Evidence

(Q&A)

LAW OF EVIDENCE QUESTIONS AND ANSWERS

2015

ILL- GOTTEN EVIDENCE:

1. AREA OF LAW Is Relevance and Admissibility

UKELY ISSUES: hypothetical issues (likely)

1. Whether or not the information obtained by
   a. a device,
   b. confessions,
   c. entrapment,
   d. surveillance

   Is relevant?

2. Whether or not the information obtained by a device, confessions, entrapment, surveillance *Is admissible?*
3. Whether or not infomation was *illegally* obtained?

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2. AUTHORITIES

1. *Constitutional Authorities:*

Article: 1(2) talks of the Supremacy of the Constitution as against any legislation. That is any law found to be inconsistent with the constitution is void.

14(2) ; A person arrested to be informed of the reason of arrest

14(3): Arrested person shall be brought before court within 48 hours

15(2): No person shall be subjected to torture or other cruel, inhumane or degrading treatment

with the law (By article 18(2), it is unconstitutional for an investigator to bug information from suspects in prison, police custody).

2. *Evidence Act (NRCD 323)*

Section 51 (2): All relevant evidence is admissible except as otherwise provided by any enactment.

Section 51(2): No evidence is admissible except relevant evidence

Sections 51(2) and 51 (3) emphasises that the basic requisite or requirement for admitting evidence under The Evidence Act is RELEVANCE

3. What is admissibility?

i. Acceptance by the court of the evidence offered by a party
ii. Evidence is relevant when it tends to prove or disprove a fact in issue

Section 52: A judge can exclude relevant evidence where the evidence will cause

i. undue delay, waste of time,
ii. unnecessary repetition of evidence
iii. substantial danger of unfair prejudice.

4. CASES

1. <u>R V LEATHAM</u>

"it matters not how you get it even if you steal it, it would be admissible in evidence"

2. <u>JEFFREY V BLACK</u>

The accused was arrested for stealing sandwiches. His house was searched without warrant and a quantity of drugs was found there. It was

held that what was found in the search should have been admitted in evidence.

3. KWABENA AMANING ALIAS TAGOR V THE REPUBLIC

Counsel for the appellant submitted that recorded conversation upon which the victim was based had been wrongfully admitted. This is because it had violated the constitutional rights of the appellant.

4. R V KHAN

Public policy should override the liberty and interest of an individual. Lord Nolan stated "It would be strange reflection on our law if a man has admitted his participation in the importation of heroine should have his conviction set aside on grounds that his privacy has been evaded."

5. TUFFOUR V ATTORNEY- GENERAL

It was emphasised that, equitable principle of estoppel should not prevail over constitutional provision. The Supreme Court States "no person can make lawful what the constitution says is unlawful. The conduct must conform to due process of law as laid down in the fundamental law of the land or it is unlawful and invalid."

5. FRUIT OF THE POISONOUS TREE (AMERICAN JURISPRUDENCE)

The outcome of illegal or improper search should not be admissible because the tainted source or tainted procedure should be considered as tainting the finding. Where the finding or outcome of the search is found by the court to be illegal, the court can legally be right in relying on it to found a conviction or judgement because the general principle is that decisions are to be based on legal or admissible evidence and not

In Ghana, the courts have ruled as inadmissible statements taken in violation of the constitutional rights of the accused. On the contrary, another school of thought proposed that evidence obtained by improper or illegal methods should be admissible provided it is of proper probative value i.e. if through the improper means evidence is made available on the basis of which the accused may be convicted that evidence should be admissible.

In the case of R V LEATHAM, it states, it matters not how you get it if you steal it even, it would be admissible in evidence.

CONCLUSION

In Ghana, admissibility is based in evidence as stated in NRCD 323, SECTION 51(2) and (3).

- *51(2) all relevant evidence is admissible except as otherwise provided by any enactment.*

- *51(3) No evidence is admissible except relevant evidence.*

If the court finds the evidence relevant, it has the power to admit. But the section clearly states that the evidence may be rendered inadmissible by statute such as the provision on public policy and NRCD 323 SECTION 52. The provisions should be subject to the constitutional provisions.
The Ghanaian position appears to be relevant evidence but not how the evidence was obtained but subject to constitutional provisions.

(2)

TRADITIONAL EVIDENCE

ISSUES

i. Whether or not evidence of settlement and conquest are the proper means for evaluating traditional evidence.
ii. The effects of acts of ownership and possession
iii. What is the effect of coherence and demeanour in traditional evidence
iv. Whether or not books or publication have any probative value in traditional evidence.

In traditional evidence, narrations are therefore given by people who have no personal knowledge because the events they narrate occurred long before they were born, this makes traditional evidence generally hearsay but made as an exception in NRCD 323 IN section 128 and 129. In traditional evidence, the most satisfactory method of testing the traditional history is by examining it in the light of such more recent facts as can be established by evidence in order to establish which of the two conflicting statements of tradition is more probably correct.

AUTHORITIES

1. SECTION 48 may be considered when evaluating traditional evidence. It emphasises on possession and ownership in relation to traditional evidence especially when considered in connection with lands and landed property. This section raises a presumption of ownership in favour of a person in occupation or in possession of property or one who manifest ownership over it.
ii. SECTION 128: Traditional evidence over family history is hearsay but becomes admissible when concerning birth, marriage, divorce etc.

Both section 128 and 129 allow hearsay evidence relating to the subject matters covered therein to be admitted as exception to the hearsay rules.

CASES

1. EBU V ABABIO (COMMON LAW)

Evaluation

2. ADJEIBI KOJO V BONSIE (locus classicus)

This case provided the basis for the development of the law of traditional evidence in evaluating which of the conflicting traditional evidence to accept as more probable. The following must be taken into consideration;

i. The most recent ownership of the contested subject matter or possession of the subject matter.

ii. Those facts should not be in dispute and should be facts which have recently occurred or of recent memory.

3. ADJEI V ACQUAH (SECTION 48).

Matters and events within living memory

A person in occupation or in possession of property or one who manifests ownership in the owner if it is in land litigation, proven uninterrupted and unchallenging acts of possession in the absence of some cogent evidence on record to the contrary cause a presumption of ownership on record.

4. KWASI YAW V KWAW ATTAH

Recent acts in relation to the land

It was held that where there is a conflict of traditional history, the best way to find out which side is probably right is by reference to recent acts in relation to the land. In the instant case, the fact that the plaintiff is in possession of the land is acknowledged by his boundary owners to be the owner is enough to prove that his evidence of tradition is probably right.

Page

5. HILODJIE V GEORGE (SECTION 48)

- Undisputed overt Acts of ownership or possession exercised over the disputed land.

- Not proper to rely on publication and text books or pamphlet in traditional evidence.

Where there is conflict of traditional history. The most satisfactory contemporary facts that a court should look for are

- Undisputed overt acts of ownership or
- Possession exercised over the disputed matter.

6. IN RE KODIE STOOL;
7. ADOWAA V OSEI
(DEMEANOUR & COHERENCE)

The court added that where the traditional evidence was conflicting and evidence of occupation and ownership were equally conflicting, the court had to decide the case by sifting and weighing the respective testimonies to see which outweighs the few clearly established facts. Other cases in support of the rule that in traditional evidence, coherence and demeanour are not a good guide.

i. In Re Tahyen & Agogo Stool Kumani v Annim
ii. In Re Adjancote Acquisition, Klu v Agyeman
iii. Adwubeng v Domfeh
iv. Ricketts v Addo &.....

CIRCUMSTANTIAL EVIDENCE

ISSUES

1. Whether or not an offence has been committed
2. Whether or not pieces of evidence gathered point to the accused and no one else
3. That guilt is the only rational hypothesis or that the inference are incompatible or inconsistent with the innocence of the accused.

Circumstantial evidence is utilised where direct evidence is not available or is not easy to obtain e.g. rape, theft, defamation etc.

Circumstantial evidence is the pieces of incidents of facts when considered or put together provides the basis for drawing conclusion, inference or deduction to the essence of...

1. Circumstantial evidence must be established beyond mere suspicion

   STATE V ALI KASSENA

   In deciding whether or not the accused is guilty, the courts stated that, multitude of suspicions cannot make a proof and that circumstantial evidence must be beyond mere suspicions.

2. Circumstantial evidence points to one and only one irresistible conclusion

   AMETEWEE V THE STATE

   That is the case where the appellant fired three shots at Dr. Kwame Nkrumah for which his body guard died instead. The pathological report showed that the deceased died of gunshot wounds. It was held that it was the appellant who killed the deceased by the gun he fired.

The circumstantial evidence comprised the facts that

- There was only one gun at the scene
- That one gun fired the shot that day and
- That the accused fired the gun.
- The accused was responsible for the death of the deceased in circumstantial evidence.

3. Where bits and pieces of evidence put together is stronger, corroborative and more convincing than even direct evidence.
   GLIGAH & ATISO V THE REPUBLIC

That is the case where two policemen alleged to have raped a second hand cloth seller in a police store room. The victim was able to give a detailed description of the room where the rape took place. The medical officer who examined the victim concluded that she had been raped by an erect organ. These pieces of information were held to have amounted to sufficient circumstantial evidence that justified the conviction for rape.

4. For circumstantial evidence to support conviction it must be inconsistent with the innocence of the accused
   STATE V ANANI FIADZO

In this case, the appellant was convicted purely on circumstantial evidence in that no one saw him kill his son who was found dead in the bush. Because he was the last person to have been seen with the child before his death and he later gave inconsistent stories as to the whereabouts of the child. In drawing a conclusion based on circumstantial evidence, the inference of guilt must be incompatible with innocence of the accused and incapable of any other

5. Where there is no direct evidence of death, circumstantial evidence can provide proof of death.

BOSSO V THE REPUBLIC

In this case, the deceased was last seen alive entering the room of the accused. She disappeared thereafter. The accused denied killing her. He initially told inconsistent stories about the whereabouts of the deceased. Several months later after the deceased had disappeared, the accused led the police to the body of the deceased, which had dismembered into 150 pieces. Accused appealed against his conviction but the Supreme Court affirmed the conviction.

6. In circumstantial evidence, the conclusion must be consistent and overwhelming, where the prosecution case is more consistent with innocence than with guilt, the conviction cannot sustain

LOGAN AND... V THE REPUBLIC

Cocaine was found concealed in a special compartment or hole in a wall within a corridor upstairs. The only link between the appellant, Logan and Laverick and the cocaine in question was that they were found to be in the house where the cocaine discovered at the time the police conducted a swoop on that house. The court found that in applying circumstantial evidence as basis for conviction, the defence of the appellant was more consistent with their innocence than with their guilt.

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7. Where the only reasonable, irresistible inference leads to the accused, circumstantial evidence is applicable

DUAH V THE REPUBLIC

The pathologist report showed that the victim died of stab wounds caused by high violent external force which could not have been done by the victim herself. Circumstantial evidence established that, it was the appellant who committed the crime.

