EVI3702 Questions and Answers

1) **Identify the factors highlighted by the court in S v Mthethwa when assessing the reliability of a witness's observation (the cautionary rule in respect of identification).**

- Lighting
- Opportunity for observation as to both time and situation
- Visibility
- Eyesight
- Suggestibility
- Result of identification parade
- Accused's voice, face, build, gait, dress
- Proximity of the witness
- Extent of prior knowledge of the accused
- Mobility of the scene
- Corroboration

(LOVES RAPE MC)

2) **List 5 requirements that must be met before a witness will be allowed to refresh her memory while in the witness box. [5]**

1. The witness must have personal knowledge of the events recorded.
2. The witness must have recorded the information personally.
3. The record must have been made (or checked and verified) while the facts were still fresh in the memory of the witness.
4. The witness must be unable to recall fully a matter on which she is being examined.
5. The document used to refresh the memory while the witness is in the witness box must be made available to the court and the opposing legal team so that they can inspect it.
6. Where the witness has no independent recollection of the incident, the original document must be used.

3) **Summarise the ten principles related to the cautionary rule in respect of accomplices, as listed in S v Masuku.**

1. Caution is imperative when dealing with accomplice evidence.
2. An accomplice is a witness who has a possible motive for telling lies about an innocent accused.
3. Corroboration of the accomplice's testimony is required.
4. The cautionary rule will only be satisfied if there is corroboration that directly implicates the accused in the commission of the offence.
5. Such corroboration may be found in the evidence of another accomplice, provided his evidence is reliable.
6. Where no corroboration is available, there must be some other assurance that the evidence of the accomplice is reliable.
7. Such assurance is self-evident where the accused is a lying witness, or where he does not testify.
8. The risk of false incrimination is reduced where the witness is a friend of the accused.
9. Where the above are absent, the court can only convict when fully appreciating the danger inherent in accomplice evidence, and only if the accomplice is an excellent witness.
10. Where corroboration of an accomplice is offered by another accomplice, the court must also approach this corroborative evidence with caution.

4) A notorious fact is a well-known fact. Certain notorious facts are matters of general knowledge, which our courts have taken judicial notice of. Mention 5 such facts. [5]

1. The fact that there are seven days in a week.
2. The fact that there is a national road network in South Africa and that these roads are public.
3. The fact that billiards, chess, and table tennis are games of skill.
4. The fact that dangerous wild animals remain potentially dangerous even after docile behaviour has come about as a result of semi-domesticity.
5. The fact that scab is a well-known sheep disease.
6. The fact that brand marks on cattle do not fade completely.
7. The fact that rhinoceroses are more rare than elephants.
8. The instinctive behaviour of domesticated animals.

5) Explain how it is determined whether a fact is of local notoriety and thereafter mention 4 facts that have been considered sufficiently well known at local level for the courts to have taken judicial notice of.

A fact is of local notoriety is that fact is "notorious among all reasonably well informed people in the area where the court sits". Examples of such facts that the courts have taken notice of are:

1. The fact that a road that passes within 50 metres of the court is a public road.
2. The fact that Franschhoek is not a small place and that it contains a number of streets.
3. The location of the local city hall.
4. The fact that a certain local street is particularly dangerous as far as traffic is concerned.

6) Discuss the competency and compellability of officers of the court to testify [5]

It is in the interests of justice that presiding officers should remain objective with respect to the cases over which they preside. For this reason, judges and magistrates are considered to be incompetent witnesses with respect to these cases over which they preside.
Where, however, a presiding officer perceives a certain fact in the court over which he is presiding, he will be considered competent to testify on such fact in another court.

7) Write a short note explaining how the court in <u>S v Moti</u> applied the cautionary rule with respect to identification evidence. [5]

Such evidence has to be approached with care and skepticism. The court has to answer two questions: 1. Was there a proper identification? 2. Was the evidence reliable?
The identification would be improper if photo identification was done when the suspect was already in custody, if the photograph was shown to the witness just before the identification parade, or testimony in court.
The reliability of the evidence would be affected by factors such as the credibility of the witness, the opportunity of the witness to observe the offender during the crime, whether he had previously been shown a picture of the suspect, etc.

8) Discuss whether there are any formal requirements for the handing in of objects such as weapons or prohibited substances such as dagga. [5]

There are no formal requirements for the handing in of objects such as weapons or prohibited substances such as dagga, but the handing in of such objects is often accompanied by oral evidence (testimony).
In the first place, someone has to identify the object and place it in context – for instance the investigating officer in a criminal case, who selects the exhibit from among a number of exhibits intended for other cases. His testimony might run as follows: "I found the knife in the possession of the accused, immediately after the murder had been committed." The court then takes it into possession, marks it, and reference is made to it as part of the court record as "Exhibit One".
In the second place, an expert witness is often called to explain the object, or its operation. This in fact constitutes opinion evidence although the object itself remains real evidence.

