

COUNCIL OF LEGAL EDUCATION
NORMAN MANLEY LAW SCHOOL

LEGAL EDUCATION CERTIFICATE
FIRST YEAR SUPPLEMENTARY EXAMINATIONS

LEGAL DRAFTING AND INTERPRETATION

(AUGUST 11, 2016)

Instructions to Students

- (a) Time: 3 ½ hours
- (b) Answer **FIVE** questions.
- (c) In answering any question, a candidate may reply by reference to the law of any Commonwealth Caribbean territory, **but must state at the beginning of the answer the name of the relevant territory.**
- (d) It is unnecessary to transcribe the questions you attempt.
- (e) Answers should be written in black or dark blue ink

PLEASE REMAIN SEATED UNTIL YOUR SCRIPT HAS BEEN COLLECTED.

QUESTION 1

Your client, Big Smallman, was charged for and found guilty of conspiracy to import cocaine. At his trial, the prosecution relied upon evidence of several instances of private communication which had been intercepted pursuant to various court authorizations. In several of the instances, the interception had been done by the use of a listening device, which had been surreptitiously planted in Smallman's apartment. None of the authorizations made reference to the manner of installing the listening device, which is a radio transmitter, but the authorizations provided that all telecommunication and oral communication be intercepted, and referred to the use of "any electromagnetic, acoustic, mechanical or other device" for this purpose.

The evidence presented to the court by the prosecution was as follows:

1. Between January 25, 2015, and December 15, 2015, the Anti-Narcotics Unit of the Police Force obtained a series of authorizations and renewals to intercept the private communication of Smallman at Apartment 22, Lowdown Drive.
2. On January 2, 2016, four anti-narcotics police officers without permission entered Apartment 22 and installed a listening device. They were in the apartment for about an hour. The transmitter operated continuously thereafter and intercepted not only telephone conversations but also all conversations in the apartment.
3. On May 4, 2016, three anti-narcotics police officers, again without consent, entered the apartment to change the batteries in the listening device. They stayed for about twenty minutes.

Section 78(1) of the Criminal Code states as follows:

“78(1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless –

(a) the interception was lawfully made; or

(b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;

but evidence obtained directly or indirectly as a result of information required by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.”

Smallman appealed his conviction to the Court of Appeal, which by a majority of 2 to 1 upheld his conviction.

Mr Justice Right for the majority said that the trespass did vitiate the authorization. He also said, however, that while any wrongful act committed in the carrying out of the authorization could be the subject of criminal or civil proceedings, such wrongful acts did not affect the admissibility of the evidence of private communication.

Mr Justice Wong, however, in his dissenting judgment was of the view that the authorization to intercept private communication could not and did not authorize a trespass. He went on to say:

“An authorization does not implicitly carry with it a right of entry to private premises. Equally a judge does not possess any authority to include a right of entry as a term of authorization. The question therefore to be resolved is whether the interceptions of private communication accomplished by means of the illegal entries were lawfully made within the meaning of section 78(1) and hence admissible in evidence.

It seems manifest that Parliament intended any breach of the right of privacy to be unlawful in the widest sense. In these circumstances it is not possible to separate the installation of the listening device from the process of listening to and recording conversations. This is an artificial unrealistic distinction. That interception must go beyond mere listening and recording not only conforms with common sense it is a necessary consequence of the wording of section 78(1). The section demands that the interception be lawfully made. An interception accomplished by means of an unlawful entry cannot have been lawfully made.”

Smallman seeks your advice as to whether he should appeal this decision, having regard to the minority judgment.

Advise Smallman, giving reasons.

QUESTION 2

Ren West was recently found guilty of rioting, contrary to Section 2 of the Riot Act. Section 2 states:

“2. If any persons, to the number of twelve or more being unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace at any time after the passing of this Act, and being required or commanded by any one or more Justices of the parish or place where

such assembly shall be, by proclamation to be made in the Queen's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more, notwithstanding such proclamation made, unlawfully, riotously, and tumultuously remain or continue together by the space or one hour after such command or request made by proclamation shall be adjudged felony, and the offenders therein shall, upon conviction, be liable at the discretion of the Court to be imprisoned for life with or without hard labour."

