

Outline answer

Question 1(a)

- **Powers of PP under the Constitution:**

Art.145(3) FC: "The attorney general shall have power, exercisable at his discretion, to *institute, conduct or discontinue* any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial".

- **Powers of PP under the CPC:**

(1) S.376(1): The Attorney General (AG) shall be the PP and shall have the control and direction of all criminal prosecutions and proceedings under the CPC.

- **Appointment of persons who can exercise powers of PP**

- **Personal powers of PP**

- **Explanation of the power to institute, conduct and discontinue with the relevant cases**

Question 1(b)

- **Purpose of Charge**

(1) inform the accused of the offence alleged against him and for him to prepare his defence;

(2) enable the court to know what evidence should be led by both parties;

(3) indicate the punishment to be imposed; and

(4) indicate the jurisdiction of the court.

- **Please state at least 2 cases in support .**

Question 2 (a)

- **Power of the PP to transfer the case**

- Whether the accused charged for drug trafficking under s.39B DDA 1952 may be brought before the Sessions Court for the charge to be read: *PP v Darkasyi & Anor*

- S41 DDA is a specific provision and it can be used to transfer the case
- S39B DDA carries the death penalty and as such the Sessions court has no jurisdiction
- **Explanation of S417 1st limb and 2nd limb**

Question 2(b)

- Art.121(1B) FC: establishes the Court of Appeal which shall have jurisdiction to determine appeals from decisions of a High Court or a judge thereof except decisions given by a registrar.
- ***Jurisdiction of Court of Appeal: s.50 CJA 1964:***
- ***Matters which may be appealed:***
 - (i) s.50(4) CJA: Appeals may lie on a question of law or of fact or of mixed law and fact for :
 - i. Category (a) above i.e. against the decision of the High Court in exercise of its original jurisdiction i.e. where the case is first tried in the High Court; and
 - ii. Category (b) above i.e. against the decision of the High Court in exercise of its appellate or revisionary jurisdiction in criminal matters decided by the sessions court.
 - (ii) s.50(2) CJA: Appeals in category (c) above (i.e. against the decision of the High Court in exercise of its appellate or revisionary jurisdiction in criminal matters decided by the magistrate's court) shall be confined only to questions of law which have arisen in the course of appeal or revision.
- (3) ***“any decision”:***
 - (i) “any decision” in S.50(1) CJA 1964 includes any judgment, sentence or order.
 - (ii) In *Ang Gin Lee v PP* [1991] (supra), the Supreme Court held that the order must be a final order which finally disposes of the rights of the parties.
- **Leave of Court of Appeal:**
 - (1) If the PP appeals in category (c), no leave is required from the Court of Appeal.

In *Pasupathy Kanagasaby* [2001] 2 CLJ 753, the High Court held that if the prosecution appeals, no leave is required under s.50(3) CJA and the court may hear appeals on both facts and law. This was affirmed by the Court of Appeal (Lamin Mohd Yunus PCA) which held that s.50(2) is only for the accused. s.50(3) read with s.50(2) apply to the prosecution. The reason is that the Public Prosecutor has the liberty to re-examine every aspect of the case.

- (2) In other appeals, leave of the Court of Appeal must be obtained.
- (3) Application for leave of the Court of Appeal must be made within 14 days after the date of the decision of the High Court.

- **Procedure:**

- (1) ***Filing of notice of appeal:***

- (i) The notice of appeal must be in writing and filed with the registry of the High Court within 14 days after the date of the decision of the High Court: s.51(1) CJA1964.
- (ii) Where leave is required, computation of the 14 days commences from the date immediately after leave has been granted by the Court of Appeal: s.50(2A) and Proviso to s.51(2) CJA 1964.

- (2) ***Grounds of decision:***

- (i) S.52(1) CJA 1964: The High Court judge must record in writing the grounds of decision.
- (ii) In *Lorraine Phyllis Cohen & Anor v PP*
- (iii) There is no time frame for the judge to write the grounds of decision but it is expected to be prepared within a reasonable time.

- (3) ***Filing of petition of appeal:***

- (i) The registrar will notify the appellant or his advocate when the grounds of decision are ready: s.52(2) CJA 1964.