9) Do photographs constitute documentary evidence or real evidence? Briefly explain. [5]

Photographs may sometimes constitute real evidence, particularly where the physical photograph itself is central to the case, either because, for example, it has fingerprints on its surface (i.e. the subject of the photograph is immaterial), or because it is a rare historical photograph that was stolen from a museum, or because it had been adjudged to be pornographic and in the possession of someone in contravention of a statutory measure.

The situation is different when the photograph is simply used to represent something that is the subject matter of the particular court case. It then serves a documentary function, and both dictionary and judicial definitions of "document" are wide enough to cover it.

10) Explain the meaning of judicial notice with reference to statutory law and common law. [4]

Judicial notice is the process through which a judicial officer presiding in the case accepts the truth of certain facts even though no evidence has been led about such facts.
The courts must take judicial notice of the law. No evidence may therefore be led with regard to the nature or scope of any South African law.

With regard to statutory law, the courts have to take judicial notice of any "law or matter" published in a Gazette by the Government Printer.
The courts have to take notice of common law. It does not matter how vague or obscure a particular rule may be – there are no exceptions.

11) Explain the significance of official documents. [4]

An official document may be defined as an original document in the custody or under control of a state official, because of the position he holds.
Before a copy of an official document can be produced in court, the copy has to be certified as true by the head of department in control/custody of the document, or any officer authorised to do so. It can then be handed in by anybody. An original official document may only be produced upon an order by the Director of Public Prosecutions. Official documents are treated as an exception to the requirement that the original document has to be produced in court.

12) Explain the procedure of presentation of real evidence of fingerprints and handwriting in court. [+- 4]

An expert witness usually has to be called to present fingerprint evidence. When fingerprints are used, an enlargement of the accused's fingerprints is compared in court with that of a fingerprint found on the scene of the crime. If seven points of similarity are found, this will usually amount to proof beyond reasonable doubt that the same person has made the two sets of prints.
The same procedure is followed with regard to handwriting, but the court is not as bound to the opinion of an expert and may also hear lay evidence in this regard, or draw its own comparisons.

13) Compare unfavourable and hostile witnesses. [4]

An unfavourable witness is someone who merely gives unfavourable evidence. To counter this evidence, the party calling the witness may lead other evidence which may contradict her evidence.
However, if it becomes clear that the witness intends to prejudice the case of the party who called her, that party may apply to court to have the witness declared

a hostile witness. Once such a witness has been declared a hostile witness, she may be cross-examined by the party who called her.

14) Write a note on the extent to which judicial notice may be taken of political and constitutional matters. [5]

A court may take judicial notice of the sovereignty of sovereign states, and the existence of a war. Where a court is in doubt about a political matter, it should seek information from the Minister or other appropriate government official, whose certificate on the point will be conclusive.
Certain political circumstances in a specific area of a country may be judicially noticed if they are sufficiently notorious.

15) Write down the guidelines that a court has to take into account when evaluating evidence. [3]

Generally speaking, the court has to determine the credibility of the witnesses, draw inferences, and consider probabilities and improbabilities.

16) Discuss the nature of closed-circuit camera videotapes, with reference to reasons and authority. [5]

Zeffertt et al argue that videotapes should be treated as documentary evidence. It is submitted that, like photographs, it should be considered to be documentary evidence if the subject matter of the video is what is really in issue.
A more attitude was taken in S v Mpumlo and S v Baleka; videotapes were considered to constitute real evidence and therefore it was decided that the tapes did not have to comply with the (stricter) requirements for documentary evidence. In S v Singh and S v Ramgobin it was decided that videotapes should be treated as documentary evidence.

17) Discuss what is meant by "public document" and give an example. [5]

According to Northern Mounted Rifles v O'Callaghan, a public document is a document that "must have been made by a public officer in the execution of a public duty, it must have been intended for public use, and the public must have had a right of access of it". A title deed and birth certificate are examples of a public document. At common law, public documents are admissible to prove the truth of what they contain. This means that they are treated as an exception to the hearsay rule. A document that complies with both the definition for an official and public document should be treated as a public document by the party wanting to use it, since such an approach would ease the proof of the document slightly.

18) Discuss the competency of children to testify.

There is no statutory provision barring children under a certain age from testifying, and also no particular age above which a child is competent to testify. Children are therefore subject to the same general rule of presumed competency as all other persons, provided that they understand what it means to tell the truth, have sufficient intelligence, and can communicate effectively. Evidence will usually be led in this regard and the child will be questioned by the parties to the issue.

19) What is the significance of the phrase "both parties will be given the opportunity to address the court in argument"? [5]

Once all the evidence has been adduced by both parties, but before the court evaluates all the evidence and comes to its decision, both parties will be given the opportunity to "address the court in argument".
The parties will give the court their assessment of the evidence, and will also argue the law that may be applicable, in the process referring the court to various sources of the law, including case law, statutes, textbooks, and so on. They will refer to the strong points in their own case, and the weak points in the case of their opponents, and in this manner attempt finally to persuade the court to find in their favour.