8. In Ghana, the application for circumstantial evidence in criminal matters stretches further than ordinary 'proof beyond reasonable doubt'.

COLLINS ALIAS DERBY V THE REPUBLIC (1987- 88)

In Ghana, the defence of proof required was that, the prisoner's guilt should be established by circumstance that consistently and overwhelmingly imputed guilt and excluded any other rational conclusion.

COMPETENCE AND COMPELLABILITY OF WITNESS

ISSUES

1. Whether or not an 11 year old girl could be a competent witness.
2. Whether or not an estranged wife who is unwilling to testify against the husband can be compelled.
3. Whether or not a person involved in an offence can testify against himself.
4. Whether or not a person who has just been discharged from a psychiatric hospital can be a competent witness.

AUTHORITIES

1. FRE 601 removes all common law grounds of incompetence by providing that "every person is competent to be a witness except as otherwise provided in these rules. There is no provision regarding the age of the prospective witness.

2. SECTION 58 OF NRCD 323

Every person is competent to testify in any proceedings and such witnesses are compellable.

3. SECTION 59(1) OF NRCD 323

S59(1)(a) A person is not qualified to be a witness if he is incapable of expressing himself so as to be understood directly or through an interpreter or

S59 (1) (b) incapable of understanding the duty of a witness to tell the truth.

SECTION 59 (2) OF NRCD 323

A child or a person of unsound mind is competent to be a witness unless he is disqualified by s59 (1) on disqualification of witnesses: he must have 3 attributes and these are

i. Incapable of expressing himself so as to be understood
ii. Incapable of understanding the duty of a witness to tell the truth

The competence of a child is not based on his age but his ability to understand the duty to tell the truth.

Under Section 59(2) of NRCD 323, A child or a person of unsound mind is competent to be a witness unless he is disqualified by subsection (1) of this section.

Subsection (1) states;

A person is not qualified to be a witness if he is

a. Incapable of expressing himself so as to be understood either directly or through interpretation by one who can understand him or
b. Incapable of understanding the duty of a witness to tell the truth.

4. A spouse may be competent to give evidence for the prosecution or defence except where marital privilege is to be applied as stated in section 110 of the Evidence Act.

5. Section 58; every person is competent to testify in any proceedings and such witness are compellable.

6. Section 110 of NRCD 323

[illegible] privilege to refuse to disclose and to prevent any

(2) A communication is confidential if not intended to be disclosed and made in a manner reasonably calculated not to disclose its contents to any third party.

NB; this privilege applies to communication issued while the marriage was subsisting. It will not apply to situations which existed before marriage. This section- section 110 forbids the disclosure of marital communication after divorce.

Once the communication is proved to have been made during marriage, the fact will still stand that to allow a disclosure will defeat the very revulsion which seeks to avoid.
This section is only applicable where couples are properly and legitimately married. This implies that the privilege can be claimed during marriage and even after the dissolution of the marriage in the death of one spouse.

7. An accused person cannot be compelled to give incriminating evidence against himself. Section 97 (1) In any criminal proceedings, a person has a privilege to refuse to disclose any matter or to produce any object or writing that will incriminate him.

8. By this privilege, a person facing interrogation by the police or people in authority (including departmental...) may refuse to answer questions when he believes the answer will incriminate him.
NB; when a person is of unsound mind generally but his insanity does not affect certain matters such as

a. Recognise a person who robbed him of his money or
b. Ability till his story coherently as well as
c. The need to tell the truth.

this permanent state of general insanity will not disqualify him from giving evidence on that particular issue although his insanity may affect cogency.

9. An Officer of The Court

The other ground disqualifies.....of the official role a person may be playing in the trial and not because he lacks any attributes of competency. Thus a judge sitting at a trial cannot testify as a witness at a trial.

EXPERT WITNESS

ISSUES (hypothetical)

1. Whether or not a person who has gained experience in hand writing without formal training qualifies as an expert.
2. Whether or not a nurse who has worked for 5 years qualifies as an expert in pathology.
3. Whether or not a judge is compelled to accept the evidence of an expert.

AUTHORITIES

Section 67 NRCD 323 (Qualification)

This section defines an expert based on his special skill, experience or training. A person may acquire academic qualification as an expert by training or by learning. The training may be formal or informal.

In the case of; 67, 112, 114

i. Tachie v The State - T D R

ii. Osei v The Republic -

iii. R v Silverlock - a solicitor was held to be an expert in handwriting through experience gained by studying on his own in the cause of his practice.

In highly sophisticated or technical areas, such as medicine only a professionally trained person is required to be an expert.

In R v Inch, it was held that a medical orderly does not qualify as an expert.

The determination of the competence or qualification of an expert is a matter for the judge.

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Section 112

(Expert Opinion Evidence)

By this section, where a person is able to establish that he is an expert, his evidence will be admissible if the subject matter he will testify upon satisfies these 3 conditions;

a. That the subject matter must be beyond Common experience
b. That his expertise must relate to the subject in issue before the court.
c. His expert opinion should be helpful to the court.

Section 113

The basis of the Expert Opinion.

The Expert is not expected to disclose the source or basis of his information and yet his opinion will be admissible in evidence. The expert may however be cross examined on his testimony on the basis of his opinion. The expert may further be ordered by the court to disclose the source of his opinion if the court in its discretion so directs.

Section 114

Court Expert

This section allows the court to appoint its own expert. Also, parties may object to the appointment of an expert appointed by the court. Parties may cross examine the court appointed expert.

Section 115

Opinion on Ultimate Issue — danger of expert evidence

The ultimate issue refers to the very question that the court has to determine in the trial. Unlike the situation at common law, the law in Ghana is that, the expert is entitled to comment on the issue which is pending to be ultimately

FENUKU V JOHN TEYE

The privilege of law regarding expert evidence is that the judge need not accept any of the evidence offered.

The judge is only to be assisted by such expert evidence to arrive at a conclusion of his own after examining the whole of the evidence before him.

The expert evidence is only a guide to arrive at a conclusion.

(6)

DOCUMENTARY EVIDENCE

In R V DAYE, a document was defined as anything that is capable of being evidence. However, in everyday language, we associate a document with statements recorded on paper or in same form.

The definition of document is not restricted to a "thing written" although, writing appears to be an essential attribute of a document.

The following have to be held to be a document in case law

- Tape recorder
- A film

In the case of STATE V MPUNBO, it was held that everything that contains written or pictorial proof could be said to be a document.

ADMISSION OR TENDERING DOCUMENT

At Common Law, a Party who wishes to tender a document must produce the original. This is known as the "Best Evidence Rule".

However, this rule has lost its potency because in most cases it is inconsistent to produce the original.

Section 165 of the Evidence Act

Except as otherwise provided by this Decree or any other enactment, no evidence other than the original writing is admissible to prove the contexi of a writing.

NB; we do not confine ourselves to the best evidence, we admit all relevant evidence the goodness or the badness goes only to weight and not admissibility. The generalrule is that, you must bring the best evidence.

EXCEPTION TO THE GENERAL RULE THAT DOCUMENT MUST BE ORIGINAL

1. PRIVATE DOCUMENT

These are documents for private use e.g. Contract, Wills.

Where private documents may be admitted on the following grounds;

I. Where the original is lost or has been destroyed but must not be as a result of deliberate or fraudulent act of the proponent.

Section 168;

Originals unavallable by Judicial means

That is when the document is unavailable by judicial means, the secondary evidence will be admissible.

Section 169; Where the original is in the hands of a third party and is unavailable to produce where a third party is served with a subpoena to produce a document and the person fails to produce the original secondary evidence will be allowed.

Section 170; collateral writings as stated in section 170- the collateral writing will be admissible if it is incidental to the main issue.

Section 171; where it is voluminous writings that is large collection documents then secondary copies will be admissible.

Section 172; Immovable Writing; for e.g. an inscription on a tombstone. In this case, removing the original will be impossible.

Section 173; where the opponent has admitted to the content of the document. Then there will be no need in producing the original.

For the purpose of convenience, a party is sometimes allowed to produce copy of the document for which the original exists. For e.g. Birth

certificate, educational certificates. In terms of section163; parties to litigation may agree that copies of documents that they all sign should be treated as original.

PUBLIC DOCUMENT (OFFICIAL DOCUMENT)

SECTION 179, Interpretation

That is documents that emanate from public entity will be classified as public document.

The test for identifying a public document include

...the context which it was created

...which public entity made that document?

...for what purpose

...the manner in which it is kept in other to come into conclusion that it is a public document.

Again at Common Law, Secondary evidence was admissible for public or official document. The reason behind this was explained as practical and convenient.

For a copy of a public document to be admitted, the following conditions must be met;

i. The original document has in fact been filed in the office of a public entity where documents of that nature are regularly kept.

ii. The copy which is sort to be tendered in lieu of the original has been certified as correct by the custodian of the original.

iii. A competent person who has had the chance to compare the original and the copy has been called upon to give evidence as to the correctness of the copy.

iv. Where the original of the public document cannot be talked after diligent search, other evidence of its content shall be admissible to the same extent as the original.

BANKERS BOOK

The evidence Act, has no definition to conduct constitutes a bankers book, however, the Common Law position is that, bankers books were limited to the

i. Ledger

ii. Day book

iii. Cash book

The entry of the bank books must have been made in the ordinary cause of business or regular course of business.

As per Section 176, when copies of bankers books or admitted they are admitted to the same extent as the original to prove the context.

APPIAH V THE REPUBLIC (1987-88) 2 GLR 337

In terms of section 176(3), where a bank is not a party an official of the bank can be compelled to produce a document, subpoena decus tecum.

RES GESTAE (124)

SECTION 124 of EVIDENCE ACT deals with res gestae

To ascertain whether or not statements are gestae one of the two 4 conditions listed must be satisfied

i Contemporaneity or spontaneity of the statement

i Immediately after the occurrence

ii Under the stress of the event

iv State of the mind explanation

Possible issues relating to Res Gestae

i Whether or not the statement was contemporaneous

i Whether or not the statement was made immediately after the occurrence.

ii. Whether or not the statement was made under the stress of the event.

iv. Whether it was a state of mind explanation.

CONTEMPORANEITY OR SPONTANEITY

i The statement should have been made while the event under investigation was actually taking place.

Under the principle of contemporaneity, evidence of tape recordings, video and CCTV recording of relevant past event are held admissible in evidence during court trials.

Time gap draws the events apart may result in the event not being held to be contemporaneous to form part of the res gestae. However, case law has given contradictory ruling on time gaps regarding res gestae.

PRIVILEGE

A privilege is an exceptional or special right immunity or exception by which a person may refer to give evidence or disclose a fact or prevent others from doing so in court proceedings or administrative enquiries.

