THE PAPER ONLY AND LABEL EACH SHEET CLEARLY WITH:

- **NAME OF PAPER**
- **CANDIDATE LETTER**
- **QUESTION NUMBER**
- **PART NUMBER OF THE QUESTION (if applicable)**

MATERIAL PROVIDED:

1. **The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, as amended**
2. **The Drug Trafficking (Bailiwick of Guernsey) Law, 2000, as amended**
3. **The Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991, as amended**
4. **The Criminal Justice (International Co-operation)(Bailiwick of Guernsey) Law, 2001, as amended**

QUESTION 1

(25 marks)

You are the duty advocate in court and required to help the following people:

(a) David is charged with assaulting his partner Sally. The incident took place last night in their house when their two children, aged 7 and 5 years, were present. David and Sally had both been drinking and an argument ensued during which David pushed Sally to the floor and then punched her several times to the face requiring A&E treatment. Although the Police were called Sally refused to make a statement and does not wish to support police action. David was nevertheless arrested and during an interview under caution admitted the assault and was later charged with the offence. He was refused police bail and the prosecutor has indicated he will be seeking a further remand in custody. David wants to plead not guilty and for you to apply for bail until trial. Sally also approaches you before you go into court and says she wants David back and that the incident was "all a silly mistake."

- (i) On what grounds can the prosecution seek a remand in custody and what might you try to offer to the court by way of bail conditions that might increase his chances of getting bail?
- (ii) Even though Sally refuses to make a statement should you have spoken to her? Would the position be different if she had made a statement of complaint but then informed the Police later that she wanted to withdraw it? To what extent might your answer vary if David and Sally are married?

(5 marks)

(b) Dylan has been convicted of disorderly behaviour and criminal damage and is due to be sentenced today. He has a long list of previous convictions, including one for possession of cannabis for which he was sentenced, in December 2014, to 3 months imprisonment suspended for two years. He wants to know what options the court now has with regard to that sentence. If Dylan had not received a suspended sentence but instead it had been a community service order for 120 hours, of which he had completed 60 hours, what advice would you have given?

(3 marks)

(c) You see Donald who has been remanded in custody by the police after having been charged with 17 counts of shoplifting and 2 counts of indecent exposure. As soon as you meet him you are concerned he has mental health problems. He seems unable to hold a proper conversation and every time you try and explain who you are he thinks you are a policeman. The prison officer suggests to you quietly that Donald might not be fit to plead.

- (i) What does it mean when someone is “not fit to plead”?
- (ii) Assuming a medical report is obtained to the effect that Daniel is not fit to plead but the prosecution is not prepared to drop the cases against him explain the procedures that would be followed thereafter.

(4 marks)

(d) Patsy is aged 16 years and charged with robbery and causing grievous bodily harm with intent. The prosecution want her remanded into the care of HSSD until her trial:

- (i) on what grounds can the court order that; and
- (ii) if the application is granted and HSSD want to keep Patsy in secure accommodation what criteria have to be met?
- (iii) Patsy ultimately is convicted of the offences and the Judge says: “You have been convicted on overwhelming evidence. It is a disgrace that you pleaded not guilty in the first place. There is no mitigation to be considered other than your age. The court has no alternative but to send you to prison for 4 years.” What is wrong with this and what would you advise Patsy how a possible appeal might be argued?

(6 marks)

(e) Walter has been charged with causing £6000 worth of damage to a neighbour's car. He accepts he is guilty of the offence but thinks the value of the damage has been exaggerated and considers it to be closer to £3000. What order can the Magistrate's court make in respect of compensation? Would your answer be any different if the case was heard in the Royal Court?

(2 marks)

- (f) Dylan has been charged by the police with assault. However, at court the prosecutor indicates to you that he would be prepared to let Dylan be “formally cautioned.” What does this mean and what are the consequences for Dylan?

(2 marks)

- (g) You have to go to the Court of Alderney with your pupil who wants to know how the court will be constituted and what the maximum sentencing powers of it are.

(3 marks)

QUESTION 2

(20 marks)

You act for Daniel who is charged with being knowingly concerned in the fraudulent evasion of the prohibition of importation of goods, namely 1 kilo of heroin that would have a local street value of £500,000. More specifically, on 1 April 2015 he brought his boat into St Sampson marina from England and was met by customs officers. His boat was searched and the drugs were found in the hold. During an interview under caution Daniel admitted that he knew the drugs were there but said he had no choice because his life and those of his family had been threatened. Once in Guernsey he was to have been met by someone who would take the drugs from him and would give him £5,000 cash as a reward. He also told them the name of the person who had forced him to bring the drugs to Guernsey, whom he named as Cyril, and explained where he might be located.

Background checks reveal that the boat is registered to Daniel and is valued at £20,000. In addition, he owns a house (value £200k and is mortgage free), a car (value £10k), he has £50k invested in shares and a bank account (with a balance of £35k) all of which are in England. Social Security and Income Tax records suggest Daniel has never worked.

