ANWAR IBRAHIM'S LONG STRUGGLE FOR JUSTICE

Report on Datuk Seri Anwar bin Ibrahim's Appeal against conviction observed on behalf of the Australian Bar Association and International Commission of Jurists

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1. Introduction

Federal Court Upholds Anwar Appeal

On 2 September 2004, the Federal Court of Malaysia delivered its decision in the appeal brought by the former Malaysian deputy prime minister Datuk Seri Anwar Bin Ibrahim against convictions for sodomy.

By a majority of 2:1 the Court upheld his appeal overturning the convictions and ordered his immediate release from prison. The Court was later to reject his appeal against convictions for acting corruptly by using his office to interfere with the police investigation of the sodomy allegations.

The majority found the complainant on whose testimony the prosecution was based to be an unreliable witness. Given the various inconsistencies and contradictions in his testimony, the judges concluded that it was not safe to convict on the basis of his uncorroborated testimony alone. They found that Anwar Ibrahim should have been acquitted without having to enter a defence.

The Federal Court's decision was for Anwar Ibrahim the culmination of a 6-year struggle for justice after pleading his innocence through the various tiers of the Malaysian Court system.

The Political Crisis of 1998

This report does not attempt to analyse the political dynamics that ultimately led to the dismissal of Anwar Ibrahim, but some brief observations are important to put what happened in context.

Anwar Ibrahim had been Dr Mahathir's political protégé and favourite to succeed him as prime minister. He was seen as the moderate and progressive voice of Islam.

His political fortunes ended abruptly when on 2 September 1998 the Malaysian Prime Minister Dato' Seri Dr Mahathir bin Mohamad dismissed his heir apparent from the positions of Deputy Prime Minister and Finance Minister.

For some months there had been tension between them. For the most part it seemed to concern the issue of how best to respond to the growing Asian financial crisis, but increasingly as Dr Mahathir's public popularity fell the real possibility of a leadership challenge became apparent. Anwar had become the Prime Minister's chief rival.

By the late 1990's Prime Minister Mahathir had been in power for almost 20 years. He had certainly presided over a period of dramatic economic growth in Malaysia, but his popularity was falling while that of his deputy was on the rise.

Anwar Ibrahim was seen as the natural successor to the Prime Minister. He was popular and highly regarded internationally as Malaysia's finance minister. Some in fact preferred to credit him with the management of the "financial miracle" that had transformed the country.

It seems abundantly clear the Prime Minister was convinced Anwar was moving to replace him, but Dr Mahathir was not ready to leave office.

The smear campaign against Anwar Ibrahim started in the Malaysian newspapers only days after his sacking.

Traditionally favouring the Government, the media headlined that Anwar Ibrahim had been implicated in acts of sodomy with others. It is difficult to imagine that such allegations would have been made against the wishes of Dr Mahathir or that the police investigation and subsequent decision to prosecute Anwar Ibrahim would have taken place without his approval.

The public response to Anwar Ibrahim's sacking was immediate. A series of public demonstrations occurred culminating on 20 September 1998 with a rally of more than 30,000 people led by Anwar through the streets of Kuala Lumpur protesting his dismissal and demanding the Prime Minister's resignation.

The public protests confirmed that Anwar Ibrahim was not about to leave public office quietly. The massive crowd of demonstrators that gathered in Merdeka Square in the heart of Kuala Lumpur must have been viewed as a serious threat to Dr Mahathir's rule.

Dr Mahathir justified his decision to dismiss Anwar Ibrahim deeming him "*morally unfit to lead the country*". He argued it was based on allegations of sexual misconduct, tampering with evidence, bribery and threatening national security.

He was quoted as saying:

> "He has… hoodwinked the whole nation and appeared to be very religious. If he becomes prime minister, God help this country... We cannot have a leader who is easily swayed by his lust... We cannot accept a leader who has strange behaviour".
>
> *Agence France Presse, 25 September 1998*

He went on to allege that Anwar Ibrahim had wanted to topple the Malaysian government.

Anwar Ibrahim counterclaimed that he was a victim of a high-level conspiracy to prevent him from revealing corruption and cronyism within the government.

Anwar Ibrahim's Arrest

On the evening of 20 September, while Anwar Ibrahim was in the middle of an international press conference, a contingent of 250 armed and masked security police forced their way into his home smashing doors and manhandling a large number of supporters who had gathered there.

Anwar Ibrahim was immediately arrested under the *Internal Security Act (ISA*) and taken from his house. He was kept in solitary confinement in police custody for nine days, interrogated and severely beaten.

When finally brought before a court, Anwar Ibrahim was charged with several offences of corruption and sodomy.

The Trial Process

After a lengthy trial lasting many months Anwar Ibrahim was in April 1999 convicted for acting corruptly and was sentenced to 6 years imprisonment. At the culmination of another trial on 8 August 2000, he was also convicted of various acts of sodomy allegedly committed on his wife's driver. He was sentenced to an additional term of nine years imprisonment.

Both trials attracted considerable international attention.

Over the next six years, Anwar Ibrahim maintained his innocence until partially vindicated in September 2004 when the Federal Court upheld his appeal against conviction on the sodomy offences. Weeks later, the same court refused to reverse an earlier decision by it to uphold the convictions on the corruption charges.
During his lengthy period of incarceration, Anwar Ibrahim had become the symbol of political opposition to the Mahathir regime. *Amnesty International* declared him to be a prisoner of conscience, stating that he had been arrested in order to silence him as a political opponent.

Dr Mahathir was later to say:

> "I have always been able to stand up against the people who challenge my leadership and I have won. And I believe that even against Anwar, I would have won".

He stated at the same time that he had sacked Anwar Ibrahim for moral reasons and the sacking had nothing to so with disagreements over IMF issues. [*Straits Times,* Singapore, 12 October 2004]

However, while enjoying considerable international support Anwar Ibrahim's criminal convictions effectively removed him from the Malaysian political stage. No longer a member of the dominant political party *UMNO*, he became the titular head of the small opposition grouping formed around him calling itself the *National Justice Party* (*Parti Keadilan Nasional*, popularly known as *Keadilan)* that sprang out of the "reformasi" movement that has increasingly dwindled in membership and influence over the last few years.

Keadilan suffered a severe defeat in the national elections of March 2003, losing four of its five seats in Parliament, with Anwar Ibrahim's wife, Dr. Wan Azizah Ismail, barely winning the seat her husband held before his downfall.

Dr Mahathir's successor, Prime Minister Abdullah Ahmad Badawi, on the other hand, led his party to resounding victory, defeating the country's fundamentalist Muslim opposition party, (known as *PAS*) in one or two states it controlled and widening *UMNO's* majority in Parliament.
Prevented by legislation from returning to Parliament until April 2008, Anwar is still considered by many as having the potential to become prime minister of Malaysia.

Whether that happens or not only time will tell, but his continuing battle with the justice system provides insight into its development under the considerable influence of Mahathir bin Mohamad over the 22 years of his rule.

Purpose of Report

The primary objective of this report is to record my observations of Anwar Ibrahim's appeal against his convictions for sodomy that took place in the Federal Court of Malaysia at the newly constructed *Palace of Justice* at Putra Jaya in May 2004.

My report seeks to examine the way in which the Malaysian justice system, when dealing with Anwar throughout his legal battles, failed to act independently from the executive arm of government that for the most part was identified with the interests of Prime Minister Mahathir.

It also reflects the struggle, since the late 1980's, of the judiciary to regain some independence from executive government influence. It was then that Dr Mahathir stamped his authority firmly on the judiciary by dismissing the

Chief Justice and other justices thought hostile to the Government or at least considered to be unwilling to comply with its will.

Since that time, the judiciary in Malaysia has been criticised for lacking the capacity to independently and impartially determine politically sensitive cases.

One may conclude that in Anwar Ibrahim's case the judiciary simply failed to respond fairly and impartially to his complaints until such time as the influence of Dr Mahathir Mohamad had been lifted from it by his departure from office in October 2003. Only then could the abuses and injustices of past legal proceedings be rectified.

Substantial complaints were made against the legal process, including the use of the infamous *Internal Security Act (ISA)* to arrest and isolate Anwar and other persons in custody for extended periods of time before charging them with substantive offences; the use of violence by police to interrogate Anwar and his alleged accomplices to obtain confessions; the use of tactics by the judiciary and prosecution to intimidate Anwar's counsel during his trial by bringing charges of contempt and sedition against them (1) ; the many unfair rulings made by the presiding Judges at the trials and the admission of obviously inadmissible evidence against the accused during those proceedings.

The Malaysian Court of Appeal later rejected all of these complaints.

The Federal Court of Malaysia represented the final court of appeal for Anwar.

The Events Leading to Anwar's Arrest

The investigation concerning Anwar was well underway before the massed display of public disobedience in Merdeka Square on 20 September 1998.

Sukma Darmawan Sasmitaat Madja was an Indonesian national who had obtained Malaysian citizenship. He was also the adopted brother of Anwar.

On 6 September 1998, he was arrested without charge.

Microbiologist Dr Munawar Anees was born in Pakistan, but moved to Malaysia in 1988 where he became a respected Muslim writer and founder of several journals of Islamic studies. He was also a friend and occasional speechwriter for Anwar Ibrahim. On 14 September 1998 he was arrested under Section 73(1) of the draconian *Internal Security Act (ISA).*

The arrest of both men was not coincidental.

Convictions for Sodomy

On Saturday 19 September 1998, both Sukma and Dr Munawar appeared in separate courts charged under Section 377D of the *Penal Code* with "*outrages on decency*".

The essence of the charges was that they had "*allowed Anwar to sodomise them*". It was alleged the offences had occurred at residences occupied by Anwar Ibrahim in 1993 and 1998, but no exact dates or times were specified.

Pleas of guilty were entered through their lawyers and they were accordingly convicted of "*unnatural offences*" and sentenced to terms of imprisonment of 6 months.

Sections of the Malaysian Penal Code applying to "unnatural offences"

Homosexuality or homosexual acts are not defined in the Malaysian *Penal Code*. They are described by reference to "*unnatural offences*" deemed to be "*against the order of nature"* and are punishable by up to 20 years imprisonment and whipping.

Section 377A of the Penal Code states:

> "Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature."

Section 377B of the *Penal Code* states:

> "Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping".

Section 377D of the *Penal Code* states:

> "Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years".

In addition, under *Shariah* law in several Malaysian states homosexual acts between Muslims are illegal and can incur jail terms of up to three years as well as mandatory whipping.

Appeals against Conviction

The morning after the court appearances of each man, the Malaysian media published sensationalist stories of the convictions. Anwar Ibrahim responded by denying the allegations that he had sodomised the men saying the convictions were part of a conspiracy to discredit him. He claimed the guilty pleas had been "*extorted under dire circumstances and emotional trauma*".

On 29 September 1998, newly appointed lawyers on behalf of both men advised that each had retracted his confession claiming it had not been given voluntarily and confirmed that appeals against convictions would be lodged.

There were other concerns about the investigation and trial process.

There is little doubt both men had been ill-treated in order to coerce confessions from them and during their pre-trial detention neither had been allowed access either to family or lawyers appointed to act on their behalf. When they appeared in court lawyers appointed by the authorities represented them.

Amnesty International would later take the view that Sukma Darmawan Sasmitaat Madja and Dr Munawar Anees were prisoners of conscience who were prosecuted solely to secure a conviction against Anwar Ibrahim and to discredit him publicly.

However, more charges were to be brought against Sukma Darmawan. He was later to be charged jointly with Anwar Ibrahim that he had sodomised Azizan Abu Bakar, the former driver of Anwar's wife, at Sukma's apartment in Tivoli Villa, Bangsar between January and March 1993.

2. The Arrest of former Deputy Prime Minister Anwar Ibrahim

The stakes had become incredibly high.

After his dramatic arrest on 20 September 1998, Anwar had been detained in solitary confinement for nine days before being charged with sodomy and corruption. He was then remanded to Sungei Bolah prison there to remain in solitary confinement until trial.

When on 29 September 1998 Anwar was brought to court to answer the charges he showed visible signs of injury. It was obvious that he had a swollen eye and bruised arm, neck, hand and face. He told the court that after his arrest he had been handcuffed and blindfolded then severely beaten by police to unconsciousness. He protested that he was not allowed medical attention for five days after that.

He explained that:

> "I was boxed very hard on my lower jaw and left eye. I was also boxed on the right of my head and they hit me on the left side of my neck very hard. I was slapped very hard left and right until blood came out from my nose and my lips cracked. Because of this, I could not see and walk properly."

As a result of his complaints, the court ordered that Anwar be medically examined. The medical report confirmed that there was evidence of injury "*over the left forehead and neck and received blunt trauma that resulted in residual bruises over the left upper and lower eyelids*...". The doctor considered these injuries to be consistent with having been assaulted as he alleged.

The outrage at Anwar's treatment continued to gather momentum. On 10 October 1998, the *Malaysian Bar Council* at an Extraordinary General Meeting adopted a resolution calling for the appointment of an independent Royal Commission of Inquiry to investigate the complaint of assault.
On 5 January 1999, the Attorney General Mohtar Abdullah revealed that police officers were responsible for the injuries suffered by Anwar Ibrahim while he was in legal custody. The Attorney stated that:

> "Based on medical reports and the investigation file of the Special Investigation Team as a whole, I am satisfied that several injuries alleged by (Anwar) are not true, while there are injuries on certain parts of his body which are proved to have been caused by police officers whilst he was in police custody. I am also of the opinion that the Royal Malaysian Police is fully responsible for the injuries to (Anwar) whilst he was in legal custody of the Police. Nevertheless, the investigations which have been carried out so far have not identified the person or persons responsible for such injuries."

Two days later, the Inspector-General of Police Rahim Noor resigned admitting his direct responsibility for the assaults.

On 3 April 1999, the Government appointed the *Royal Commission of Inquiry into the Injuries of Dato' Seri Anwar Ibrahim Whilst in Police Custody*.

The Commissioners reported to His Majesty the Yang di Pertuan Agong (the Malaysian King) on 6 April 1999 concluding that they accepted the testimony of Anwar that he had been assaulted as he had described. They identified the perpetrator as Inspector-General Rahim Noor, but they could find no evidence to suggest he was part of a police conspiracy against Anwar or that Prime Minister Mahathir abetted the assault.

More that two years later, on 30 April 2001, Rahim was convicted of the assault of Anwar and was sentenced to two months imprisonment and fined RM 525.

3. The Trials and Convictions of Anwar Ibrahim

The Corruption Charges

The trial concerning the allegations of corruption took place from November 1998 until April 1999.

There were four charges.

The first charge read as follows:

> "That you between 12 August 1997 and 18 August 1997, at the official residence of the Deputy Prime Minister, No 47 Damansara Road in the Federal Territory of Kuala Lumpur, while being a member of the Administration, to wit, holding the post of Deputy Prime Minister and Minister of Finance, committed corrupt practice whereby you had directed Dato' Mohd Said bin Awang, Special Branch Director and Amir bin Junus, Special Branch Deputy Director II, Royal Malaysian police, to obtain a written admission from Azizan bin Abu Bakar to deny sexual misconduct and sodomy committed by you for the purpose of protecting yourself against any criminal action or proceedings and as a result of which Azizan bin Abu Bakar had thereby made a written admission dated 18 August 1997 to the Prime Minister as directed and you have thereby committed an offence punishable under Section 2(1) *Emergency (Essential Powers) Ordinance No 22/1970*"

The three other charges alleged the same acts of misconduct, but on different dates, namely 27 August 1997 (Charge 2), between 12 August and 18 August 1997 (Charge 3) and 27 August 1997 (Charge 4). Charges 1 and 2 referred to Azizan bin Abu Bakar, while charges 3 and 4 spoke of another complainant Ummi Hafilda bte Ali.

Section 2(1) of the *Emergency (Essential Powers) Ordinance No. 22/1970* provides as follows:

> "Any member of the Administration, Parliament or State Legislative Assembly or any public officer who commits a corrupt practice shall be liable to a term of imprisonment of 14 years or a fine of RM 20,000 or both."

The term "*member of the Administration*" includes a person holding office as a government minister. Relevantly, "*corrupt practice*" is defined as "*any act done by a member…in his capacity as such member…whereby he has used his public position or office for his pecuniary or other advantage…*".

The allegation against Anwar Ibrahim was that he had attempted to orchestrate a cover-up by asking police to secure retractions from two people who had accused him of sexual misconduct.

When it became obvious at the conclusion of the prosecution case there were difficulties with some of the evidence concerning these issues, the trial Judge permitted each charge to be amended by deleting the words "…*to deny sexual misconduct and sodomy committed by you for the purposes of protecting yourself from criminal action or proceedings*…".

Raja Aziz Addruse (Anwar Ibrahim's counsel) complained that it had been an abuse of process by the prosecution to make sensational allegations of sexual misconduct throughout the trial and then abandon them at the conclusion of its case.

He complained that:

> "Anwar's name…(was)…smeared throughout the trial and the prosecution now tells us that the sodomy and sexual misconduct allegations are not a major part of the charges."

Justice Augustine Paul (a judge with no previous High Court experience who had been transferred from the Malacca Sessions Court to conduct the trial) saw no prejudice to the accused and allowed the amendment.

In April 1999, Justice Paul found Anwar Ibrahim guilty of the charges and sentenced him to six years imprisonment on each charge to be served concurrently with each other.

During the proceedings, Anwar Ibrahim had explained what he believed to be the underlying motive behind his persecution. He told the court: "*I objected to the use of massive public funds to rescue the failed businesses of his (Mahathir's) children and cronies."*

Justice Paul was later appointed to hear the controversial prosecution of Anwar Ibrahim's counsel, Karpal Singh, for allegedly uttering seditious words during the 'sodomy trial' when raising concerns that his client was being poisoned while in custody. After a series of adjournments of the trial, the Attorney General subsequently withdrew the charge on 14 January 2002.

The response by Anwar supporters to his conviction and sentence was predictable. A crowd of about 500 demonstrated outside the court voicing their anger at the decision.

They were met with a quick and violent police response. Using tear gas, baton charges and water cannon laced with eye irritant police dispersed the protestors arresting 24 of them.

An appeal against conviction was taken to the Court of Appeal, but it upheld the decision of the trial judge delivering its decision on April 2001. An appeal to the Federal Court was also rejected in 10 July 2002.

A detailed examination of this case is not part of this report, but the conduct of the trial Judge together with his misdirections and rulings has been the subject of much discussion by many observers who for the most part concluded that a miscarriage of justice undoubtedly occurred.

Lawyers for Anwar Ibrahim were later to make a fresh application in September 2004 to the Federal Court to review its own decision to refuse the appeal.

The Sodomy Charges

The trial took place from June 1999 until July 2000. Anwar Ibrahim was convicted by Justice Dato' Arifin Jaka and sentenced by him on 8 August 2000 to a term of imprisonment of nine years to be served cumulatively with the other sentence.

The accused Sukma Darmawan was sentenced to six years imprisonment with four strokes of the rattan. Anwar Ibrahim, because of his age, was spared the rattan.

Anwar Ibrahim appealed his conviction to the Court of Appeal, but again the trial judge's decision was upheld and the appeal refused on 18 April 2003.

On 21 August 2003, Anwar Ibrahim made a statement to the press in response to that decision.

It read as follows:

> "After studying the written Judgment of the Court of Appeal 2003 (Y.A. Dato' P.S. Gill; Datuk Y.A. Richard Malanjum and Y.A. Dato' Hashim Yusoff), not only is it totally devoid of legal substance, it reeks of deception and fraud and utter contempt for the truth.
>
> On the pivotal appeal issue raised by counsel, of the filing of a notice of alibi under Sec 402A CPC, and the consequent judgment on it by Court - was a brazen attempt by the court to hoodwink the public into believing that I had not filed it. On the contrary, it was duly filed and even the prosecution during the appeal had in no uncertain terms admitted to the effect.
>
> This is a matter of incontrovertible public record and can be verified. The reason for doing this is clear - that is to deny me of my legal right to have the proceeding against me vitiated. This in itself, I dare say, is where the Judges have blatantly overstepped judicial bounds - to the outright borders of committing Judicial Deception.