20) Discuss the competrence of mentally disordered or intoxicated witnesses to testify.

In S v Katoo, the court considered section 194 of the Criminal Procedure Act which deals with such witnesses. The court held that the first requirement of the section is that it must be shown to the trial court that the witness suffers from (1) a mental illness, or (2) that he labours under imbecility of mind due to intoxication or drugs or the like.
Secondly, it must be established that as a direct result of the mental illness or imbecility, the witness is deprived of the proper use of his reason.
These two requirements must collectively be satisfied before a witness may be disqualified from testifying on the basis of incompetence.

21) Explain the process of discovery, inspection, and production of documents. [5]

"Discovery" simply means that it may be expected from one of the litigants to discover all possibly relevant documents in his or her possession, in the sense of making them available to the opposing party. This is done by means of a written affidavit listing all possibly relevant documents in the possession of the declarant party or his lawyer, except for those which they may lawfully refuse to discover or which are no longer in their possession. If a party fails to discover possibly relevant documents, such documents may not be used in subsequent litigation without the express permission of the court.

Once the discover affidavit has been analysed by the opposing side, the rules also provide for the inspection of selected documents by such opposing party.

If a relevant document is in the hands of a third party (not involved in the litigation), such party may be ordered to come to court and bring the document with. This happens in terms of a *subpoena duces tecum* from the court.

22) Explain, in view of the constitutional right to silence, whether an accused can be convicted if he fails to testify. [4]

In the past, the mere silence of the accused was seen as a sign of a guilty conscience. Silence was used as a form of circumstantial evidence to bolster a weak case on the part of the state. The Constitution has changed everything. This inference can no longer be made, since a person has a constitutional right to remain silent if he wishes. This does not mean that he cannot be convicted. If the state is in no way contested by the accused or his legal team, the court will have no other option but to convict, provided that the other prerequisites for conviction have been complied with.

In S v Hena, the accused failed to testify themselves after the state's case had been closed. The judge emphasised that the lack of evidence on the side of the defence in order to rebut the state's case did not mean an automatic conviction of such an accused. Silence on the part of the accused could not make up for deficiencies in the state's case. On the other hand, accused 1 had been linked by means of DNA evidence to the case of the state. Because he had done nothing to controvert this evidence, the conviction stood.

23) Is the question of the incidence of the onus of proof one of substantive or formal law? Refer to any relevant case law on this point. [5]

In Tregea v Godart the testator left half his estate to his nurse in a new will made two hours before he died. The family members who contested the will on the grounds that the testator did not have sufficient mental capacity to make a will would have inherited the whole estate in a former will. The common law of our substantive law, Roman-Dutch law, has a presumption in favour of the validity of a will, which would have placed the onus of proving lack of validity of the new will on the family. English law, the common law of our formal law, however, states that the person alleging that a will is valid must prove this.
The court did not know which way to decide the issue, which meant that the party bearing the onus of proof had to lose the case. It found that the question of onus of proof is governed by substantive law, burdening the family with the onus of proof, and they lost the case.

24) Define corroboration and list the requirements therefor. [10]

Corroboration is evidential material that independently confirms other (untrustworthy) evidential material and which is admissible.
Requirements:

1. Corroborative evidence must be admissible.
2. Corroborative evidence may take a variety of forms and doesn't consist solely of oral evidence.
3. Corroborative evidence should be independent, that is, it should not come from the same source as the (untrustworthy) evidence which the corroborative evidence seeks to back up.
4. Corroborative evidence should confirm the other evidence. (The corroborative evidence should be trustworthy.)

25) What must happen before a conviction may follow on an accused's admissible confession? Discuss with reference to section 209 of the Criminal Procedure Act. [5]

Section 209 states that a conviction may follow on the confession if one of the following two requirements is met:

1. Corroborative evidence is produced which confirms the confession in a material respect (e.g. the accused confesses to murder by poisoning, and arsenic is found in the victim during the autopsy).
2. Evidence is adduced that shows an offence had actually been committed.

In R v Mataung the accused confessed to stock theft. The prosecution adduced evidence that stock disappeared from the fenced camp in which the stock was kept. The court found this not sufficient to satisfy the second requirement. It did however confirm the confession in a material respect and as such it was sufficient to found a conviction based upon the confession alone.

26) Fully explain the meaning and functioning of rebuttable presumptions of law with reference to marriages and children. [10]

A presumption is a legal rule according to which the existence of a fact is presumed based on the existence of another fact. Rebuttable presumptions of law are rules of law compelling the provisional assumption of a fact. They are provisional in the sense that the assumption will stand unless it is destroyed by countervailing evidence.
The following are examples of rebuttable presumptions of law with reference to marriages and children:

1. The presumption that a marriage is valid.
2. The presumption that a man and woman living together as husband and wife do so in consequence of a valid marriage.
3. The presumption that a child conceived or born during a lawful marriage is legitimate.
4. The presumption that a man admitting to having had intercourse with a woman is the father of her illegitimate child.

