Problem answer to law of evidence question

In this coursework I have paid particular attention on theYouth Justice and Criminal Evidence Act 1999(YJCEA) , Criminal Justice Act 2003 , Code D ofPACE 1984Code of Practice and cases such as Turnbull [1977] , R v Hanson [2005] , R v Vye [1993] and other relevant cases in order to solve this problem question based on criminal proceedings and interpret the statutes , the general rule and exceptions of hearsay evidence , apply the case laws and critically evaluate and analyses them.

In this given set of facts we need to discuss and apply the legal rules of evidence in the context of criminal proceedings specifically witness competence & compellability, good character & bad character, general rules of hearsay evidence and its exceptions with the proper application of Youth Justice and Criminal Evidence Act 1999 (YJCEA) and Criminal Justice Act 2003 and relevant cases , journals , articles .

According to the facts Thomas is only 11 years old who saw two men putting electrical equipment into the boot of a white van. He along with Harry Jones identified Adam King as one of the men they saw at a video identification procedure . Now we need to focus on mainly whether Thomas is really competent to give evidence and even if he can, what type of evidence he will provide . As a child under 14 Thomas must give unsworn evidence.[1]In this essence the test for sworn testimony is set out inR v Hayes[2]which is unnecessary in this scenario . However, inR v MacPherson[3]the Court of Appeal held that a 5 years old child is competent in giving witness . Moreover, the evidence of children under 14 is to be given unsworn and that a child’s evidence must be revived unless it appears to the court that the child is incapable of understanding questions put to him and unable to give

answers which can be understood.[4]The court must decide not whether he is competent on grounds of age but whether he is capable of giving intelligible evidence . It is submitted that a normal 11 years old child would be . The witnesses credibility and reliability are relevant to the weight to be given to his evidence and might well from the basis of a submission of no case to answer but they are not relevant to competence[5]. In delivering the judgment of the Court of Appeal inR v Sed[6]Auld LJ pointed out that section 53 does not expressly provide for 100% comprehension and in this case the Court of Appeal was much influenced by the earlier decision inR v D. [7]Allowance should be made on the witness's performance . In this fact it may vary according to the subject matter of the questions, on the length of time between the events referred to by the witness and the date of the questioning and on any strong feelings that those events may have caused[8]as to whether Thomas is really competent to give evidence or not . Moreover according to the statute there is no minimum age for children's to give evidence.[9]

In this fact, Thomas's parents informed the CPS that Thomas is nervous about giving evidence in court . In relation with this there is a possibility to use of Special Measures like to use screens[10], live link[11], video recorded evidence in chief[12], evidence to be given in private[13]by the prosecution. In this case the court can interview the child witness[14]and it could be a video interview if necessary[15]. It may be considered that Thomas might encounter special difficulty in testifying . Under section 16 (1) (b) and section 16 (2) of the YJCEA 1999[16]may give evidence by means such as live video link or pre – recording . InR (On the application of D) v Camberwell Green

Youth Court[17]the Divisional Court held that special measures provisions , here involving children , were compatible with article 6 (3) (a) of European Convention of Human Rights[18]which embodies the defendant's right ' to examine or have examined witnesses against him' . As person under 18 Thomas may also be eligible for special Measures Directions . Under section 21 (1) (a) of the Youth Justice Act and Criminal Evidence Act 1999(YJCEA) [19]as amended by the Coroners and Justice Act 2009 , the primary rule in requiring admission of a video interview as examination in chief and cross examination through a live link or video link[20]at trial , applies to all witnesses under 18 , regardless of the nature of the offence . However , under section 21 if the court determines that under the primary rule special measures would minimize the quality of the witness's evidence then court can consider a screen which will be open for Thomas to elect to give oral evidence in chief or testify in the courtroom rather than using the live link or pre recorded police video[21]. Under section 21 (4C) of YJCEA 1999 the court will consider some factors[22]. Although Thomas is not in an age where he might be expected to be able to give live testimony as he is nervous in giving evidence in court according to the facts but he may be accompanied by an adult to provide support for example his mother who have no personal involvement in this case .