> The cavalier manner in which the Judges addressed the role of the two prosecutors who were caught red handed in their attempt to procure fabricated evidence in order to secure my convictions is most deplorable. Any self-respecting Judge would have treated the matter with the utmost concern; particularly in the light of the Federal Court's decision, which found both the prosecutors (Tan Sri Abdul Gani Patail and Dato' Azhar Mohammad), and the said Judge Augustine Paul had acted as "defence counsel for the prosecutors". The Court of Appeal deliberately overlooked such flagrant violation on the part of the High Court Judge working hand in glove with the prosecutors.
>
> Other glaring issues staring directly into the face of gross injustice are amongst others: the myriad contradictions and inconsistencies on the part of the prosecution witnesses; the unfair conduct of the prosecution in wantonly changing dates of the commission of offence (at the interval of years) and the Judge allowing the amendment with impunity; the lack of credit worthiness of the "star" prosecution witness who has contradicted himself countless number of times; Justice Ariffin Jaka's refusal to recuse after evidence was adduced of his ownership of shares in *Dataprep Berhad* where the PM's son Mirzan Mahathir was the major shareholder; the cruelty of the Judges in meeting out consecutive and very harsh sentences (the norm in Sec 2 Ordinance 22 corrupt practice sentencing has always never exceeded 2 years); and also the unprecedented ordering of the commencement of sentence from date of conviction rather than the date of arrest, being the norm.
>
> Despite all this, the fact that I was found guilty reinforces my conviction from the very outset, that the trumped up charges were designed to force me out of office and to relegate me to political oblivion.
>
> Can there be any question therefore to the widespread perception of the public that these Judges, including Ariffin Jaka were handpicked, servile and compliant judges who have now been promptly and generously rewarded with promotions – unfairly bypassing independent judges of integrity.
>
> It is pathetic and an utter travesty that these Judges have wantonly sold their souls for worldly gains, failing to recognize the fact that they will still have to account for it someday! "
>
> ANWAR BIN IBRAHIM

Some commentators expressed their concern about the constitution of the Court of Appeal bench. On 22 April 2003, Dato' Param Cumaraswamy (at the time *UN Special Rapporteur on the Independence of Judges and Lawyers*) criticised the decision. He spoke of it in these terms:

> **Press Release: The Anwar Appeal**
>
> The oral judgments of the Court of Appeal dismissing Datuk Seri Anwar Ibrahim's and Sukma Darmawan's appeals against the decisions of High Court Judge Arifin Jaka's decision of August 8, 2000 come as no surprise. They once again reflect the state of the independence, impartiality and integrity of the Malaysian judiciary in politically sensitive cases.
>
> Anwar has exhausted all his appellate avenues over his conviction and sentence in the first trial. He has another right of appeal to the Federal Court from the judgment of the Court of Appeal delivered today.

> The three judges who heard this appeal are the most junior in the Court of Appeal. There are a few senior judges in that Court who could have been empanelled to hear this appeal. For reasons best known to whoever named the panel (it is not certain whether it was the former Chief Justice or the then President of the Court of Appeal who is now the Chief Justice, though by right it should be the President of the Court of Appeal) the seniors were excluded. Maybe the Chief Justice should explain this to the public. The public have a right to know.
>
> What is more, the present Chief Justice of Malaysia will empanel the Bench to hear Anwar's final appeal to the Federal Court from the decision delivered today. He had previously, as judge of the Court of Appeal, sat with two others and dismissed Anwar's appeal to that Court from the judgment of Justice Augustine Paul in the first trial.
>
> What hope has Anwar for justice in such circumstances?
>
> So long as there are judges who are prepared to, and continue to, compromise the values and principles of their high office in such cases there is no hope for judicial independence and impartiality in the Malaysian justice system.

The Court of Appeal's decision was taken on appeal to the Federal Court for final determination.

4. Appeal to the Federal Court against the Sodomy Convictions

The Federal Court listed the appeal to commence on 10 May 2004.

Various international legal and parliamentary organisations decided that it was necessary to send observers to monitor the appeal. These included Marzuki Darusman, the former Attorney General of Indonesia, representing the *Inter-Parliamentary Union* (*IPU*); distinguished advocate Desmond Fernando PC, Chairman of the *Sri Lanka National Commission of Jurists* and Former President of the *International Bar Association* (*IBA*); respected Sri Lankan lawyer and former President of the Bar Association of Sri Lanka (*BASL*) Upali Gooneratne representing *LAWASIA* and Mark Trowell QC, for the *Australian Bar Association (ABA)* and the Geneva-based *International Commission of Jurists (ICJ)*.

In a joint press release, the *International Commission of Jurists*, *Human Rights Watch* and *Amnesty International* called upon the Federal Court to fairly hear the application:

> **Malaysia: In Final Appeal, Anwar Must Get Fair Hearing**
>
> *ICJ, Human Rights Watch*, and *Amnesty International* urged Malaysia's highest court to provide a fair hearing on 10 May for the former deputy prime minister, Anwar Ibrahim, who has been in jail since 1998 on politically motivated charges of corruption and sodomy.
>
> Malaysia's highest court must give Anwar Ibrahim a fair trial, *Human Rights Watch, Amnesty International,* and the *International Commission of Jurists* said today. On May 10, the Federal Court of Malaysia will hear the final appeal of the former deputy prime minister, who has been in jail since 1998 on politically motivated charges of corruption and sodomy.
>
> "Judicial independence has been a serious concern in Malaysia for decades," said Linda Besharaty-Movaed, Legal Advisor for ICJ's Centre for the *Independence of Judges and Lawyers.* "This hearing is a tremendous opportunity for the Malaysian Federal Court to squarely rectify the defects of the past trial and ensure that, this time, Anwar's appeal is in full accordance with fair trial standards."
>
> The hearing represents Anwar's final opportunity for judicial redress. The court will also hear the final appeal of Sukma Darmawan, Anwar's co-accused and adopted brother. Anwar has now served his sentence for the corruption conviction. If he loses his appeal before the Federal Court, he will have to serve out the remainder of his term for sodomy, and will not be eligible for release until April 14, 2009.
>
> "This is Anwar's last chance at freedom," said Ingrid Massage, director of Amnesty International's Asia Program. "It is time that the injustices that marked the arrest, trial and imprisonment of Anwar Ibrahim be set right."
>
> Anwar was initially held under Malaysia's draconian *Internal Security Act (ISA),* and was beaten by the former national chief of police while in custody. He was convicted

of corruption and sodomy following two separate trials in 1999 and 2000 respectively and sentenced to consecutive terms of six and nine years.

Both the trials and appeals were marred by serious violations of due process. The prosecution repeatedly amended the charges against Anwar in an apparent attempt to nullify Anwar's alibi, and government witnesses made contradictory statements about their contact with the accused. One of Anwar's lawyers faced contempt proceedings when he tried to thwart the fabrication of evidence by the prosecution, and the prosecution relied on coerced "*confessions*" by Sukma Darmawan and others who later testified that they made their statements under threat of physical abuse from the police.

"Anwar was put in jail because of Mahathir's political vendetta against him," said Sam Zarifi, Deputy Director of Human Rights Watch's Asia Division. "The Federal Court needs to make sure that Anwar will finally get what he should've gotten in 1998: a chance to answer the charges against him without the outcome being a foregone conclusion."

In addition, Anwar Ibrahim is seeking to reverse previous rulings by lower courts that have refused him release on bail pending a final ruling of his sodomy appeal. Malaysian courts usually grant bail in the absence of any indication that the accused is a flight risk or a likely repeat offender. As a former deputy prime minister, Anwar and his attorneys argue that he is unlikely to fall into either category.

Malaysian and international human rights organizations have repeatedly called for Anwar's release, expressing concern that the charges of "*corrupt practices*" (interference in a police investigation) and sodomy subsequently brought against him were a pretext to remove him from public life. Anwar's dismissal followed policy disagreements with Mahathir and rumors of a leadership challenge to the Prime Minister when Mahathir's popularity was at an all-time low. Amnesty International regards Anwar as a prisoner of conscience.

The ICJ's *Justice in Jeopardy: Malaysia 2000* report, published jointly with the *International Bar Association, the Commonwealth Lawyers Association*, and the *Union Internationale Des Avocats*, concluded that executive influence severely comprised the independence of the judiciary during Anwar's first two trials.

On Monday, the Federal Court will also hear the appeal of Anwar Ibrahim's co-accused, Sukma Darmawan, against his sentence of six years and four strokes of the cane. Malaysian and international observers have raised serious concerns about Sukma Darmawan's treatment: that he was prosecuted solely to secure a conviction against Anwar Ibrahim; that his complaints of ill-treatment, threats, and sexual humiliation by police to coerce a "c*onfession*" have not been fully investigated; and that the police who allegedly mistreated him have not been held to account. If his appeal is rejected, Sukma could soon face caning by prison officials.

Anwar Ibrahim's health has deteriorated while in detention, and he suffers from increasing pain due to a spinal injury apparently aggravated by the beating inflicted on him by the then-national police chief in 1998. His medical condition has not responded to the limited treatment available to him in jail. Anwar has worn a neck brace at his court appearances and has often had to be helped into the courtroom by police.

Malaysia's National Human Rights Commission, *SUHAKAM*, has called for Anwar to be allowed to travel abroad, on the recommendation of medical doctors to receive the recommended specialized medical treatment unavailable in Malaysia. According

to *SUHAKAM*, there are no provisions in Malaysian law that would prohibit him from doing so.

International observers from the following organizations will monitor Anwar's trial:

Marzuki Darusman, *Inter-Parliamentary Union (IPU)*
Desmond Fernando PC, Chairman of the *Sri Lanka National Commission of Jurists*, Former President of the *International Bar Association (IBA)*
Mark Trowell QC, *Australian Bar Association (ABA)* and *International Commission of Jurists (ICJ)*

Meeting with Anwar Ibrahim's Wife & Family

The day before the commencement of the appeal, the foreign observers were taken by Dato' Param Cumaraswamy to meet with Anwar Ibrahim's wife, Dr. Wan Azizah Ismail, at the Anwar family home in Kuala Lumpur.

Together with members of the Anwar family we discussed the circumstances of his arrest, his incarceration, his declining health, the various legal proceedings that he had faced over the years and their hopes for his release.

Inter-Parliamentary Union Resolution

Anwar Ibrahim's plight had been brought to the attention of the prestigious international organisation of parliamentarians known as the *Inter-Parliamentary Union* a body founded in 1889.

At the 174th Session of the IPU Governing Council held at Mexico City on 23 April 2004, a unanimous resolution was passed concerning Anwar Ibrahim's plight. It is worth reproducing it in its entirety.

It read as follows:

Resolution adopted unanimously by the IPU Governing Council
at its 174th Session (Mexico City, 23 April 2004)

The Governing Council of the Inter-Parliamentary Union,

Referring to the outline of the case of Mr. Anwar Ibrahim, a member of the House of Representatives of Malaysia at the time of the submission of the complaint, as contained in the report of the Committee on the Human Rights of Parliamentarians (CL/174/12(b)-R.1), and in the resolution adopted at its 173rd session (October 2003).

Taking also into account communications from Mr. Ibrahim's wife and defence counsel and from other sources dated 18, 24 and 31 January, and 3 and 4 February 2004.

Recalling that, having been dismissed from his post as Deputy Prime Minister and Finance Minister, Mr Anwar Ibrahim was arrested on 20 September 1998, initially under the *Internal Security Act* without any charge, and subsequently prosecuted on charges of abuse of power and sodomy he was found guilty on both counts and sentenced, in April 1999 and August 2000, respectively, to a total term of 15 years' imprisonment, which he is currently serving; on 10 July 2002, the Federal Court dismissed at final instance Mr. Anwar Ibrahim's appeal against the abuse of power charges; in August 2002 Anwar Ibrahim lodged an application with the Federal Court to review its own decision; the hearing of the application, originally set for 18 March 2003, was adjourned owing to a petition of the Attorney General for the application to be heard by a five-member instead of three-member panel; that request has been approved by the Chief Justice: however, no date has so far been set for a hearing, although the Chief Justice is said to have it announced for June 2003.

Recalling also that on 18 April 2003 the Appeal Court rejected Mr. Ibrahim's appeal in the sodomy case; he lodged an appeal with the Federal Court which is pending; considering that, in October 2003, he further lodged a petition in the Appeal Court for a review of its own decision on the ground of serious flaws in its judgment: it not only, ignored an alibi notice given by Anwar Ibrahim but also failed to take account of the fact that he had been prevented from presenting a new alibi notice upon the amendment of the charges in June 1999; the charges had been amended upon presentation of Anwar Ibrahim's and his co-defendant's alibi notice proving that the building in which the offence had allegedly been committed was under construction at the time mentioned in the charges; the prosecution then changed the time frame from "*sometime in May 1992*" to *"between the months of January to March 1993*"; on 19 January 2004 the Appeal Court ruled that it was not competent to review its earlier decision,

Recalling further the serious concerns regarding the fairness of both trials, with particular reference to the attempts made by the prosecution to fabricate evidence against Anwar Ibrahim, the lack of credibility of the main witness, Azizan Abu Bakar, the lack of any medical evidence in the sodomy case, and the serious allegations about extraction of witness statements against Anwar Ibrahim,

Considering that, in May 2003, Anwar Ibrahim filed an application for bail under Section 57 of the *Courts of Judicature Act* pending the proceedings before the Federal Court; the application was rejected on 21 January 2004, reportedly without any reason being stated,

Considering also that, on 5 December 2003, Anwar Ibrahim's defence counsel denounced the provision of partly incorrect information by the parliamentary authorities in their report of September 2003 regarding Anwar Ibrahim's medical care: thus (a) he did not have "*for his exclusive use a large air-conditioned gymnasium which is equipped with the adequate equipment for him to carry out his prescribed physiotherapy exercises at his own convenience…*" but only "*one exercise bench and two dumbbells placed in a*

small air-conditioned living room adjacent to his small cell which is Spartan and certainly not air-conditioned..."; and (b) between the period of October 1999 to June 2003, he was taken from his cell to Kuala Lumpur Hospital on two occasions only and not, as the authorities affirmed, "*taken out of the prison for routine medical treatment*"; considering also that the parliamentary authorities have so far not replied to the Secretary General's letter of 9 December 2003 inviting them to comment on the matter,

Considering further that, given his increasing pain, Anwar Ibrahim's family requested in August 2003 that a medical examination be conducted by an orthopaedic neurosurgeon of their own choice; while this request has not so far been granted, Anwar Ibrahim was examined on 6 January 2003 by a government orthopaedic specialist, which examination revealed new medical complications; Anwar Ibrahim has since been taken for physiotherapy three times a week; he is dependent on the wheelchair and analgesics to alleviate his back pain; recalling that, in their report of September 2003, the authorities affirmed that Anwar Ibrahim was receiving appropriate medical treatment and that his health had significantly improved with conservative treatment,

Recalling that, contrary to the recommendation of the Malaysian *National Human Rights Commission (SUHAKAM*), Anwar Ibrahim has so far not been allowed to undergo surgery abroad; considering that in its communication dated 24 March 2004, *SUHAKAM* reiterated that its stand on the matter of medical treatment remained unchanged,

Recalling also that it has repeatedly requested the parliamentary authorities to provide information on how the Malaysian Parliament, as a guardian of human rights, ensures follow-up to the recommendations made by *SUHAKAM* and that, in their observations forwarded in August 2002, the parliamentary authorities under-took to provide these details:

1. *Regrets* that the parliamentary authorities have so far provided no clarification on the question of allegedly incorrect information provided by them in September 2003; and invites them to comment on the observations of the defence counsel regarding Ibrahim's medical treatment;

2. *Expresses deep concern* at Anwar Ibrahim's worsening state of health; urges the competent authorities to grant him bail without delay and to authorise him to undergo the medical treatment of his choosing, as recommended by the National Human Rights Commission; firmly believes that Parliament, as a guardian of human rights, should not hesitate to support the recommendations of the country's Human Rights Commission and make every effort to relay them favourably to the competent authorities; and calls once again on Parliament to do so;

3. *Notes with deep concern* that Mr. Ibrahim's alibi notice in the sodomy case has so far not been taken into consideration, the Appeal Court ruling that it was incompetent to review its earlier decision; considers that ignoring such an important item of evidence seriously infringes Mr. Ibrahim's right to defend himself;

4. *Trusts* that the Federal Court will rule on Anwar Ibrahim's petitions in a manner fully respectful of the rights of the defence, which the Court itself considers to be "*sacrosanct*" and "*a principle so fundamental to our system of justice*", and hopes that the relevant hearings will soon take place;

5. *Invites* the parliamentary authorities once again to provide information on how in general the Malaysian Parliament, as a guardian of human rights, ensures follow-up to the recommendations made by *SUHAKAM*;

6. *Requests* the Secretary General to convey this resolution to the competent Malaysian authorities and to the sources;

7. *Requests* the Committee on the Human Rights of parliamentarians to continue examining this case and report to it at its next session, to be held on the occasion of the 111th Assembly (September-October 2004).

5. The Appeal Hearing

On 10 May 2004, the Federal Court commenced to hear arguments on the appeal against Anwar Ibrahim's convictions for sodomy.

The appeal was to be heard in the courtroom located on the first floor of the newly constructed *Palace of Justice* at the new administrative city of Putra Jaya located 30 kilometres from Kuala Lumpur.

By nine o'clock that morning, the public gallery was filled with international observers, members of the national and international media, the family of the appellants and their supporters.

Foreign embassy officials were also present representing Australia, Canada, Denmark, France, Germany and the United States.

Security was particularly heavy both inside and outside the court building where a crowd of about 1000 Anwar supporters had gathered to express their support for him.

At one stage on that first day, supporters breached security and invaded the large entry hall of the building chanting slogans and calling out "*reformasi*" and "*Free Anwar*". Security officers soon dispersed the crowd and thereafter supporters were kept outside on the steps of the building to be admitted only after obtaining a pass from court staff. Otherwise, they were well behaved for the entirety of the hearing.

The bench comprised Federal Court justices Datuk Abdul Hamid Mohamad and Datin Paduka Rahmah Hussain sitting together with Court of Appeal judge Datuk Tengku Baharuddin Shah Tengku Mahmud.

The Malaysian Attorney General Tan Sri Abdul Gani Patail assisted by Senior Federal Counsel Datuk Mohd Yusof bin Zainal Abiden headed the large prosecution team.

It is of interest to note that the Attorney General had prosecuted at both of the Anwar trials. He was also one the prosecutors who was alleged by the defence to have attempted to procure false testimony against Anwar Ibrahim.

The defence team was equally as large. Veteran counsel Chris Fernando headed the team with distinguished advocate Karpal Singh. Assisting them were Sankara Nair, Kamar Ainiah Kamaruzzaman, Pawanchek Marican, Zulkifli Noordin, Saiful Izham Ramli and Marisa Regina.

Gobind Singh Deo assisted by Ram Karpal Singh Deo appeared for Sukma Darmawan.

6. Preliminary Applications

Application by Bar Council to Appear on Watching Brief

As is customary in court proceedings in Malaysia, the Bar Council will often make application to have counsel appear on its behalf to observe the proceedings at the bar table and if asked will make submissions on any points of law concerning its members or matters affecting the legal profession. It is described as a "*watching brief*". The right to appear is always a matter of judicial discretion and is not always granted. (2)

A member of the Bar Council sought leave to appear at the Appeal, but Justice Hamid refused the application on the basis he could see no reason for the Bar to be represented.

Application to Disqualify the Judges

Before the commencement of their submissions on behalf of Anwar Ibrahim, both Chris Fernando and Karpal Singh submitted to Justice Abdul Hamid that he should *recuse* himself from hearing the appeal because of remarks he had made at an appeal against sentence by *Negeri Sembilian* State Assemblyman, Waad Mansof, for offences of corruption under the same legislative provision used against Anwar Ibrahim.

Waad Mansof had been fined. The prosecution appealed against what it claimed was a lenient sentence. At the appeal, Justice Hamid defended the sentence by suggesting that Anwar Ibrahim's case involved issues of national security where there had been a "*threat to public order".*

It was submitted that by his remarks Justice Hamid had shown his prejudice towards Anwar and should not preside at his appeal.
Chris Fernando also submitted that Judge Tengku Baharuddin should disqualify himself because he was a relatively junior judge who was not even a Federal Court judge and was being asked to return a decision against a judge previously his senior in the appeal court.

Decisions on these matters were reserved until after lunch.

As court moved to adjourn for lunch, Anwar Ibrahim shouted his objections to the bench claiming that each of them had been handpicked to find against him and that Dr Mahathir had virtually destroyed the judiciary by appointing people who would maintain his control over it. The judges ignored the outburst and left the court.

Returning after lunch, Justice Hamid rejected the submissions that either judge should *recuse* himself on the basis that:

1. There was no personal bias on his part and his comments at an unrelated appeal did not relate to this case and he had merely made a distinction for the purposes of sentencing another accused.

2. Each judge of the court was presumed to be independent and impartial and to disqualify Judge Baharuddin for the reason advanced by counsel would undermine the independence of the judiciary.

At that point Anwar Ibrahim indicated that he did not wish to proceed with the appeal.

He shouted at the judges from the dock:

> "I am considering withdrawing the appeal as I have no confidence in the judges who are to hear my appeal. I see no point in continuing these proceedings. Your Lordships surely understand my predicament, as my counsels' arguments were not even properly addressed. What we are saying is that why more senior and qualified federal Court judges were ignored. I see no point in proceeding if this will be a foregone conclusion. This is a facade of a fair trial."

The proceedings were temporally adjourned while Anwar Ibrahim consulted with his legal team. When the Court reconvened, Chris Fernando announced to the Court that Anwar Ibrahim was "*pretty adamant he didn't want to proceed, but he has been persuaded that he should*."