- (a) Early on, Daniel tells you that he has “dynamite” information regarding a major Columbian drugs cartel that is using Guernsey as the centre of its money laundering operation. In addition, he says he knows where there is a £2million stash of drugs on the island. He wants you to tell the prosecution that he will let them have this information if they drop the case against him. How do you deal with this information? If the prosecution say they are interested in the information but are not prepared to drop the case how else might it help Daniel if he tells them?

(2 Marks)

- (b) Daniel wants you to apply for bail. He wants you to offer the £50k in his bank account as “security” and he says a friend of his can also offer £100k as a “surety”. Your pupil does not understand the difference between the two terms and wants you to explain them to him.

(2 marks)

(c) If Daniel is convicted the prosecution are going to seek a confiscation order. Based on the above information what are they likely to allege is his benefit figure? If that figure is greater than the value of his assets what orders could a court make and with what consequences for Daniel? Apart from seeking it (or its equivalent value) as part of a confiscation order under the Drug Trafficking Law, 2000, how else might Daniel's boat be taken from him?

(5 marks)

(d) How might the prosecution go about restraining Daniel's assets?

(6 marks)

(e) The prosecution obtain a confiscation order and want to enforce it against Daniel's UK assets. How may they do that?

(3 marks)

(f) The Law Officers want to prosecute Cyril for his part in the affair. Assuming he lives in England how might this be achieved? If Cyril lived in Spain would your answer be different?

(2 marks)

QUESTION 3

(15 marks)

- (a) You are in house counsel for ABC Trust Company which has administered the family trust of Karim Gazinfar, who is recorded in the company's records as being a furniture retailer in Iran where he lives. The trust has assets of £500,000, which was a one-off deposit made 3 years ago and said to have come from an inheritance upon the death of Gazinfar's father. One of the directors of ABC comes to see you because he has just been in a conference call with Gazinfar who has advised your colleague that he has recently had an offer accepted for the purchase of an Open Market house in St Martins for £3 million. Gazinfar has already paid a cash deposit of 10% to the seller's agent and said that he hopes to complete the sale within 8 weeks. Gazinfar will be coming to Guernsey in approximately 3 weeks to actually see the property (he has only seen it on the internet so far) and will bring with him the balance of the purchase money in cash for it to be held by ABC until completion.

In addition, a downturn in work has caused ABC to look at its profitability and the only way to maintain profits is to shed staff. Those that do not bill clients are likely to be the first to go, including the HR manager and the MLRO. In respect of the MLRO post it is intended to split the role between two part-time staff. The firm's training budget will also have to be slashed considerably.

What advice do you give to the director?

(8 marks)

- (b) As part of its marketing strategy your firm holds a number of free breakfast briefings for industry and you are asked by the senior partner to speak at the next session. The theme of your topic will be *"IMF and Moneyval inspections of Guernsey's Anti-Money Laundering regime are all very well but at the end of the day Guernsey has to make a living and increasing and burdensome regulation make it uncompetitive."* How would you address your audience on this topic?

(7 marks)

QUESTION 4

(20 marks)

You are required to advise the following:

- (a) Tom and Dick are jointly charged with a non-domestic burglary and the prosecution have already indicated they are content for the case to be heard in the Magistrate's Court. Tom came to see you a few days ago and you have applied for and been granted legal aid on his behalf. Dick now approaches you as the duty advocate and wants you to represent him as well. In what circumstances can you act for both Tom and Dick and when can you not?

(2 marks)

- (b) You are asked to represent Tanya (aged 20 years) who has just been convicted in the Royal Court of wounding with intent and sentenced to 3 years imprisonment. The witnesses for the prosecution consisted of (i) the victim, Fiona, who did not know Tanya prior to the incident and (ii) a friend of Fiona's, called Myrtle, who did not witness the assault but who used to go to primary school with Tanya.

At the time of the attack Fiona had been in The Golden Monkey nightclub when, as she exited a toilet cubicle, she was struck a blow to the head by someone holding a glass. She told the police shortly afterwards that she did not really remember much about the incident and did not think she would be able to identify her attacker. The following day Fiona was on Facebook looking at a friend's page where she saw a picture of the person she thought had attacked her and told this to the police. A few days after that Myrtle, who knows Tanya, was in the Jamaica Inn and overheard Tanya boasting to the barman that she had given "*some bitch a glass to the face because she was dancing with my ex-boyfriend, Gary.*" Fiona had in fact danced with someone called Gary on the evening she was attacked.

