

# LAW OF EVIDENCE

28<sup>TH</sup> JUNE 2019

## MARKING SCHEME

### General Scheme

1. Identifying appropriate area(s) of law (1-2 Marks)
2. Raising appropriate legal issues/use appropriate legal language (1-5 Marks)
3. General discussion of the law (1-9 Marks)
4. Application of discussion to issues (1-3 Marks)
5. Citing and applying appropriate authorities and sections (1-6 Marks)

### QUESTION 1

Area of Law: Matters not requiring proof: Judicial Notice

Issue : Whether the judge was right in using his personal knowledge in taking judicial notice of a fact

Question seeks to test the understanding and application of the rules of proof in judicial enquiries. Candidates must state the general position in evidence that all facts in issue or relevant to the issue in a given case must be proved; he who avers must prove. Candidates must discuss any exceptions to this rule which include judicial notice. Candidates must explain the legal effect of judicial notice, that is, relieving the party of the requirement of proving his averment. Marks shall be awarded for the detailed discussion of section 9(2) (a) and (b) namely taken judicial notice only of facts generally known within the territorial jurisdiction of the court or capable of accurate and ready determination. The question requires

discussion of the taken of judicial notice using personal knowledge. This requires reference and discussion of cases like *R v Mensah*; *R v Igombo*; *Cubson v Bon Galahn*. Marks may be awarded for stating of matters where personal knowledge may be considered such as specialist courts or tribunals where judges are appointed on the basis of their expertise. The analysis should be that the judge took judicial notice of facts that are not notoriously known within the jurisdiction and also not from readily verifiable information and therefore he was wrong.

## QUESTION 2

AREA OF LAW: RELEVANT AND ADMISSIBILITY; ADMISSIBILITY OF CHARACTER EVIDENCE

Issues:

1. Whether a judge has discretion to admit irrelevant evidence
2. Whether the test for admissibility of evidence is fairness
3. Whether the evidence of an accused character is relevant from the commencement of a trial till the end

This question seeks to test the knowledge of students on the provisions of on relevance and admissibility of evidence in general and the specific provisions on the admissibility of character evidence. Candidates should explain what evidence is; relevant evidence, that is the material connection and probative value of evidence. Candidates shall discuss the general provision in section 51 and the exclusion provision in section 52. Marks shall be awarded for distinguishing between exclusionary discretion and inclusionary power of judges: that is, can a judge admit irrelevant evidence (inclusionary power) or can a judge exclude relevant evidence (exclusionary power). More marks shall be awarded for stating and explaining the exclusion factors in a-c of Section 52. Marks shall be awarded for brief explanation of character evidence. The nature of

character evidence either good or bad character, the prejudicial nature of character evidence, which may be relevant though. Marks may be awarded for the rationale for excluding character evidence; probative value outweighed by prejudicial value. Marks may be awarded for stating the rationale for excluding evidence of previous conviction until after trial

Students may refer to cases, such as

*DPP v Kilbourne*; *R v Wilson*; *State v Brobbey & Nipa*; *R v Sang*; *Avegaviand Ors v R*; *R v Butterwasser*; *Goody v Oldham Press Ltd*; *Abdul Mohammed v Republic* etc.

### QUESTION 3

Area of law: Cross-examination; Finality of Answers to collateral questions

Issue: Whether or not there are any exceptions to the rule on finality of answers to collateral questions

The question seeks to test the understanding of students on the importance of cross-examination and specifically how to test the credibility of witnesses in cross-examination. Students shall discuss briefly the three modes of questioning witnesses in court namely: evidence in chief, cross-examination and re-examination. Emphasis should be placed on the discussion of cross-examination showing the importance of cross-examination and the effect of failing to cross-examine a witness on an issue while in the witness box. Students in the general analysis may refer to cases such as *Hobbs v Tinling and Co Ltd*; *Mensah v Nimoh*; *Fori v Ayirebi*; *Quagraine v Adams*. Marks shall be awarded for the discussion of testing credibility of witnesses in cross-examination by attempting to rebut answers given in cross-examination. The candidate must show the rationale for the rule that answers to collateral questions in cross-examination are final namely to avoid multiplicity of issues and that litigation must have end. Most marks shall be awarded to students who are able to distinguish between collateral matters, that is matters only going to credit as opposed to matters with material connections with the issue at stake. Students who refer to and discuss the decision in *AG v*

Hitchcock on the matter should be rewarded. Candidates may also refer to cases like R v Bashir and Manzur. The analysis should focus on the exceptions to the rule especially in rape and other sexual offences where issues of credibility are not merely collateral but go to the substance of the case. Marks shall be awarded for the discussion of the exception in R v Kraus. Marks shall also be awarded for candidates who refer to section 80 of the Evidence Act dealing with the general testing of the credibility of witnesses in cross-examination.