The first presumption may be rebutted by any evidence that proves that the marriage ceremony had been a legal ceremony.
The second presumption may be rebutted by evidence that, for example, the couple had simply lived together and had never gone through a marriage ceremony.

The third presumption may be rebutted by evidence, for example, that a man other than the husband is the actual father (such as DNA evidence).
The fourth presumption may be rebutted by evidence that, for example, the man is sterile.

27) Explain the circumstances under which a spouse may be a competent and compellable witness. [6]

The spouse of a party in civil proceedings is a competent and compellable witness for and against the party concerned, although spousal privilege may prevent a spouse from mentioning certain facts. With regard to criminal proceedings, the following rules are in force:

Spouse as state witness
Section 195 of the Criminal Procedure Act clearly states that a spouse is competent to give evidence on behalf of the prosecution, but he can be compelled to testify only in certain circumstances. In general, these circumstances apply to proceedings which deal with the wellbeing of, and relationship between, the married couple, as well as the wellbeing of their children. Section 195 is also applicable to people who were married when the relevant crime was committed (even though the marriage dissolved in the meantime). The Criminal Law (Sexual Offences and Related Matters) Amendment Act has the effect of including: a child in the care of the spouse of the accused; incest; the sexual exploitation of children and persons who are mentally disabled.

Spouse as a defence witness
In terms of section 196, the spouse of an accused is a competent and compellable witness in defence of the accused, whether such accused is jointly charged with someone else or not.
If the accused is jointly charged with someone else, the spouse of the accused will be competent to give evidence on behalf of that co-accused, but cannot be compelled to do so.

28) Discuss the competence and compellability of a co-accused to testify. [10]

Where accused persons are tried jointly, they are referred to as “co-accused”.

Co-accused as a defence witness
(A) may testify in defence of (B) and vice versa. (A) may not be compelled to testify in defence of (B) because (A) is also an accused.

Co-accused as a prosecution witness

A co-accused is not a competent witness for the state, because he is also an accused. The question of compellability does not even arise where the witness is not competent to testify.

There may, however, be circumstances where the state may call someone who had previously been a co-accused, to testify. This happens when the person is no longer a co-accused in that case. This can happen in one of the four following ways:

1. By withdrawing the charge against the co-accused. (This is not an acquittal, and a former accused may be prosecuted again.)
2. By finding the co-accused not guilty.
3. By the co-accused entering a plea of guilty. In such a case, the trials of the accused and co-accused can be separated.
4. If the trials of the accused and co-accused are separated for some other valid reason.

29) Explain how blood, semen, and skin scrapings will be introduced as evidence at trial, and how the court will evaluate it. Make reference to reasons and authority. [10]

In Van der Harst v Viljoen, tissue tests were used for the first time in order to prove paternity.

An even more modern and more accurate method is so-called "DNA fingerprinting". Everyone's DNA contains unique genetic code and this can be determined by, for example, blood, semen, hair roots, or scrapings of skin.

Blood tissue, as well as DNA, are examples of real evidence which definitely need to be explained by means of expert evidence. In the case of blood tests, a written affidavit is used, but because tissue tests and DNA tests are so complex, it is probably more useful to hear the oral evidence of an expert.

DNA fingerprinting has been used both to establish guilt and to prove innocence. The chance of error is very remote, and a properly conducted test is said to render proof of identity beyond any doubt.

30) Fully discuss, with reference to S v Webber, how the court should approach evidence of a single witness. [8]

The evidence of a single witness can be relied upon when it is clear and satisfactory in every material respect. (It cannot be relied upon, for example, where the witness has a conflicting interest to that of the accused or is biased

against the accused.) A conviction is possible on the evidence of a single witness. Such witness must be credible and the evidence should be approached with caution. Due consideration should be given to factors which affirm and factors which detract from the credibility of the witness. The probative value of the evidence of a single witness should also not be equated with that of several witnesses.
There is no rule-of-thumb or formula to apply when considering the credibility of a single witness. The evidence of a single witness may be satisfactory even though it is susceptible to criticism. The degree of caution which should be applied to the testimony may also be increased by other factors, for example if the state relies on a single witness and does not adduce other evidence, there is a greater need for caution.

31) Discuss the relevant evidentiary rule that a judicial officer should take into account with regard to police traps and private detectives. [10]

A police trap is someone whose credibility may be questioned because he receives remuneration in exchange for obtaining evidence for the state. A trap would, for example, offer diamonds or gold to someone with the purpose of soliciting that person to commit the crime of illicit buying of diamonds or gold. Our courts apply the cautionary rule to the evidence of such persons [define the cautionary rule] because there are valid reasons for suspecting the reliability of their evidence. Because a police trap receives payment for his services, he may be tempted to colour his evidence in such a way that the accused is falsely incriminated. The possibility of false incrimination is compounded by the fact that the police trap has intimate knowledge of the crime, and may also be motivated by the wish to secure a conviction.