After being told this by Myrtle, Fiona sent a text message to Tanya from Myrtle's phone (pretending to be her) asking if what she had heard in the Jamaica Inn was correct. Tanya replied that it was and attached a picture of herself laughing. Fiona went to speak with the Police the next day and they arranged for her to undertake a PROMAT identification (which is done by showing the witness a series of video images of people's faces). Fiona said she recognised the person who had attacked her and selected the photo of Tanya. By the time the Police spoke to Myrtle they found that her phone settings caused all text messages to be deleted automatically after they are read. Myrtle gave evidence at trial of what she had overheard in the

Jamaica Inn and Fiona gave evidence about the text message she received from Tanya on Myrtle's phone.

In her defence Tanya gave evidence that she had been in Sark on the night of the attack.

The Jurats found Tanya guilty by a majority of 6 to 5. At the sentencing hearing the judge said that he had been told that the court had not had any reason to doubt Fiona's evidence and that to him Myrtle seemed like an honest person who had done her best to tell the truth. He also remarked that the court had thought Tanya appeared shifty when giving evidence and all the Jurats were pretty certain she had not been telling the truth.

Tanya tells you that since being convicted she has found mobile phone records that show she had made calls from Sark on the night of the attack. She also tells you that she discovered yesterday that her aunt was in Sark on the same weekend as the attack and that although she had seen Tanya she not approached her.

Advise Tanya on her appeal generally (she wants to appeal both conviction and sentence) but make particular reference to the ground(s) upon which she may appeal and the strengths and weaknesses of her case. Advise her also on how the appeal court will be constituted.

(10 marks)

- (c) You act for Eric who is charged with (i) possession of heroin with intent to supply and (ii) grievous bodily harm against his wife. The prosecution say they want both matters heard together in the Royal Court.

In relation to the drugs matter the evidence is entirely circumstantial and rests in part upon the evidence of a witness who Eric is sure will not turn up. However, the prosecution have indicated they also wish to call Eric's wife and daughter as witnesses because both have made statements to the police about his whereabouts on certain dates that they consider important to their case.

With regard to the GBH matter both Eric's wife and daughter have made statements that implicate Eric directly in that offence. However, your client tells you he has an alibi witness but thinks he is unlikely to turn up to court.

Explain to Eric how he may challenge the evidence as the case proceeds through the system and how that may be done, whether the two matters can be tried at the same time and how the attendance of Eric's reluctant alibi witness may be secured.

(8 marks)

QUESTION 5**(20 marks)**

- (a) You represent First Mutual Bank ("the bank") which is approached by an officer of the Guernsey Border Agency (GBA) in connection with enquiries he is making about one of its customers, Harold, who has held three accounts with the bank for about five years. The officer explains that he is still at a very early stage in respect of a fraud and money laundering investigation and is looking for some intelligence to confirm that Harold is a customer, whether the accounts are active and what sort of sums are held in them. The officer explains that nothing may come of the enquiry in respect of Harold but the GBA knows he is associated with a number of people whom the officer describes as "London heavies." He says if Harold is involved it is more likely to be on the laundering side rather than the frauds. The bank has a blanket policy that it will terminate its relationship with any customer in respect of whom there is a known or suspected criminal enquiry and as the result of the GBA approach the bank's automatic policy has kicked in automatically. It therefore intends to write to Harold to tell him that after a review the bank has decided to terminate its relationship with him and that his accounts will be closed in 1 month's time. No other explanation will be given. The GBA has asked the bank to hold off from taking any action with regard to closing the account, including writing to Harold, and to do so for 3 months. If it does not do so the GBA has indicated that it will refuse consent to all transactions taking place on the accounts, including paying the money away upon closing the accounts.

Advise the bank generally as to its position but include within your advice whether it should provide to the GBA officer the intelligence that he seeks, how else it might be provided and what consequences, if any, there might be for the bank by writing the proposed letter in defiance of the GBA request and whether the GBA can, in effect, refuse consent to close the accounts.

(10 marks)

- (b) Emile is a local man charged with a number of money laundering offences. He is presently in custody awaiting trial in the Royal Court. The offences with which he is charged are alleged to have taken place in December 2013 and he is unlikely to have his case heard before June 2015. He has already entered not guilty pleas. The prosecution has obtained a restraint order in respect of all his locally held assets, including a business bank account of his business (he is a sole trader) that contains £20,000. Emile has over the last few years engaged Denby Ltd (a local book keeping company) to assist him with finalising personal and business accounts, completing tax returns etc. and had presented a bill of £15,000 prior to Emile's arrest

for work undertaken. He had sent a business a/c cheque to them but when it was presented his bank refused to honour it because by that time the restraint order was in place on the account. The prosecution has accepted the debt is genuinely owed but refuses to agree to any money being released from restraint because "at this stage all his assets must be considered tainted and liable to confiscation in the event of conviction."

Advise Denby Ltd as to their position with regard to: (i) how they may at this stage seek to recover their debt (including any procedure that should be followed) out of the restrained funds and (ii) assuming they are unsuccessful at this stage whether ABC Ltd will be able to recover the debt at all if the Crown obtains a confiscation order in respect of all of Emile's known assets.

(10 marks)