Formal Recognition of Foreign Observers

The next application concerned the status of the international observers.

None of the observers had asked for any official status at the trial, but Anwar Ibrahim's counsel asked the Court to officially record our presence. Karpal Singh submitted to the Judges that there was precedent for that to happen.

However, Justice Hamid would have none of it.

He reminded counsel that in previous court proceedings involving Anwar Ibrahim only the names of counsel had been recorded. He further suggested that there was no need to officially record the names of any other persons because all were equally welcome in the court. In fact, he stated he would prefer not to know who else was in court other than counsel.

Again, Karpal Singh persisted with the application suggesting that the recognition of the international observers was no more than a courtesy to them.

The application was refused.

Had an Alibi of Notice Been Filed & Served on Prosecution?

The final matter to be resolved was the issue of whether Anwar Ibrahim's lawyers had served an alibi notice on the prosecution?

This had been a matter of much controversy at the hearing before the Court of Appeal.

The service of an alibi notice is a statutory requirement under Section 402 of the *Criminal Procedure Code* that requires that it be served 10 days before any trial. Failure to file the document enables the prosecution to obtain an adjournment of the proceedings to investigate the alibi.

An alibi notice had in fact been filed and served on the prosecution during the original trial, but the trial Judge made no mention of that fact in his reasons for decision. Later during argument before the Court of Appeal a copy of the document was produced, but was not tendered as an exhibit. When the Court of Appeal delivered its decision it was clear from the reasoning that it did not accept that service of the alibi notice had been given, when in fact it had.

Anwar Ibrahim's counsel Karpal Singh had not missed the error and immediately challenged the Court of Appeal saying the judgement could not stand. The judges then suggested they had not seen the notice in court. The prosecution refused to contradict them.

This was a critical preliminary point for it was argued that by ignoring the alibi notice the judgement of the Appeal Court was flawed and should be overruled on that basis alone.

Justice Hamid asked counsel whether it could be agreed that the notice had been filed and if so then it was obvious the Court of Appeal had erred and the issue could cease to be a motion and become part of the substantive appeal for the court to determine whether or not it amounted to a miscarriage of justice.

In what appeared to be a surprise turn-around Attorney General Tan Sri Gani Patail conceded that a notice of alibi had either been served on the prosecution or if not the prosecution had been advised of it. He said he had difficulty recalling which because it had been so long ago.

Karpal Singh wanted the issue settled demanding that the prosecution concede that the Court of Appeal had been advised of the service of the notice of alibi before delivering its decision. The Attorney General finally conceded that it was so.

Accordingly, the controversy was resolved.

The Various Grounds of Appeal

Each counsel focused on particular appeal grounds of which there were many.

For Anwar Ibrahim, several grounds of appeal were argued that included the following:

(1) That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge misdirected himself in admitting evidence of alibi in circumstances where he had determined that a notice of alibi had not been given to the prosecution. Section 402A of the *Criminal Procedure* Code imposed a mandatory requirement to provide notice of alibi and the trial Judge's failure to enforce that requirement constituted a miscarriage of justice.

(2) That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge gave insufficient regard (if any) to the various retractions made by the complainant Azazin bin Abu Bakar both in his statements to the police and his testimony given at the trial and the adverse impact that had on his credit.

(3) That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge failed to direct himself of the danger of convicting the appellant based on the uncorroborated testimony of the complainant.

(4) That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge had failed to take account of evidence the appellant claimed established there had been payments made to witnesses to give false testimony.

(5) That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge failed to have sufficient regard (if any) to the testimony of lawyer Majeet Singh, Jamel Abdel Rahman and Raja Kamabidden concerning attempts by the police and the prosecution to fabricate evidence against Anwar Ibrahim.

(6) That the Court of Appeal erred in not upholding the appellant's submission that attempts by prosecutors to procure false testimony against him tainted the entire legal process and amounted to a miscarriage of justice.

(7) That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge had reversed the onus of proof by requiring the appellant to prove the existence of a political conspiracy and the fabrication of evidence against him.

(8) That the Court of Appeal erred by not upholding the appellant's submission that the trial Judge should have disqualified himself from hearing the case because of financial links he had to Prime Minister Mahathir's son.

(9) That the Court of Appeal erred in not upholding the appellant's submission that the prosecution should have been permanently stayed because of the delay in bringing the prosecution.

Finally, the appellant appealed against his sentence claiming it was manifestly excessive in all the circumstances.

The primary thrust of the appellant's attack was on the credit of the complainant Azazin bin Abu Bakar on whose testimony the respondent for the most part relied.

It should be recalled that Azazin testified at each of the two trials.

His testimony was relevant in the '*corruption trial'* because each charge had alleged that Anwar had instructed police to obtain a written admission from each of the complainants "*to deny sexual misconduct and sodomy committed by him*" for the purpose of protecting himself against any criminal action. In that trial, the prosecution set out to prove that acts of sodomy had taken place.

Azazin had maintained during examination-in-chief that he had been sodomised, but when cross-examined conceded that he had not. When pushed in re-examination he changed his mind yet again.

When re-examined he also changed the dates on which he alleged the offences had occurred. That resulted in an amendment to the charges.

At the '*sodomy trial'* Azazin again changed the dates when it was alleged the offences occurred. He was unable to explain why he had changed his mind, but again an amendment of the dates was allowed.

When pressed by defence counsel under cross-examination he admitted that he had changed the dates at the request of the police.

For Sukma, the primary attack focused on the involuntary nature of the confession obtained by police.

His counsel Gobind Singh submitted that "*the trial judge misdirected himself when he failed to consider the totality of the circumstances surrounding the appellant when he made the confession*."

He submitted the trial judge failed to direct his mind to the impact and effect of the detention on Sukma Darmawan, the manner of the interrogation and the oppression that resulted in the confession.

Further, he said, the judge failed to give proper weight to the fact that a witness had, during a trial-within-a-trial, agreed that police were only satisfied with his client's statement after 12 days of intense interrogation.

Respondent's Reply

In summary, the respondent replied to these appeal grounds by submitting:

(1) The issue of whether a notice of alibi had been given by the appellant was irrelevant because the trial Judge nevertheless considered the evidence of alibi given by the appellant. The respondent also submitted that in any event, Section 402A of the *Criminal Procedure Code* was "*merely directory and not mandatory*" so that failure to enforce that requirement did not constitute a miscarriage of justice.

(2) The trial Judge was best placed to assess the credit of the complainant Azazin and was aware of his various retractions, but was nevertheless entitled to accept his testimony as being truthful and reliable.

(3) The trial Judge was also aware of the various allegations made against the police and the prosecution that each had attempted to fabricate evidence against the appellant, but he was not bound to accept that the allegations against Anwar Ibrahim had been fabricated.

(4) The trial Judge should not have disqualified himself from hearing the trial because any links he might have to the Prime Minister's son was only through his shareholding in a company and did not disclose a bias against Anwar Ibrahim.

(5) The charges brought against Anwar Ibrahim were not so old as to justify the court ordering a permanent stay.

(6) The trial Judge was well aware of the necessity to direct himself appropriately concerning the uncorroborated testimony of Azazin and did so.

(7) The confessional statement given by Sukma Darmawan to police was voluntarily given and not coerced from him by force or threat.

(8) There was no substance to the allegation that the prosecutors at the trial had attempted to procure fabricated testimony against Anwar Ibrahim.

Conference with Malaysian Attorney General

On the afternoon of 10 May 2004, the international observers were invited to attend at the Attorney General's Chambers to discuss aspects of the appeal with the Attorney General Tan Sri Abdul Gani Patail and his senior prosecutor Datuk Mohd Yusof bin Zainal Abiden.

Joining the foreign observers at the meeting was Dato' Param Cumaraswamy.

The Attorney General participated in a very frank and far ranging discussion with the observers over a period of some hours.

Relevant to the appeal, the Attorney expressed the view that he had opposed the defence application to record the presence of international observers because it had the potential to intimidate judges hearing the proceedings. He said that he opposed the trend to incorporate foreign observers into the court process.

There had been a rumour that the Attorney General had together with the Prime Minister met with the appeal judges to discuss the proceedings. The Attorney denied any such meeting had taken place.

Finally, Marzuki Darusman asked the Attorney about the issue of clemency based on Anwar Ibrahim's deteriorating health. The Attorney responded by saying there were concerns that Anwar Ibrahim's health was not as serious as he claimed, but there was no reason why competent medical treatment was not available in Malaysia even when he complained he could only be treated in Germany.

The conference was very helpful in understanding the prosecution's view of the appeal.

During the court proceedings the Attorney General always made himself available to discuss aspects of the case and provided material to us including copies of the appeal papers, submissions and legal authorities.

The defence team also co-operated extensively with the foreign observers.

Reserved Decision

On 20 May 2004, the Federal Court adjourned the proceedings and reserved its decision.

Immediately after the hearing was adjourned, the following press release was released to local and international news organizations speaking on behalf of the *Australian Bar Association* and the *International Commission of Jurists*:

PRESS RELEASE

20th May 2004 - Putrajaya, Malaysia

The final appeal of former deputy prime minister Datuk Seri Anwar bin Ibrahim against his conviction for sodomy ended today in the Federal Court of Malaysia at Putrajaya.

The judges have reserved their decision. The question of whether Anwar should be released on bail pending that decision is to be heard tomorrow morning.

International observer, Mark Trowell QC, representing the *Australian Bar Association* and *International Commission of Jurists* reflected on various aspects of the appeal at the conclusion of proceedings this afternoon.

"Even though the judges refused an application by Anwar's counsel to officially record our presence at court, we appreciate their courtesy in welcoming us to observe the proceedings", said Mr Trowell.

He further expressed gratitude to the Malaysian Attorney General, Tan Sri Gani Patail, for generously making himself available to the observers and supplying a large amount of appeal material to them.

"Anwar's lawyers also provided considerable assistance to us", he added.

Mr Trowell said that the observers "make no complaint as to the conduct of the appeal proceedings". He said that the judges at the hearing "acted with courtesy, patience and apparent interest in the submissions made by counsel."

"However", he emphasised, "the fairness of this appeal will be judged by the final decision of the Federal Court."

"Whether the court has been fair and just shall be assessed by its response to the process of the original trial that was patently unjust and tainted by significant errors of law."

Mr Trowell also expressed some concern about the deteriorating health of Dato' Seri Anwar. He said that Anwar's "failing health was deserving of some clemency and a compassionate response by the authorities to ensure that he received the necessary medical treatment."

"We should also not forget the plight of Anwar's adopted brother Sukma Darmawan", said Mr Trowell. "His counsel, Gobind Singh Deo, has raised serious concerns about his client's treatment while in police custody after his arrest when a confession was obtained after 12 days of harassment and interrogation by the police."

Mr Trowell said that this evidence raised serious doubts that the statement was voluntary. "It substantially taints his confession and critically damages the case against him. That fact a lone deserves particular scrutiny by the judges", he said.

Later that day, when asked by the media to express the general view of the international observers concerning the process most of them had witnessed over the previous two weeks, I responded by saying:

> "The international community has a clear perception that the original trial was patently unfair and contained many errors of law. That perception can only be overcome by the court acting objectively and dealing with the appeal on its merits without regard to any extraneous factors. Malaysia's reputation as a modern and democratic nation governed by the rule of law will be assessed by how the judges deal with this appeal."
>
> Aljazeera.Net, Saturday 22 May 2004
> Associated Press, May 22 2004
> The China Post, 24 May 2004

Bail Application

The next day counsel for Anwar Ibrahim made application to the Court that he be released to bail pending its decision.

The Court refused the application holding there were no special or exceptional circumstances that warranted a stay of execution. In his ruling, Justice Addul Hamid stated that at this stage the panel of judges would not like to prejudge their decision and in the circumstances they preferred to maintain the *status quo*.

Justice Hamid added:

> "However, let me repeat what I have said on Thursday. We give our promise that we shall come up with our written judgment as fast as we can and within a reasonable time. Please bear with us. Give us the chance to read the records and the numerous authorities submitted by both sides, consider the submissions and come up with an honest judgment whichever way it may go, based entirely on evidence and law, and nothing else."

Anwar responded by saying he had expected to be refused bail, adding that he believed he would probably also lose the appeal.

He told the media:

> "We are not going to get any honest or fair judgement. The judges are quite prejudiced."
>
> Associated Press, 22 May 2004
> The China Post, 24 May 2004

The *International Commission of Jurists* urged the Court to deliver a speedy decision. It issued the following press release on 28 July 2004:

> **Malaysia: No More Delays In Anwar Appeal**
>
> The *ICJ* urged the Malaysian Federal Court today to deliver its judgment expeditiously in the appeal of Anwar Ibrahim, the former deputy prime minister who is in jail on politically motivated charges of corruption and sodomy.

The International Commission of Jurists urged the Malaysian Federal Court today to deliver its judgment expeditiously in the appeal of Anwar Ibrahim, the former deputy prime minister who is in jail on politically motivated charges of corruption and sodomy.

"We are concerned that the Court vacated the date fixed for delivering the judgment, 22 July, without providing any reasons whatsoever and without fixing another date." said Linda Besharaty-Movaed, Legal Advisor for the *Centre on the Independence of Judges and Lawyers of the International Commission of Jurists*. "This is particularly worrying as Anwar continues to be held in detention where his health is reportedly deteriorating" she added.

After completion of the hearing on 20 May 2004, the Presiding Judge stated, "We are reserving our judgment. I promise we will sit down, work hard uninterruptedly and we will give the decision as soon as possible."

Malaysian and international human rights organizations have repeatedly called for Anwar's release, expressing concern that the charges of "corrupt practices" (interference in a police investigation) and sodomy subsequently brought against him were a pretext to remove him from public life.

The *Australian Bar Association*, the *Bar Council of Malaysia*, the *International Commission of Jurists*, the *International Bar Association*, the *Inter-Parliamentary Union* and *LAWASIA* monitored the appellate proceedings.

7. The Decision

The Federal Court delivered its decision four months later on 2 September 2004.

The recently appointed Vice-President of the *International Commission of Jurists (*and former *UN Special Rapporteur)*, Dato' Param Cumaraswamy, was there to observe the handing down of the judgment.

By a majority decision of 2:1 Justices Hamid and Judge Baharudin upheld the appeal overturning the conviction based upon what they considered to be significant deficiencies in the prosecution's case, which caused them sufficient reason to doubt the case against each of the accused.(3)

"*We allow the sentence and conviction to be set aside. We find the High Court misdirected itself. He should have been acquitted*," said Judge Abdul Hamid Mohamad, head of the three-judge panel.

The Judges decided the appeal on the preliminary question of whether:

> "… at the end of the prosecution's case, the prosecution had proved beyond reasonable doubt that, in respect of both appellants, the appellants had sodomised Azizan bin Abu Bakar ("Azizan") at Tivoli Villa one night between the month of January until March 1993 and, in respect of the second appellant only, whether he had abetted the offence committed by the first appellant."

First, the Judges found the confession of Sukma to be inadmissible because it was involuntary.

Secondly, the prosecution had alleged the offences took place on certain dates. The majority concluded that the period during which the offences were alleged to have been committed was an essential part of the charge and needed to be proved by the prosecution. Having rejected the confession of Sukma, the only evidence of the commission of the offences on those dates was the testimony of the complainant Azizan. They found him to be an unreliable witness whose testimony had not been corroborated in circumstances where he was obviously an accomplice. Accordingly, the majority concluded it was not safe to convict on the basis of his testimony alone.

The judges therefore concluded that as the prosecution had not managed to prove the case against each of the appellants beyond reasonable doubt both Anwar Ibrahim and Sukma should have been acquitted without having to enter a defence.

Justice Abdul Hamid Mohamad summarised the judgement of the majority in the following terms:

"…even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we are more inclined to believe that the alleged incident at Tivoli Villa did happen, sometime, this court, as a court of law, may only convict the appellants if the prosecution has successfully proved the alleged offences as stated in the charges, beyond reasonable doubt, on admissible evidence and in accordance with established principles of law.

We may be convinced in our minds of the guilt or innocence of the appellants, but our decision must only be based on the evidence adduced and nothing else. In this case Azizan's evidence on the '*date*' of the incident is doubtful as he had given three different 'dates' in three different years, the first two covering a period of one month each and the last covering a period of three months. He being the only source for the "date", his inconsistency, contradiction and demeanor when giving evidence on the issue does not make him a reliable source, as such, an essential part of the offence has not been proved by the prosecution.

We also find the second appellant's confession not admissible as it appears not to have been made voluntarily. Even if admissible the confession would not support the 'date' of the commission of the offences charged.

We have also found Azizan to be an accomplice. Therefore corroborative evidence of a convincing, cogent and irresistible character is required. While the testimonies of Dr. Mohd. Fadzil and Tun Haniff and the conduct of the first appellant confirm the appellants' involvement in homosexual activities, such evidence does not corroborate Azizan's story that he was sodomised by both the appellants at the place, time and date specified in the charge.

In the absence of any corroborative evidence it is unsafe to convict the appellants on the evidence of an accomplice alone unless his evidence is unusually convincing or for some reason is of special weight which we find it is not. Furthermore, the offence being a sexual offence, in the circumstances that we have mentioned, it is also unsafe to convict on the evidence of Azizan alone.

For all the above reasons, we are not prepared to uphold the conviction. Since the applicable law in this case requires that the prosecution must prove its case beyond reasonable doubt before the defence may be called, the burden being the same as is required to convict the appellants at the end of the case for the defence, we are of the view that the High Court has misdirected itself in calling for the appellants to enter their defence. They should have been acquitted at the end of the case for the prosecution.

We therefore allow the appeals of both appellants and set aside the convictions and sentences."

8. The Response to the Decision

The day following the Federal Court decision, the *International Commission of Jurists* issued the following press release applauding the decision:

Malaysia: ICJ Welcomes Ruling in Anwar Appeal

The *International Commission of Jurists* welcomed Malaysia's highest court ruling yesterday overturning former Deputy Prime Minister Anwar Ibrahim's sodomy conviction and sentence of nine years imprisonment and setting him free.

"*The Federal Court's ruling is a step in the right direction in upholding the rule of law,"* said *ICJ* Secretary-General Nicholas Howen. "*Basic standards of fair trial were not followed in the first and second trials and Anwar should have been acquitted long ago*", Nicholas Howen said.

In a 2:1 ruling, Malaysia's Federal Court decided to overturn Anwar's previous conviction and found that the High Court had misdirected itself. The Court also found that the prosecution's key witness was unreliable and in effect involved in the facts that gave rise to the charge.

"*Finally justice has been done*," said *ICJ* Vice-President Dato' Param Cumaraswamy, who observed the handing down of the judgment on behalf of the ICJ. "*Since 1988, under the Mahathir regime, the Judiciary did not have the courage to dispense justice independently*", he added.

Anwar Ibrahim was jailed for six years for corruption in 1999. One year later he was sentenced to further nine years for sodomy. He always argued that the charges against him were politically motivated after former Prime Minister Mahathir Mohammed sacked him.

"*The Malaysian Government should now take steps to bring the country's human rights record into line with international standards*", said the *ICJ* Secretary-General. "*I encourage the Government to ratify and implement core international human rights treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights",* added Nicholas Howen.

The ICJ has monitored Anwar Ibrahim's trial since its initial stages.

Earlier this year, the *International Commission of Jurists*, the *Australian Bar Association*, the *Bar Council of Malaysia*, the *International Bar Association*, the *Inter-Parliamentary Union* and *LAWASIA* monitored the appellate proceedings at the Federal Court.

Amnesty International also responded to the decision issuing the following press release on 3 September 2004:

Malaysia: Anwar Ibrahim's release renews confidence in judicial independence

Amnesty International warmly welcomes today's decision by Malaysia's highest court to uphold the final appeals of former deputy prime minister Anwar Ibrahim and his adopted brother, Sukma Darmawan. Both men had been convicted on charges of sodomy.

"*The Federal Court's decision to release Anwar Ibrahim marks an historic milestone in the restoration of confidence in the rule of law and respect for human rights in Malaysia*," said Catherine Baber, deputy Asia director at *Amnesty International.*

The significance of Anwar Ibrahim's arrest and prosecution went far beyond the fate of one individual.

"*It exposed a pattern of political manipulation of key state institutions including the police, public prosecutor's office and the judiciary, all of which are crucial in safeguarding the human rights of Malaysians*," said Catherine Baber.

Amnesty International hopes today's ruling will serve as a lasting reminder of the role the judiciary must play in scrutinising executive actions and preserving key principles -- including freedom of speech and of political dissent -- which are enshrined in Malaysia's constitution and international human rights standards.

Noting how the Federal Court drew attention to abuses by police as seeking to elicit an involuntary 'confession' from Sukma Darmawan, *Amnesty International* urged the government to continue efforts to reform the police and other justice institutions. *Amnesty International* welcomed Prime Minister Abdullah Badawi's creation earlier this year of a Royal Commission of Inquiry to examine the police and urges the Commission to make recommendations for wide-ranging reform. The commission is due to report in early 2005.