Now we need to assess the admissibility of the identification evidence against George Smith . It mainly deals with Code D of PACE 1984 Codes of Practice.[23]Breaches of Code D sometimes can result in the exclusion of identification evidence under s. 78 (1) of PACE. Because failure to comply with the provision in CODE D can affect the reliability of the evidence and

reliability is an important consideration in the application of s. 78(1). An important case on the consequences of non-compliance with the provisions of Code D isRvGorja (Ranjit)[24]. Moreover if Code D do not justify the exclusion of identification evidence, they may require appropriate warnings to be given to the jury[25]. In order to avoid mistaken identification of a defendant by prosecution witnesses the Court of Appeal recommended a new approach by trial judges to deal with the problems of identification inTurnbull[26]. The directions in this case only apply whenever the prosecution case depends ‘ wholly or substantially ’on the correctness of one or more identifications of the defendant, and the defence alleges that the identifying witnesses are mistaken and in this case the prosecution substantially depends on the correctness on the identification of George. According toShand v The Queen[27]the prosecution may argue that theTurnbulldirection must be given where identification is based on recognition. Moreover, one witness Thomas already mistaken to identify George[28]. But sometimesTurnbullis not required when a witness failed to recognize the suspect[29]and Thomas failed to recognize George.[30]InR v Forbes[31]it was held that the breach of Code D did not require the evidence to be excluded under section 78 of PACE. However , in this fact , Thomas failed to identify George[32]. Moreover , George denied that he was involved in burglary[33]. It could be argue that the identification procedure under Code D paragraph 3. 12 is not necessary in this fact . InR v Turnbull[34], the Court of Appeal (CA) laid down guidelines for the treatment of the identification evidence where the case depends wholly or substantially on the correctness of the identifications. The guidelines make it clear that the judge should remind the jury of any weakness in the identification evidence

and that the judge should withdraw the case from the jury unless there is any other evidence which will support the identification evidence and in this fact there is another witness named Harry who confirmed and recognized George[35]. In this fact it is highly likely that the prosecution will be able to argue that identification of evidence against George Smith is admissible.

The next issues to be consider Adam King's previous convictions for assault, robbery and burglary . Evidence of a witness's bad character did not have to amount to proof of a lack of credibility on the part of the witness.[36]This question is concern with rules relating to the admissibility of defendant's bad character and also the fairness of the changes made byCJA 2003. In this regard the Law Commission reports on bad character in 2002.[37]The common law recognized the way in which evidence of character could be relevant. It could make allegations against a defendant more likely be true but the trial should not be used to investigate the truth of a previous allegation.[38]Sec-101 of CJA 2003states that in criminal proceedings evidence of defendant's bad character is admissible if one of the factors from sub-section101(1) (a)-101(1)(g)is satisfied[39]. In this regard we need to consider the three fold test inR v Hanson[40]which is laid down by the Court of Appeal. In this case the propensity[41]to commit the offence is relied on as the basis for admitting evidence of a defendant's bad character. [42]The prosecution now may argue that his previous convictions is relevant to an important matter in this trial[43]. But previous convictions for offences of the same description or category does not automatically mean that they should be admitted[44]. Adam King's bad character might be admissible by the courts as the defendant has a propensity to committee offences of this

kind because a single previous conviction can be sufficient to establish propensity[45]. Moreover inIsichei[46]where the defendant's propensity[47]to supply cocaine was relevant to the issue of identification.

In this issue we need to discuss as to how should the judge direct the jury about George Smith's character . In this fact George Smith already denied that he have any involvement in the burglary and he don't even have any previous conviction . Similarly inR v Aziz[48]the house of Lords held that a person with no previous convictions was generally to be treated as being of good character[49]and in this fact it could argue that George have good character . Whenever a evidence of good character is given , its significance must be explained to the Jury . The Court of Appeal laid down two limbs inRvVye[50]. In this fact it could easily argue that the judge will direct the jury based on theVyedirection about George's character. However , there were some problems inVyedirection like if someone plead guilty in any other county then he is no longer of good character but in this fact it is already apparent that George don't have any previous conviction . Moreover , in *R* v *M (CP)* [51]it was held that once the judge decided that the defendant should be treated as a person of good character then the fullVyedirection on good character should be given as it is a matter of law . The *prima facie* rule of practice is to deal with this by giving a qualifiedVyedirection rather than no direction at all.[52]According to *R* v *Doncaster* [53]it can easily argue that if the defendant has no previous conviction but bad character evidence is given under the Criminal Justice Act 2003 then a modified direction should be given . From the above discussion it can easily argue that the judge in

this scenario should direct the jury about George Smith’s character withVyedirection because it is the *prima facie* rule or practice.[54]