- (ii) ***Time and place to file petition of appeal:***

- (a) Within 10 days after service of such notice, the appellant must file 5 copies of the petition of appeal with the registry of the High Court: s.53(1) CJA 1964.
- (b) However, there appears to be a conflict as to the place to file the petition as Rule 65 of the Rules of the Court of Appeal 1994 (RCA 1994) provides that the petition of appeal must be filed with the “registrar” meaning registrar of the Court of Appeal.

- (iii) ***Non-compliance with the time prescribed:***

If the petition of appeal is not filed within the time prescribed, the appeal is deemed to have been withdrawn: s.53(3) CJA 1964 same as s.307(9) CPC.

- (iv) ***Extension of time to file petition of appeal:***

Extension of time to file the petition of appeal may be granted if good reasons are given: s.56 CJA 1964 same as s.310 CPC.

- (4) ***Transmission of record of appeal:***

- (i) S.55 CJA 1964
- (ii) On receiving the record of appeal, the Court of Appeal judge may:
 - (a) summarily reject the appeal or may grant leave to amend the grounds of appeal: s.58 CJA; or
 - (b) set the appeal down for hearing: s.59 CJA 1964.

Question 3 (i)

(A) One transaction principle:

- This means that the charges arise out of the *same transaction* and the sentences are to run concurrently as seen in the following cases:
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- *PP v Yap Huat*
- *Abu Seman v PP*
- *Ayob Abdul Jabar v PP*

(B) Totality principle:

- (1) The court looks at all the sentences imposed and decides whether in totality they are excessive.
- (2) If the total sentence is excessive then the court may order two or more sentences to run concurrently.
- *Sau Soo Kim v PP*
- *Bachik bin Abdul Rahman v PP*

- **An illustration of the facts of the cases will be necessary**

(C) The gap principle:

It operates as a mitigating factor to give the convicted person a lighter sentence. Where there is a reasonable gap between the commission of the first offence and the second offence it should be treated as a mitigation

- (1) In *Zaidon Shariff v PP* [1996] 4 CLJ 441, Augustine Paul JC opined that:

“In any event the fact that there has been a ten-year gap in the appellant’s criminal record has not been duly appreciated by the learned Magistrate. The appellant’s clean record since his last conviction in 1986 ought to have operated as a mitigating rather than as an aggravating factor. The rationale of the gap principle is that the offender has made an effort to rehabilitate himself and it should, accordingly, operate in his favour”.

- (2) In *Soosainathan v PP* [2001] 3 AMR 2945, the High Court held that the gap between a previous conviction and the present offence should be viewed as a mitigating factor rather than an aggravating factor. The longer the gap, the greater the mitigating factor.

- (3) In *Mogan Maruthamuthu v PP* [2003] 5 CLJ 118, VT Singham JC reduced the sentence as there was a 16-year gap between the previous and the present conviction of the accused for the same offence of drug possession.

Question 3 (ii)

2nd Class Magistrate

1. Trial jurisdiction

(1) S.88 SCA 1948

(2) S.117(2) CPC

2. Sentencing jurisdiction

S.89 SCA 1948

1st Class Magistrate

1. Trial jurisdiction

(1) S.85 SCA 1948:

(2) S.83 SCA 1948

(3) S.9 CPC

2. Sentencing jurisdiction

(1) S.87(1) SCA 1948

- **An explanation of each of the sections is required**

(2) Exceptions

There are 2 exceptions where the 1st Class Magistrate may exceed the sentencing jurisdiction –

1st Exception

Proviso to s.87(1) SCA 1948 – the 1st Magistrate can award punishment in excess of the power prescribed where any law gives him the authority.

2nd Exception

S.87(2) SCA 1948 – 1st Class Magistrate may increase the punishment prescribed in s.87(1) SCA 1948 provided the judge knows of the accused's previous convictions before sentencing and records his reasons. The judges in *Tengku Hitam* and *Abdul Wahab* pointed out that the prosecution has a duty to choose the proper court to charge the accused.