Under section 89, privilege is personal to the holder and therefore be waived by the person entitled to it. Where privilege exists, the one entitled to claim it may be deemed to have waived it if he does not claim it. Again, he will be deemed to have waived it if he discloses some or part of the privilege material or information.

NB; the rules of privileges is applicable to all proceedings including judicial administrative, formal or informal inquiries.

LAWYER CLIENT PRIVILEGE (100(2))

Who is a client? (Section 100(1) (a))

A person including a public entity, association, body corporate, who directly or through an authorised representative seeks professional legal source from a lawyer.

Who is a representative of a client (100(1)(b))?

A person authorised by the client to act on behalf of the client.

Who is a lawyer (s. 100(1)(c))

In the case of AKUFFO ADDO V .QUARSHIE IDUN and a later case, REPUBLIC V HIGH COURT, ACCRA; EXPARTE JUSTIN PWARA TERWAJAH, establish the principle that a lawyer is a person who has acquired the requisite qualification and passes a valid solicitors licence. It follows that only those who possess valid solicitors licence qualify in terms of EVIDENCE ACT to give professional advice.

COMMUNICATION

For a communication to qualify as a privilege it should be for the furtherance of professional advice with the object of seeking professional legal services. The emphasis is on fact that the client must give to the lawyer to seek professional advice. In order for a communication to be subject to litigation privilege, it must be confidential and it has to have been made for the sole or dominant purpose of being used in aid of or obtaining legal service about, actual or anticipated litigation. Where litigation has not been commenced at the time the communication is made, it has to be reasonably in proposal.

NB; DOMINANT PURPOSE OF LITIGATION

Even if litigation is reasonably in prospect at the time a document is created, litigation privilege will not be available unless the document was created for the dominant purpose of that litigation. The litigation need not be the sole purpose of the document but it is not sufficient to establish that the litigation was one of purpose of equal importance.

CASE; WAUGH V BRITISH RAILWAY BOARD

An internal report had been prepared by two of the Boards officers two days after a collision involving the death of a locomotive driver, where...brought an action and now sought its production.

HELD; the court considered litigation privilege. The report contained materials collected by or on behalf of the Board for the use of their solicitors in anticipation of litigation, but because it could not be shown that this was its dominant purpose, the document did not attract litigation privilege.

WOOLEY V NORTH LONDON RAILWAY;

A report on the cause of an accident prepared by scientist to the locomotive...and copied to the defendant's solicitors were considered privilege for being in anticipation of litigation.

Again in M... V P... when a solicitor was consulted with the view to retaining his service it was held that the communication that passed between him and the would-be client was privilege although the solicitor was not after all retained.

NB: A Lawyer communication therefore should have been deliberately offered by or to a lawyer following the conscious effort of the client to seek professional legal advice. Information given by or to the lawyer by pure chance or accident will not be privileged.

MEDICAL PRIVILEGE (SECTION 103)

The privilege relating to mental or emotional treatment is described as medical privilege. This section covers only physician, psychologist and those assisting the doctor or psychologist such as nurses and medical attendants.

For the communication to be privileged, it must relate to emotional or mental treatment. Communication in respect of other medical will not be privileged.

PRIVILEGE AGAINST SELF INCRIMINATION (SECTION 97(1))

S. 97(1) In any criminal proceeding, a person has a privilege to refuse to disclose any matter or to produce any object or writing that will incriminate him

For a privilege against self incrimination to apply the court has to be satisfied that by the disclosure the accused will face a real danger of being prosecuted for violating any criminal law in Ghana.

By this privilege, a person facing interrogation by the police or people in.... including departmental inquiries may refuse to answer questions when he believes the answer will incriminate him.

MARITAL PRIVILEGES (SECTION 110)

A person has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between himself and his spouse during the marriage.

It applies to communication issued while the marriage was subsisting. It will not apply to situation which existed before marriage. Even after divorce; section 110 forbids the disclosure of marital communication.

NB; it is only communication between couples for which they intend confidentiality that will be privilege and not every conversation..

JUDICIAL NOTICE (SECTION 9(2))

Judicial notice is therefore one of the methods the courts adapts to do away with the taking of formal evidence where otherwise formal evidence would have been necessary to establish certain facts under section 9(2) which sets out the concept of judicial notice under the Evidence Act, Judicial Notice may be classified into three broad sources which sometimes overlap

i. General Knowledge and Observation
ii. Knowledge confined within the Traditional Jurisdiction of a court
iii. Judicial notice derived from ready and reliable sources.

CASES;

1. COMMOMWEALTH SHIPPING REPRESENTATIVE V P.O PREMPEH

DEFN; Judicial notice are facts which a judge...may be called upon to receive and act upon it based on his general knowledge of them or from enquiries to be made by himself from a source what is proper for him.

2. R V MENSAH

The judge was invited to take notice of the inflation situation in the ...attributing it to the world inflation and in oil prices on the world market. Cecilia Koranteng-Addow in considering judicial notice should be taken of facts which were generally known within the jurisdiction of the court or which are easily verifiable by resort to verifiable and accurate sources. However, she continued that the taking of judicial notice of world inflation in Ghana is misplaced as the extent to which world inflation has affected the economy of Ghana was not a matter within the General knowledge of the court. Hence, judicial notice cannot be taken.

3. READ V. BISHOP OF LINCOLN.

The issue was whether water could be added to communion wine and whether this was part of the historical tradition of the Church of England.

The judge took judicial notice of the fact that this has not been part of the tradition of the church.

4. DAVIS V RENDALL

A local court cannot rely on a foreign law to take a decision. To this end, a party who pleads foreign law or hopes to rely on it should prove it.

Section 9 (2) Judicial Notice can be taken only of facts which are;

S9(2)(a) So generally known within the territorial Jurisdiction of the Court.

A judge who is ignorant of notorious fact or not in a position to know all things within his jurisdiction and for that matter cannot take judicial notice has to call evidence to that effect.

9(2)(b) a judge can judicial notice of any fact irrespective of his territorial jurisdiction his personal knowledge or the knowledge of the parties involved can be ascertained from a source which is so reliable that no reasonable person can doubt the accuracy of the infomation that it provides and such a source is readily available.

APPLICATION OF JUDICIAL NOTICE

Where the condition for taking judicial notice as set out in section 9(2) exists, a court may take judicial notice either on it's

a. own initiative or

b. on an application by a body

Another method of admitting facts as evidence without the necessity of calling evidence is...admission.

NB; It must be noted that a judge cannot rely on his own private and personal facts to take judicial.

CUBSON V

held that, "I knew ...hotel as much as the witness, I give a ruling now, it is a hotel." On appeal, this ruling was set aside because the judge was said to have relied on his personal knowledge but not known to other members of the society.

Judicial notice can be adduced on two main principles;

1. facts which are notoriously known
2. facts which are capable ready and accurate from a source whose credibility cannot reasonably be obligated

NB; matters of obvious and universal notoriety e.g....

SIMILAR FACTS

APPLICABLE STATUTES;

1. Section 53 " evidence of a person's character or trait of his character is not admissible to prove his conduct in conformity with such character on a specific occasion except-

    a. Where the accused uses his character to prove his innocence.

    b. Where the accused attacks the character of the victim to prove his innocence.

2. Section 54 (methods of proving character)

Section 54 (1) except as provided in s. 83 to s.85), relating to the credibility of a witness and in subsection (2) of this section, in all circumstances in which evidence of the character or trait of the character of a person is admissible, such evidence may only be in the form of an opinion or evidence of reputation.

54(2) evidence of the character or a trait of the character of a person may not be in the form of specific instances of the persons conduct except where the character or a trait of the character of such a person is an essential element of a charge or defence.

3. Section 83 (Character traits affecting credibility)

(1) Subject to subsection (2) of this section evidence of good character to support the credibility of a witness is not admissible unless evidence which impugns the good character of the witness has been admitted for the purpose of attacking his credibility.

(2) An accused in a criminal action may introduce evidence of good character to support his credibility; and unless he first introduces such evidence the prosecution may not attack his credibility by introducing evidence, including evidence of a previous conviction to impugn his good character.

(4) For the purpose of attacking or supporting the credibility of a witness evidence of the reputation of the witness is not admissible to prove facts of his character.

CASES

1. MAKIN V AG OF NSW

Intent (intent as opposed to mistake; accident etc. may be inferred from evidence on specific conduct similar to the fact in issue.

2. R V THOMPSON / R V SMITH

Due to the striking similarity of the act it is unlikely to be an accident. In R V SMITH the accused was charged with the murder of his wife by drowning her in a bath. The evidence showed that the accused made mutual wills with his wife for which he would be the sole beneficiary upon the death of his wife. The accused had gone through a similar marriage which resulted to a similar mode of death of the second wife.

3. R V STRAFFEN

An accused who was a lunatic escaped from prison, he was imprisoned for the murder of young girls. After the escape, a young girl was found murdered with no sexual interference, no struggle, no attempt was made to conceal the bodies. This was similar to the previous deaths. Clearly, who ever committed the previous murders committed the present one.

4. DPP V BOARDMAN

Accused the headmaster of a boarding school for was convicted of buggery and incitement to commit buggery with two boys. The headmaster committed acts of homosexual with the boys and the manner in which the acts were committed made the headmaster the passive partner. In the present case, his lordship found that there was striking similarity in the way in which the accused had propositioned the boys.

(c) What is the duty of such an expert when he/she testifies or to his opinion? (2 marks)

(d) Is the court bound to accept the expert's testimony?

(2 marks)

(e) In case of conflict between two experts on the same issue, how should the court refuse the issue? (3 marks)

Sections 67; 112-114 Evidence Act

Osei & Ors v The Republic [1976] 2 GLR 383

R.v Silverlock (1894) 2 QB 766

QUESTION THREE MARKING SCHEME

What is relevance?
- S.51 (1) Evidence Act, DPP v Kilbourne [1973] - Evidence which is logically probative or disprobative of some matter which requires proof. [2 marks]
What is the distinction between relevance and admissibility?
Evidence receivable for the purpose of determining the existence or non-existence of facts in issue is called admissible evidence.
[2 marks]

What is required to be proved or disproved?
- Unlawful carnal knowledge without the consent of the victim s. 98 Criminal Offences Act 1960 [3 marks]

(a) Relevant to the issue of consent. R v Holmes [1871]. If victim denies earlier sexual intercourse with accused ins can be rebutted. If they had consensual intercourse on a previous

occasion it is thought that this time around it is consensual. R v Riley (1887) [4 marks]

(b) Relevant to the issue of consent. R v Bashir &Manzur (1969) If victim denies it, evidence could not be adduced of her prostitution. However, in R v Krausz (1973) it was suggested that evidence could be adduced of indiscriminate promiscuity. [4 marks]

(c) Irrelevant - shows bad character only S. 53 Evidence Act unless it falls under any of the exceptions under that section. [3 marks]

(d) Irrelevant - accused exercising his constitutional right to remain silent. [2 marks]

(e) Irrelevant - accused exercising his constitutional right not to testify at his trial. [2 marks]

(f) Circumstantial evidence. On its own may not be relevant but when coupled with other facts may give motive for the rape, namely, he was aroused by what he has seen in those magazines (R v Phillips (2003)) In others words, to show propensity to commit a particular offence charged, in contradistinction to commit crimes in general of the type charged is relevant (DPP v Kilbourne (1973)). [3 marks]

Total Marks 25

QUESTION FOUR

Assess the accuracy or otherwise of the following summing up with regard to the burden and standard of proof.