The evidence before the court was that on May 5, 2016, at about 7:20 a.m., a crowd in excess of 500 adults and a number of children blocked the main road in Queen's Town. Thereafter they behaved in a riotous and tumultuous manner.

About 10 minutes after the crowd had gathered on the road, a detachment of police arrived on the scene. The police inspector in charge of the detachment, then requested the assistance of a justice of the peace, who lived nearby, to make the proclamation as prescribed in Section 3. At 7:50 a.m., the justice did so while standing about fifty feet from the crowd and with the use of a megaphone. Section 3 states:

"3. The order and form of the proclamation that shall be made by the authority of this Act shall be as hereafter follows, that is to say the Justice, shall among the said rioters or as near to them as he can safely come, with a loud voice, command or cause to be commanded silence to be while proclamation is making, and after that shall openly, and with a loud voice, make, or cause to be made, proclamation in these words or like in effect: "Our Sovereign Lady the Queen chargeth and commandeth all persons being assembled immediately to disperse themselves, and peaceably to depart to their habitations, or their lawful business, upon the pains contained in the Riot Act – God Save the Queen."

The police thereafter remained on the scene while the crowd gradually dispersed, until there were about 50 adults remaining. All the children had dispersed. At approximately 8:50 a.m., the police proceeded to arrest those persons who were there, including West. He was subsequently found guilty of rioting.

West tells you that on the morning in question, at about 8:35 a.m., he was on his way to work, travelling on a bus, when the bus came upon the road block. As it could not proceed any further he came off the bus, along with the other passengers, and began walking through the crowd with the hope of getting a bus on the other side of the crowd. Suddenly he was held by two policemen and arrested along with many others and taken to the nearby police station.

He further tells you that he was unrepresented before the magistrate/parish judge, but he tried to explain that he was not a rioter and that he was on his way to work. However, the magistrate/parish judge said it was absurd for West to believe that the police were required to identify persons who were present at the outset of the riot in order to determine who was still there beyond the hour as prescribed.

West now wishes to appeal his conviction and has sought your advice.

Advise West. Give reasons.

QUESTION 3

Laura owned, *inter alia*, two properties – one at Westmoorings (the Westmoorings property) and the other at Gulf View (the Gulf View property). She personally made a Will in which she left both properties to:

“My wonderful granddaughter Ann and her heirs but in case she dies under age eighteen and without children; I leave the Westmoorings property to my grandson Roger (Ann’s cousin); but in case he dies under age eighteen and without children, the last mentioned premises shall devise in the same manner as I hereafter declare concerning my Gulf View property. I direct that if my granddaughter Ann dies under age eighteen and without children my Gulf View property be sold and the proceeds be donated to the Guardian Needest Fund.”

Ann died on her eighteenth birthday in a motor vehicle accident. Roger died three months later, having attained the age of eighteen and having got married a month earlier. Neither of them had children.

The following wish to claim the property as follows:

- (i) Ann’s parents claim both properties;
- (ii) Roger’s new wife claims the Westmoorings property; and
- (iii) The Guardian Needest Fund claims both.

Advise the executor of the Will.

QUESTION 4

In June 2015, Jonny made an anonymous telephone call to Pam during which he is alleged to have used obscene, profane, vulgar, lewd, lascivious and indecent language and threats. Pam subsequently reported this incident to the police who were able to trace the call to Jonny. He was then charged with making an obscene call, contrary to Section 5 of the Obscene Publication Act.

At the trial the prosecution conceded that Jonny made no specific threats other than those inherent in words to the effect that he desired sexual intercourse with the woman he called. The magistrate/parish judge then dismissed the case, basing the dismissal on an interpretation of the statute that required both obscene language and threats as distinct elements of the crime.

Section 5 reads:

“No person shall engage in or institute a local telephone call, conversation or conference of an anonymous nature and therein use obscene, profane, vulgar, lewd, lascivious or indecent language, suggestions or proposals of an obscene nature and threats of any kind whatsoever.”