#### QUESTION 4

Area of Law: Circumstantial evidence as a means of proof

Issue(s): Whether the circumstantial evidence led by the prosecution is sufficient to lead to the conviction of the accused

This question seeks to test candidates understanding and application of the use of circumstantial evidence in a criminal trial. This is not a question seeking the discussion of the procedure for the application of 'no-case' in a criminal trial. Marks shall be awarded for the brief reference to what constitutes proof and the means of proof in a litigation. Marks shall be awarded for brief discussion of the difference between direct evidence and circumstantial evidence. Most marks shall be awarded for the discussion of the nature of circumstantial evidence; circumstantial evidence as distinguished from rumours and speculations. Students should be rewarded for distinguishing cases like *Alli Kassena v State*; *Brobbeey and Nipa v State*; *Anani Fladzo v R*; *Gligah and Atiso*. The analysis on whether the evidence constitutes multitude of suspicion but does not lead to one conclusion, that is the guilt of the accused should be rewarded.

#### QUESTION 5

Areas of Law: Hearsay and competence of a child as a witness

#### Issues

1. Whether the evidence of the uncle of the accused is admissible as *res gestae*; if not admissible as *res gestae*, can the statement 'I have killed Afoko' constitutes a confession statement

2. Whether the four-year-old is competent to testify as a witness

The question is testing candidate's understanding and the application of the general exclusionary hearsay rule. Candidates are required to discuss the general nature of hearsay rule as provided in sections 116, 117 and 118. Candidates must explain the exclusionary nature and the reason; that is generally inadmissible and the basis for admissibility, such as unavailability as provided in section 118. Most marks shall be awarded for discussing *res gestae* as an exception to hearsay as in section 124 and confession as an exception provided in section 120. The analysis on *res gestae* should consider the distance of 15 kilometres and the time between 12.30 to 2.30 pm in determining contemporaneousness in time and space. In discussing this part, candidates may refer to the decisions in *Duah v R* and *Woledzi v Akufu-Addo*. On the issue of confession, candidates shall explain what constitutes confession; the test for its admissibility (voluntariness); briefly the meaning of voluntary statement. Most marks shall be awarded for discussing the provision in section 120(3) on the requirement of independent witness. Candidates must be able to show whether in the circumstances of this case there was the need for an independent witness. Marks may be awarded to candidates who refer to the cases of *Frimpong alias Iboman v Republic*; *Ellis Kaati and Ors v R* and *Ekow Russel v R* on the controversy as to whether a policeman is qualified to be an independent witness. In the general discussion of confession, students may refer to cases like *Myers v DPP*; *Subramaniam v DPP*; *Apaloo and Ors v R* etc.

The last issue requires brief explanation as to who a witness is and who is qualified to be a witness. This part calls for the discussion of the provisions in sections 58 and 58 of the Evidence Act. The analysis should show that every person is competent to be a witness (section 58) and a person is disqualified to be a witness if he fails to satisfy section 59. For

the avoidance of doubt, a child is a competent witness provided he or she satisfies the requirement in section 59

### QUESTION 6

Area of Law: Privilege specifically Lawyer Client Privilege

Issues:

1. Whether or not there is a lawyer client privilege between Ojojo and Barrister Amos
2. Whether the documents in the custody of Barrister Amos are privileged

This question seeks to test the candidates understanding of privilege in general and specifically lawyer client privilege and exception to the privilege. Candidates shall briefly explain privilege as a right not to be compelled to testify as a witness or even when compelled as a witness refuse to disclose documents on the basis that such documents are privileged. Privilege serves as immunity from contempt of court for refusing to testify or provide documents. Marks shall be awarded for reference to section 88 which provides for the privileges recognized under Ghana law and section 89 which provides for the power to waive once privilege. The analysis should concentrate on the lawyer client privilege which is provided for in section 100. Marks shall be awarded for explaining what constitutes the lawyer client privilege which is a client's refusal to disclose and to prevent any other person from disclosing a confidential communication reasonably related to professional legal services. The analysis should consider the essence of confidentiality for the purpose of lawyer client privilege; seeking professional legal services and for purposes of legal advice or litigation. The determination of the issues raised should be referable to section 100(a) as to whether sufficient evidence has been produced to support a finding of fact that the services of the lawyer was sought to aid a person to commit crime. Marks shall be awarded for the reference to cases like *R v Cox and Railton*; *Re a Firm of Solicitors*; *Francis and Francis v Central Criminal Court*. For the general discussion of lawyer client privilege, candidates may refer to cases such as: *Brown v Forster*, *Balabel v Air India* etc