(a) *"The accused had alleged that he was insane at the time he committed the assault on the complainant. It is for the prosecution to satisfy me so that I feel sure that the accused was not insane at the relevant time."*

(b) *"The accused claims he punched the complainant in order to defend himself. Since the prosecution has not demonstrated his*

story to be false beyond reasonable doubt, I hereby acquit and discharge him."

(c) "It is the duty of the prosecution to prove the guilt of the accused to a high degree of probability. Anything short of this will not do. However, if there is any doubt in the case of the prosecution, I have a discretion to convict the accused."

QUESTION FOUR MARKING SCHEME

Question seeks to test knowledge of burden and standard of proof in the circumstances provided. Distinction between the legal burden and the evidential burden as well as the different standard of proof. [5 marks] S. 10, 11

(a) In general by virtue of ss. 11 (1) and 15 (1) of Evidence Act the prosecution has to prove the guilt of the accused. Coupled with Art. 19 (2) of the 1992 constitution the burden of persuasion and the burden of producing evidence lie on the prosecution. However, in terms of s. 15 (3) Evidence Act, where insanity is pleaded the burden of proving it lies on the accused. The standard of proof is on the preponderance of probabilities. Asare v The Republic [1978] and Dabla v The State [1963] and Dogo Dagarti v The State [1964]. Consequently, the statement does not reflect the true state of the law. [6 marks]

(b) He who asserts must prove. This is emphasised by ss. 11 and 17 Evidence Act – Faibi v State Hotels Corporation [1968] and Total Ghana Ltd v Thompson [2011]. It therefore the duty of the accused to lead evidence to show that he acted in self-defence – R v Lobell [1957]. The prosecution may then rebut the evidence produced. [6 marks]

(c) The use of other phraseology to describe the criminal standard which the prosecution must attain may lead to misdirection in law. Sections 11(2), 13(1) and 22 of the Evidence Act must be discussed. There is no consistent definition of "proof beyond doubt" but the phraseology used in the question was approved in R v Summer [1952] Other cases that may be discussed include Woolmington v DPP [1935] and Miller

v Minister of Pensions [1947] and Oteng v The State [1966] [8 marks]
Total marks 25

QUESTION FIVE MARKING SCHEME

Question tests candidate's knowledge of conditions for admission of a confession in a criminal trial.
Distinguish between admission and confession ss. 119 & 120 Evidence Act. [8 marks]

State the conditions for admissibility under s. 120 of Evidence Act 323 and discuss cases such as Duah v The Republic [1987-88]; Republic v Animah [1989-90]; Art. 14 (2) 1992 Constitution [10 marks]

Did the making of the statement in the circumstances of the facts constitute a 'confession'? [6 marks]

1 mark for clarity of expression, orderly presentation etc.

Total mark 25

QUESTION SIX MARKING SCHEME

The area of law is the use of previous conviction to affect or attack credibility of an accused - Two (2) marks

The main issue to resolve is whether or not the Prosecutor can use the previous conviction of the accused to discredit him when the accused is under cross examination. - Two (2) marks

Student shall discuss the circumstances under which the accused person's previous conviction may be used against him. A party may

Previous convictions S. 300 – Act 30

lead evidence by the examination of the accused or by a judgement that the accused has a previous conviction of a crime involving dishonesty or false statement. No evidence of whatever kind of previous conviction of an accused during trial is admissible except conviction of crime involving dishonesty or false statement. Five (5) marks

Student shall further state that conviction of crime involving dishonesty or false statement cannot be used to discredit an accused person after ten years has lapsed from the date of conviction or the termination of the sentence imposed on the accused, whichever last occurs for that conviction. - Four (4) marks

Student shall discuss the effect of pendency of appeal and state that the pendency of an appeal against conviction does not prevent a person from leading evidence with respect to conviction of crime involving dishonesty or false statement - Two (2) marks

Where the evidence of conviction is led and there is an appeal pending against the conviction, the pendency of the appeal shall be led. - One (1) mark

Proof of previous conviction shall be proved in accordance with section 117 of Act 29 ? Two (2) marks.

Student shall discuss the purpose of the use of previous conviction of an accused person after conviction which is to enable the court to impose appropriate sentence in accordance with section 300 of Act 30 - Two (2) marks.

Student shall conclude that apart from conviction for a crime of dishonesty or false statement within ten years from the date of conviction or the termination of the sentence imposed on the accused, which ever last occurs for that conviction, the prosecutor

is obliged to state the offence for which the accused has the previous conviction to enable the court to decide whether it is admissible or not. - two (2) marks

Citation of statutes and cases. The statutes include section 85 of the Evidence Act and section 100 of the Criminal and Other Offences (Procedure) Act, Act 30 - two (2) marks

Clarity of expression - One (1) mark

Total marks 25

LAW OF EVIDENCE 2018 (POST CALL) MARKING SCHEME

QUESTION ONE MARKING SCHEME

1. Candidates should be able to identify the main thrust of the dispute by pointing out that the areas of law are judicial notice and presumptions. That should attract 4 marks. (1) (2)

2. Candidates should be able to identify the main issues raised in the case which are:

   i. Whether or not the judge was right in taking judicial notice of the marriage age of women in Ghana

   ii. Whether or not presumption of marriage will arise from the mere fact of persons co-habiting for a long period

   (4 marks)

3. Laws Applicable

   1. NRCD 323, 9(1)
   2. NRCD 323, s 31

   (4 marks)

4. Analyses

Candidates should be able to state the principles on rebuttable presumptions and judicial notice applicable to the facts of the case. Marks are to be awarded for cases or principles which are relevant to the facts of the case.

In particular, candidates should be able to point out that the applicable law on the question relating to marriage is s 31 of NRCD 323 and the applicable law on judicial notice is s 9 (1) of NRCD 323.They should state that judicial notice is one of the topics in the law of evidence in respect of which no proof is required before the court will admit them in evidence. Candidates should state the principles applicable before the court can take judicial notice. In particular, they should argue whether or not a judge is permitted to rely on his own knowledge of facts even if no evidence is led on them. Candidates should argue the controversy on

whether or not rebuttable presumption can be raised from the fact that couple stay together for a long time without having to go through any ceremony of marriage or perform marriage rites. Candidate should articulate their own views on common law marriage or marriage by presumption. Answers which make use of decided cases in addition to these statutory authorities should attract more marks.

Candidates should apply the provisions in s 31 and s 9(1) as well as decided cases found in their own researches to resolve separately the two issues raised by the laws on presumptions and judicial notice (13 marks)

5. Total Marks - 25

[illegible]

Rubric:

[illegible] admissibility of Alhaji Quaye as an expert witness.

Reflection of the opinion of Alhaji Quaye vs to the authorities on [illegible]

(c) Relying on the conflicting evidence of the cause of death. (5 marks)

General rule: Opinion evidence is generally inadmissible except that of an expert

(a) Who is an expert: (2 marks)

(b) Who determines whether the witness being called is an expert: (2 marks)

(c) What is the duty of such an expert when he/she testifies as to his opinion? (3 marks)

(d) Is the court bound to accept the expert's testimony: (2 marks)

(e) In case of conflict between two experts on the same issue, how should the court resolve the issue? (3 marks)

[illegible]

[illegible]

[illegible]

QUESTION THREE MARKING SCHEME

What is relevance? – S.51 (1) Evidence Act, DPP v Kilbourne [1973] - Evidence which is logically probative or disprobative of some matter which requires to be proved. [2marks] (for determination)
What is the distinction between relevance and admissibility? Evidence receivable for the purpose of determining the existence or non-existence of facts in issue is called admissible evidence, [2marks]

What is required to be proved or disproved? - Unlawful carnal knowledge without the consent of the victim s. 98 Criminal Offences Act 1960 [3 marks]

(a) Relevant to the issue of consent. R v Holmes (1871). If victim denies earlier sexual intercourse with accused this can be rebutted. If they had consensual intercourse on a previous occasion it is thought that this time around it is consensual. R v Riley (1887),[4 marks]

(b) Relevant to the issue of consent. R v Bashir &Manzur (1969). If victim denies it evidence could not be adduced of her prostitution. However, in R v Krausz (1973) it was suggested that evidence could be adduced of indiscriminate promiscuity. [4 marks]

(c) Irrelevant - shows bad character only S, 53 Evidence Act unless it falls under any of the exceptions under that section. [3 marks]

(d) Irrelevant - accused exercising his constitutional right to remain silent, [2 marks]

(e) Irrelevant - accused exercising his constitutional right not to testify at his trial. [2marks]

(f) Circumstantial evidence. On its own may not be relevant but when coupled with other facts may give motive for the rape, namely, he was aroused by what he has seen in those magazines (R v Phillips (2003)) In others words, to show propensity to commit a particular offence charged, in contradistinction to commit crimes in general of the type charged is relevant (DPP v Kilbourne (1973)). [3 marks]

Total Marks [25 marks]

ESTION FOUR (4) MARKING SCHEME

The question is designed to test the knowledge of the parole evidence rule as stated at common law and under s. 177 of the Evidence Act.

Statement of the rule at common law [5 marks]

Discussions of the rule under the Evidence Act and its exceptions with case law such as Mouganie v Yemoh [1977] 1 GLR 163; Wilson v Brobbey [1974] 1 GLR 250; Duah v Yorkwa [1993-94] GLR 217; Peters v Peters [1963] 2 GLR 182; re Koranteng (Decd) [2005-06] SCGLR; Goss v Nugent (1833); Brown v Byrne (1854) [20 marks]

Total marks 25

QUESTION FIVE

The area of law is a will made by an illiterate without a jurat. - (Two (2) marks)

The general principle of law is that illiterates and semi illiterates are treated the same when it comes to the determination of the legal effect of a Will made by them without jurat. -(Three (3) marks)

The main issue to resolve is the legal effect of the Will made by Uncle Barton who was an illiterate without jurat.-(Three (3) marks)

Discussion on the legal effect of a Will made by either illiterate or semi illiterate.