A private detective is in the same situation as the police trap in the sense that he is also paid to secure evidence. The difference between these two types of witnesses is of course that the police trap takes part in committing the crime and the private detective does not. The evidence of a private detective will also be approached with caution to make sure that the accused is not falsely incriminated.

32) Fully discuss the admissibility of photographs and voice recordings as evidence in terms of section 15 of the Electronic Communications and Transactions Act 25 of 2002. Start your answer by explaining the meaning of "data message". [10]

A data message means data generated, sent, received, or stored, by electronic means, and includes

a) Voice, where such voice is used in an automated transaction
b) A stored record

The evidential provisions of the Act were designed to cope with evidence in a "digital" format. Once a photograph, a letter, a picture, or even a video has been stored in a computer, the format changes from analogue to digital.
The concept of "data" is central to the Act because a data message is the digital alternative to traditional evidential concepts of statement, object, or document. Although it is tempting to argue that courts appear to have little discretion in respect of the admissibility of a data message but rather that they are required to exercise their discretion when they assess the weight to be attached to the evidence, it is unlikely that such an approach will be followed by the courts. For example, the view of the court in Ndlovu v The Minister of Correctional Services is that section 15 serves to facilitate the admissibility of electronic evidence by excluding evidence rules which deny the admissibility of electronic evidence purely because of its electronic origin.

33) Discuss the court's approach to evidence of children.

In S v V, the court stressed that whilst there is no statutory requirement that a child's evidence should be corroborated, it is accepted that, given the nature of the charges and the age of the complainant, the evidence of young children should be treated with caution. The South African Law Commission has recommended that the cautionary rule applicable to children be abolished.
The court has to be sure that the child understands the importance of telling the truth. Trustworthiness depends on a number of factors such as the child's ability to observe what happened, to remember what he observed, and to tell the court these observations. One should guard against labeling all children as "imaginative and suggestible". In S v S, the court followed a different approach, in which less skepticism regarding the child witness was evident.

The current position is that the Supreme Court of Appeal accepts that a cautionary approach be applied to children if the circumstances are appropriate, as seen in S v V.

34) Write a note on circumstantial evidence. Refer in you answer to both criminal and civil cases, as well as to decided cases. [10]

Direct evidence is given when an eyewitness testifies about actually seeing the prohibited act taking place. Circumstantial evidence can provide only indirect evidence, and inferences have to be drawn about the prohibited act. An eyewitness sees, for example, a suspect running from a house with a bloody knife in his hand. Upon further investigation, the eyewitness finds someone fatally stabbed inside the house. Other examples of circumstantial evidence are fingerprint evidence and DNA tests performed on the tissue of the suspect in a rape case.

The evaluation of circumstantial evidence depends on the presiding officer's ability to think logically. When evaluating circumstantial evidence, the court should consider the cumulative effect of all the circumstantial evidence presented in the case. It would be wrong to consider each piece of circumstantial evidence in isolation.

If inferences are to be drawn from circumstantial evidence in a criminal case, two cardinal rules of logic apply:
Firstly, the inferences sought to be drawn must be consistent with the proven facts. If this is not the case, an inference cannot be sustained.
Secondly, the proven facts should be such that they exclude every reasonable inference except the one sought to be drawn. If not, then there must be doubt about the inference sought to be drawn, and the accused cannot be convicted. This is because the state must furnish proof beyond a reasonable doubt in a criminal case. The state need not exclude every possibility (especially when it is far-fetched), only reasonable ones.

In a civil case, the inference sought to be drawn must also be consistent with all the proven facts, but the inference need not be the only reasonable inference. It is sufficient if it is the most probable inference.

Circumstantial evidence is not necessarily weaker than direct evidence. R v Blom is the *locus classicus* on the question of circumstantial evidence. Blom had made the deceased pregnant, and he had bought chloroform shortly before the deceased died on the railway tracks outside of Graaff-Reinet. He was seen riding away from the scene of the crime shortly after it happened. He also gave false explanations for everything and relied on a false alibi. All these premises could only lead to one final conclusion, namely that Blom killed his girlfriend.

35) Fully discuss originality and authenticity as requirements for the admissibility of documentary evidence. [10]

The general rule is that no evidence may be used to prove the contents of a document except the original document itself. It is often said that "primary evidence" or the "best evidence" of the document has to be provided.