Question 4

- The old law on 113 statements- cautioned statement is used and the issue of threat and oppression. Today it is no longer applicable.
- The issue of the statement not read over to the suspects and signed by them

- The remand period according to the new law on s117 and s119 CPC as opposed to the old law
- Rights of an accused person according to Art 5(3), Christie v Leachinsky and s28
- Remedies for wrongful arrest of P and B
- Whether the use of 112 statement
- Whether bail is allowed depending on the type of the offence i.e bailable, unbailable or not bailable. As well as the factors considered for bail Wee Swee Siang

Question 5

(a) S 107A- Explain the section

(b) Sureties may apply to have the bond discharged: S.393 CPC

S.393 CPC provides that:

- (1) A surety may at any time apply to the magistrate to discharge the bond either wholly or partly as refers to him only.
- (2) The magistrate will then issue a warrant for the arrest of the accused that was released on bail and be brought before the court.
- (3) The magistrate will then discharge the surety from his obligations. The accused must find further sureties failing which the court may commit him into custody.
- (4) In urgent circumstances, where the surety realises that the accused is about to abscond, the surety may arrest the accused and bring him before the court the next day.

- *Mohan v PP*

(c) The answer is divided into bail pending trial where the factors in Wee Swee Siang will be used and for Bail pending appeal the factors in the case of Re Kwan Wah Yip is used.

Question 6

(a) “shall be liable to”:

- (i) In *PP v Man bin Ismail* [1939] MLJ 207, Aitken J said that the words “shall be liable to (imprisonment)” mean that the court has *discretion* whether to impose punishment of imprisonment or to release the accused on a bond for good behaviour under s.294 CPC.
- (ii) In *Jayanathan v PP* [1973] 2 MLJ 69, the Federal Court agreed with *Man bin Ismail* and said if it decides to impose the sentence of imprisonment, then it must be within the limitations.
- (iii) In *Abu Seman v PP* [1982] 2 MLJ 338, the High Court applied *Jayanathan* and held that the sentence was illegal as the minimum fine should be RM250.

“shall be punished with”:

- (i) Courts are still in conflict as to the meaning of “shall be punished with”.
- (ii) The following cases have held that the phrase ‘shall be punished with’ means that the punishment is mandatory and the court has no discretion and no binding over order under s.294 CPC can be made:
- a. In *Philip Lau Chee Heng v PP* [1988] 3 MLJ 107, Chong Siew Fai J held that “shall be punished with imprisonment for life and with whipping with not less than six strokes” is mandatory and the court has no discretion.
 - b. In *PP v Leonard Glenn Francis* [1989] 2 MLJ 158, Edgar Joseph Jr J (as he then was) held that the sessions court president erred and said that once the accused is convicted under s.8 FIPA, which uses the words “shall be punished with”, s.294 CPC cannot be invoked. A sentence of imprisonment and whipping of not less than 6 strokes must be imposed.
 - c. In *Nordin Yusmadi bin Yusoff v PP* [1997] 3 MLJ 754, Court of Appeal held that for the offence of rape under s.376 of the Penal Code, although the punishment of a minimum term of 5 years’ imprisonment is mandatory, the JCA 1947 conferred the Magistrate or Sessions Court with special power to order a youthful offender to be detained in a Henry Gurney School until he attained the age of 21 years. .
- (iii) However, some cases have held that the courts have discretion to order good behaviour bond under s.294 CPC notwithstanding the phrase ‘shall be punished with’: *PP v Lim Hong Chin* [1993] 3 MLJ 736.
- (iv) Also, in *Chew Chee Wah* [1995] 4 MLJ 26, Abdul Malik Ishak J opines that ‘shall be punished with’ per se does not make imprisonment mandatory due to the phrase “instead of sentencing him at once to any punishment” under s.294(1) CPC.

(b) Abdul Hamid V PP

- The effect of lack of sanction and lack of consent
- Doctrine of alter ego.

(c) (i) -What is prima facie- s173 statutory definition

- The effect of failure to establish prima facie under s173(f) – courts must grant an acquittal

(ii) – s173(g)

- Chu Chee Peng
- DNAA should be granted and at least 2 relevant cases

Question 7

- (a)** An explanation of s51A on the production of documents as opposed to the previous situation under s51 with at least 2 cases

(b) Methods of body search under the 4th Sch of the CPC

- Pat down search
- Strip search
- Intrusive search
- Intimate search

When and who can carry out these search procedure as well as if it is a woman only a woman officer can carry out the search with strict regard to decency under s19CPC

(c) Transfer of cases and the difference when an accused applies and when the PP applies.

Reference to be made to s177 , s417, s418 and s418A&B depending on if the trial has begun or not.