As stated earlier illiterates and semi-illiterates are considered as illiterates when it comes to the meaning to assign to a document prepared by them. The general principle of law is that when it comes to documents prepared by an illiterate, extrinsic evidence is normally admitted to prove the intention of the parties. See the cases of Addai v Eyiah [1972] 2GLR 358 and Manu v Emeruwa [1971] 1GLR 442.-(Three (3) marks)

There are two conflicting positions in the law that (1) a document made by an illiterate without jurat is void while the second proposition is of the opinion that it is not void but that evidence may be adduced to prove whether the illiterate understood the document. In such cases as Kwamin v Kuffuor (1914) Ren 808; Waya v Byrouthy (1958)3WALR 413, Fori v Ayirebi [1966] GLR 627 and In re Kodie Stool, Adowaa v Osei [1999-99] SCGLR 23, it was held that any document prepared for an illiterate without jurat is void. - (Four (4) marks)

The recent decisions are that a document prepared for an illiterate without jurat is not void but shall be treated as a presumption which must be proved by the person

Illiterates Protection Ordinance, Cap 262 (1957)

Order 66 rule 19 of the High Court (Civil Procedure) Rules. C.I 47 provides that a will made by an illiterate shall not be declared void and probate may be granted where it is proved to the satisfaction of the court that that it appears from the face of the will that it was read over to the testator before its execution or the deceased had at that time knowledge of its content.The court admits extraneous evidence to satisfy itself that the deceased knew of the contents of the Will at the time it was executed. See also the case of In re Mensah (dec'd) Barnie v Mensah. -(Three (3) marks)

Clarity of expression -(Two (2) marks)

QUESTION SIX

(a) The evidence is admissible and relevant. The parties are not a married couple and "X" can rape "Y"? The fact that the parties used to be a married couple is not relevant to the offence charged- (Four (4) marks)

(b)"Y" a prostitute can be raped by "Y" once it is proved that "Y" had sexual intercourse with her without her consent. A prostitute can be raped where she fails to give consent to a male- (Four (4) marks)

(c) The fact that "X" has a previous conviction of indecent assault on a male person has no bearing with the rape case which is being tried. That issue may come up after "X" has been convicted of rape. It is only considered for sentencing purposes and not within the trial. It is not admissible under section 85 of the Evidence Act as conviction of indecent assault is not one of the previous convictions used to attack credibility -(Four (4) marks)

(d) "X" is not under any obligation to respond to a question posed to him by the police without telling him the basis of his arrest, the language he understands and a right to a lawyer of his choice. See clause (2) of article 14 and paragraph (d), clause (2) of article 19 of the Constitution, 1992. -(Four (4) marks)

(e) "X" has a right not to give evidence at the trial. An accused person is

presumed to be innocent until convicted or proved guilty and "X" may decide not to give evidence in person but may call witnesses to testify. Section 174(2) of Act 30 does not require every accused person to give evidence. The accused may state that he does not desire to be heard in person and may decide to call witnesses or otherwise.-(Four (4) marks)

(f) The "Ghana Must Go" carrier bag and the nude pictures found in them are not admissible as they are not relevant to the charge of rape preferred against "X" and its admission shall create unfair prejudice. See section 52 of the Evidence Act.-(Four (4) marks)

MARKING SCHEME FOR QUESTION ONE

AREA OF LAW: Admissibility, with special reference to illegally obtained evidence. (2 marks)

ISSUES

1. Whether or not the sacks of cocaine were illegally obtained (2 marks)
2. Whether or not the evidence of the cocaine is admissible (2 marks)
3. Whether or not the tape recording was illegally obtained (2 marks)
4. Whether or not the tape recorded evidence is admissible (2 marks)

AUTHORITIES (4 marks)

1. 1992 Constitution, art 18(2)
2. NRCD 323, SS 51,52,
3. Kuruma v The Republic
4. Jeffrey v Black
5. R v Leatham,
6. DPP v Kilbourne
7. Tuffour v Attorney –General
8. Amaning alias Tagor v The Republic
9. R v Khan
10. R v Apicela

ANALYSES (8 MARKS)

More marks will be awarded to students who apply the principles t the facts to resolve issues raised in the case

CONCLUSION (2 Marks)

2. MARKING SCHEME FOR QUESTION TWO

Eight marks for each answer

EXAMINER TO DECIDE BASED ON THE MERITS

MARKING SCHEME FOR QUESTION THREE

3. AREA OF LAW: PRIVILEGES WITH SPECIFIC REFERENCE TO LAWYER-CLIENT AND RELIGIOUS PRIVILEGE. (2 marks)

Issues: 1. Whether or not the friend qualifies as a lawyer to be able to give professional advice

2. Whether or not the statement of the lawyer can be considered as professional legal advice capable of giving rise to privileged communication

3. Whether or not the Pastor qualifies under NRCD 323 as priest to be capable of giving professional religious advice that can give rise to religious privilege

4. Whether or not the statement of the Pastor can be ruled by the court as privileged so as to prevent its disclosure in court.

(Two marks for each)

AUTHORITIES: (6 marks)

NRCD 323, s 87, 88, 100 (1) (b), 101 (1) (d), 104

Derby v Magistrates Court, Ex parte B

Akuo Addo v Quarshie Idun

Republic v High Court (Fast Track Division), Accra; Ex parte Operation Association & Ors

The Legal Profession Act, 9Act 32)

ANALYSES

Candidates should be able to identify who an expert is, whether the lawyer qualifies as professional enough to be able to give professional legal advice.

Candidates should be able to identify who qualifies to give religious advice under NRCD 323.

Candidates should be able to apply the principles discussed by them to resolve the issues raised on the facts. (8 marks)

4. MARKING SCHEME ON QUESTION FOUR

AREA OF LAW: TRADITIONAL EVIDENCE (2 marks)

ISSUES: 1. What constitute traditional evidence

2. What are the various factors taken into account in evaluating the traditional evidence?

2. Whether or not the judge was right in the way he handled evidence of traditional evidence.

3. Whether or not the conclusion f the judge can be defended in the light of the principles applicable to resolve conflicting traditional evidence

4. Whether or not the judge could rely on his belief or disbelief of the parties to determine the case as he seemed to have done on the facts.

(2 marks each)

AUTHORITIES

Rickette v Addo (Consolidated)

Adjeibi-Kojo v Bonsie

Ebu v Ababio

Hilodgie v George

In re Taahyen & Asaago Stools; Kumanin II v Anin

Kwasi Yaw v Kwasi Atta

Adjubeng v Domfeh

In re Krobo Stool

Adjei v Acquah

Ago Sai v Kpobi Tsuru III

In re Kodie Stool

In re Adjancote Acquisition: Klu v Agyemang II

NRCD 323, SS 48, 128 and 129.

(5 marks for candidates who can raise more than six case and support them with statutes.)

ANALYSES

Candidates should be able to identify the fact that traditional evidence is hearsay evidence, but is subject to the exceptions provided in NRCD 323, particularly sections 128 and 129.

Candidates should be able to use most of the above cases to resolve the issues raised in the case.

Candidates should be able to draw conclusion from their discussion of the principles and apply them to the facts of the case.

(8 marks)

GHANA SCHOOL OF LAW - EVIDENCE

QUESTION ONE

Consider the following rulings of Wiseman J in the *Republic* v *Ghanaman* and assess whether his rulings on the evidence are supportable in law.

"I now turn to the handwriting evidence which forms exhibits PP1 and PP2. The prosecution called no evidence from any hand writing expert in order to prove that the accused is the author of exhibit PP1. The defence on the other hand, called Mr. Ocansey, who is a Bank Manger at Oasis Bank, but who has studied handwriting as a hobby for the last 10years. He was objected to by the Prosecution but I allowed him to testify. However, his evidence to the effect that in his opinion exhibit PP1 was not written by the accused is rejected by me as I find no rational basis for such a conclusion. Furthermore the testimony of the expert for the prosecution, Dr. Sowuto. as to the cause of death conflicted with the expert for the defence, Dr. Amos. Of the two testimonies, I prefer that of the defence and reject that of the prosecution..."

QUESTION TWO

In *Kwabena v Akosa*, the plaintiff seeks to tender the following documents at the trial. Discuss the admissibility or otherwise of the documents in (a) and (b) and assess the consequences of failure by the defendant to comply with the notice in (c)

(a) A letter written by the defendant's lawyer and headed "Without Prejudice" in which the defendant offered GHC 50, 000 as settlement of the suit. The plaintiff had rejected this offer.

(b) A letter written by the defendant, a Chief Director of the Ministry of Information, to his Minister in which the defendant alleged that the plaintiff had misappropriated GHC100,000 of Government funds and suggesting that criminal proceedings be brought against him. The State has indicated that it will object to the production of the letter on the ground that its disclosure will be inimical to the proper functioning of the Public Service.

(c) The allegation contained in the letter in (b) above was passed on to the Commission on Human Rights and Administrative Justice (CHRAJ), which after investigation found no substance in the allegation. The plaintiff has served notice to the defendant to reveal the identity of the person who made the allegation to the Chief Director.

MARKING GUIDE

QUESTION ONE

Rulings:

(a) Admissibility of Mr. Ocansey as an 'expert' witness.
(b) Rejection of the opinion of Mr. Ocansey as to the authorship of the 'writing'.
(c) Ruling on the conflicting evidence of the cause of death.

General Rule: Opinion evidence is generally inadmissible except that of an expert.

(a) Who is an expert?
(b) Who determines whether the witness being called is an expert?
(c) What is the duty of such an expert when he/she testifies as to his opinion?
(d) Is the court bound to accept the expert's testimony?
(e) In case of conflict between two experts on the same issue, how should the court refuse the issue?

Sections 67; 112-114 Evidence Act
Osei & Ors. v The Republic [1976] 2 GLR 383
R.v Silverlock (1894) 2 QB 766

QUESTION TWO

(a) What constitutes "Without prejudice" communication?
(b) What is the pre-condition for claiming the privilege? Existence of a dispute.

Sections 105; 106; 107 Evidence Act; Art. 135 1992 Constitution

Baiden v Solomon [1963] 1 GLR 488
Ahumah v Akorli [1975] 1 GLR 415.
MOH v Pfizer Products [1968] GLR 138
Marks v Beyfus (1890) 25 QBD 494.
Conway v Rimmer [1968] AC 910.

EVIDENCE MOCK EXAM 2019

MARKING SCHEME QUESTION 1

Admissibility of evidence, admissibility of out of court declaration as part of the res gestae as an exception to the hearsay rule stated in section 117 (1 mark

1. The question requires candidates to evaluate the ruling delivered and to state whether it accords with the principles on which hearsay statements are admitted as part of the res gestae.

2. Candidates are expected to define hearsay statements and briefly state the rule excluding hearsay statements (2 MARKS)

3. candidates are to identify res gestae as one of the statutory exceptions to the rule, as provided by section 124 of the Evidence Act (2 MARKS)

4. Candidates are expected to define the rule on admissibility of statements as part of the res gestae as a statement by a person about an event in issue, made in such circumstances of spontaneity or contemporaneous involvement in the event that the possibility of concoction or error can be disregarded, is admissible as evidence of the facts stated (4 MARKS)

Candidates are to discuss the two situations created by section 124 of the Evidence Act under which the rule applies.