There are exceptions to the basic rule, which permit secondary evidence of the document to be adduced. Secondary evidence can be any kind of admissible evidence – this means that a document might be proved by producing copies of any kind, or by oral evidence of someone who can remember its contents. Secondary evidence will be permitted if:

1. The document is an official document.
2. There is evidence that the original is destroyed or cannot be found after a diligent search.
3. The production of the original would be illegal.
4. The production of the original is impossible.
5. The original is in the possession of the opposing party or a third party who refuses or cannot be compelled to produce it.

A document has to be handed in by a witness who can identify the document and prove that it is authentic. "Authenticity" means that the document is what it appears to be.
The following persons may authenticate a document:

1. The author, executor, or signatory of the document.
2. A witness who saw the author drawing up the document or the signatory signing the document.
3. A person who can identify the handwriting or signature (if the author or signatory is not available).
4. A person who found the document in the possession or control of an opponent.
5. A person who has lawful control and custody of the document.

In a number of instances, a document need not be identified or authenticated by a witness. Some of these instances are the following:

1. Where the opposing party has discovered a document and has been asked to bring it before the court.
2. When the court takes judicial notice of the document.
3. When the opponent admits the authenticity of the document.
4. When a statute provides for an exception.

36) Describe the application of the principle relating to presumptions of fact with reference to regularity and the maxim known as *res ipsa loquitur*. [10]

A presumption is a legal rule according to which the existence of a certain fact is presumed based on the existence of another fact. A presumption of fact is not really a presumption, but merely an inference which a court may draw, representing the most logical outcome of a given situation. Presumptions of fact

have also been described as "frequently recurring examples of circumstantial evidence".

Regularity
A party who alleges that a letter has been posted, may lead evidence to the effect that a routine for the posting of letters was followed, and that the letter in question was dealt with in this manner. Once this has been established, it will provide circumstantial evidence that, owing to the "presumption of regularity", the letter was posted. Such a routine will be easier to establish in the case of public officials than in the case of people working in the private sector, because in the case of public officials the court will take judicial notice of the existence of an office routine. The inference that owing to an office routine, the letter in question was actually posted, does not entitle the court to infer that the letter was also received.

Res ipsa loquitur
The maxim of *res ipsa loquitur* means "the matter speaks for itself". It is used if the cause of a certain occurrence (often an accident) is unknown, and the court is asked to draw an inference as to the cause of the event from the picture painted by the provided evidence. *Res ipsa loquitur* has come to be almost exclusively applied to infer negligence from circumstantial evidence in respect of the conduct of the defendant, such as in the case of the causing of a motor-vehicle-accident.

37) Give a full discussion of the constitutionality of statutory presumptions. Refer to legislation and court decisions in your answer, and include a discussion on the difference between the onus of proof and the evidentiary burden. [10]

In order to determine whether a statutory presumption is constitutional or not, one must follow the approach adopted in S v Zuma. First of all, one must look at the wording of the presumption to determine whether the presumption creates a so-called "reverse onus". It is therefore essential to establish the exact nature of the onus placed upon the accused.
A reverse onus is a legal onus of proof that is placed upon the accused. It has to be discharged on a balance of probabilities. The onus is not discharged by the accused if he merely raises a doubt with respect to the applicability of the presumption. If, at the end of the trial, the probabilities are evenly balanced, the presumption will apply. If a presumption applies "until the contrary is proved" (or other words to that effect), it creates a reverse onus. Where it is stated that the "evidence of one fact constitutes *prima facie* proof" or "*prima facie* evidence of", only an evidential burden is created. The words "in the absence of evidence to the contrary" have the same effect.

If a statutory presumption creates a reverse onus, this means that the blanket provision in section 35(3) of the Constitution is infringed or violated. More specifically, the rights to be presumed innocent, to remain silent, and not to be compelled to give self-incriminating evidence are at issue.

The most important principle is that if a presumption has the result that the accused can be convicted in the face of reasonable doubt, it will infringe the rights mentioned in section 35(3).

An infringement of the Constitution will be unconstitutional unless it is harmonious with the limitation clause. The court must consider whether such infringement, caused by a reverse onus that has been created by a statutory presumption, could be justified by the limitation clause. In S v Meaker the court found that a presumption that infringed upon the Constitution was justified by the limitation clause. This was because the provision was designed to achieve effective prosecution of traffic offences and therefore the efficient reulation of traffic. The presumption furthermore targeted a specific group of people, namely vehicle owners. The rights of this group of people are always influenced when their vehicles are involved in offences on a public road. Furthermore, it must be proved that the driver committed an offence before the presumption finds application. The presumption further operates logically, because most owners buy a vehicle with the aim of using it. Owing to the value of vehicles, it can also be expected that even if the owner was not himself driving, he will invariably know where the vehicle is, and who is driving it. All these factors distinguish this presumption from those found not to comply with the requirements of the limitation clause.

The court in Bhulwana stated that a reverse onus required proof on a balance of probabilities, whereas an evidentiary burden simply required the accused to create a reasonable doubt.

38) The onus of proof in civil matters is slightly more complicated than the onus of proof in criminal matters. Describe how different issues may generate different onuses of proof in civil matters.