9. Appeal to the Federal Court against Corruption Convictions

Less than a week after the Federal Court quashed Anwar Ibrahim's sodomy conviction, his lawyers asked Malaysia's Federal Court to review its own decision, made in 2002, to refuse an appeal against the corruption conviction.

A bench comprising Court of Appeal President Datuk Abdul Malek Ahmad and Federal Court judges Datuk Siti Norma Yaacob and Datuk Alauddin Mohamed Sheriff unanimously ruled that they could hear the application dismissing the preliminary objections of Attorney General Tan Sri Abdul Gani Patail that a review was beyond the court's jurisdiction.

"*We are of the unanimous view that we have the jurisdiction to deal with the motions filed*," ruled Judge Malik Ahmad. "*The preliminary objection is dismissed*."

The application had been brought under Rule 137 of the *Federal Court Rules (1995)*, which gives the court inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of process of the court.

The Rules provide for no automatic right to review a decision previously made by the Court, but allows it only in circumstances where it can be demonstrated that it has determined the issue based on some defect of the legal process.

Essentially, the appeal was based on two arguments.

The first argument was a constitutional point. Karpal Singh submitted that the basis for review was a defect in the process of delivering the judgement of the Federal Court. He argued that the power given to the Chief Justice under Section 94(2) of the *Courts of Judicature Act* in delivering judgement in an appeal was unconstitutional in allowing him to split the decisions of the court between the issues of guilt or innocence and sentence.

The second argument related to fresh evidence which Anwar' Ibrahim's lead counsel Chris Fernando submitted should be considered by the Court.

On September 15, the Federal Court delivered its decision rejecting both arguments ruling unanimously that its previous decision to uphold a High Court ruling that found Anwar Ibrahim guilty was in order.

Having this appeal rejected by the Federal Court, the only avenue for redress would be for Anwar Ibrahim to obtain a pardon from His Majesty the Yang di-Pertuan Agong. However, the pre-requisite to obtaining a pardon is an admission of guilt. That is something he has stated he is not prepared to do.

10. What is to be concluded from the Federal Court decision?

Anwar Ibrahim's long struggle for justice certainly attracted international attention.

His struggle exposed fundamental issues confronting the Malaysian justice system, including the capacity of the judiciary to independently and impartially determine politically sensitive cases, allegations of police brutality and corruption and the use of the draconic *Internal Security Act (ISA)* in prosecuting alleged offenders.

These are longstanding complaints ever since Dr Mahathir's attack on the judiciary in the late 1980's.

Does the Federal Court decision to uphold Anwar's appeal and release him from prison represent a change of direction for the judiciary?

Was it an independent and impartial decision made without any political interference?

There is probably little doubt the Federal Court decision would not have been possible under Dr Mahathir's regime given his considerable influence over the judiciary.

Prime Minister Abdullah Badawi made it perfectly clear in media interviews he would not seek to influence the court decision emphasising it was entirely a matter for the judges.

Anwar Ibrahim's assessment of the result was clear. He told reporters on his release that he was grateful to current Prime Minister for not imposing his will on the judiciary:

> "You've got to recognise the fact that his predecessor (former Prime Minister Mahathir Mohammed) wouldn't have made this judgment possible,"
>
> BBC World News, Thursday 2, September 2004

Prime Minister Abdullah Badawi was at the time keen to distinguish his style of governing from that of his predecessor. He had early in his term authorised prosecutions against politicians and businessmen for corruption and spoke constantly of the need for the government to be accountable.

Critics of the Government suggested his approach was no more than "*window dressing"* claiming the prosecutions were few and selective. They also took the view that the Prime Minister's public statements about judicial independence carried little weight given they were made at a time when Anwar Ibrahim was no longer a political threat.

However, there are signs that the system may be changing.

In May 2005, the Royal Commission appointed to inquire into the Royal Malaysian Police Force delivered its report.

The Commissioners found that the police had abused powers of preventative detention and recommended that the police should no longer be able to use internal security laws to sidestep courts and lock up suspects.

Foreign observers regularly take the view that the Malaysian judicial system should not be congratulated for doing what it should do and that is to decide cases based on the principles of law rather than be influenced by political considerations.

Perhaps the Federal Court decision indicates a shift in direction for a judiciary that for some 20 years had been subject to executive government influence?

It may be that by this decision the judiciary had shown itself capable of now acting in a more independent and impartial way. The Anwar appeal decision may well have been the turning point for the Malaysian judicial system.

Whether it is so is yet to be seen.

11. Postscript

There are many persons to thank for their assistance in preparing this report.

First, may I extend my appreciation to both the *Australian Bar Association and International Commission of Jurists* for requesting that I represent their interests at the appeal.

Tony Glynn SC (at the time President of the *Australian Bar Association)* enlisted me to observe the appeal on behalf of the *ABA*. He was an enthusiastic supporter of the project believing the *ABA* should assume a more active role in promoting international human rights.

Ian Viner QC (now President of the *Australian Bar Association*) gave ongoing support during the final stages of the appeal and the writing of this Report. He shared his predecessor's commitment to promote human rights within the region.

Dato' Param Cumaraswamy (at the time Vice-President of the Geneva-based *International Commission of Jurists*) is a passionate advocate for human rights. He provided much valuable advice during and after the appeal and was responsible for the attendance of so many international observers at the appeal.

Chief Justice of Western Australia David K. Malcolm AC (also Chair of the Judicial Wing of *LAWASIA*) must be thanked for his encouragement and constant support after my appointment, on his recommendation, to observe the sedition trial of distinguished Malaysian lawyer Karpal Singh on behalf of LAWASIA in 2002-2003. Chief Justice Malcolm enjoys an international reputation as a jurist and his commitment to human rights is widely known. In fact, David Malcolm QC (as he then was) attended as the LAWASIA observer at the sedition trial of Dato' Param Cumaraswamy (then President of the *Malaysian Bar Council*) who at that time was under attack from the Malaysian Government in 1986.

I should also make mention of the assistance of the Federal Minister for Justice and Customs, Senator Christopher Ellison, for providing me with advice and diplomatic support in Malaysia.

My fellow observers were wonderful companions during the appeal process. They were a constant source of inspiration. I speak of Marzuki Darusman, the former Attorney General of Indonesia, representing the *Inter-Parliamentary Union* (*IPU*); distinguished advocate Desmond Fernando PC, Chairman of the *Sri Lanka National Commission of Jurists* and Former President of the *International Bar Association* (*IBA*) and respected Sri

Lankan lawyer and former President of the *Bar Association of Sri Lanka (BASL)* Upali Gooneratne.

All of the lawyers involved in the appeal were very helpful to the international observers. At all times they were willing to discuss aspects of the case and provide written materials used by them at the appeal. We are also thankful to the various court staff and security personnel who assisted us always with courtesy and good humour.

Footnotes

(1) Zainur Zakaria, was sentenced to three months in jail for contempt for filing an affidavit alleging that two public prosecutors had attempted to fabricate evidence against Anwar. The Federal Court unanimously set aside the sentence, which had been upheld by the Court of Appeal, and acquitted Zainur. All three Federal Court judges criticized the decision of the lower court, stating that the lower court judge, Augustine Paul, had behaved more like a prosecutor than a judge. Justice Paul was later to preside over the more controversial prosecution of distinguished advocate Karpal Singh for sedition. For detailed consideration of this case refer to the report by the author to *LAWASIA* and *ABA* dated 6 December 2001 and 12 September 2002.

(2) The Malaysian Bar Council relies on the *Legal Profession Act 1976* (Act 166) to provide a basis for allowing it to appear in this capacity. Section 42 (1)(e) describes one of the Council's functions as "…*to represent, protect and assist any member of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia*."

(3) Refer to the attached majority judgements of Federal Court justice Datuk Abdul Hamid Mohamad and Court of Appeal judge Datuk Tengku Baharuddin Shah Tengku Mahmud; and dissenting judgement of Justice Datin Paduka Rahmah Hussain. Also attached is the judgement of the Federal Court dismissing the appeal against the corruption convictions.

ANWAR IBRAHIM'S LONG STRUGGLE FOR JUSTICE

Report on Datuk Seri Anwar bin Ibrahim's Appeal against conviction observed on behalf of the Australian Bar Association and International Commission of Jurists

Appendix A

Sodomy Appeal Judgements

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN JENAYAH NO: 05-6-2003 (W)

ANTARA

DATO' SERI ANWAR BIN IBRAHIM … PERAYU

DAN

PENDAKWA RAYA … RESPONDENT

RAYUAN JENAYAH NO. 05-7-2003 (W)

SUKMA DARMAWAN SASMITAAT MADJA … PERAYU

DAN

PENDAKWA RAYA … RESPONDENT

CORAM:

ABDUL HAMID MOHAMAD F.C.J.

RAHMAH HUSSAIN F.C.J.

TENGKU BAHARUDIN SHAH TENGKU MAHMUD J.C.A.

MAJORITY JUDGMENT OF

ABDUL HAMID MOHAMAD F.C.J.

AND TENGKU BAHARUDIN SHAH TENGKU MAHMUD J.C.A.

In this judgment, Dato' Seri Anwar bin Ibrahim will be referred to as "the first appellant" and Sukma Darmawan Sasmitaat Madja will be referred to as "the second appellant".

The first appellant was charged with an offence punishable under section 377B of the Penal Code.

The second appellant was charged with two offences. The first charge is for abetting the first appellant in the commission of the offence with which the first appellant was charged. The second charge is similar to the charge against the first appellant i.e. under section 377B of the Penal Code.

Both the appellants were tried jointly. The first appellant was convicted and sentenced to nine years imprisonment commencing from the expiry of the sentence he was then serving in the first trial. High Court Kuala Lumpur Criminal Trial No. 45-48-1998 (1999)2 M.L.J. 1 (H.C), (2002)2 M.L.J. 486 (C.A.) and (2002) 3

M.L.J. 193 (F.C.)). The second appellant was convicted on both charges and sentenced to six years imprisonment and two strokes for each charge with the sentences of imprisonment to run concurrently. For the judgment of the High Court in the present case, see (2001) 3 M.L.J. 193.

They appealed to the Court of Appeal. Their appeals were dismissed – see (2004) 1 M.L.J. 177.

They appealed to this court and this is the majority judgment of this court.

Section 87(3) of the Courts of Judicature Act 1964 ("CJA 1964") provides that a criminal appeal to this court "may lie on a question of fact or a question of law or on a question of mixed fact and law." The position is the same as in the case of the Court of Appeal hearing an appeal from a trial in the High Court as in this case – see section 50(3) CJA 1964.

In this judgment, we shall first consider whether the trial judge had correctly, in law and on the facts, called for the defence. If he had not, it would not be necessary for us to consider the defence: the appellants are entitled to an acquittal. Only, if we find that the learned trial judge had correctly called for the defence that we will have to consider whether he had correctly convicted the appellants at the close of the case for the defence.

In so doing, this court (and the trial court too), as a court of law, is only concerned with the narrow `legal issue i.e. whether, at the end of the prosecution's case, the prosecution had proved beyond reasonable doubt that, in respect of both appellants, the appellants had sodomised Azizan bin Abu Bakar ("Azizan") at Tivoli Villa one night between the month of January until March 1993 and, in respect of the second appellant only, whether he had abetted the offence committed by the first appellant.

In considering whether the defence was correctly called, this court, being an appellate court not only will consider whether all the ingredients of the offences have been proved beyond reasonable doubt, but will also consider whether there have been misdirections or non-directions amounting to misdirections that have caused a substantive miscarriage of justice.

It must be borne in mind that the duty on the part of the prosecution at the close of the case for the prosecution is to prove beyond reasonable doubt, not only, that the offence was committed one night at Tivoli Villa, but also that that "one night" was in the month of January until and incluing the month of March 1993. Even if it is proved that the incident did happen but if it is not proved "when", in law, that is not sufficient. This is because the period during which the offence is alleged to have been committed is an essential part of the charge. It becomes even more important when the defence, as in this case, is that of alibi. The appellants must know when (usually it means the day or date, but in this case the period from and including the month of January until and including the month of March 1993) they are alleged to have committed the offence to enable them to put up the defence of alibi.

In this respect we propose to take the bull by the horns. We shall consider, first, whether the prosecution had proved beyond reasonable doubt not only that the offence was committed, but whether it was committed one night during the three months' period. That would call for the evaluation of Azizan's evidence, and determining whether the second appellant's confession is admissible. There will be sub-issues that will have to be determined e.g. the impeachment proceeding against Azizan, whether Azizan is an accomplice and the issue of voluntariness of the second appellant's confession. After deciding on those issues, we shall consider whether, in view of our findings on them, the decision of the learned trial judge to call for defence can stand. If it cannot stand, the matter ends there. If it can still stand, then only we shall consider the other issues raised at the close of the case for the prosecution. Only if after considering all the issues raised in respect of the case for the prosecution we are satisfied that the learned trial judge had correctly called for the defence that we shall consider the defence. Otherwise we do not have to as the appellants would also be entitled to an acquittal at the close of the case for the prosecution.

Credibility of Azizan: general observation

For reasons best known to the defence which is also not difficult for us to understand, learned counsel for the appellants, especially Mr. Christopher Fernando, kept stressing that Azizan was an outright liar.

Actually, in doing so, he had placed a very high burden on the appellants. For the purpose of the case, in a criminal trial, it is not necessary for the defence to show or for the court to arrive at a conclusion that Azizan is a liar before his evidence may be regarded as unreliable. Azizan may not be a liar but his evidence may or may not be reliable. Further, some parts on his evidence may be reliable and some may not be.

Before considering Azizan's credibility as a witness, one point must be made so that whatever conclusion we arrive at will not be an issue vis-a-vis the earlier finding of the High Court in the first trial which had been confirmed by the Court of Appeal and this court.

It is to be noted that Azizan's credibility had been considered in the earlier case. All the three courts, including this court, had found that he was a credible witness.

We must point out that that is a separate matter. His credibility as found by the courts in that case was in respect of that case, based on the evidence he gave in that case. In that case the main issue was whether the first appellant directed Dato' Mohd. Said bin Awang, Director of the Special Branch and Amir Junus, Deputy Director II of the Special Branch to obtain a written statement from Azizan denying and withdrawing his (Azizan's) allegation of sodomy against the first appellant as contained in his (Azizan's) statutory declaration dated 5 August 1997 (Exh. P14C in the first trial and Exh. P5 in this trial which will be referred to as Exh. P14C/P5) which they (Mohd. Said and Amir Junus) obtained in the form of a written statement dated 18 August 1997 (Exh. P17 in the first trial). That was the substance of the offence in the first trial. The substance of the main offence in the instant appeal is whether the appellants sodomised Azizan at Tivoli Villa one night in January until and including March 1993.

Secondly, is it true that Azizan's statutory declaration dated 5 August 1997 (Exh. P14C/P5) and Azizan's statement dated 18 August 1997 (Exh.P17 in the earlier trial) featured strongly in this trial and appeal. But, as pointed out by this court, in the judgment of Haidar FCJ (as he then was) in the earlier appeal at page 213:

"In respect of (1) (i.e. allegation of sodomy by the first appellant in Exh. P14C/P5 – added), after the evaluation of the evidence, the learned judge ruled there is evidence to show that Ummi and Azizan had made the allegations. In fact, in our view, the defence did not seriously dispute that the allegations were made but contended that they were false and fabricated. However, in view of the amendment to the charges, the truth or falsity of the allegation was no longer in issue. There are no reasons for us to disagree with the learned judge when he said at p 114 that:

"….. there is evidence to show that Ummi and Azizan had made the allegations against the accused."

The principles adopted by the appellate courts not only in this country but also in other common law jurisdictions have been reproduced at length by the Court of Appeal - see from page 206 to 208 of (2004) 1 MLJ. The Court of Appeal reproduced dicta made in the following cases: Clarke Edinburgh Tramways (1919) SC (HL) 35 @ 36 (per Lord Shaw of Dunfermline), Powell and Wife v Streatham Manor Nursing Home (1935) AC 243 at p.249 (per Viscount Sankey L.C.), Herchun Singh & Ors. v Public Prosecutor (1969) 2 MLJ 209 at p. 211 (per H.T. Ong C.J. (Malaya), Lai Kim Hon & Ors v. Public Prosecutor (1981) 1 MLJ 84 (per Abdul Hamid F.J. (as he then was), Kandasamy v. Mohamed Mustafa (1983)2 MLJ 85 (P.C.) (per Lord Brightman) and Goh Leng Kwang v. Teng Swee Lin & Ors (1994) 2 MLJ 5 (Singapore). Even learned counsel for the appellants did not disagree with the principles stated in those cases. We shall not repeat them except to quote a few short passages from the judgments and point out the contexts in which they were made.

In Herchun Singh & Ors v. Public Prosecutor (1969) 2 MLJ 209 at p. 211, H.T. Ong (C.J. (Malaya)) said:

"This view of the trial judge as to the credibility of a witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the judges, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding: see Sheo Swarup v. King-Emperor AIR 1934 PC 227."

It must be noted that, in Herchun Singh's case (supra), the police report made shortly after the robbery by the complainant, not only failed to identify the appellants but contained a further statement "I do not know them (saya tidak kenal)". This was contradicted by the complainant who denied those words, in fact, he remembered telling the police about Adaikan, the third appellant, as well as giving a description of the first appellant. He remembered telling the policeman who wrote the complainant's police report that there were Sikhs among the robbers and that one of them was a brother of the estate watchman but whose name he could not recollect at the time he made the report. Ong Hock Thye (C.J. (Malaya)) then said:

"The learned trial judge, having heard the complainant's explanation, was satisfied that the latter was still very much shaken by the alarming experience he had undergone when he made his report but that, despite his agitation, he did mention the names to the police. This was a finding of fact that the report which was taken down contain errors and omissions for which the constable was responsible."

This passage is then followed by the passage quoted earlier. So, that passage must be read and understood in the light of that finding of fact i.e. that the police report contain errors and ommissions. Indeed, in Herchun Singh's case (supra) the learned Chief Justice (Malaya) distinguished Ah Mee v. Public Prosecutor (1967) MLJ 220 (F.C.) In that case, a rape case, the Federal Court held that in view of the inconsistencies in the evidence of the complainant it was unsafe to rely on her uncorroborated evidence and therefore the conviction must be set aside. This is in spite of the fact that the trial judge considered that the complainant's credibility was unimpeached and had stated that he was personally impressed by his demeanor.

Ah Mee (supra) is a case where the complainant's own evidence is inconsistent, not a case in which the evidence of one witness on a particular point is contradictory to that of another witness, and the judge believes one witness and not the other.

We shall only refer to another Federal Court judgment in Lai Kin Hon & Ors v. Public Prosecutor (1981) 1 MLJ 84. In that case, in a passage quoted by the Court of Appeal in the instant appeal, Abdul Hamid F.J. (as he then was) said:

"Viewed as a whole it seems clear that the finding of fact made by the trial judge turned solely on the credibility of the witnesses. The trial judge heard the testimony of each witness and had seen him. He also had the opportunity to observe the demeanour of the witnesses. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. And which evidence is to be believed or disbelieved is again a matter to be determined by the trial judge based on the credibility of each witness. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject. Viewed in that light we did not consider it proper for this court to substitute its findings for that of the learned trial judge.

The principle of law governing appeals in criminal cases on questions of fact is well established, in that the Appeal Court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness."

In that case the Federal Court did not interfere with the finding of the trial judge because the court was of the view that the trial judge had enough evidence before him which, if believed, would justify his finding the appellant guilty.

Of course, the general principle is not in dispute. However, it is the application of the principle to a particular situation that is difficult and, more often then not, in dispute.

Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of H.T. Ong (C.J. Malaya) in Herchun Singh's case (supra) "there are substantial and compelling reasons for disagreeing with the finding." Otherwise, no judgment would ever be reversed on question of fact and the provision of section

87 CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

Azizan's credibility was attacked, first, through the impeachment proceeding and, having failed in the impeachment proceeding, on ground of contradictions in his evidence made in the earlier trial and in this trial. The learned trial judge correctly stated in his judgment that the "defence is entitled to embark on the assault of the credibility of Azizan based on the facts of the case even after a ruling has been made by the court that his credit is saved." – see page 250, letter "G" of (2001) 3 MLJ. The Court of Appeal, after citing the learned trial judge at length and stating the law, agreed with the decision of the learned trial judge on the impeachment proceeding and the learned trial judge's finding that "Azizan was a reliable, credible and truthful witness notwithstanding some of the discrepancies and contradictions that were higlighted by the defence." – see page 215, letter B (2004) 1 MLJ 215.

It is said that these are concurrent finding of facts of the two courts but, again, that does not mean that this court should shy away from analysing the evidence to see whether there are "substantial and compelling reasons for disagreeing with the finding", again borrowing the words of H.T. Ong (C.J. (Malaya) in Harchun Singh (supra).