5. Candidates are to discuss the fact that the issue of contemporaneity has been an issue in this area of law. Candidates are to demonstrate knowledge of the old authorities which insisted on strict contemporaneity such as R v Beddingfield, R v Teper.

6. Candidates are to discuss the fact that Duah was decided on the basis of the principles established in Beddingfield and approved off in Teper. Candidates may also discuss Woledzi V Akkufu Addo. (4 MARKS)

7. Candidates are to demonstrate evidence of having read Ratten v R and to show knowledge of the fact that Beddingfield was overruled in Ratten and

the statement made by the wife some minutes before she was shot was admitted as part of the res gestae. Candidates are to state the ratio in Ratten that the test of admissibility should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish; such external matters as to the time which elapses between the events and the speaking of the words (or vice versa) and differences in location being relevant factors but not, taken by themselves, decisive criteria. (4 MARKS)

8. Candidates in evaluating the ruling are to demonstrate evidence of having read R v Andrew and R V Turnbull which holds that
In order for the statement to be sufficiently *"Spontaneous"* it must be so closely associated with the event which has excited the statement that it can fairly be stated that the mind of the declarant was still dominated by the event. Thus the Judge must be satisfied that the event which provided the trigger mechanism for the statement was still operative (4 MARKS)

Candidates who discuss the five point test in R V Andrews are to be awarded extra marks (2 MARKS)

9. Candidates are cite and discuss GPHA, CAPTAIN ZAIM vs. NOVA COMPLEX where a statement made one day after the event was admitted as being part of the res gestae because the maker was still under the stress caused by the event.

10. The part of the ruling that the difference in time and place per se makes the statement inadmissible is not an accurate reflection of the law, the determinate factor being whether the maker of the statement was under the influence of the stress caused by the event at the time the statement was made. (2 MARKS)

MARKING SCHEME QUESTION 2A

AREA OF LAW: Circumstantial evidence as means of proof (1 mark)

The learned trial Judge in his ruling makes the following statements of the law; that direct evidence is better than circumstantial evidence, that a case cannot be established using circumstantial evidence alone, that in a murder trial, the prosecution could not make out a case relying solely on circumstantial evidence, especially if the body of the deceased is not found.

1. Candidates are to define circumstantial evidence, contrasting it with direct evidence. Candidates who cite cases like Kwaku Frimpong alias Ibo man to illustrate the definition are to be awarded extra marks. (3 MARKS)

2. Candidates are to indicate that as a means of proof circumstantial evidence is as potent and weighty as direct evidence. Candidates who cite cases such as R v Taylor, weaver and Donovan, Dexter Johnson, Kamil v Rep and Kwaku Frimpong V rep are to be awarded extra marks. (3 MARKS)

3. Candidates are to discuss the fact that owing to the potential dangers associated with the reception and use of circumstantial evidence as a means of proof, certain safeguards have been developed through case law to regulate its reception and use.
   (a) A multitude of suspicions put together does not constitute proof.
   State v Otchere, State v Ali Kassena.
   (b) Circumstantial evidence must be examined with care
   Nyame v The Rep, R v Danso.
   (c) The circumstantial evidence must lead to the irresistible conclusion that the person charged is guilty of the crime charged, in other words it must be inconsistent with the innocence of the accused.
   State v Brobbey and Nipa,State v Anani Fiadzo, Collins alias Derby V Rep.
   (d) A high standard of proof is required when circumstantial evidence is used.(8 MARKS)

4. Candidates are to refer to and discuss the cases in which circumstantial evidence has been received to establish the case of the prosecution in murder trials where the cause of death could not be proved or the body of the deceased was not found in reference to the portion of the ruling that suggested this could not be done. (4 MARKS) Bosso v The Rep, R v

Candidates are to use the law as stated above to criticize the statements made by the learned trial Judge, pointing out the wrong statements of the law, supported by arguments referring to the correct position of the law in each situation (6 MARKS)

MARKING SCHEME QUESTION 3

AREA OF LAW: Estoppel per rem judicatam (1 mark)

1. Candidates are to define estoppel briefly , and then to define estoppel per rem judicatam bring out the essential elements as that where a court of competent jurisdiction has adjudicated on a subject matter, the same matter cannot be subsequently be relitigated by the parties or their privies as long as the judgement subsists. (4 marks)

2. Candidates are also expected to discuss the fact that the plea also covers claims, defences or issues which should have been litigated in previous proceedings but owing to negligence, inadvertence or even accident, they were not brought before the court. (4 marks)

3. Candidates are to identify the two species of estoppel per rem judicatam, that is cause of action estoppel or issue estoppel and set out the elements of each one. (4 marks)

4. Candidates are to set out the conditions precedent for the application of the plea as follows:
(a) A judgment that has been delivered establishing the identity of the parties, the date, the issues and the relevance of the judgment to the issue in question
(b) That the judgment was passed by a court of competent jurisdiction
(c) That the judgment was final in that it determined the disputed rights of the parties
(d) The judgment was decided on the merits of the case
(e) The judgment was obtained without fraud (5 marks)

candidates are to identify the fact that the relief sought in the second suit was one which ought to have been dealt with in the previous suit. Candidates are to refer to the case law establishing the principle that parties are not allowed to litigate piecemeal. (4 marks)

Advice to the defendant

There is a subsisting judgment between the parties given by a court of competent jurisdiction. The reliefs sought in the present suit are such that they ought to have been claimed in the previous suit. The plea of estoppel per rem judicatam must be pleaded as a defence to the action. (3 marks)

Case law

Candidates who cite relevant case law and demonstrate how they are relevant to the question are to be awarded extra marks (4 marks)

Conca engineering v Moses (1984-86) 2GLR 319 Holding 1

In re Asere Stool (2005-2006) SCGLR 637 Holding 3

In re Sekyedumase Stool Affairs; Nyame v Kesse alias Konto (1998-99) SCGLR 476. Holding 1

Dahabieh v S.A. Turqui & Brothers (2001-2002) SCGLR 498

In re Kwabeng Stool Karikari v Ababio (2001-2002) SCGLR 15

Henderson v Henderson (1843) Hare 100

Barrow v Bankside Agency Ltd (1966) 1WLR 257

Sasu v Amua Sekyi (2003-2004) SCGLR 742

MARKING SCHEME QUESTION 4B

Area of Law; Expert Opinion Evidence; Burden of persuasion (1mark)

The ruling raises two main issues for discussion

1. Whether the opinion of an expert witness is binding on the trier of fact (1mark).
2. The burden of persuasion when proof of a crime is directly in issue (1mark)

Candidates are expected to state the law that a judge need not accept the opinion offered by an expert; the judge is only to be assisted by such evidence to come to a conclusion of his own after examining the whole of the evidence before him.

Case law to be cited

Fenuku v John Teye (2001 – 2002) SCGLR 985

Sasu v White Cross Insurance Co. ltd (1960) GLR 4

Darbah v Ampah (1989-90) 1GR 598

In re Agyekum (Deceased) (2005-2006) SCGLR 851 (6marks)

Candidates who indicate that a judge has a duty to give good reasons why the expert evidence is rejected must be given extra marks and that the trial judge failed to appreciate this must be awarded extra marks. (3marks)

Tetteh v Hayford (2012) SCGLR 423

ON THE ISSUE OF THE BURDEN OF PERSUASION WHEN PROOF OF A CRIME IS DIRECTLY IN ISSUE

Candidates are to identify that generally in a civil trial, the burden of persuasion is on the preponderance of the probabilities (Section 12 of the Evidence) (2 marks)

Candidates are to identify that inspite of this, where a criminal act is the issue in a civil trial, the burden of persuasion requires proof beyond reasonable doubt citing Section 13 (1) of the Evidence Act and case law such as Fenuku v John Teye (2001-2002) SCGLR 985 and Sasu Bamfo v Sintim (2012) 1SCGLR 136

The judge therefore was wrong on the submission that the applicable burden of persuasion was on the preponderance of the probabilities. (7 marks)

4marks for General assessment

It was held in *In re Bremansu* that where the testator cannot read English, he will be considered to be illiterate. The facts show that Elder Coffie cannot write in English but he can speak some English. A will is a technical document usually written in English language. If all that the testator can do is to speak in English but cannot read or write in English, then he is illiterate.

In Zabrama v Segbedzi, Kpegah JSC stated what is relevant is the testator's ability to read and write the language in which the will was executed. Applying that principle will raise complex issues in the instant case, especially if the will by chance were to have been written in the Twi language. Candidates can proceed on the assumption that it was not written in the Twi language because if that were so it would have been stated on the facts. The better view was as expressed in *In re Bremansu* case. (4 MARKS)

- If the testator is illiterate, the law is that he is not bound by the document he signed as a will unless certain conditions are satisfied:*Kwamin v Kuffour*. The person attempting to bind the illiterate Elder Coffie with the will have the onus to establish that it was read and interpreted to him and he understood same before he signed or thumb printed it. There are several authorities in support of this principle including *Waya Byrouthy, Zabrama v Segbedzi,and BP (West Africa) Ltd v Boateng*
- The same principle is stated thus: The onus of proving that the testator appreciated the meaning and effect of the will is on the party relying on the will. On the facts in issue, the onus was on the nephew, Ace Kwamina Duncan, to show that the will was interpreted and explained to the Elder and he fully understood same before he signed it or made his mark on it: *Amankwanor v Asare* *(3 MARKS)*

- In effect, Candidates should argue that there should be a proper jurat on the face of the will before it will be binding on the illiterate testator. This is a requirement in the Illiterate Protection Ordinance, Cap 262, s. 4(3) which was applied in *In re Kodie Stool: Adowah v Osei*,

This principle has also been applied in several cases including the emphasis on the principle by Sophia Akuffo JSC *In In re Kodie stool; Adowaa v. Osei* as well as the definition of an illiterate in *Zabrama v Segbedzi* In the former case the Supreme Court set out the following as the requirements to be satisfied in proving a document executed by illiterates: 1. The writing must have been authorized by the illiterate. This implies that the testator Elder Coffie must have authorized someone to make the will for him. 2. Secondly the contents of the will must have been read by the writer to Elder Coffie: 3. Thirdly, Elder Cofie as an illiterate must have appreciated the contents of the will: 4.Fourthly, Elder Cofie must have signed or thumb printed or made his mark on the will to indicate that he actually executed it.: 5. The person who explained the will to the Elder must write on the will his name and address and state on the will that he explained the will to Elder Coffie and he appeared to have understood what was explained to him in respect of the contents of the will. The summary of these principles in *the In re Kodie case* has been accepted as the correct method for proving the execution of a document like a will by an illiterate like Elder Coffie. The onus is on Ace Kwamena Duncan to lead evidence to establish all these requirement. If these requirements are not satisfied, it will follow that the will was not properly proved and in that case the contention of Araba Lucy may be upheld by the court
(6. MARKS)

2. The distribution of the property of Elder Coffie is dependent on whether or not the will itself is valid. The attack on the validity of the will is based on the jurat. Once the issue of the jurat has been decided upon, the candidate does not need to consider other points that may touch on the validity of the will like signatures, etc since they are really not the bases of the objection of caveatrix and are therefore not in issue on the facts.