In civil matters, the basic rule as far as onus of proof is concerned is that he who alleges must prove (Pillay v Krishna). In civil cases, different issues may generate different onuses of proof. Because in civil cases there is the possibility that in one case different parties may bear the onus of proof regarding different issues, one may get the impression that the onus does indeed shift from one party to the other. In Pillay v Krishna, Davis AJA strove to explain the question of multiple onuses: "… where there are several and distinct issues, for instance a claim and a special defence, then there are several distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged". The following factual example might explain:

In a civil case, the plaintiff claims damages for assault. The onus of proving the assault rests on the plaintiff because "he who alleges must prove". The defendant admits the assault, but claims that it was done in self-defence against an attack from the plaintiff. This is the second issue, and the onus to prove that the prerequisites for self-defence existed rests upon the defendant. The plaintiff might acknowledge this, but claim that the defendant exceeded the bounds of self-defence. This onus of proof will be on the plaintiff to proof that the defendant exceeded the bounds of self-defence.

39) Explain the difference between, and the working of, the real onus of proof and the evidentiary burden in criminal cases.

The "real" onus of proof has already been fixed at the beginning of the trial in a criminal case. It does not shift during the trial, and it really only becomes important at the end of the trial. It is also called the "risk of non-persuasion". A court's finding will go against the party who bore the onus to persuade the court but who failed to do so.
On the other hand, the evidentiary burden may shift during the various phases of the trial. At the start, one of the parties might bear it in the form of a "duty to adduce evidence". This again places a "duty to rebut" on the second party. This burden is important at the halfway stage, when the first party has already closed its case and the second party argues that, owing to the failure of the first party to satisfy its evidentiary burden, no "duty to rebut" has actually passed to the second party.

The evidentiary burden will shift from the state onto the accused when good *prima facie* evidence has been given. If the accused does not acquit himself of the evidentiary burden by giving satisfactory evidence himself, the court will no longer have any reasonable doubt concerning his guilt, and the state will have acquitted itself of the onus of proof. If the accused on the other hand provides satisfactory evidence and persuades the court, or even creates a reasonable doubt in the mind of the court, the court will have to find against the state because the onus of proof has not been discharged.

40) Describe how judicial notice impacts on the law with reference to foreign law and indigenous law.

<u>Foreign law</u>

When the law of a foreign state is relevant in a South African court case in order to determine some aspect of our law, our courts may take judicial notice of that foreign law for purposes of comparison.
Where the law of a foreign state itself is in issue, the court may take judicial notice of it as far as it can be readily ascertained with sufficient certainty.

Indigenous law
A court can take judicial notice of indigenous law only if it is consistent with the Bill of Rights. Beyond this, a court may take judicial notice of indigenous laws (including custom) if they can be readily established with sufficient certainty, and if they are not in conflict with "public policy and natural justice". This is probably the same as "consistent with the Bill of Rights".

41) During argument, the defence submits that because the complainant is a single witness, and since the case is of a sexual nature, the court cannot give any value to her evidence. Do you agree? Fully discuss with reference to decided cases and legislation. [12]

[Discuss the single witness first, then:]

The cautionary rule that used to exist in cases of a sexual nature was effectively abolished in S v Jackson. Oliver JA pointed out that the "collective wisdom and experience" of judges, upon which the cautionary rule regarding the testimony of a complainant in a sexual case was said to have been based, had no factual justification – the empirical research which had been done in this regard disproved the idea that women lie more frequently than men, or that they are by nature unreliable witnesses. Another important consideration was that the cautionary rule was collapsed in a number of other countries with a similar legal system to ours, such as Canada, England, Australia, New Zealand, and Namibia. The court reached the conclusion that this cautionary rule was based on outdated and irrational perceptions, and that it unjustly stereotyped complainants in sexual cases as unreliable witnesses. The court also confirmed the rule that the burden is on the state to prove guilt of the accused beyond reasonable doubt. There needs to be a reason for suggesting that the evidence of the witness may be unreliable.

This does not mean that the cautionary approach should not be followed simply because a case is of a sexual nature. In S v Jackson, the court endorsed the statement that it is up to the judge's discretion to exercise caution. The strength and terms of the cautionary approach will depend on the content and manner of the witness's evidence and the way in which it is given, the circumstances of the case, and the issues raised. The position remains that if there is another basis for considering the evidence to be unreliable, then caution is applicable. In this regard, one can simply refer to other recognised instances where caution should

be applied, such as in the case of the witness being a single witness, or an accomplice, or where the evidence relates to identification.

A court may not approach the evidence of a complainant in criminal proceedings involving the commission of a sexual offence with caution merely on account of the nature of that offence.

42) Discuss personal appearance as a form of real evidence.