Impeachment proceeding

The impeachment proceeding was in respect of Azizan's inconsistent statements in his testimony in the previous trial and in this trial. The inconsistent statements are, in brief, in the first trial he said he was not sodomised by the first appellant after May 1992. But in this trial, he said that he continued to be sodomised after that. This becomes of utmost importance because the charge, as finally amended, gives the date of the offence as from January until March 1993. His explanation was that what he meant by the earlier statement was that he was not sodomised in the first appellant's house after May 1992.

The learned trial judge accepted Azizan's explanation that what he meant by the statement that he was not sodomised by the first appellant after September (later, May) 1992 was that he was not sodomised in the first appellant's house. His reason was that the questions were asked in relation to his visits to the first appellant's house after May 1992. The Court of Appeal found that there was nothing wrong with the conclusion of the learned trial judge. Even though we are not absolutely satisfied with the explanation, we are not inclined to disturb that finding for the following reasons. First, unlike the learned trial judge, we do not have the advantage of seeing and hearing the witness.

Secondly, in an impeachment proceeding, Azizan was placed in the position of an accused. Therefore, if there is any doubt, the benefit of the doubt should be given to him.

Thirdly, the effect of impeachment seems to be very harsh. Not only his whole evidence will be disregarded, he is also liable to prosecution for perjury. On the question whether, where a witness is impeached, his whole evidence is to be disregarded, there appears to be conflicting decisions in our courts. Earlier cases seem to take the rigid view that once a witness is impeached, his whole evidence becomes worthless (see Koay Chooi v. R. (1955) MLJ 209, Mathew Lim v. Game Warden, Pahang (1960) MLJ 89 and Public Prosecutor v. Munusamy (1980) 2 MLJ 133 (F.C.). On the other hand, in Public Prosecutor v. Mohd. Ali bin Abang & Ors. (1994) 2 MLJ 12, Chong Siew Fai J (as he then was) took the view that the fact that the credibility of a witness is impeached does not mean that all his evidence must be disregarded. It is still incumbent upon the court to carefully scrutinize the whole of the evidence to determine which parts of her evidence are the truth and which should be disregarded. The learned Judge followed the Singapore case of Public Prosecutor v Somwang Phattanasaeng (1992) 1 SLR 138. Indeed there is also another Singapore High Court case to the same effect: Public Prosecutor v Mohammed Faizal Shah (1998) 1 SLR 333. However, no reference was made to the earlier Malaysian cases, including the judgment of this court in Munusamy (supra).

As the point was not argued before us, and also since it is not necessary for this court to decide on the issue in this appeal, we would leave it to another occasion and in a proper case for it to be decided upon by this court, if it need be.

The point is, if we accept the view prior to Mohd. Ali bin Abang (supra), which we should, in view of Munusamy (supra), a Federal Court judgment, then the effect of an impeachment order, if made against Azizan would be very drastic. Not only that, he may even be subject to prosecution.

But, the fact that he was not impeached does not mean that his whole evidence must be believed. His evidence will have to be scrutinised with care, bearing in mind the dent in his credibility caused by his contradicting statements. At the end of the day, his evidence may be found to be reliable in some parts and not in others. And, at that stage, if there is any doubt, the benefit of the doubt must be given to the appellants because they are the accused.

Azizan's evidence regarding the date of offence

The only person who was present during the alleged incident, other than the appellants, was Azizan. The person who was alleged to have been sodomised was Azizan. So, he should be the only person, other than the appellants, who should know when he was sodomised.

Is he really consistent in his evidence about the "date" of the offence?

The first time he mentioned about the date of sodomy (at luxurious hotels), was in Exh. P14C/P5 dated 5 August 1997. The period given was around 1992 ("sekitar tahun 1992"). But, in P14C/P5 he did not mention Tivoli Villa. So we do not know whether he meant to include it or not. In any event, in the charge dated 5 October 1998 against the first appellant regarding Tivoli Villa incident, the date of the commission of the offence was stated as "May 1994" (Jilid 1, page 239).

Who gave the "May 1994" date to the police? Logically, the date of the commission of the offence could only come from Azizan as he was the "victim", the only person present other than the appellants.

In this trial, on 3 August 1999, Azizan was cross-examined by Mr. Christopher Fernando:

"S: Adakah kamu beritahu pihak polis kamu diliwat pada bulan Mei 1994?

J: Saya tak ingat."

S: Adakah kamu tahu tuduhan asal terhadap Dato' Seri Anwar adalah pada Mei 1994?

J: Ya, saya tahu.

S: Adakah kamu diberitahu polis kamu diliwat pada bulan Mei 1994?

J: Saya tak ingat."

(Jilid 2, page 992 to 993)

On 4 August 1999, still under cross-examination:

"S: Adakah awak berithau polis bahawa awak diliwat oleh Dato' Seri Anwar dan Sukma pada bulan Mei 1994?

J: Tidak."

(Jilid 2, page 999)

Still under cross-examination on 9 August 1999:

"S: Adakah tidak sebelum hari ini awak ada memberitahu mahkamah ini bahawa awak tidak ada memberitahu polis bahawa awak diliwat oleh Dato' Seri Anwar dan Sukma pada tahun 1994?

J: Ada.

S: Jikalau awak tidak beritahu tarikh iaitu tahun 1994 siapakah beritahu polis ianya berlaku dalam bulan Mei 1994? (Tidak ada jawapan)."

(Jilid 2 page 1028 to 1029)

On 16 August 1999, now under re-examination by the Attorney General:

"S: Adakah awak katakan apa-apa kepada polis mengenai apa-apa kejadian dalam tahun 1994.

J: Saya beritahu polis yang saya ada diliwat pada tahun 1994."

(Jilid 2, 1055)

So, having denied that he informed the police that he was sodomised by the appellants in 1994, he finally admitted that he did tell the police that he was sodomised in 1994. That answers the question that he earlier on did not answer when asked: if he did not tell the police the 1994 date who informed the police that the incident happened in May 1994?

On 23 April 1999, the second appellant was charged. The date of the offence was given as "May 1992". Three days later, on 27 April 1999, the charge against the first appellant was also amended from "May 1994" to "May 1992". How did this date come about? SAC 1 Musa provides the answer: it was based on "other statements" made by Azizan. (Jilid 2. Page 1101). After the amendment, notices of alibi were served on the prosecution. Then, it was found that the construction of Tivoli Villa had not been completed yet!

On this point, the evidence of Azizan given on 4 August 1999 reads:

"S: Setuju atau tidak pada bulan Mei 1992, Tivoli Villa (belum siap dibina)?

J: Setuju."

(Jilid 2, page 998).

On 7 June 1999 the charges were amended from "May 1992" to "between the month of January until March 1993".

On 3 August 1999 under cross-examination, Azizan said that he gave that "date" to the police on 1 June 1999 (Jilid 2, page 993).

Towards the end of his evidence, when re-examined by the then Attorney General, another point cropped up. Azizan said:

"J: SAC1 Musa telah meminta saya untuk mengingati dengan jelas tentang kejadian pertama kali saya diliwat di Tivoli Villa." (emphasis added)

(Jilid 2, page 1064)

Note that he now talked about SAC1 Musa asking him to remember the incident that he was sodomised by the appellants for the first time at Tivoli Villa. SAC1 Musa (SP9) also said the same thing:

"J: Saya minta Azizan mengingatkan tarikh pertama kali dia di liwat oleh Dato' Seri Anwar dan Sukma di Tivoli Villa." (emphasis added).

(Jilid 2, page 1096)

So, even at the end of his evidence, while he was certain about the January until March 1993 date, he came up with another poser: was there a second or third incident that he was sodomised by both the appellants at Tivoli Villa?

To sum up, he gave three different dates in three different years, the first two covering a period of one month each and the third covering a period of three months as the date of the alleged incident.

Regarding his finding on Azizan's credibility, the learned trial judge said:

"It is to be observed that May 1994 and May 1992 are not the months we are concerned with in the instant charges against both the accused. These months are relevant only in respect of the earlier charges which have been amended. We are not concerned with these charges. I had dealt with the amendment of these charges earlier in this judgment and had ruled that the amendment was lawfully made in the proper exercise of the discretion by the Attorney General. In his testimony Azizan said he was confused because he was asked about the months of May 1994 and May 1992 repeatedly as stated above. I find as a fact that he was confused. When a witness is confused, it does not mean he was lying. The naked truth is that he could not remember what he had said. I am satisfied he was not lying. In any event, the issue whether he told the police he was sodomized in May 1994 and May 1992 are not the issues in the current charges against both the accused. The issue is whether he was sodomized by both the accused between the months of January and March 1993 at Tivoli Villa. I therefore rule the credit of Azizan is not affected on this score.

It was also argued that the evidence of Azizan cannot be accepted in the light of the evidence of SAC-1 Musa. It was pointed out that SAC-1 Musa in is evidence said five statements were recorded from Azizan and that all these statements were in relation to sodomy. The allegations are consistent and true. He also testified that there was a necessity to amend the charges because there were contradictions in the date. It was submitted that there were two versions of the prosecution case on a fundamental ingredient i.e the dates. In this respect, it is necessary to recapitulate what Azizan had said about the dates. In his evidence which I had referred to earlier he was confused about the dates as he was asked repeatedly the same questions on the dates May 1994 and May 1992. In substance what he said on this issue was that he could not remember whether he told the police he was sodomized in May 1994 although he did say that he did not inform the police that he was sodomized in 1992.

Be that as it may, the evidence of SAC-1 Musa clearly states that Azizan was consistent in his statements on the issue of sodomy although he was not sure of the exact dates. The relevant dates we are concerned with in the present charges are between the months of January and March 1993. Azizan emphatically said in evidence that he was sodomized by both Dato' Seri Anwar and Sukma at Tivoli Villa between January to March 1993. Whether he was sodomized in May 1994 or May 1992 is not relevant as these dates are not in issue to be decided in this case. I see no merits on this contention and the credit of Azizan is not affected on this ground." (Page 255 to 256 of (2001) 3 MLJ).

It is true that May 1994 and May 1992 are not the dates that we are concerned with in the instant charges. But, in determining whether Azizan's evidence regarding the date in the present charges is reliable or not we do not think that they are not relevant. All the dates must have been given by Azizan as he was the "victim" and the only person present during the incident other than the appellants. Indeed evidence shows that he did give those dates to the police. We accept that he may not be lying. He may be confused. May be he cannot remember because the incident happened many years earlier and unlike in most sexual cases, he did not lodge a police report immediately. In fact he did not lodge a police report at all. But, the fact that he may be confused or he cannot remember is the point. You do not prove a thing by forgetting or by being confused about it. That is why the charge against the first appellant had to be amended twice. The fact that the amendments were lawfully made is of no consequence. We accept that the amendments were lawfully made. But, we are talking about the consistency of Azizan's evidence regarding the date of the commission of the offence.

And, it is not a matter of one or two days, one or two weeks or even one or two months. It covers a period of three years (1992, 1993 and 1994) and, even the last date given was one night in a period of three months!

Furthermore, we note that on the issue whether he informed the police that he was sodomised in 1994, having said he could not remember twice, Azizan denied informing the police, but under re-examination he admitted that he did inform the police of the fact. We also note that the learned trial judge had recorded his observation of Azizan when giving evidence, e.g. "tidak ada jawapan", "witness is very evasive and appears to me not to answer simple question put to him."

In the circumstances, even though, for the reasons that we have given, we do not interfere with the finding of the trial judge in the impeachment proceeding, when we consider Azizan's evidence as a whole, we are unable to agree with the "firm finding" of the learned trial judge and the Court of Appeal that Azizan "is a wholly reliable, credible and truthful witness". Evidence does not support such a finding. He was most uncertain, in particular about the "date" of the offence, not just the day or the week or even the months but the year. We do not say he is an "outright liar" as Mr. Christopher Fernando was trying to convince us. But, considering the whole of his evidence, he is certainly not the kind of witness described by the learned trial judge.

Is Azizan an accomplice?

Both the High Court and the Court of Appeal found that Azizan was not an accomplice. On this point too we are not going to repeat the law which has been stated by both the High Court and the Court of Appeal. Instead, we will focus on the facts.

The reason for his finding that Azizan was not an accomplice is to be found in this paragraph.

"In the instant case the evidence shows that Azizan was invited to visit Tivoli Villa by Sukma. Azizan went there to see Sukma's new apartment. He went there not with the intention of committing sodomy with both the accused. His actus reus alone is not sufficient to make him an accomplice, there must also be the intention on his part (see Ng Kok Lian's case). For reasons I therefore find that Azizan is not an accomplice."

(page 250 of (2001) 3 MLJ

The Court of Appeal added nothing to it in agreeing with the finding of the learned trial judge.

In our view, if the learned trial judge was looking for mens rea he should look at the surrounding circumstances. This is where evidence of similar facts becomes relevant. This is not a case of a person who was merely present at the time of the commission of the offence or participated in it only once. By his own evidence, he was sodomised 10 to 15 times at various places, including in the house of the first appellant over a number of years. He never lodged any police report. He never complained about it until he met Ummi in 1997. He did not leave the job immediately after he was sodomised the first time, we do not know when. Even after he left the job, he went back again to work for the first appellant's wife. Even after he left the second time, he continued to visit the appellant's house. He even went to the first appellant's office. When invited by the second appellant to go to Tivoli Villa, he went. He said he was surprised to see the first appellant there. Yet he stayed on. Signalled to go into the bedroom, he went in. There is no evidence of any protest. He followed whatever "instructions" given to him.

He said he submitted under fear and was scared of both the appellants. A person may allow himself to be sodomised under fear once or twice but certainly not 10 to 15 times over a number of years. He is not a child nor an infirm. Even on this occasion, when he saw the first appellant there, he would have known of the possibility of the first appellant wanting to sodomise him again. Why did he not just go away? Instead, by a mere signal, he went into the bedroom, as if he knew what was expected of him. He did nothing to resist, in fact co-operated in the act. And, after the first appellant had finished and went to the bathroom, he remained in that "menungging" position. What was he waiting for in that position? Indeed the whole episode, by his own account, appears like a repetition of a familiar act in which each actor knows his part. And, after that he went back to the place again, twice and talked about the incident as "the first time" he was sodomised there,

giving the impression that there was a second or third time. Are all these consistent with a person who had submitted under fear? We do not think so. Therefore, in our judgment Azizan is an accomplice, though he may be a reluctant one.

Second Appellant's Confession

The prosecution sought to introduce the confession of the second appellant recorded by Encik Abdul Karim bin Abdul Jalil, a Session's Court Judge acting as a Magistrate ("the magistrate") on 17 September 1998.

A trial within a trial was held. At the end of it the learned trial judge held that the confession was properly recorded and voluntarily made and admitted it as evidence. The Court of Appeal agreed with him.

The attack on the confession can be divided into two parts. The first was on what the magistrate did or did not do in recording the confession. This has been enumerated by the learned trial judge as points (a) to (g) – see page 232 of (2001) 3 MLJ. We have no reason to differ from the findings of the learned trial judge on those points.

The second part is on the issue of voluntariness of the confession. In this regard, the fact the magistrate who recorded the confession said that he was satisfied that the confession was made voluntarily, does not mean that the trial court must accept that the confession was voluntarily made. The magistrate formed his opinion from his examination, oral and physical, and his observation of the confessor. He formed his opinion from what he saw of the confessor and what was told to him by the confessor, in answer to his questions or otherwise. A confessor may, at the time of making the confession, tell a magistrate that he is making the confession voluntarily and the magistrate may believe him. But, that does not mean that the trial court must automatically accept that the confession was voluntarily made and therefore admissible. If that is the law, then the trial within a trial would not be necessary at all because every confession that is recorded by a magistrate is recorded after the magistrate is satisfied of its voluntariness. But, though the magistrate may be jusitfied based on his examination and observation of the confessor that the confessor was making the confession voluntarily, the trial court, after holding a trial within a trial and hearing other witnesses as well, may find otherwise. That is what a trial within a trial is for.

We do not question the opinion of the learned magistrate that he was satisfied that the second appellant was making his confession voluntarily. Neither do we find that the other grounds forwarded in respect of the recording of the confession have any merit.

What is more important is for this court to examine whether the finding of the learned trial judge that the confession was voluntarily made after the trial within a trial is correct.

In this regard too, the learned trial judge had stated the law correctly which was amplified by the Court of Appeal (see page 228 – 229 of (2004) 1 MLJ). We agree with them. However, we would like to add that, of late, this court, in considering the voluntariness of cautioned statement made under section 37A of the Dangerous Drugs Act 1952 has accepted that if there appears to be "suspicious circumstances surrounding the making of, or recording of, the cautioned statement" it is incumbent on the trial judge to hold it inadmissible: Tan Ewe Huat v. Public Prosecutor (2004) 1 MLJ 559 F.C. In so doing, this court followed the judgment of the Court of Appeal in Chan Ming Cheng v. Public Prosecutor (2002) 3 MLJ 741 in which Gopal Sri Ram JCA, delivering the judgment of the court said:

"There is no burden on an accused person to prove that the statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also no burden on an accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on an accused is to show suspicious circumstances surrounding the making of or recording of the cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible."

It must be pointed out that the provision of section 37A (1)(a) of the Dangerous Drugs Act 1952 is similar to the provision of section 24 of the Evidence Act 1950.

In dealing with this issue, it appears to us that the learned trial judge considered each allegation by the second appellant and denial by the police officers in question and concluded that he believed the police officers and held that the confession was voluntarily made.

In the circumstances of this case which, we must say, is different from any other case that we know of, we think we have to consider the whole circumstances surrounding the arrest of the second appellant and the related investigations.

As we are considering the question of voluntariness of the confession which is a question of fact, we have no choice but to reproduce the evidence, even though it is quite long.

We shall summarise the evidence of the second appellant first. The second appellant was arrested by ASP Rodwan (TPW3) and three other police officers at about 1.00 p.m. on 6 September 1998 at Societe Cafe, Lot 10 Shopping Complex, Bukit Bintang. He was then having lunch with his sister Komalawati (TDW2). He was taken to the lower ground of Lot 10 and pushed into a Proton Saga car and his hands were handcuffed. He was then taken to his car. ASP Rodwan and the other police officers ransacked ("membongkar") his car in the presence of the public. From there he was taken to Bukit Aman. During the journey, ASP Rodwan played the speech of the first appellant condemning ("memaki dan mencaci") the former Prime Minister.

They stopped at Bukit Aman only to park the second appellant's car and then proceeded to his apartment at Tivoli Villa. In the car he was verbally abused ("memaki hamun"). At the apartment they ransacked the whole place but did not find anything that they were looking for. They broke the door of the room of the second appellant's sister in spite of the fact that he told them that the key was with her. Between 3.00 p.m. to 4.00 p.m. he was taken to Bukit Aman. At ASP Rodwan's office he was asked to sit at one corner with his hands handcuffed. At that time, they were jumping merrily ("bersuka-suka dan meloncat-loncat"). ASP Rodwan was filling a form. At that time the second appellant heard Zaini, one of the officers, asking ASP Rodwan: "Boss, borang nak tahan dia ni atas dasar apa? Rodwan jawab "entah." He was taken to the lock up. Before entering he was asked to remove all his clothes except for his under pants. He was not given food that evening/night as he was told by the officer in charge of the lock-up that meal time was over. In fact he had not eaten the whole day.

On the second day, in the morning, 7 September 1998, he was taken to ASP Rodwan's offfice. There he met a person by the name of "Zul" (ASP Zulkifly bin Mohamed, TPW4). After ascertaining his identity, according to the second appellant, ASP Zulkifli lifted his shirt and pinched his nipple while making fun of him using shameful words ("memulas-mulas buah dada (nipple) saya dengan sekuat-kuatnya dengan mempersendakan diri saya dengan kata-kata yang memalukan"). At the office, ASP Rodwan asked him to make a statement regarding his homosexual relationship with the first appellant. When he denied, ASP Rodwan challenged him to take an oath with the Quran in the presence of a religious teacher ("Ustaz"). He accepted the challlenge but no "Ustaz" came.

Later in the same day, 7 September 1998, he was taken to see a magistrate. The magistrate made a remand order of two weeks straight away.

In the afternoon, he was taken back to Bukit Aman. There ASP Rodwan told him that he was under his (ASP Rodwan's) detention ("di bawah tahanan saya") and it was better for him to tell about his (the second appellant's) homosexual relationship with the first appellant. When he denied, ASP Rodwan told him if he was prepared to talk he could go home faster. If not he would be handed over to the Special Investigation Unit which officers were very rough and he would regret later.

He also said he was suffering from asthma and at night it became worse and he asked to be allowed to wear his T-shirt to cover his chest.

