

### Sample Question for Criminal Litigation Practice & Procedure

**Hypothetical Question 1:** One night, as Alex was walking home at 10.00 p.m. after alighting from a bus, he found the lone female walking ahead of him attractive. He followed her. When they were both walking along the void deck of a block of flats, he ran up to her and groped her buttocks before running away. The female victim screamed in shock and stood still, crying. A passer-by helped to call the police thereafter.

Police reviewed the CCTV footage from lift lobbies in the vicinity and identified Alex as the suspect. Alex was arrested at his home in a nearby block of flats. The police observed that Alex had short hair and no tattoos on either of his calves. When the police recorded his initial statement under section 22 of the Criminal Procedure Code 2010, he denied committing the offence and claimed that he was at home the whole night since he came back from work at 6 p.m.

Alex is charged with outrage of modesty under section 354(1) of the Penal Code. He elects to claim trial.

1(a) During investigations, the police recorded statements from, *inter alia*, the following persons. The contents of their statements are set out below:

- a. Kelly was sitting at the void deck watching videos on her phone when she heard the victim scream from somewhere behind her. She stood up, looked behind her and spotted the victim standing behind a pillar in some distress. She quickly approached the victim to find out what had happened and got a glance of a person running away in the distance. She tried to chase the person and from a distance saw that he had a ponytail and tattoos down one of his calves. She lost sight of him after a short chase, and she went back to the victim, helping her to call the police.
- b. Michael is Alex's father. Michael informed the police that he (Michael) works irregular hours and usually sleeps soundly. He was sleeping when the police arrested Alex at their home and thus could not confirm whether Alex was at home the whole night. Michael had been sleeping since about 4 p.m. that afternoon.

**Please discuss whether the Prosecution has any disclosure obligations in relation to the statements recorded from Kelly and Michael. For the purposes of this question, please assume that the Prosecution does not intend to call either Kelly or Michael as Prosecution witnesses during the trial (10 marks).**

#### **Suggested answer:**

This question tests the candidates' understanding of the Prosecution's disclosure obligations set out in the cases of *Muhammad bin Kadar and another v PP* [2011] 3 SLR 1205 ("**Kadar**") and *Muhammad Nabill bin Mohd Fuad v PP* [2020] 1 SLR 984 ("**Nabill**").

Kelly's statement falls under the Prosecution's *Kadar* obligations and should be disclosed to the Defence. Under these obligations, the Prosecution is under a duty to disclose any unused material which is (*Kadar* at [113]-[121]):

- a. Likely to be admissible and might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; or
- b. Likely to be inadmissible but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

The *Kadar* obligations do not extend to material which is neutral or adverse to the accused and only pertains to material that tends to undermine the Prosecution's case or strengthen the Defence's case. Kelly's statement is inadmissible but would provide defence counsel basis to highlight her inability to identify Alex as the robber. On the face of Kelly's statement, it undermines the Prosecution's case by casting doubt as to whether it was Alex who was the molester as Kelly distinctly informed the police that the person running away had a ponytail and tattoos on a calf.

Michael's statement falls under the Prosecution's *Nabill* obligations and should be disclosed. The Prosecution is under a duty to disclose the statement of a material witness to the Defence when the Prosecution is not calling that witness to give evidence. A material witness is one who can be expected to either confirm or contradict the accused's defence. It does not matter whether the contents of the statement are favourable, neutral or adverse to the accused and the objective of the *Nabill* obligations is to ensure that the accused can make an informed choice in deciding whether or not to call the material witness where the Prosecution does not intend to do so (*Nabill* at [39]-[50]). On these facts, Michael may potentially be considered to be a material witness as he is relevant to any alibi defence that Alex may choose to run. His statement should thus be disclosed so that Alex can make a considered decision as to whether to call him as a witness.

The stronger candidates should be able to highlight that both statements should be disclosed to the Defence when the Case for the Prosecution is served and that there is a continuing duty of disclosure that extends to appeals and only ends when the matter is completely disposed of.

1(b) When the Prosecution serves the Case for the Prosecution on the Defence, it includes a detailed further statement recorded by the police from Alex under section 22 of the CPC. In this further statement, Alex confessed that he had groped the victim's buttocks as he found her attractive. Alex admitted that his claim to have been home since coming back from work at 6 p.m. was a lie; he had only made his way home after the molest. When Alex's lawyer asks him about his admissions in this further statement, Alex claims that the further statement was improperly obtained from him and alleges that he only confessed because of the following:

- a. The investigation officer, Inspector Tom, failed to inform Alex that he had the right to remain silent and avoid incriminating himself in his further statement.
- b. After Alex provided his initial statement in which he denied the offences, two officers acting under Inspector Tom's directions handcuffed him to a bench in an air-conditioned holding area for over 8 hours. He was clad only in a t-shirt and shorts. Alex was not given a proper break or any form of refreshments before Inspector Tom started recording his further statement.
- c. While recording Alex's further statement, Inspector Tom threatened Alex by telling him "I don't care about your future. If you are uncooperative, I am going to lock you up for however long it takes for you to properly reflect about whether you want to do the right thing."