- CONCLUSION:
On the facts, there is no doubt that Elder Coffie was illiterate. Since

the claim for the properties was based on a will to which the illiterate testator must have appended his signature or made his mark, if there was evidence of jurat on the face of the will, it will follow that the will was interpreted and explained to him before he made his mark or signed his signature. That will be sufficient to prove the validity of the will even though executed by an illiterate (4 MARKS)

TOTAL MARKS: 23 PLUS 2 FOR PRESENTATION MAKING A 25 IN
ALL

MARKING SCHEME FOR QUESTION 2 B for 2019 mock exam

ELDER COFFIE'S CASE

1. Area of law

   Documentary Evidence with Special reference to illiteracy and proof of documents executed by an Illiterate. (2 MARKS)

2. Issues:-

   I. Whether or not Elder Coffie is an Illiterate

   II. Whether or not as illiterate Elder Coffie is bound by the document (the will)

   III. Proof of document executed by illiterate (2 MARKS)

3. Applicable laws

   - Illiterate Protection Act (Cap 262), s. 4(3)
   - In re Kodie Stool: Adowah v Osei
   - Kwamin v. Kufuor
   - Zabrama v. Segbedzi
   - Brown v. Ansah
   - BP (West Africa)Ltd v. Boateng
   - Waya v. Byrouthy
   - In re Bremansu
   - Amankwanor v Asare (2 MARKS)

4. Analysis

   - Candidates should begin the answer by pointing out that the facts raise issues of documents executed by illiterates and proof of their binding effects.
   - The document is a will and so it can be presumed to have been signed or thumb printed by the testator, Elder Coffie
   - The basic question is whether or not Elder Coffie is illiterate as alleged by the caveatrix.

It was held in *In re Bremansu* that where the testator cannot read English, he will be considered to be illiterate. The facts show that Elder Coffie cannot write in English but he can speak some English. A will is a technical document usually written in English language. If all that the testator can do is to speak in English but cannot read or write in English, then he is illiterate.

In Zabrama v Segbedzi, Kpegah JSC stated what is relevant is the testator's ability to read and write the language in which the will was executed. Applying that principle will raise complex issues in the instant case, especially if the will by chance were to have been written in the Twi language. Candidates can proceed on the assumption that it was not written in the Twi language because if that were so it would have been stated on the facts. The better view was as expressed in *In re Bremansu* case. (4 MARKS)

- If the testator is illiterate, the law is that he is not bound by the document he signed as a will unless certain conditions are satisfied:*Kwamin v Kuffour*. The person attempting to bind the illiterate Elder Coffie with the will have the onus to establish that it was read and interpreted to him and he understood same before he signed or thumb printed it. There are several authorities in support of this principle including *Waya Byrouthy, Zabrama v Segbedzi,and BP (West Africa) Ltd v Boateng*
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(6. MARKS)

2. The distribution of the property of Elder Coffie is dependent on whether or not the will itself is valid. The attack on the validity of the will is based on the jurat. Once the issue of the jurat has been decided upon, the candidate does not need to consider other points that may touch on the validity of the will like signatures, etc since they are really not the bases of the objection of caveatrix and are therefore not in issue on the facts.

- CONCLUSION:

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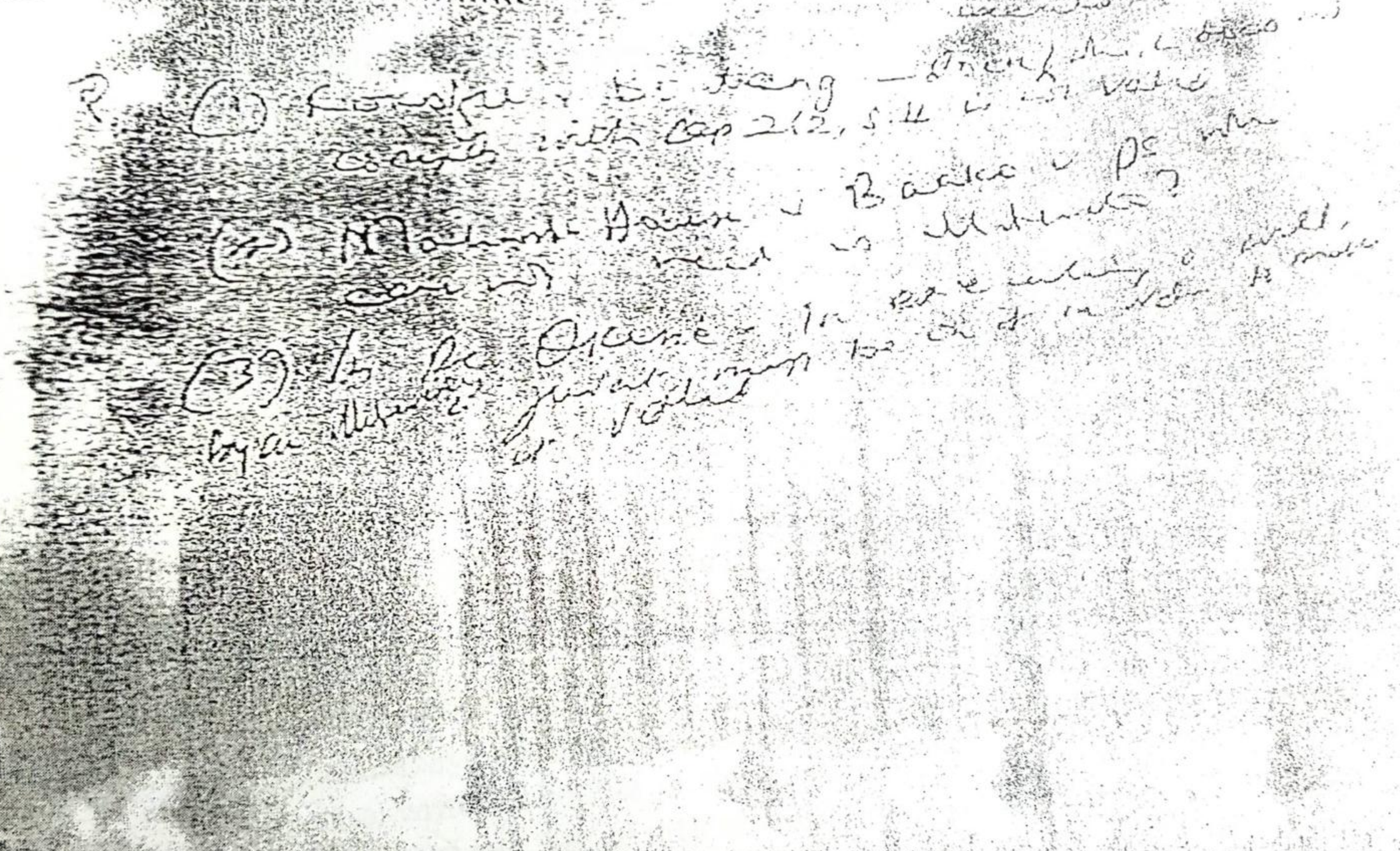
TOTAL MARKS: 23 PLUS 2 FOR PRESENTATION MAKING A 25 IN ALL



1) Statement must be made voluntarily

2) In the presence of an independent witness

3) The Independent Witness must be a person who:
   (a) can understand the language spoken by the accused
   (b) can read and understand the language in which the statement is made. and where the statement is in writing, the independent witness must certify in writing that the statement was made voluntarily in his presence and that the contents were fully understood by the accused.

4) Where the accused is blind or illiterate, the independent witness shall carefully read over and explain to him the contents of the statement before it is signed or marked by the accused, and shall certify in writing on the statement that he had so read over and explained its contents to the accused and that the accused appeared to perfectly understand it before it was signed or marked.

THE BOARD OF LEGAL EDUCATION

GHANA SCHOOL OF LAW

PROFESSIONAL LAW PART 1

LAW OF EVIDENCE

MOCK EXAMINATION

11TH APRIL 2017

TIME ALLOWED: TWO HOURS

INSTRUCTIONS TO CANDIDATES

1. Read the instructions carefully before beginning your answers
2. Answer five (5) Questions of which Two should be from Part One and three from Part Two.
3. Each question carries 20 marks.
4. Do not begin answers to Part One questions on the same sheet or at the back sheet of an answer to Part Two questions.
5. Write your name at the beginning of each answer.

PART ONE

QUESTION ONE

"Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract." Per Lord Morris in *Bank of Australasia v Palmer* [1897] AC 540 at 545.

Discuss the extent to which this common law rule is reflected in the Evidence Act 1975. Are there any exceptions to this rule?

Page 1

2018.

In Fox v Chief Constable of Guernsey Lord Fraser said "the duty of the Court is to decide whether the appellant as committed the offence with which he is charged and not to discipline the police for exceeding their powers"

Kuruma v R — "His conviction was upheld and the PC dismissed his appeal saying the Court was concerned with relevant evidence but not how the evidence was obtained".

R v Sang — "it was held that entrapment was not a defence and the Court had no discretion to exclude the evidence"

Jeffrey v Black — Where the accused was initially questioned by Constables when he was originally arrested for stealing and subsequently Police Officer had executed a Search Warrant searched his home and found the Cannabis. The trial magistrate excluded the evidence on the ground that it had been obtained as a result of an illegal search but the appellate Court per Widgery CJ held that the evidence should be admitted because an irregularity in obtaining evidence does not render it inadmissible and that whether or not it was admissible depended on its relevance to the issues in respect of which it is called.

⇒ However, s. 78 of Criminal and Evidence Act (PACE) has restored discretion to Judges to refuse to admit evidence improperly or illegally obtained. Thus, if the admission of the evidence would have an adverse effect on the fairness of the proceedings, the judge will exclude it.

Thus in England, the discretion is used on a case by case basis and test for admissibility is balancing the undermining of the Defendant's privacy with the public interest in the prosecution of crimininals. The nature of the offence tellingly has a bearing whether the evidence will be excluded e.g. — treason, subversion etc. CU then — drug smuggling.

QUESTION TWO

"It matters not how you get it, if you steal it even, it would be admissible." Per Crompton J., *R* v *Leatham* (1861) 8 Cox cc 498.

How far does this statement represent the attitude of Ghanaian courts to the admissibility of unfairly or illegally-obtained evidence?

QUESTION THREE

In *State* v *Obibini*, the accused is charged with murder. The State has available the following evidence:

(a) A blood stained knife which was found in the house of the accused. The blood on the knife matches the blood of the deceased.

(b) A statement by Obroni, a neighbor of the accused, that he saw the accused driving into his garage at about 10 pm looking frightened.