The court may look at a person in order to determine, for instance, his age, gender, race, or to observe his performance as a witness. In the last-mentioned case, the behaviour (or demeanour) of the witness is real evidence concerning a relevant fact, namely the credibility of the witness. This is why the appellate or review court is not in the same position to judge the credibility of witnesses, as a trial court would be. The last-mentioned sees the witness during the court case, their body language, signs of stress, etc.

43) Discuss inspections *in loco*.

An inspection *in loco* furnishes real evidence of what is inspected on site. The court adjourns in order to accompany the parties in an inspection of the scene of an accident or crime, while witnesses are sometimes asked to point out specific places. If the court draws any conclusions which are unfavourable to any of the parties, it should mention these in order to give the relevant party an opportunity to convince the court that its conclusions are incorrect.
An inspection *in loco* may enable a court to:

1. Follow the oral evidence more clearly, or
2. Observe some real evidence which is additional to the oral evidence.

44) Differentiate between an examination-in-chief, cross-examination, and re-examination.

- An examination-in-chief is conducted by the party who called the witness; a cross-examination by the opponent of the party who called the witness; a re-examination by the party who originally called the witness.

- The purpose of an examination-in-chief is to put relevant and admissible evidence before the court; the purpose of a cross-exam is to elicit evidence which supports the cross-examiner's case and to cast doubt upon the credibility of the opposing party's witness; the purpose of the re-exam is to enable the witness to clear up any misleading impressions which may have resulted from the answers given in cross-examination.
- Leading questions may not generally be asked during the examination-in-chief (except on undisputed facts); leading questions may be asked during cross-exam; leading questions may not be asked during re-examination (except on undisputed facts).
- The credibility of a witness may not be attacked during examination-in-chief (unless the witness has been declared a hostile witness); the credibility of a witness may be attacked during cross-exam; the credibility of a witness may not be attacked during re-examination.

45) Discuss judicial notice relating to calendars (a fact which is readily ascertainable).

In S v Sibuyi the court found that courts may take judicial notice of the accuracy of calendars and diaries in so far as they refer to days and months, but that they cannot be accepted as indisputably accurate as far as the phases of the moon or state of the tides are concerned.

46) Discuss judicial notice relating to science and scientific instruments (a fact which is readily ascertainable).

Only those scientific matters that have become common knowledge to non-specialists may be judicially noticed on the basis of their general notoriety, for example, no two fingerprints are the same.
Measurement by a scientific instrument, on the other hand, requires testimony as to the accuracy of the method of the measurement and instrument used.

47) Discuss judicial notice relating to financial matters and commercial practice (a fact which is readily ascertainable).

Judicial notice has been taken of the following facts:

1. The value of money has declined over the years.
2. The purpose of most public companies is to make a profit from income.
3. The practice of making payment by cheque.

Courts have declined to take judicial notice of the rate of exchange between the Rand and a foreign currency.

48) Discuss judicial notice relating to textbooks.

Judicial notice may not be taken of facts contained in technical or medical textbooks. However, our courts do use standard dictionaries to establish the meaning of words, and history textbooks have been used to establish historical facts.

49) Discuss judicial notice of the functioning of traffic lights.

In a number of cases, our courts have found that they can take judicial notice of the fact that if the traffic lights in an intersection facing in one direction are green, the lights facing at right angles will be red. Contrary to the general position with regard to judicial notice, it has also been held that evidence may be accepted in order to rebut such judicial notice. This is probably an incorrect labeling of the operation of a presumption of fact as judicial notice.

50) Define the cautionary rule.

The cautionary rule is a rule of practice bearing the mandatory character of a legal rule and prescribing a specific approach to be adopted by the court to assist in the evaluation of certain evidence.

51) Define judicial notice.

Judicial notice is the process through which the judicial officer presiding in the case accepts the truth of certain facts even though no evidence has been led about such facts.

52) Define a presumption.

A presumption is a legal rule according to which the existence of a certain fact is presumed, based on the existence of another fact.

53) Define a rebuttable presumption of law.

A rebuttable presumption of law is a rule of law compelling the provisional assumption of a fact.

54) Define presumptions of fact.

A presumption of fact is an inference a court may draw, representing the most logical outcome of a situation. “Frequently recurring examples of circumstantial evidence”.

55) Define corroboration.

Corroboration is evidential material that independently confirms other (untrustworthy) evidential material, and which is admissible.

56) Define documentary evidence.

Evidence by way of a document. According to Seccombe v Attorney-General, a document is “everything that contains the written or pictorial proof of something”.

57) Define "official document".

An original document in the custody or control of a state official, because of the position he holds.

58) Define "public document".

According to Northern Mounted Rifles v O'Callaghan, a public document is a document that "must have been made by a public officer in the execution of a public duty, it must have been intended for public use and the public must have had a right of access to it".

59) Define "data message"

Data message means data generated, sent, received, or stored by electronic means and includes

a) voice, where the voice is used in an automated transaction
b) a stored record.