The prosecution have appealed to the Court of Appeal (a practice permitted in the jurisdiction) contending that the dismissal was based upon an erroneous interpretation of the statute. They have pointed out that Section 5 had been amended in May 2015, and that prior to the amendment it had read:

“No person shall engage in or institute a local telephone call conversation or conference of an anonymous nature and therein use obscene, profane, vulgar, lewd, lascivious or indecent language, suggestions or proposals.”

The prosecution have further contended that the phrase, *“of an obscene nature and threats of any kind whatsoever”*, was added later by the amendment, and therefore the “and” in the added phrase should be read disjunctively.

Jonny, however, has argued to the contrary. He claimed the legislature used the word “and” in order to restrict the scope of the statute and the magistrate’s/parish judge’s ruling was therefore correct.

As a judge of the Court of Appeal, what is your judgment?

QUESTION 5

One day last month, “Prof”, a gardener employed by the College of Higher Learning, was stopped by Constable Quick while he was driving a tractor owned by the college on Camp Road, which is located on the College campus. Constable Quick had noted that the tractor had no registration plates on it. Constable Quick then asked “Prof” for his driver’s licence. “Prof” told him that he was not a licensed driver but that as the College was private property, he did not need to have a licence to drive and was permitted to drive on the campus under the Regulations governing driving on the campus. He further stated that many vehicles owned by the College and used exclusively on the campus were not licensed and therefore had no licence plates affixed.

At the entrance to the College is a sign which states:

“NOTICE

The roads on this campus are private. All motorists driving on this campus are subject to the Private Roads (College of Higher Learning) Regulations made by virtue of the Private Roads Act 1934.”

The Private Roads (College of Higher Learning) Regulations state *inter alia*:

- “2. *The College campus is privately owned property.*
3. *No person shall drive a motor vehicle on to the campus unless he has lawful business to transact thereon.*
4. *The College has the right to prevent any person from driving a motor vehicle on to or within the campus.*
5. *All learner driving is prohibited on the campus.*
6. *Every employee and student of the College who drive a motor vehicle on to the campus shall affix to the motor vehicle the prescribed pass.*
7. *The College has the right to authorize any employee whether or not he possesses a driver’s licence to drive College vehicles on the campus.*
8. *The College may, with the approval of the Minister, make such rules as it deems necessary under these Regulations.”*

A copy of these Regulations was given to Constable Quick. Nevertheless, Constable Quick charged “Prof” for driving without a licence, contrary to Section 8 of the Road Traffic Act 1946 and driving a vehicle without the required registration plates, contrary to Section 15 of the same Act.

“Road” is defined in the Road Traffic Act 1946 as follows:

“Any street, road or open space to which the public are granted access and any bridge over which a road passes and includes any privately owned street, road or open space to which the public are granted access either generally or conditionally.”

Advise “Prof”, giving reasons.

QUESTION 6

Mike Bloggs, a farmer, has been suffering losses of his goats over the last six months from attacks by roaming dogs.

One morning, in May of this year (2016) his son Jerry saw a large Dobermann pinscher dog on a section of the farm very near to the highway and about a half mile from where the goats were grazing. When the dog saw him it started moving towards the highway. Jerry nevertheless shot the dog because he was afraid it would harm the goats.

The dog in fact belonged to a neighbouring farmer, Tom Deer, who claimed that the dog was a very intelligent animal, a good house dog and watchdog and very useful around the farm. Further, that Jerry knew the dog. He claimed that on the morning in question, his wife took the dog on to the highway, on its lead, and walked with it towards her aunt’s house. She then allowed the dog to continue along the highway to meet him (Tom), as it often did in the morning. Apparently the dog then wandered on to Bloggs’s farm. The two farms are about one mile apart.

Deer initiated a civil action against Bloggs and Jerry to recover damages for the killing of his dog.

The magistrate/parish judge held that the defendants were not liable. At common law, he stated, they would probably have been liable since the law was as follows:

“To kill, shoot or injure another man’s dog without legal justification is an actionable wrong at common law. It is no legal justification that the dog was trespassing. In order to legally justify such an act it must be proved that it was done under necessity for the purpose of protecting the person or saving the person in peril at the moment of the act.”

However, the Control of Dogs By-Law provides as follows:

“A By-Law for restraining and regulating the running at large of dogs; and for seizing, and impounding dogs running at large contrary to the By-Law; and for selling the dogs so impounded or any of them at such time or times and in such manner as may be directed by any by-law in that behalf.