At about 7.00 a.m. on the third day, 8 September 1998, two officers took him to a meeting room at the third floor. There were six officers in the room. In the room he was asked to strip naked, while still being handcuffed and he was asked to turn around so that they could see his whole body. When he sat down on a chair, all the officers simultaneously scolded him: "Who ask you to sit down?" They removed his spectacles

and knocked it ("mengetuk-ngetuk") as if to break it. After he sat down an officer stood up, kicked his chair and he fell down. They did not question him then. They merely scolded him simultaneously and continuously very close to his ears in a very high and rough tone. This went on until about 1.30 pm. He was in that room from about 8.00 am or 8.30 am to about 1.30 p.m.

After lunch, at about 2.00 p.m. or 2.30 p.m. he was taken to the same room again. The same thing happened again, until about 4.30 p.m. or 5.00 p.m.

On the fourth day, 9 September 1998, he was taken to a room. There were a few people there including one Dr. Zahari (Dr. Zahari Noor (TDW5)). Dr. Zahari examined his whole body paying particular attention to his private part and his anus. He also inserted his finger into his (the second appellants') anus. He was naked during the examination. ASP Rodwan directed the cameraman to take photographs of the second appellant while naked but Dr. Zahari stopped it as he did not require the photographs. But ASP Rodwan said it was necessary for the purpose of the investigation. Photographs of him, naked and in various positions and close ups of his private part, were taken (and in fact tendered in the main trial as P7 A – G.)

After that he was taken to the same room on the third floor again. There were six people there. The second appellant identified C/I Sampornak bin Ismail (TRW2), D/Kpl Ahmad Bustami bin Ayob (TRW3), D/Kpl Mokhtaruddin bin Suki (TRW5), D/Kpl. Hamdani bin Othman (TRW4). They told him that the photographs would be used as evidence, but not for what.

As had happened on the previous day, he was roughly scolded until about 4.30 p.m. or 5.00 p.m.

On the fifth day, 10 September 1999, the interrogation continued. On that day they were rougher. They threatened that if he did not follow their instructions he would be detained under the Internal Security Act for two years and then for a further two years. They also told thim that he could be charged like Dato' Nalla. They could place bullets in his car which was then at Bukit Aman. They also threatened him that they could pay someone to shoot him and no one would suspect the police for it.

On 11 September 1998, the sixth day, his stand was not strong anymore ("saya tidak lagi teguh dengan pendirian saya") because he could no longer bear what was being done to him and he followed their instructions. After that they became nice to him. They removed the handcuff, lowered their voices, allowed him to wear shirt and trousers, gave him drink, cigarette and cakes in the morning. Asked by learned counsel, what they wanted from him, the second appellant said that they wanted him to admit that he had sexual relationship with the first appellant.

The interrogation continued on the following days, in a more friendly manner.

On 16 September 1998, the eleventh day of his detention, at about 7.30 a.m. or 8.30 a.m. ASP Rodwan came to see him at the lock-up. He informed the second appellant that he should make a statement before a magistrate. He agreed after ASP Rodwan told him that he would be released after making a confession before a magistrate. On the following day, 17 September 1998, the twelfh day, he was taken to see the magistrate (TPW1) who recorded his confession. Asked by his counsel how he could make such a long confession, about 10 or 12 pages, he said he was guided by ASP Rodwan repeatedly. ASP Rodwan also told him it was alright if he were to make mistakes but what was more important was to give a clear and detailed evidence ("keterangan") about his homosexual relaitonship with the first appellant and Azizan.

Cross-examined by Mr. Karpal Singh he said that from 6 September 1998 to 16 September 1998 he was taken to the interrogation room every day including Sunday. Each day he was interrogated from about 8.30 a.m. to 1.00 p.m. and from about 2.00 p.m. or 2.15 p.m. until 4.30 p.m., though at times until 5.30 p.m. or even 6.30. It was about 8 hours a day for 10 days.

Still under cross-examination by Mr. Karpal Singh, on 18 September 1998 (one day after the confession was recorded) SAC1 Musa told him that if he engages his own lawyer he would be charged under section 377B of the Penal Code but if he uses the lawyer appointed by him ("jika saya gunakan yang dia lantik") he would only be charged under section 377D and would be sentenced to three months only. The lawyer in question is Encik Mohd. Noor Don who went to see him at about 4.30 p.m. on the same day, 18 September 1998. He

said Mohd. Noor Don told him if he pleaded guilty and said he had repented ("bertaubat") he would only be sentenced to one day imprisonment.

Under cross-examination by Dato' Gani, he admitted that he had filed an affidavit in Criminal Case No.44-166-1998 that the name of the lawyer mention by SAC1 Musa was Zulkifli Nordin instead of Mohd. Noor Don. He also admitted that on 30 September 1998 (note that this is 11 days after he was charged in the sessions court in which he was represented by Mohd. Noor Don) he signed a letter confirming that Mohd. Noor Don had acted for him on 19 September 1998 on his instructions. However, he said he was forced to sign the letter by SAC1 Musa. Then he was referred to Tun H.S.Lee Police Report No.25536/98 (Exh. T.P.1) lodged by the second appellant.

Under re-examination he explained the inconsistency between his affidavit dated 10 December 1998 while he was under detention at Bukit Aman and his evidence in court thus: Mohd. Noor Don told him that SAC1 Musa told him (Mohd. Noor Don) that he (the second appellant) would be sentenced to one day imprisonment but the second appellant told Mohd. Noor Don that SAC1 Musa had told him (the second appellant) that the sentence would be three months. Mohd. Noor Don then went to see SAC1 Musa and came back and told him (second appellant) that he (Mohd. Noor Don) had confirmed with SAC1 Musa that the sentence would be one day imprisonment.

He also confirmedd that the letter dated 30 September 1998, signed by the second appellant confirming the apointment of Mohd. Noor Don as his (the second appellant's) counsel was prepared by SAC1 Musa.

An important witness for the second appellant in the trial within a trial is Mr. Ganesan a/l Karupanan, an advocate and solicitor (TDW4). He said that he was appointed to act for the second appellant on 6 September 1998. On the next day, he came to know that the second appellant was at Bukit Aman. He wrote a letter to the Inspector General of Police. On 8 September 1998 in an attempt to meet the second appellant, he went to see ASP Rodwan at Bukit Aman. He was told that he had to get the permission of SAC1 Musa.

On the following day, 9 September 1998 he wrote to SAC1 Musa informing him that the second appellant's sister would like to see him. He tried to see the second appellant on 7, 8, 9 and 11 September 1998 but was not successful. He even wrote to the Attorney General seeking his assistance. On 14 September 1998 ASP Rodwan called him and told him to go to his office because he wanted to record a statement from him. He also contacted SAC1 Musa who told him the same. Neither SAC1 Musa nor ASP Rodwan contacted him before the second appellant was charged in the Session's Court on 19 September 1998. Under cross-examination by Mr. Christopher Fernando he said he made six attempts altogether, three were purely to see the second appellant and the other three were in respect of the recording of his statement.

Under cross-examination by Mr. Karpal Singh he said that between 7 September 1998 until 18 September 1998 he was not told by the police or the Attorney General's Chambers that some other lawyer had taken over as counsel for the second appellant. However, on 19 September 1998 the day the second appellant was charged in the Session's Court, at 9.00 a.m. he received a telephone call from Mohd. Noor Don who told him that the second apellant had appointed him as his counsel. Mohd. Noor Don also told him that he received a telephone call from the second appellant the previous night who wanted him (Mohd. Noor Don) to act for him.

Regarding Zulkifli Nordin, Ganesan said he told Zulkifli to check what was happening in Court on 19 September 1998.

Under cross-examination by Datuk Gani he said he was appointed to act for the second appellant by the socond appellant's sister, Komalawati.

At the beginning of the trial within a trial the prosecution called 4 witnesses. I shall skip the evidence of Encik Abdul Karim, the recording magistrate. The second witness, Mr. Kathi Velayudhan a/l Palaniappan (TPW2) merely produced the records of proceedings in Criminal Case No.62-135-98, which also includes the confession that was tendered in mitigation.

The third witness was ASP Mohd. Rodwan bin Hj. Mohd. Yunus (TPW3). He informed the court that he arrested the second appellant on 6 September 1998 at about 1.00 p.m. at Lot 10, Bukit Bintang. On the following day, 7 September 1998, at about 12.45 p.m. he took the second appellant to see a magistrate who made a remand order effective from 7 September 1998 to 20 September 1998 (a period of 14 days).

According to him, on 16 September 1998 at about 3.00 p.m., the second appellant was brought to his office. After the second appellant told him something he took the second appellant to see SAC1 Musa. SAC1 Musa asked him to tape the second appellant's confession. The reason was because the case was a sensitive case and it was to avoid accusations ("tohmahan") that it was a police invention being made later. The recording was done from 4.30p.m. to 5.05 p.m.

On 17 September 1998, ASP Rodwan took the second appellant to see a magistrate because the second appellant "wanted to make a confession on his own will".

Cross-examined by Mr. Govind Singh Deo, ASP Rodwan admitted that the second appellant was investigated in relation to Police Report No.14140/98 lodged by Mohd. Azmin Ali mentioned earlier. Asked whether the second appellant was investigated as a witness, ASP Rodwan replied that he recorded the second appellant's statement as a witness. He admitted that he did not contact the second appellant before he was arrested. He admitted that at Tivoli Villa he was told by the second appellant that the key to his sister's room was with her and agreed that they (the police party) broke the door to the room. He admitted, at Tivolli Villa, the second appellant was handcuffed. He denied that the second appellant was made to remove all his clothes except for the under pants while at the lock-up. Asked about his duties in the investigation of the case, he said it was to assist in the investigation regarding the book "50 Dalil". The interrogation was done by "pihak Bantuan Teknik" from the Interrogation and Photography Division of the Criminal Division (my translation). He admitted that when he took the second appellant to see the magistrate on 7 September 1998, it was he who asked for a 14-day remand straight away. He also admitted it was not a normal practice for a magistrate to make a 14-day remand order. When asked, he answered that he took the second appellant to see the magistrate who gave the 14-day remand order at the High Court, not at the magistrate's court, as usual. Asked why, he said it was because he was instructed (by SAC1 Musa) to take the second appellant to see Tuat Mat Zaraai ("kerana saya diarah untuk membawa Sukma untuk berjumpa dengan Tuan Mat Zaraai"). Asked whether it was fixed, he said he did not know. He said that after that he met the second appellant on 9, 10 16 and 17 September 1998 but he was not present during all the interrogations. He admitted that on 9 September 1998 the second appellant was examined by Dr. Zahari Noor (TDW5) who also examined the second appellant's anus and that he (ASP Rodwan) instructed that photographs be taken. He denied that when he took the second appellant to see the magistrate to have his confession recorded he told the second appellant that he would be released the following day if he made the confession.

Cross-examined by Mr. Karpal Singh why the second appellant was remanded for 14 days he said it was to investigate further regarding the second appellant's homosexual involvement and to look for witnesses.

Coming to the day the second appellant was charged in court in respect of Criminal Case No.62-135-98, i.e. on 19 September 1998, ASP Rodwan admitted meeting Zulkifli Nordin, an advocate and solicitor who wanted to meet the second appellant. He also admitted that Ganesan (TDW4) had also tried to meet the second appellant during the latter's detention but was not successful. He admitted that Ganesan had written to him, telephoned him and even saw him on 10 September 1998 for that purpose but he did not allow Ganesan to meet the second appellant.

Re-examined by the Deputy Public Prosecutor, he said that on 19 September 1998, the second appellant's counsel was Mohd. Noor Don.

The next witness called by the prosecution was ASP Zulkifli Mohamed (TRW4). He accompanied ASP Rodwan to get the remand order on 7 September 1998. He denied all the allegations made by the second appellant against him, mentioned earlier.

We now go to the rebuttal witnesses called by the prosecution. The first rebuttal witness was SAC1 Musa bin Hassan (TRW1). He said that at about 9.30 a.m. on 18 September 1998 he met the second appellant. He told the second appellant that he would be charged under section 377D of the Penal Code. He showed

two letters from Ganeson (TDW4) and asked him whether he would like to appoint the solicitor who wrote those letters. He also showed the second appellant call cards of lawyers for him to choose. On the same day at about 4.30 p.m. he arranged for the second appellant to contact Encik Mohd. Noor Don, by telephone. Mohd. Nor Don came to see the second appellant twice. He denied all the allegations made by the second appellant regarding the appointment of Mohd. Noor Don and regarding the charge to be preferred against him and the sentence he would receive.

On 30 September 1998 Mohd. Noor Don telephoned him. He said he wanted to see the second appellant which he did at 3.40 p.m. Shown the letter dated 30 September 1998 he denied forcing the second appellant to sign it.

Under cross-examination by Mr. Jagdeep Singh Deo, he admitted that he met the second appellant twice i.e. on 16 September 1998 and 18 September 1998. He admitted that it was he who instructed that the second appellant's confession be recorded, after 10 days detention. He agreed that according to Ganeson's letter dated 10 September 1998, Ganeson was still acting for the second appellant. However, until 18 September 1998 he did not get a confirmation about Ganeson's appointment. Neither did he contact Ganeson. Asked whether it was usual for him to recommend a lawyer to detainees, his reply was "Not necessarily". He denied that when he saw the second appellant on 18 September 1998, he told the second appellant not to use the services of Ganeson and that if the second appellant were to plead guilty he would only be sentenced to three month's imprisonment. He admitted that the second appellant's sister met him when the second appellant was under remand. Asked why he did not ask the second appellant to get his sister to engage a lawyer for him, he replied that the second appellant was under investigation. Asked whether the second appellant was still under investigation on 18 September 1998, he said "No". He also did not provide the second appellant the facility to contact his sister for the purpose of engaging a lawyer. He admitted he was in court throughout the proceeding on 19 September 1998 and he met Zulkifli Nordin who informed the court that he was acting for the second appellant. Asked whether he knew that the appointment of Mohd. Noor Don was disputed ("dipertikaikan"), he replied that the appointment of Mohd. Noor Don was not disputed. He was then shown the notes of evidence of the Criminal Case No.62-11-35-98. The record reads:

En. Zulkifli : Keluarga OKT melantik saya untuk mewakili OKT. Keluarga OKT X kenal P/OKT. Keluarga OKT mempertikai perlantikan Encik Mohd. Nor Don. Minta izin bercakap."

(My translation: "The accused's family has appointed me to represent the accused. The accused's family does not know the accused's lawyer. The accused's family disputes the appointment of Encik Mohd. Noor Don. I ask for permission to speak.")

SAC1 Musa was then asked whether the record was wrong. He said "I don't know." Put to him that Mohamed Nor Don's appointment was disputed. He replied "No". He admitted that according to the record Mohamed Nor Don asked for one day's imprisonment but denied that it was the same as ("selaras dengan") what he had informed Mohamed Nor Don.

Shown the letter dated 30 September 1998, he said he did not know who typed the letter, but on that day Mohd. Nor Don did meet the second appellant at Bukit Aman. He denied it was typed on his instruction.

He was further cross-examined by Mr. Karpal Singh. He admitted that in 1997 he investigated the allegations ("tohmahan-tohmahan") against the first appellant. He did not carry out a full investigation in 1997. However he admitted that he recommended that no further action be taken on the file and that a full investigation be carried out first before such recommendation be made. He also admitted that he made similar recommendation to the Attorney General who agreed with him. The file was however re-opened in June 1998 based on the police report by Mohd. Azmin Ali concerning the book "50 Dalil". The following question and answers read:

"S: You arranged for a meeting in your office between Mohamed Nor Don and Sukma?

J: Benar, pada 30.9.98.

S: Sebelum tarikh ini, Mohamed Nor Don belum dilantik.

J: Saya setuju.

S: You allowed the use of your office by Mohamed Nor Don to see Sukma.

J: Yes."

He admitted that the second appellant was a timid person and "most probably" was prone to be more succeptible to breaking down. He was aware of the beating of the first appelllant by the Inspector General of Police. He was aware that the second appellant was not questioned within the first 24 hours. He agreed that a statement from the second appellant was video-taped and it was something new. He admitted that he was given a copy of the second appellant's confession on 17 September 1998 by ASP Rodwan (at 6.00 p.m).

Under re-examination by the Deputy Public Prosecutor, he explained that he recommended the investigation against the first appellant to be closed in 1997 because the first appellant called him to his office and handed to him letters purportedly signed by Ummi Hafilda and Azizan to the effect that they had withdrawn the allegations ("tohmahan") against the first appellant and directed him to close the investigation as the allegations were unfounded. Regarding the meeting with Mohamed Nor Don he said it was the latter who contacted him. He said the investigation was completed on 17 September 1998 after he received the confession. He denied it was he who appointed Mohamed Nor Don to act for the second appellant.

The second rebuttal witness was K/Insp. Sampornak Ismail (TRW2). He said that on 7 September 1998 at about 3.00 p.m. he was told by ASP Rodwan to interrogate the second appellant. He carried out the interrogation with five other officers (D/Kpl. Ahmad Bustami (TRW3). D/Kpl. Mokhtaruddin (TRW5), D/Kpl. Hamdani (TRW4), Lee Tuck Seng (TRW7) and Tan Hwa Cheng (TRW6). He was the leader of the team. The interrogation started on 8 September 1998 and completed on 15 September 1998 onwards, he was assisted by three detectives. The interrogations were conducted from 9.00 a.m. to 12.30 p.m. and then from 2.00 p.m. to 4.45 p.m. He admitted that at the beginning of the interrogation on 8 September 1998 he asked the second appellant to remove his shirt and trousers to examine whether he had any injury which was a normal procedure. He denied all the specific allegations made by the second appellant which I need not repeat e.g. the kicking of the chair, the knocking of his spectacles, the scolding, the threat etc.

Cross-examined by Mr. Govind Singh Deo, he agreed that the interrogation was in respect of the book "50 Dalil" which he had not seen but was given pages 63 and 64 by ASP Rodwan. Asked who else was mentioned in the book, he replied if he was not mistaken another person by the name of Azizan was also mentioned. Asked whether any other name was mentioned he said he could not remember. Asked whether it was a high profile case, he said he did not understand the meaning of high profile. When explained to him he said "Now I understand". Pressed further whether he now knew the name of a "famous person" ("orang yang terkenal") mentioned in the said pages given to him, he replied: "Now I know – Dato' Seri Anwar Ibrahim. Before the interrogation, I did not know." Asked for how long the second appellant was completely undressed on 8 September 1999, he said about four minutes. He admitted that he and four other officers repeatedly questioned the second appellant, but not simultaneously. He denied all the specific allegations made by the second appellant. He repeated that the purpose of the interrogation was to obtain "intelligence statement" which means "risikan keselamatan negara" as instructed by ASP Rodwan.

Asked whether the second appellant was a timid person he said he was not clear what "timid" means. After it was explained to him, he replied: "He was a normal person ("Dia seorang yang biasa"). He said that the interrogation was about 5 to 6 hours a day.

Under re-examination by the learned Deputy Public Prosecutor, K/Insp. Sampornak said he started recording intelligence statement from the second appellant from 13 September 1998 until 15 September 1998. Of course he denied the specific allegations made by the second appellant.

Another rebuttal witness called by the prosecution was Det. Kpl. Ahmad Bustami bin Ayob (TRW3). Basically his evidence was similar to that of K/Insp. Sampornak (TRW2). He said that interrogation ("soal

siasat") started on 8 September 1998 until 15 September 1998. Out of that, from 8 September 1998 to 12 September 1998 were question and answer sessions. From 13 September 1998 to 15 September 1998 K/Insp Sampornak (TRW2) recorded intelligence statement from the second appellant. He said that they treated him as a usual offender ("sebagai pesalah biasa"). Allegations made by the second appellant were put to him by the learned Deputy Public Prosecutor and he too denied them all.

Kpl. Hamdani bin Othman (TRW4) was another rebuttal witness called by the prosecution. He too denied all the allegations made by the second appellant.

The evidence of Det./Kpl. Mokhtaruddin bin Suki (TRW5) is similar to that of the other rebuttal witness. He too denied all the allegations made by the second appellant. Under cross-examination he denied that the purpose of the interrogation was to obtain a confession from the second appellant. It was to obtain "risikan" (intelligence statement). He stated that the second appellant was not interrogated as a witness, but as an offender (sebagai seorang yang salah"). Asked what was the offence, he said he did not know.

In the earlier part of the cross-examination he admitted that no confession ("pengakuan") was obtained from the second appellant. But, just before the court adjourned for lunch, the record reads as follows:

"S: Adakah kamu dan ahli-ahli yang menjalankan soal siasat puas hati atas jawapan Sukma?

J: Puas hati.

S: Bilakah kamu puas hati dengan jawapannya – hari pertama, hari kedua, hari ketiga?

J: Pada hari yang akhir."

(Jilid 1 page 444)

He said that the interrogation started on 8 September until 15 September 1998.

Of course, under re-examination, after the lunch break, he explained it thus:

"S: Awak ada mengatakan di dalam soal balas awak berpuashati di hari terakhir. Apa yang kamu puas hati?

J: Saya berpuas hati Sukma telah memberi kerjasama dengan baik dan memastikan segala cerita-cerita telah dijelaskan tidak diada-adakan dan saya tidak mahu ada unsur-unsur penganiayaan."