(c) A statement by the accused denying knowing the victim or being anywhere near the scene of the crime. The accused later retracted the statement.

(d) A statement by Mrs. Obibini that she was told by her husband that Molato stabbed the deceased.

Identify the types of evidence available and assess their relevance to the charge.

QUESTION FOUR

"Illiteracy is not a privilege but rather a misfortune..." per Kpegah JA in *Zabrama* v *Segbedzi* [1991] 2 GLR 221 at p. 237.

With the aid of statutory provisions and case law, discuss how the misfortune has been ameliorated where a document is being sought to be enforced against an illiterate.

1) In In Re Bremansu — an illiterate is a person who cannot read and write a particular language even if he can sign. Thus, an Ashanti man may be illiterate in Twi if he cannot read and write Twi.

2) Kwami v Kuffour — The presumption that a person intends the content of a document bearing his mark does not apply to illiterates. Illiterate Protection Ordinance 1912 (Cap 262)

PART TWO

QUESTION FIVE

The accused was charged with aiding and abetting the crime of illegal mining in the Krokro District. He pleaded not guilty. His defence was that he merely led the Chinese to see the chief when they first entered the town but did not encourage them to mine and did not take part in the mining. In his ruling at the end of the trial, George J stated that:

"I went to the mining site by myself and saw the devastation caused by the miners to the land and water in the area. Anyone connected with that type of mining should know that he is ruining the area. He does not need the police to tell him this. From my own investigations, I can take judicial notice of the fact that the accused persons are destroying the land and should be punished. I convict all of them for the offences preferred against them."

Comment on the judgment of the court.

QUESTION SIX

In a dispute between the plaintiff and the defendant over a parcel of land between their houses in the village of Pan, the plaintiff based his root of title on a grant from the chief of the village. The defendant who claimed that his people had been on the land from time immemorial traced his root of title from an ancient document which he said proved that the land was acquired many years ago from his family by the Government. The plaintiff and his grantor insisted that the Government did not pay compensation for the land and in any case one High Court judge had ruled that the land belonged to the chief. They tendered that judgment in support of plaintiff's case. They added that the ancestors of the defendant were strangers who were given pieces of land on which to settle after the Second World War. The defendant on the other hand averred that the Government paid compensation to his family for the acquisition in 2014 of the land on which the only Community High School in the area was situated. The tria

ge ruled that the judgment was obtained by fraud and considering the traditional evidence led by the two sides, he accepted the story of the defendant as more credible since his witnesses were more truthful and impressive than those of the plaintiff.

Do you agree with the judgment of the trial judge?

QQUESTION SEVEN

In an action for declaration of title to a caterpillar truck, the plaintiff based his case on a power of attorney which was signed by only one witness. The defendant objected to the capacity of the plaintiff to sue on the basis of that power of attorney. The defendant on the other hand counterclaimed for the truck on the basis of an agreement which the court held to have been procured by fraud. The trial magistrate found that his monetary jurisdiction was up to one hundred thousand Cedis but the value of the truck was one hundred and fifty thousand Cedis.

From the evidence before the court, what ruling would you give if you were the trial magistrate? Give reasons for your answer.

QUESTION EIGHT

For some time, there had been rumours circulating in the town that some people had embarked on stealing goats which they sold in the next village on market days. Following a complaint that the complainant's goat had been stolen, the police went to search the house of Kojo Omama whose chop bar specialized in the sale of goat meat. Seth, a driver's mate, was found with eight goats and could not account for how he came by them. He was charged with receiving the eight goats knowing very well that they had been stolen. He pleaded not guilty. In his defence, he stated that it was his master, Joe Blackie, the driver of their Sprinter Benz bus which belonged to Kojo Omama, who gave the goats to him for safe keeping. Joe Blackie was charged with stealing the goats. He too denied the charge against him. His defence was that he actually gave only two goats to his for safe keeping but not the eight found in his possession. The owner of the [illegible] because he too failed to

report the first and second accused to the police when he saw the goats in his bus in the evening while the bus was parked in his yard. The trial circuit court judge convicted all three of the offences preferred against them.

Comment on evidential issues arising from the facts.

QUESTION NINE

Job was a very successful business man who retainer lawyer was Chris. Job went to the chambers of Chris with nine gold bars which he said he picked from the back of the police station. Job added that the police had put them there with the view to collecting them in the night under cover of darkness but luck was on his side and that was why the Good Lord led him to where they were. He said he did not want to take them to his house because he did not want his wife to know that he had come by that fortune. Lawyer Chris called his Pastor, the General Overseer of the Holy Evangelical Ministry Int. He quickly responded and upon being shown the gold bars, proceeded to pray hard for Job and the success of his business. In the course f the prayers, Job fainted and Lawyer Chris called Dr. Cole whose clinic was in the ground floor of the building where the lawyer had his chambers. In the processor resuscitating Job, the Police pounded on all of four and arrested them. They were all charged with conspiracy to steal and stealing gold bars. The lawyer pleaded lawyer –client privilege. He put in the pleas of religious privilege and medical privilege for the Pastor and the Doctor.

Comment on the pleas of the accused person

A. MARKING SCHEME FOR QUESTION FIVE

1. The facts raise issues of judicial notice. Candidates are expected to raise the issue in the case the area of law as well as the main issue in the case which is judicial notice (5 marks)
2. Candidates should explain the circumstances when a judge can take judicial notice of facts. Candidates should refer to NRCD 323, s 9 and apply the provisions set out therein (4 points)
3. No answer will be complete without citing and applying Mensah v The Republic, Republic v High court ; Accra; Ex parte Concord Media Ltd and others; R v Ingombe and Cubson v Bon Galatian Hotel (2 points for each case)
4. Candidates should arrive at the right conclusion which is that the trial judge was wrong in holding that the accused persons were guilty by reason of evidence that he himself had discovered because he could not be called to testify and XXD for the veracity of otherwise of his findings' to be checked. (5 marks).

MARKING SCHEME FOR QUESTION SIX

1. The area of law on the facts is traditional evidence.

2. The issue is whether or not the trial judge was right in preferring the traditional evidence of the defendant to that f the plaintiff.
3. Candidates are expected to explain the principle applied in using traditional evidence to decide a case. Circumstances when a judge can use traditional evidence to settle contrasting evidence.
4. Candidates should cite Adheibi Kojo v Bonsie and apply it. Other cases which should be applied include Hlodgie v George, In re Taahyen & Asaago Stools: Kumnain II v Anin, Achoro v Akonfela, Adwubeng v Dwumfeh
5. Reference should also be made to NRCD 323, s 48 in answering the question
6. The decision based on the credibility of the witness as criteria for accepting or reject traditional evidence should be commented upon.
7. Acts of recent ownership in the form of the compensation should be commented upon as more legitimate ground for accepting the traditional avoidance. That is evidenced by the fact of compensation to the defendant's family instead of the plaintiff's family.
8. **Adwubeng v Dwomfeh** should be used to conclude that a person may fail in his traditional evidence and still win his case and therefore the trial judge erred in ruling in favour of the plaintiff merely because the traditional evidence failed. (20 marks).

MARKING SCHEME FOR QUESTION SEVEN

1. The facts raise only three issues.
2. These are issues relating to capacity to sue, fraud and jurisdiction
3. Fraud vitiates everything. Therefore if the agreement was found to be fraudulent, it followed that the defendant who relied on it must lose the case.

4. The second was capacity. A power of attorney should be signed by at least two people. To the extent that it was signed by one person, that power is not valid.
5. Fraud vitiates everything and so if the court ruled that the agreement was procured by fraud, the defendant too should lose his counter claim.in any case the trial magistrate should strike out the case for want of jurisdiction since the monetary value of the claims exceeds his jurisdiction
6. Candidates who are able to cite cases in support of their answers should be given credit. A case which may be cited is Husein v Moro in which both the claim and counterclaim were dismissed. (20 marks)

MARKING SCHEME FOR QUESTION EIGHT

1. AREA OF LAW: Proof by life style evidence

ISSUES: a. Does the fact that his chop bar specialize in sale of goat meat amounts to sufficient proof that he was likely to be the thief of any stolen goat?

b. The police went to search for one goat and found ten goats. What is the significance of a search which reveals more than the object of the search? Will the finding amount to ill-gotten evidence for the eight goats to be treated by the rules of ill-gotten evidence?

c. If a person charged with an offence admits to a smaller amount which is capable of constituting the crime charged, what is the effect?

d. Is a person bound to report any incident which comes to his knowledge and what are the conditions for obligating such a person to report the offence?

ANALYSES

ISSUE NO ONE: On the first issue, the chop bar keeper may not necessarily be guilty of the offence. The evidence against is tenuous. Unless someone comes forward with evidence that he saw him buying or carrying goats which did not belong to him, rumours per se cannot constitute evidence on the basis of which to convict him.

ISSUE NO TWO: Where the police conduct a search and come up with finds which are far in excess of their estimation, several issues may arise. One of them is whether or not the findings are admissible since what they set out to look for was not what they eventually discovered. The second issue is whether the search was conducted with a warranted in which case it could be said to be authorized. If it was conducted without a warrant, can the finding be described as illegally obtained evidence? If it is illegally obtained evidence, the Constitutional provisions on invasion of privacy and misconduct on the part of police men may be used to argue that the evidence found is not admissible.

Even if there was no warrant, the other side of the principles may be canvassed to argue that society need to be protected from criminals and so even if he evidence was improperly obtained, if it was capable of substantiating the charge laid, it should be admissible so that criminal are not let loose on society for technical legal grounds.

ISSUE NO 3: If a person is charged with a crime but he admits to committing amount which is smaller than the one preferred in the charge, he may still be found guilty of the offence. At best, the quantity may affect sentencing but not ht e conviction

1SSUE NO 4: There are rules on the necessity to report crimes. Some crimes need to be reported if they are committed in the presence of police men If they are not reported in the presence of the police, there is no obligation to report them. On the facts, it is not certain that the owner of the truck was a police officer to warrant the need for him to report to the police. His failure to report to the police may raise no serious evidential issues.

In all these analyses, the principles raised should be related to the facts in the question for conclusions to be drawn whether or not the principles will be applied

to the facts or whether the facts are such that they will constitute exceptions to the principles.

MARKING SCHEME FOR QUESTION NINE

Area of law: Privileges in respect of lawyers, pastors, and doctors

ISSUES: Whether or not the lawyer, pastor and doctor can claim privileges as defence

Each privilege should be taken separately. The requirements to be satisfied in order for the privileges to be applies should be stated. Only the requirements deemed to be relevant should be stated.

After stating each requirement, they should be related to the facts of the case to see if in your opinion, any of them qualifies to claim privilege as his defence. Give reasons for your answer. The reasons should g=be related directly to the facts raised in the problem.

Each answer should refer to the criminal nature of the transaction and its effect of the claim for privilege as defence