- 1. For the purpose of the next succeeding paragraph a dog shall be deemed to be running at large when found in a street or other public place and not under the control of any person.*
- 2. It shall not be lawful for any dog to run at large unaccompanied by its owner or by such member of such owner’s family and any dog except hounds, found so running at large a greater distance than one half mile from the premises of its owner and unaccompanied therewith may be killed by any resident of this municipality.”*

Deer seeks your advice as to whether he should appeal this decision.

What is your advice? Give reasons.

QUESTION 7

Sylvia, a young attorney-at-law, in drafting a release for her client, General Insurance Limited, decided to redraft the precedent set out below which has been regularly used by other attorneys-at-law in her firm and which goes back to the 1950s.

“RELEASE

I _____ in the parish of _____ for the consideration of the sum of Dollars lawful money to me in hand paid by _____ have remised, released and forever discharged and by these presents do for myself my heirs executors and administrators remise, release and forever discharge the said _____ their respective heirs and assigns of and from all causes of action, suits, controversies, trespasses, damages, judgments, executions, claims and demands whatsoever against the said _____ which I ever had, now have, or which I, my heirs, executors or administrators hereafter can, shall or may have by reason of any matter or thing whatsoever and also by virtue of any claim or demand for damages by reason of any accident and injury to me claimed to have been sustained on or about the day of _____ 19 .

The aforementioned sum is accepted by the undersigned in settlement of all damages injuries and disabilities, which may hereafter result from said accident, as well as for those now known to have been caused thereby.

IT IS EXPRESSLY UNDERSTOOD *that said sum is paid and accepted not only for time and wages lost, expenses incurred, (including legal and medical expenses, if any) and property*

QUESTION 8

Tom Tibbs has appointed Mary Desouza as his attorney pursuant to the Power of Attorney set out below:

“POWER OF ATTORNEY

BY THIS POWER OF ATTORNEY given on the 15th day of June Two Thousand and Fifteen I TOM TIBBS of Great Bay, Miami, Florida, U.S.A., Businessman, (“The Donor”) appoint MARY DESOUZA of 22 Buttercup Way, Apartment 56, Businesswoman, (“The Attorney”) my Attorney for me and in my name to do and execute all or any of the following acts, deeds and things that is to say:

1. *To manage my business affairs, investments, securities and personal property for the time being in such manner as the Attorney shall think fit and to make any payments in connection with my business affairs, investments, securities and personal property.*
2. *To commence, carry on or defend all actions and other proceedings touching my property or affairs or any part thereof or touching anything in which I or my affairs may be in any way concerned.*
3. *To settle, compromise or submit to arbitration all accounts claims and disputes between me and any other person or persons.*
4. *To accept the transfer of any stocks, funds, shares, annuities and other securities which shall or may at any time hereinafter be transferred to me whether solely or jointly with any other person or persons.*
5. *To carry into effect and perform all agreements entered into by me with any other person or persons.*
6. *Generally to act in relation to my property and affairs and to this deed as fully and effectually in all respects as I myself could do.*

AND I HEREBY UNDERTAKE to ratify everything which my Attorney or any substitute or substitutes or agent or agents contained shall do or purport to do by virtue of the Power of Attorney.”

MARY DESOUZA, the Attorney named in the above power of attorney, has come to see you. She tells you that Tom Tibbs, the donor of the power, who is presently in Florida owns the following:

1. a travel agency which she has been managing;
2. a house and beach cottage both of which are unoccupied;
3. shares in various local companies; and
4. current and savings accounts in the National Bank.

She further tells you that:

- (a) she has been approached by an overseas company with a view to leasing the house for a period of three years;
- (b) the Hotel and Villa Association tells her that there is a desperate need for beach cottages for visitor occupation and wants her to make the cottage available for that purpose;
- (c) having regard to the present fall in the stock market, she thinks she ought to sell the shares before they fall even further in value; and
- (d) she has his cheque book and savings account book but does not know whether she can operate them.

Mary Desouza seeks your advice on her powers with regard to (a) to (d) above.

What is your advice? Give reasons.

END OF PAPER