(Jilid 1 page 748)

[We think we should point out that there appears to be mistake in the notes of evidence at page 749 of Jilid 1 where it was recorded that it was TRW4 (Del/Kpl. Hamdani Othman) who was giving evidence. If the sequence of the notes of evidence is followed, it should be TRW 5 (Mokhtaruddin Suki)]

We do not think we have to summarise the evidence of the other rebuttal witness.

Our first comment is that there seems to be so many unusual things that happened regarding the arrest and the confession of the second appellant.

First, the second appellant was not arrested pursuant to a report by a victim that he was sodomised as in a normal case. He was arrested pursuant to a report made by Mohd. Azmin Ali who complained that the book "50 Dalil" contained blasphemous and shameful allegations ("tohmahan") against him, his wife and his family. The report has nothing to do with the second appellant. But the book contained allegations of homosexual relationship between the first appellant and the second appellant, that too as can be

understood, he was the passive participant or the receipient. Had the dominant partner been a "Mr. Nobody", no one would have raised an eyelid. But the "dominant partner" being the first appellant who was what he was then at the point of time that was then he became important as a source of obtaining evidence against the first appellant. So, he was arrested. What was he arrested for? The second appellant's evidence, though denied, that Zaini asked ASP Rodwan "Boss, borang nak tahan dia ni atas alasan apa?" and ASP Rodwan's answer "Entah" seems to offer the answer: They were not sure themselves. However, ASP Rodwan's evidence offers the answer. First, when asked whether the second appellaant was investigated as a witness, he answered that the second appellant's statement was recorded as a witness. Later, when asked why he requested for a 14-day remand, he replied: "Untuk menyiasat lanjut tentang penglibatan OKT dalam homosexual, dan untuk mencari saksi-saksi." So, that was the reason: to look for evidence and witnesses regarding the second appellant's involvement in homosexual activities, with whom? Clearly with the first appellant.

But, if that was the reason, why arrest the second appellant and subject him to the kind of interrogation done even if the version of the prosecution witnesses were to be accepted. You call him and record his statement, first, at least.

Secondly, the remand order of 14 days one stretch and the circumstances under which it was obtained is unusual. No questioning was done during the first 24 hours. Then he was taken to see a magistrate to get a remand order, not to the magistrate's court where magistrates are but to see a particular officer at the High Court. We take judicial notice that there are no magistrates in the High Court, only officers who had served as magistrates and who remain gazetted as magistrates. Requested by ASP Rodwan, he gave a 14 day remand order straight away, something that even ASP Rodwan admitted as unusual.

Back in Bukit Aman, intensive interrogation went on for ten days. The officers kept saying that the purpose of the interrogation was to obtain "intelligence statements" which was explained by ASP Sampornak, the leader of the interrogation team, to mean "risikan keselamatan negara". However, the way the interrogation was done justifies Det. Kpl. Mokhtaruddin Suki (TRW5) to form an opinion that the second appellant was not interrogated as a witness, but as an offender even though he did not know what offence. Another rebuttal witness of the prosecution, Det. Kpl. Ahmad Bustami bin Ayob (TRW3) also said that the second appellant was interrogated as a "normal offender" ("pesalah biasa").

Thirdly, within two days after the confession was recorded by the magistrate, the second appellant was charged for having allowed the first appellant to sodomise him in April 1998 at the latter's official residence, an offence under section 377D of the Penal Code. Normally, it is the sodomiser who is charged or both are charged together. But, we must make it very clear that there is nothing wrong legally speaking with that charge. But again, we are only looking at all the surrounding circumstances relating to the confession.

Fourthly, the appointment of Mohd. Noor Don as counsel for the second appellant in that case is rather unusual too. Ganeson, purportedly appointed by the second appellant's sister, had been trying to see the second appellant. He was not successful in all his attempts. Instead, he was called to Bukit Aman twice to have his statements recorded. Then we have the involvement of SAC1 Musa in the appointment of Mohd. Noor Don. It is very pertinent to note that SAC 1 Musa admitted that Mohd. Noor Don was not appointed by the second appellant before 30 September 1998 which means that he was only appointed 11 days after he had appeared in court and "mitigated" for the second appellant. Even if we were to accept SAC 1 Musa's own evidence (even though we must say, in this respect, the second appellant's version is not improbable) does the fact that he gave Mohd. Noor Don's card to the second appellant, arranged for the second appellant to call Mohd. Noor Don by telephone, allowed Mohd. Noor Don the use of his office to meet the second appellant, denied access by Ganeson even though at earlier stage, and also Mohd. Noor Don's tendering of the confession in mitigation (we will say more about this later), the appearance of Zulkifli Nordin in court at the behest of Ganeson to see what was happening, the denial by SAC1 Musa that Zulkifli Nordin disputed the confession even though he was shown the notes of proceedings of the court, the belated letter dated 30 September 1998 (11 days after the second appellant was charged and convicted) confirming Mohd. Noor Don's appointment, not raise some suspicion about the actions of the police relating to the confession?

Fifthly, the tendering of the confession by Mohd. Noor Don "in mitigation" of sentence in criminal case No.4-62-135-98. Even unrepresented accused do not do such a thing, what more an advocate and solicitor

representing an accused person. Tendering a confession stating that an accused has committed other offences in mitigation of sentence is a contradiction in terms, to say the least. When you are pleading for a lenient sentence, you simply do not inform the court that you have committed other offences!

Whether it was the intention or not, the reason for the tendering of the confession in that case, is to be found in this case. The whole notes of proceedings of the case including the confession was tendered in evidence in this case and the tendering of the confession in mitigation of sentence in the Sessions Court case was used as an argument to prove its voluntariness: the second appellant had used it, therefore it has been made voluntarily. Again, we must say, there is nothing wrong legally speaking about it all. But, again, we are looking at the circumstances surrounding the confession to determine whether it was voluntarily made.

We have covered all the "unusual" circumstances surrounding the confession. Now, a few more things.

First, even the first appellant who, until his dismissal (on 2 September 1998) was the Deputy Prime Minister of Malaysia, was deemed fit to be assaulted by no other than the then Inspector General of Police. Would it not be too much to expect that the second appellant was given a completely different kind of treatment during his detention?

Secondly, it is easier for seasoned police officers to deny specific allegations put to them either by the learned Deputy Public Prosecutor or learned counsel than for the second appellant to create the story especially when it covers a period of about 10 days. In fact, the version given by the prosecution witnesses confirms many of what the second appellant told the court, except for the specific allegations which are denied. Indeed, on those matters, the prosecution's witnesses especially C/Insp. Sampornak, even from reading the notes of evidence, can be clearly seen to be evasive.

Thirdly, Det/Kpl. Mokhtaruddin Suki (TRW5), whose evidence we have reproduced earlier admitted that no confession ("pengakuan") was obtained from the second appellant but on the last day of the interrogation (15 September 1998) they were "satisfied with his answers." Note that on the next day, 16 September 1998 the taping of the second appellant's statement was done and on the following day, 17 September 1998, the second appellant was taken to see the magistrate who recorded his confession. Although Det/Kpl Mokhtaruddin Suki (TRW5) tried to explain it after the lunch break, he appears to say that they did not obtain the confession ("pengakuan") earlier but on the last day (15 September 1998) they were satisfied with the second appellants "answers" or as he puts it in the re-examination, he "had given good co-operation." In other words, having been satisfied on 15 September 1998, the interrogation stopped, followed by the taping on the following day and the recording of the confession by the magistrate on the next day. It also fits with the second appellant's version.

Fourthly, it was argued that the fact that the second appellant could narrate a story of that length and detail shows that he was not "programmed" and that he was making the confession voluntarily. Here too, we think, that the defence, in alleging that the confession was "programmed", was making things more difficult for themselves. Understandably, the defence was trying to clear the apppellants totally from any indication of homosexual involvement. But, in so doing, the defence was placing a very heavy burden on themselves. It is not easy for any court, or indeed any reasonable man, to accept the story that the second appellant was "programmed" to make a story of that length and detail.

Be that as it may, the fact that the second appellant was not "programmed" to make the confession does not necessarily mean that the confession was voluntarily made. The fact that the confession is true, if it is true, does not make it admissible if it is not voluntarily made.

Two things should not be confused. Voluntariness and admissibility should not be confused with truth of the confession and the weight to be attached to it. A confession may be true yet if it is not voluntarily made, it is not admissible in evidence. A confession, though false, is admissible in evidence if it is voluntarily made, even though it may not be acted upon when considering the weight to be given to it at a later stage.

The learned trial judge, having stated the law correctly, which we shall not repeat, went on to consider the various allegations made by the second appellant and the evidence of the prosecution witnesses, in which they denied all the allegations made by the second appellant and concluded that he believed the

prosecution witnesses. Of course, he had the advantage of seeing and hearing them. But, we do not think that it is just a matter of seeing and hearing the witness. What is more important, in the circumstances of this case, is to look at the broader picture, including all the surrounding circumstances enumerated above. This, with respect, the learned trial judge had failed to do. In our judgment and with respect, that is a misdirection or a non-direction amounting to a misdirection.

We would pose the following questions. Applying the words of section 24 of the Evidence Act 1950, considering all the surrounding and unusual circumstances that we have enumerated, does it not appear that the making of the confession has been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person or persons in authority and sufficient in the opinion of the court to give the accused person ground which would appear to him reasonable for supposing that by making it he would gain an advantage or avoid any evil of a temporal nature in reference to the proceeding against him? Applying Dato' Mokhtar Hashim's case (supra), has the prosecution proved beyond reasonable doubt that the confession was made voluntarily? Or, to put it another way, considering all the circumstances enumerated above, are the allegations of the second appellant so improbable that it does not appear that the making of the confession was not voluntary, or that it does not raise any reasonable doubt that the confession was not made voluntarily? Or, applying the "classic test" laid down in Director of Public Prosecutions v Ping Ling (1975) 3 All E.R. 175, has the prosecution established "beyond reasonable doubt that it was voluntary, in the sense that it was not obtained from him either by fear or prejudice or hope of advantaage created by a person in auhtority, or by oppression [which test] should be applied in a manner which is part objective, part subjective"? – per Abdolcader F.J. in Dato' Mokhtar Hashim (supra) and cited by the Court of Appeal – see page 229 of (2004) 1 MLJ. Or, applying Tan Ewe Huat (supra) and Chan Ming Cheng (supra), are there no "suspicious circumstances surrounding the making of" the confession? If we consider these questions seriously in the light of all the surrounding circumstances that we have enumerated, we do not think that we can reasonably conclude that there was no doubt as to the voluntariness of the confession or that it does not appear that it was made involuntarily.

We are asked to believe beyond any reasonable doubt as if, after the arrest and having "slept" over it, the second appellant was full of repentence and he would like to clear his chest because he had kept the secret for too long. ("Lama sangat dalam dada, saya hendak meluahkan segala-galanya.") We accept that the second appellant had said that to the recording magistrate. It may even be that he was telling the magistrate what he truly felt then. But, under what circumstances did it come about? That must be considered. It came after 10 days of intensive interrogation and 12 days of detention (up to the time he made that statement to the magistrate), when for all intents and purposes he was arrested as a witness but interrogated as an offender and ended as an accused, twice. Indeed he was charged two days later for allowing the first appellant to sodomise him the record of which was introduced as evidence in this trial.

With respect, the learned trial judge and the Court of Appeal had failed to consider all the surrounding circumstances, many of which unusual, before and after the confession was made. It may be asked: why should the surrounding circumstance after the making of the confession be relevant? It is true that what happened after the making of the confession does not affect the state of mind of the second appellant leading to the making of the confession. But, it reflects on the police oficers: it shows that they wanted a confession from the second appellant. Of course there is nothing wrong with that but we are looking at it in determining whether the confession was voluntarily made. The learned trial judge appears to have only considered the specific allegations made by the second appellant regarding the treatment given to him during his detention and during the interrogation and the denials by the police officers and he believed the police officers. The Court of Appeal, without much analysis of the facts, agreed with the learned trial judge. In our judgment there is a serious misdirection that warrants this court to intervene in the finding of the two courts on the issue.

In this respect, we are supported by the dictum of Abdolcader F.J. in Dato' Mokhtar Hashim (supra) at page 272 and quoted by the Court of Appeal in this case at page 229 of (2004) 1 MLJ:

"It is open to an appellate court to interfere with the finding on a question as to the voluntariness of a confession if the impunged finding has been reached without applying the true and relevant tests and consideration of relevant matters (Sarwan Singh v. State of Punjab [A.I.R. 1957 S.C. 637, 643], Public Prosecutor v. Thum Soo Chye [(1954) MLJ 96, 99]."

Indeed, the surrounding circumstances in this case are much more serious than those in other cases in which this court and the Court of Appeal had found it fit to interfere e.g. Tan Ewe Huat (F.C) (supra), Chan Ming Cheng (C.A) (supra) Hasibullah bin Mohd. Ghazali v Public Prosecutor (1993) 3 MLJ 321) (S.C.) and Dato' Mokhtar Hashim (F.C.)(supra)

Effects of our findings

Having made our findings on Azizan's evidence, in particular regarding the "date" of the offence and on the issue whether he is an accomplice and the second appellant's confession, we think we are now in a position to consider the prosecution's case, whether, in view of the said findings, the prosecution had proved the case beyond reasonable doubt that justifies the calling for the defence and a conviction, if he chooses to remain silent. The burden of proof is the same as at the end of the case for the defence. If at the end of the case for the prosecution, the court has a reasonable doubt that any of the ingredients of the charge had been proved, the accused is entitled to an acquittal without his defence being called. This is again trite law.

The court, as a court of law, is concerned with proof in accordance with the requirement of the law, not whether, the judge reading the records is convinced that the incident did happen or not. He must be satisfied beyond reasonable doubt, that every ingredient of the charge has been proved on evidence admissible in law and in accordance with the requirement of the law.

In this respect, the dicta of Abdul Hamid C.J. (Malaya) (as he then was) in Teoh Hoe Chye v Public Prosecutor (1987) 1 MLJ 222 at 230 (S.C.) quoting Ong Hock Thye Ag. C.J. (Malaya) in Sia Soon Son v. Public Prosecutor (1966) 1 M.L.J. 116 (F.C.) is worth quoting:

"In this regard, it behoves us to reiterate that "the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else ……." (Sia Soon Son v. Public Prosecutor (1966) 1 MLJ 116."

We shall now consider whether, based on our findings on the three main points, at the end of the case for the prosecution, the prosecution had proved its case beyond reasonable doubt, that being the law applicable to this case.

The "date" of the commission of the offence

The learned trial judge, when discussing the question "whether the charges are vague or weak" concluded that the charges contain sufficient particulars as required by section 153(1) of the Criminal Procedure Code. The Court of Appeal agreed with him. We too agree with him. Ku Lip See v. Public Prosecutor (1982) 1 M.L.J. 194 (F.C.) is a case on point.

However, we think we have to say something on the oft-quoted sentence from the judgment of Atkin J in Severo Dossi 13 Cr.App.R158:

"From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence."

The learned trial judge in this case quoted it in support of his statement "In any event a date in the charge has never been material" when he was discussing whether the charges are vague and weak, not whether it is material that it must be proved. He merely quoted the sentence as quoted in Law Kiat Lang v. Public Prosecutor (1966) 1 M.L.J. 215 (F.C.) and Ho Ming Siang v. Public Prosecutor (1966) 1 MLJ 252.

To understand the context in which that statement was made, we should look at the facts of that case.

In that case, a 1918 judgment of the Court of Criminal Appeal in England, the appellant (accused) was charged with indecently assaulting a child "on March 19th, 1918," and with indecently assaulting another child "between September 12th and 30th, 1917." The jury found the appellant not guilty with regard to the

March 19th charge but "If the indictment covers other dates, Guilty". They also found him not guilty of indecently assaulting the second child. On the application of the prosecution the Deputy-Chairman amended the indictment by substituting "on some day in March" for the words "on March 19th, 1918", and the jury then found the appellant guilty on the amended charged.

The judgment of Atkin J., inter alia, reads:

"The first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days they found him Not Guilty and that verdict must stand. It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. "And alhtough the day be alleged, yet if the jury finds him guilty on another day the verdict is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the same law is in the case of an indictment," 2 Inst.318 ……".

It is to be noted that in that case the court was concerned with the power of the court to amend the charge from 19th March 1918 to "on some day in March" of the same year as the jury had found that the charge bearing the specific date 19th March had not been proved but it was proved that the offence was committed in the month of March. That is the context in which that statement was made. Even then, the sweeping opening words were qualified by the words "unless it is actually an essential part of the alleged offence."

That passage was quoted by the Federal Court in Law Kiat Liang v. Public Prosecutor (supra). That case is one of the "Konfrontasi" cases. In the first charge the date of the alleged offence was given as "between 2.00 a.m. on 2nd day of September, 1964 and 12.00 noon on the 4th day of September 1964."

In the judgment of the court, Thomson L.P., after reproducing the charges, straight away went on to say:

"With regard to the first of these charges, the dates are wrong and the charge was at no time amended. This in itself, however, is without importance. As was observed by Atkin J in the case of Servo Dossi ……."

The learned Lord President went on to cite the same sentence reproduced earlier. Nothing more was said on it. No reference was made the section 153(1) of the Criminal Procedure Code, our written law. However, considering his statement that "the dates are wrong", it appears to us that in that case, as in Servo Dossi followed by the court, it was proved that the offence was committed on another day (or period) but not the date (or period) specified in the charge. That being the case, it is understandable why having referred to that case he said no more about the appeal before him on that point. The only difference is that in the Federal Court case, the charge was not amended.

The case of Ho Ming Siang v. Public Prosecutor (supra) is similar to Law Kiat Lang v. Public Prosecutor (supra). Even the date of the alleged offence in the first charge is the same. That part of the judgment is a repetition of what was said in Law Kiat Lang v Public Prosecutor (supra).

It must be noted that in all these cases, the court did find that the offences were proved to have been committed on another date, even though not on the date stated in the charges. In the circumstances, the convictions were upheld.

In the instant appeals, it is not that the offences have been proved to have been committed on another day, not being the date stated in the charge. The question of amending the charges does not arise. It is simply a question whether the alleged offences have to be proved to have been committed as per charge, including the date. As has been pointed out, the Federal Court in the two cases referred to earlier did not address its mind to the provision of section 153(1) of the Criminal Procedure Code. Perhaps that was because it was only dealing with the question whether the charges should have been amended. In the instant appeals we are dealing with the question whether, the offences not having been proved to have been committed on another date, it must be proved to have been committed on the date stated in the charges. Section 153(1) of the Criminal Procedure Code clearly states that "The charge shall contain such particulars as to the time …." Since it is mandatory to state the "time" (i.e. date or period) when an offence is alleged to have been

committed, clearly it is a "material matter" and an "essential part of the alleged offence", to use the words of Atkin J. in the exception stated by him, even if that case is applied. If the law clearly provides that the charge shall contain particulars as to "time", it follows that such particulars must be proved.

In any event, reading the judgment of the High Court, even though the learned judge did not mention the date of the offence when he listed the ingredients to be proved (see (2000) 3 M.L.J. at page 276), it is clear from his judgment that when he found that the charges had been proved, he meant the date as well. So, there is really no issue whether the date of the alleged offences as stated in the charges have to be proved. The issue is whether it is proved.

The concluding paragraph of the learned trial judge's judgment on the inconsistencies of Azizan's evidence regarding the date of the offence reads:

"Be that as it may, the evidence of SAC-1 Musa clearly states that Azizan was consistent in his statements on the issue of sodomy although he was not sure of the exact dates. The relevant dates we are concerned with in the present charges are between the months of January and March 1993. Azizan emphatically said in evidence that he was sodomized by both Dato' Seri Anwar and Sukma at Tivoli Villa between these dates and he gave the reasons for remembering the dates. This evidence was not successfully challenged. It is therefore established on this evidence that Azizan was sodomized by both Dato' Seri Anwar and Sukma in Tivoli Villa between January to March 1993. Whether he was sodomized in May 1994 or May 1992 is not relevant as these dates are not in issue to be decided in this case. I see no merits on this contention and the credit of Azizan is not affected on this ground." (page 255 to 256 of (2001) 3 M.L.J.)

The only evidence available to prove the date of the commission of the offence is that of Azizan. The second appellant's confession, even if admissible (but which we hold is not) does not help. It was made on 17 September 1998. He mentioned the date as "Dalam lebih kurang dua atau tiga tahun yang lalu waktu dan tahun yang tepat saya tidak ingat ……". "Two or three years ago" can only mean in 1996 or 1995. The learned trial judge interpreted that phrase to include 1993. This is what he said:

"In my view, the phrase 'dua atau tiga tahun yang lalu' does not conclusively establish that the date of the commission of the offences could not be 1993. I do not agree with the contention of the defence that 'dua atau tiga tahun yang lalu' would be in 1995 or 1994 because this may also include 1993. This year cannot be excluded for the simple reason that Sukma himself was not sure of the exact date but only giving an estimated date. He could have said with precision that the year was 1994 or 1995 if he was sure that what he meant by 'dua atau tiga thaun yang lalu' refers to these years but he said 'tahun yang tepat saya tidak ingat.' This in my view does not exclude 1993." (page 263 of (2001) 3 M.L.J.)