Now we need to discuss the issue as to whether the persecution will be permitted to adduce the written statement[55]of Harry who is moving to New Zealand . From this issue it is apparent that we need to consider the statement as hearsay evidence which is defined as a statement made outside off the court with the purpose of showing that the statement is true.[56]But generally in criminal cases hearsay is inadmissible which is also affirmed by Lord Normand inTeper v R[57]. Moreover inMyers v DPP[58]it was held that a contemporaneous record made by workers in a motor car factory of cylinder block and chassis numbers was held to be inadmissible hearsay. In this fact , we need to focus if the prosecution made a written statement from Harry then whether it will be admissible[59]. In this scenario , Harry was outside of UK[60]and in relating with these sort of issue the Law Commission introduced a ‘ reasonable practicability ‘ test which require the party wishing to adduce the evidence to make reasonable efforts to bring the witness to court but the court will take into account some factors such as the seriousness of the case and the importance of the information contained in the statement.[61]Moreover , inR v Castillio and Others[62]it was held that it was not reasonably practicable for the witness to attend and important consideration was given to the evidence given by the witness. The prosecution also argue that it falls within the exception of the general rule as the witness Harry moved outside of UK[63]and it was beyond reasonable doubt[64]. From the above discussion it is highly likely that the prosecution will be able to adduce the written statement of Harry at the trial.

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[1]Section 56(1) &(2) of the Youth Justice and Criminal Evidence Act 1999

[2][1977] 1 WLR 234

[3][2005] EWCA Crim 3605

[4]Section 53 (3) of the Youth Justice and Criminal Evidence Act 1999

[5]R v MacPherson [2005] EWCA Crim 3605 , [2006] 1 Cr App R 30

[6][2004] EWCA Crim 1294

[7][2002] 2 Cr App R 36

[8]Paragraph 45 – 46 where there is a danger that a complainant may be incompetent , the judge will usually before the trial have seen a video

recording of the complainant’s interview with the police and so will be in some position to make a decision about competence after hearing submissions from prosecution and defence under Youth Justice and Criminal Evidence Act 1999 , section 27

[9]Section 53(1) 0f Youth Justice and Criminal Evidence Act 1999

[10]Section 23 of Youth Justice and Criminal Evidence Act 1999 and R v Brown [2004] EWCA Crim 1620

[11]Section 24 of Youth Justice and Criminal Evidence Act 1999

[12]Section 27 of Youth Justice and Criminal Evidence Act 1999

[13]Section 25 of Youth Justice and Criminal Evidence Act 1999

[14]Guidance for Vulnerable or Intimidated Witness , including children (“ The Memorandum 2002) and it is also available inwww. cps. gov. uk

[15]Rv K [2006] EWCA Crim 472 , R v Powell [2006] EWCA Crim 3

[16]Section 16 (1) (b) of YJCEA 1999 states that if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2) like section 16 (2) (a) states that the witness suffers from mental disorder within the meaning of Mental Health Act 1983 .

[17][2003] EWHC Admin 22

[18]Article 6 (3) (a) of ECHR states that everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

[19]Section 21 (1) (a) of YJCEA 1999 states that a witness in criminal proceedings is a ‘ child witness’ if he is an eligible witness by reason of section 16 (1) (a) of YJCEA states that whether or not he is an eligible witness by reason of any other provision of section 16 or 17 of YJCEA

[20]R v Camberwell Green Youth Court [2005] 1 WLR 393

[21]R v Powell [2006] 1 Cr App R 31

[22]Under section 21 (4C) of YJCEA 1999 the court will consider some factors such as (a) the child’s age and maturity , (b) the child’s ability to understand the consequence of giving evidence in a different way , (c) the relationship between the witness and the accused , (d) the child’s social and cultural background and ethnic origins and (e) the nature and alleged cir