**What procedures and principles govern whether the Prosecution can successfully admit Alex's confession against him? Please discuss with reference to Alex's allegations as set out above. In addition, can Alex choose to omit these allegations in his Case for the Defence so that he can "take the Prosecution by surprise" during the trial? (20 Marks)**

**Suggested answer:**

Taken by itself, Inspector Tom's failure to inform Alex that he had a right of silence and to avoid incriminating himself would not affect the admissibility of his statement. While section 22(2) of the CPC allows a witness to avoid saying anything that might expose him to a criminal charge, penalty

or forfeiture, Explanation 2(d) to section 258 of the CPC makes it clear that an otherwise admissible statement will not be rendered inadmissible merely because the accused was not warned about this right. This position is in line with the case of *PP v Mazlan bin Maidun* [1992] 3 SLR(R) 968 at [13]-[19] and [37].

The other two allegations directly relate to the voluntariness of Alex's confession. A clear starting point for this discussion is section 258(1) of the CPC, which stipulates that Alex's section 22 statement is admissible in evidence at his trial if the Prosecution seeks to rely on it to establish its case against him. This is subject to the court being satisfied that it was voluntarily recorded. In line with section 258(4) of the CPC, the burden of proof is on the Prosecution to prove beyond reasonable doubt that Alex provided his statement voluntarily. In support of this proposition relating to the burden of proof, candidates should also be able to cite *Chia Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619 ("*Kelvin Chia*") at [53]).

Given that Alex is challenging the admissibility of his statement on the basis that Inspector Tom (1) subjected him to oppressive treatment (2) and directed a threat at him, the court must call for an ancillary hearing pursuant to section 279(1) of the CPC. Section 279(2) stipulates that the evidence adduced at the ancillary hearing is to be limited only to the ancillary issue and section 279(3) sets out the order governing the ancillary hearing procedure.

In relation to the alleged oppressive treatment, candidates should also be able to cite Explanation 1 to section 258 of the CPC as an avenue for the court to exclude Ted's statement on the basis that it was recorded from him in a way that was likely to sap his will and did in fact sap his will. *Tey Tsun Hang v PP* [2014] 2 SLR 1189 at [113] makes it clear that the litmus test for oppression is whether the investigation was, by its nature, duration or other attendant circumstances, such as to affect the accused's mind and will such that he speaks when he otherwise would have remained silent.

Applying this threshold to the facts, candidates should be able to make a reasoned argument as to whether Inspector Tom's treatment of Alex amounted to oppression (or otherwise). From the cases on the reading list, the threshold for treatment that can constitute oppression is rather high and Alex's allegations may not satisfy it. This is evident when compared to the following:

- a. In *PP v Tan Boon Tat* [1990] 1 SLR(R) 287, the offender contested the voluntariness of his statement by arguing oppression. He argued that he was in a daze and a state of confusion as he was very hungry and tired. He alleged that the police officer had handcuffed one of his hands to the chair for 9 hours (4 pm to 1 am) upon his arrest and that he was not given any food or drink during that period before the contested statement was recorded from him. These allegations were undisputed. The court held that while what the police officers did were "highly inconsiderate", it "did not think that the accused was in such a state of shock, exhaustion and fatigue that he had no will to resist making any statement which he did not wish to make". The court held that the statement was made voluntarily.
- b. In *Fung Yuk Shing v PP* [1993] 2 SLR(R) 771, the offender challenged the voluntariness of his statement on grounds that he had not been given any food or drink after his arrest for 7 hours before his statement was recorded from him. The court commented that while "the failure to offer sustenance might be a deliberate ploy to weaken the accused's will or it might be a genuine oversight amidst the flurry of investigative activity", it is not "realistic to take the sweeping stand that every failure to offer an accused sustenance constitutes a "threat" or an "inducement" of such gravity as to automatically render any statement he makes involuntary". The court held that the statement was made voluntarily.

In relation to the alleged threat against Alex, the test for voluntariness is applied in a manner that is partly objective and partly subjective (*Kelvin Chia* at [53]). The objective limb is satisfied if there is in fact a threat, inducement or promise. The subjective limb is satisfied when the threat, inducement or promise operates on the mind of the accused through hope of escape or fear of punishment connected with the charge. On the face of the allegations, these conditions are satisfied and the court must refuse to admit Alex's statement into evidence if the Prosecution fails to prove beyond reasonable doubt that this threat was not uttered by Inspector Tom.

Any omission of Alex's allegations from the Case for the Defence would be problematic. In particular, Illustration 2 to section 165 of the CPC makes it clear that, when filing and serving his Case for the Defence, Alex's summary of defence must specify the facts that he intends to rely upon in challenging the voluntariness of his statement. Under section 169(1)(c) of the CPC, the court is entitled to draw an adverse inference against Alex for omitting the allegations from his summary of defence. In turn, this may affect his overall credibility and increase the likelihood that the court will admit the statement into evidence.