With respect, such an interpretation is unwarranted. The phrase "waktu dan tahun yang tepat saya tidak ingat" cannot reasonably be interpreted to expand the period of "dua atau tiga tahun yang lalu". The phrase "tahun yang tepat saya tidak ingat" follows immediately the phrase "dua atau tiga tahun yang lalu." It must therefore be read in that context. "…… tahun yang tepat" must necessarily refer to the "dua atau tiga tahun yang lalu". It means he could not remember the exact year but it was two or three years earlier. It cannot also mean five years earlier. Such an interpretation is not reasonable, whatmore in a criminal trial. In a criminal trial even if a word or phrase or statement is open to two interpretations, the one in favour of the accused should be adopted. This is not even such a case. There is no reasonable alternative interpretation that can be given. In any event, this discussion is on the basis that the confession is admissible. Since we have held that the confession is not admissible, the confession need not be considered at all. There is no other evidence, oral or documentary, to support the "date" of the offence.

So, we have to rely on Azizan's evidence alone to prove the "date" of the offence.

The learned trial judge found Azizan a truthful, credible and reliable witness. He was even prepared to convict the appellants on Azizan's evidence alone.

But, we find that Azizan's evidence, especially on the "date" of the commission of the offence doubtful. He had given three different periods, the first two covering one month each and the last covering three months, in three different years (1992, 1993 and 1994), including one ("May 1992") when the construction of Tivoli

Villa was not even ready. Besides, he also contradicted himself on the issue whether he informed the police that he was sodomised in 1994. His demeanor even prompted the learned trial judge to record that he was "very evasive and appears to me not to answer simple question put to him" when he was cross-examined as to the manner the police finally obtained from him the "date" specified in the charges. On such evidence, can the court accept that the "date" of the offence has been proved beyond reasonable doubt? In considering his evidence whether it proves the offence or not, any benefit of the doubt should be given to the appellants who are the accused.

There is yet another point concerning the date of the commission of the offence. The notes of evidence on 19 August 1999 shows that when Mr. Karpal Singh requested for an adjournment to enable SAC1 Musa (SP9) to carry out an investigation in respect of alibi for the period from January 1993 to March 1993, the then Attorney General, at first had no objection. However, after the lunch break, he objected to the postponement on the ground that, at that stage, he had advised SAC 1 Musa that there was nothing more to investigate. And he said this:

"Peguam Negara: Saya telah memberi nasihat pada saksi ini (SAC1 Musa – added) siasatan lanjut berkaitan dengan alibi yang diberi oleh kedua-dua pihak pembela (tidak perlu (?)– added) kerana pihak pendakwa mempunyai rekod dan keterangan berkaitan dengan pergerakan (movement) Dato' Seri Anwar di dalam negara dan di luar negara dari tahun 1992 hingga September 1998 iaitu tarikh pemecatan."

(Jilid 2, page 1124)

The point is this. If the prosecution had such a record, which should include the night(s) the first appellant went to Tivola Villa, then the prosecution should be able to know when the first appellant visited Tivoli Villa. Instead, the prosecution had given three "dates" as the date of the commission of the offence covering a period of three years (1992, 1993 and 1994) and the final date covers a period of three months. It only shows that even the prosecution was not sure.

Furthermore, as agreed by both parties before us, the prosecution did supply the diaries of the first appellant to the defence for inspection. This happened on 21 October 1999 (Jilid 2 page 1371). However, as admitted by the prosecution, only diaries for 1994 to 1999 were made available. That is because:

"2. Pihak kami hanya mengambil buku dairi milik Dato' Seri Anwar bin Ibrahim dari tahun 1994 hingga 1999. Dairi 1993 tidak ada dalam simpanan kami."

(Jilid 5, page 2984 – letter dated (?) Jun 1999 from SAC 1 Musa in reply to S.N. Nair's letter dated 18 June 1999 (Jilid 5, page 2983).

It must be noted that this letter was written soon after the date in the charges was amended to read "from January until March 1993". The statement of SAC1 Musa in his reply may be true. But, it is not free from suspicion.

In the circumstances, our conclusion is that the prosecution had not proved one of the material particulars of the charge i.e. the "date" of the commission of the offence.

The broader question: Has the prosecution proved its case beyond reasonable doubt?

Putting aside the issue about the date for a while, we shall now consider the broader question i.e. whether the prosecution has proved the charges beyond reasonable doubt that warrants the calling for the defence.

We have found Azizan to be an accomplice.

Section 133 of the Evidence Act 1950 provides:

"133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

The illustration (b)of section 114 of the same Act however provides:

"The court may pressume –

(a) ……

(b) That an accomplice is unworthy of credit unless he is corroborated in material particulars."

In Madam Guru & Another v. Emperor (1923) Vol.24 Cr.LJ 723, it was held that:

"Under section 133 of the Evidence Act the evidence of an accomplice by itself would be sufficient for the purpose of conviction; but it is a rule of practice founded on experience that in every case where an accomplice has given evidence the court must raise a presumption that he is unworthy of credit unless corroborated in material partiuclars. Failure to raise that presumption is an error of law".

In Yap Ee Kong & Anor v. Public Prosecutor (1981) 1 MLJ 144 (F.C.), Raja Azlan Shah C.J.(Malaya) (as he then was) had this to say:

"It is trite law that although an accomplice is a competent witness a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. All leading authorities have stated in clear terms that it has long been a rule of practice or rule of prudence which has become virtually equivalent to a rule of law for the judge or jury to be warned of the danger of convicting on the uncorroborated testimony of an accomplice. It is a matter of prudence except where circumstances make it safe to dispense with that there must be corroboration of the evidence of an accomplice."

Regarding the "nature and extent of corroboration", his Lordship then said:

"The rules are lucidly expounded by Lord Reading in Baskerville's case, supra. The rules may be formulated as follows:

(1) There should be some independent confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance;

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice; and

(3) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another."

On the same point, the Privy Council, in Dowse v. Attorney-General, Federation of Malaya (1961) 27 MLJ 249 held:

"2) evidence, to be corroborative, must be truly probative of the relevant issue; that is, it must positively implicate the accused person and positively show or tend to show the truth of the accomplice's story that the accused committed the offence. A fact which is indifferently consistent with the accomplice's story and the accused's denial of it is neutral and supplies no corroboration."

On the issue whether corroboration is at all necessary where the evidence of the accomplice is itself "uninspiring and unacceptable", the then Chief Justice (Malaya) applied the principles enunciated by Lord Morris of Borth-y-Gest in Director of Public Prosecutions v Hester (1973) A.C. 296, 315:

"The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said ….. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence."

His Lordship then went on to say:

"Accordingly the court should first evaluate the evidence of an accomplice and if the same is found uninspiring and unacceptable then corroboration would be futile and unnecessary."

The dictum of Lord Hailsham in Director of Public Prosecutions v Kilbourne (1973) 1 All E.R. 440 at p.452 quoted by the learned trial judge at (2001) 3 MLJ at p.268 is also to the same effect.

We do not go so far as to say that Azizan's evidence is "uninspiring and unacceptable" or that all his evidence is not credible. All that we say is that some parts of his evidence are rather doubtful or are inconsistent. So, we would still look for corroborative evidence.

Is there such corroborative evidence? Tun Hanif Omar's evidence, for example, regarding the conduct of the first appellant when told to stop his wayward activities i.e. he did not protest, at the most, only supports the first appellant's homosexual activities, not the specific charge.

Likewise, Dr. Mohd. Fadzil's (SP2's) evidence. Even though the learned trial judge ruled that his evidence was relevant he did not find that Dr. Mohd. Fadzil's evidence corroborated Azizan's evidence. The Court of Appeal agreed with learned trial judge's view. We agree with the views of both the courts.

Regarding the conduct of the first appellant, two incidents were considered by the learned trial judge. The first is where the first appellant asked Azizan to deny his statutory declaration which was sent to the then Prime Minister. Secondly, where he asked SAC1 Musa to close the investigation into the allegation made against him in police report No.2706/97.

On the first, this is what the learned trial judge said:

"n the 'Pengakuan Bersumpah' Azizan said that the act of sodomy took place 'sekitar tahun 1992'. By this it is clear that it is not confined to just acts of sodomy committed in 1992. It could include acts committed in 1991 or 1993. This view is supported by what Azizan said in cross examination that he did tell Umi Hafilda who drafted P5 some of the places only and the date i.e. sekitar 1992 where the acts took place. He did not tell Umi all the places but this does not necessarily mean that the acts did not take place elsewhere. Therefore when Azizan signed P5 he also had in mind the incident at Tivoli Villa. Thus when Dato' Seri Anwar asked Azizan to deny P5 to the police, the accused is specifically also referring to the Tivoli incident. In my view, this amounts to Dato' Seri Anwar asking Azizan to lie, as stated by Azizan in his evidence, about the acts of sodomy which would include the Tivoli incident. This amounts to suborning of false evidence and is evidence of conduct against the accused under s 8 of the Act. I shall deal with the application of this section later." (Page 271 of (2001) 3 M.L.J.)

We note that towards the tail-end of his evidence, in re-examinaiton by the prosecution, Azizan had expanded the words "sekitar tahun 1992" in his statutory declaration to include "early 1993". Now the learned trial judge has expanded it further to include both 1991 and 1993 as well. He did so to impute that Azizan, when signing Exh. P5 also had in mind the incident at Tivoli Villa despite the fact that it was not even a luxurious hotel as those named therein. With respect, in a criminal trial, such an interpretation should not be given. By doing so, the learned trial judge was not only not giving an interpretation which was more favourable to the appellant, but was actually expanding the evidence to connect Exh.P5 with the offences for

which the appellants are charged and to hold that the conduct of the first appellant in asking Azizan to deny the contents of of Exh. P5 is corroborative evidence.

The second conduct is in respect of the first appellant's request to SAC1 Musa to close the investigation into the alleged sexual misconduct against the first appellant in 1997 based on a police report lodged by ASP Zull Aznam in connection with an anonymous letter entitled "Talqin Untuk Anwar Ibrahim". The learned trial judge held that that act amounts to asking SAC1 Musa to destroy evidence "relevant to help the court to come to a finding of fact whether there was indeed fabrication of evidence in respect of sodomy alleged to be committed by Dato' Seri Anwar Ibrahim". He then concluded:

"For the above reasons and in the circumstances I find that the conduct of Dato' Seri Anwar as described referred to above is relevant and admissible and to that extend (sic) enhances the credibility of Azizan and corroborates his evidence on the allegation of sodomy committed against him". (page 273 of (2001) 3 M.L.J.

The Court of Appeal, without saying much, agreed with him "although such evidence could not be said to be directly in relation to the offence as per charge." So, even if we agree with the Court of Appeal, it does not help.

So, we find no corroborative evidence of the nature and extent described in the cases cited above, nor "of a convincing cogent and irresistable character" – see Jegathesan v. Public Prosecutor (1980) 1 MLJ 167.

In the circumstances, is it safe to convict the appellant on Azizan's evidence alone? No doubt Azizan has been consistent in admitting the incident at Tivoli Villa despite the shame that would have been caused to him by such admission though made years later, but we are doubtful as to when it happened and his purported role as the innocent victim therein. As such we are really in no position to say that his story is unusually convincing nor can we find any reason to give it special weight that warrants a conviction to be recorded on his evidence alone. We do not think it is safe to convict on his evidence alone.

Furthermore, the offence is a sexual offence. Even though a conviction founded on the uncorroborative evidence of the complainant is not illegal provided that the presiding judge warns himself of the danger of convicting on such uncorroborated evidence (see Chin Nam Hong v. P.P. (1965) MLJ 40, it is unsafe to convict on an uncorroborated testimony of the person on whom the offence is said to have been committed unless for any special reason that testimony is of special weight – see Ganpart v Emperor AIR 1918 Lab.322 and Bal Mukundo Singh v. Emperor) 1937) 38 Cr.L.J. 70(Cal.).

In this respect, our discussion and conclusion regarding corroborative evidence in support of the evidence of an accomplice and in respect of Azizan's evidence is applicable. On this ground too it is unsafe to convict the appellants on Azizan's uncorroborated evidence alone.

To summarise our judgment, even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we are more inclined to believe that the alleged incident at Tivoli Villa did happen, sometime, this court, as a court of law, may only convict the appellants if the prosecution has successfully proved the alleged offences as stated in the charges, beyond reasonable doubt, on admissible evidence and in accordance with established principles of law. We may be convinced in our minds of the guilt or innocence of the appellants but our decision must only be based on the evidence adduced and nothing else. In this case Azizan's evidence on the "date" of the incident is doubtful as he had given three different "dates" in three different years, the first two covering a period of one month each and the last covering a period of three months. He being the only source for the "date", his inconsistency, contradiction and demeanor when giving evidence on the issue does not make him a reliable source, as such, an essential part of the offence has not been proved by the prosecution. We also find the second appellant's confession not admissible as it appears not to have been made voluntarily. Even if admissible the confession would not support the "date" of the commission of the offences charged. We have also found Azizan to be an accomplice. Therefore corroborative evidence of a convincing, cogent and irresistable character is required. While the testimonies of Dr. Mohd. Fadzil and Tun Haniff and the conduct of the first appellant confirm the appellants' involvement in homosexual activities, such evidence does not corroborate Azizan's story that he was sodomised by both the appellants at the place, time and date specified in the charge. In the absence of any corroborative evidence it is unsafe to convict the appellants on the evidence of an accomplice alone unless his evidence is unusually convincing or for some reason is of special weight

which we find it is not. Furthermore, the offence being a sexual offence, in the circumstances that we have mentioned, it is also unsafe to convict on the evidence of Azizan alone.

For all the above reasons, we are not prepared to uphold the conviction. Since the applicbale law in this case requires that the prosecution must prove its case beyond reasonable doubt before the defence may be called, the burden being the same as is required to convict the appellants at the end of the case for the defence, we are of the view that the High Court has misdirected itself in calling for the appellants to enter their defence. They should have been acquitted at the end of the case for the prosecution.

We therefore allow the appeals of both appellants and set aside the convictions and sentences.

We must record our appreciation for the meticulous recording of the notes of evidence by the learned trial judge, without which we would not be able to scrutinise the evidence, the submissions and the grounds for every ruling and decision that he had made in the preparation of this judgment.

2 September 2004.

(DATO' ABDUL HAMID BIN HAJI MOHAMAD)

Hakim Mahkamah Persekutuan

Malaysia.

Bagi Pihak Perayu Pertama:

1. Mr. Christopher Fernando
2. Mr. Karpal Singh
3. Encik Pawancheek Marican
4. Puan Kamar Ainiah
5. Mr. S.N. Nair
6. Encik Zulkifli Nordin
7. Ms Marisa Regina
8. Encik Saiful Izham Ramli

Bagi Pihak Perayu Kedua:

1. Mr. Jagdeep Singh Deo
2. Mr. Gobind Singh Deo
3. Mr. Ramkarpal Singh Deo
4. Encik Shamsul Iskandar Mohd. Amin

Mewakili Pendakwa Raya:

1. Tan Sri Abdul Gani Patail
2. Dato' Mohd. Yusof b. Zainal Abiden
3. Dato' Azahar bin Mohamed
4. Encik Tun Abdul Majid b. Tun Hamzah
5. Encik Mohamad Hanafiah bin Zakaria
6. Encik Shamsul bin Sulaiman
7. Encik Ishak bin Mohd. Yusof
8. Encik Md. Azar Irwan bin Mohd. Arifin

ANWAR IBRAHIM'S LONG STRUGGLE FOR JUSTICE

Report on Datuk Seri Anwar bin Ibrahim's Appeal against conviction observed on behalf of the Australian Bar Association and International Commission of Jurists

Appendix B

Corruption Appeal Judgements

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN JENAYAH NO.:05-4-2000 (W)

ANTARA

DATO' SERI ANWAR IBRAHIM … PERAYU/PEMOHON

DAN

PENDAKWA RAYA … RESPONDEN

(Dalam Perkara Mahkamah Rayuan Jenayah No. W05-25-99 & W05-27-99)

Antara

Dato' Seri Anwar Ibrahim - Perayu

dan

Pendakwa Raya - Responden

(Dalam perkara Mahkamah Tinggi Malaya di Wilayah Persekutuan Perbicaraan Jenayah No. 45-48-98 & 45-59-98) Antara Pendakwa Raya Dan Dato' Seri Anwar bin Ibrahim)

Coram

Abdul Malek Ahmad, PCA

Siti Norma Yaakob, FCJ

Alauddin Mohd. Sheriff, FCJ

JUDGMENT OF ALAUDDIN MOHD. SHERIFF, FCJ

By Enclosure 89(a) the Applicant prays for an order that this Honourable Court invoke its inherent powers under rule 137 of the Rules of the Federal Court 1995, to allow fresh/additional evidence affecting the trial to be adduced as such evidence was not available during the trial. This application is supported by the affidavit of the Applicant himself sworn on 10th March 2003 which is in Enclosure 89(b).

Briefly, the Applicant's affidavit reveals the following facts:-

> The Applicant was charged under Section 2 of the Emergency (Essential Powers) Ordinance No. 22 of 1970 at the High Court of Malaya at Wilayah Persekutuan on 14.4.1999 on four charges of corruption. The Applicant was found guilty of the said charges, convicted and sentenced to 6 years imprisonment on each charge, with the sentences being ordered to run concurrently.
>
> The Applicant appealed against the decision of the High Court to the Court of Appeal which dismissed the appeal on 29th April 2002. He then appealed to the Federal Court against the decision of the Court of Appeal. On 10th July 2002 his appeal to the Federal Court was dismissed with the convictions and the sentences being confirmed.

It has been brought to the Applicant's knowledge that one of his counsel, Encik Zainur Zakaria (ZZ), had faxed copies of two letters he received from Mr. Manjeet Singh Dhillon (MSD) to Mr. Christopher Fernando, his lead counsel, just before the hearing of his appeal in the Court of Appeal. The letter sent to ZZ contained an enclosure which is a letter written by MSD to Y.A.A. the Chief Justice where MSD made a formal complaint against Justice Augustine Paul, the trial judge, for improper conduct in the Re ZZ case which occurred during the Applicant's trial.

In the light of this new evidence contained in MSD's letter the Applicant instructed his counsel to file this application to urge this court to allow him to adduce such evidence in the interest of justice under rule 137 of the Rules of the Federal Court 1995.

As stated in paragraph 17 of the Applicant's affidavit the evidence that is sought to be adduced is to the following effect:-

(i) That MSD was requested by Tan Sri Mohtar (TSM) to see him before the proposed contempt proceedings against himself and ZZ began that morning. The request was made through MSD's counsel, Mr. Jagjeet Singh (JS). MSD reluctantly agreed and met with TSM. They met at the ante room at the courthouse in the presence of Datuk Abdul Gani Patail (AGP), Datuk Azhar Mohamad (AM) and JS. Upon seeing MSD, TSM went up and hugged him and turned around and told AGP and AM that MSD was an altruist and apologized to MSD for not having done anything on MSD's letter in which he had levelled accusations against AGP. TSM added that he had not as yet taken this matter up with his officers. MSD responded by reminding TSM that he had made very serious allegations against his officers and had written to him expecting something to be done but that nothing had been done. This letter referred to is the letter where MSD complained to TSM that AGP and AM had attempted to extort fabricated evidence from his client Datuk Nallakaruppan (DN) through him to be used against Datuk Seri Anwar Ibrahim (DSAI) in exchange for DN's life. TSM did not deny or refute MSD's allegations against his officers and both AGP and AM remained silent.

(ii) That as early as September 1998 DN had made a signed statement denying any involvement in any sexual improprieties involving the Applicant. This statement was in response to the affidavits of SAC Musa Hassan dated 2nd September 1998 making allegations against the Applicant and DN and the affidavit of TSM making vague hearsay allegations. This evidence is clearly pertinent and relevant to the Applicant's case. In summarily dismissing the Applicant's application to stop AGP and AM from further conducting the prosecution against him the learned judge had this to say, (the relevant portion of which reads), "Secondly the conclusion of MSD as contained in para 4 of the letter may be justifiable only if he arrived at after he had discussed the matter with his client in order to ascertain what his client knew. The letter is dated 12th October 1998. However, para 8 of the statutory declaration stated that MSD met his client on the 13th October 1998 to convey AGP's demands to him. This shows that MSD came to his conclusion even before he discussed the matter with his client to find out what the latter knew. I found support of this in para 8 of the statutory declaration where MSD had said that there was nothing his client could have done… short of lying. This clearly shows that up to 13th October 1998, MSD did not know what his client knew…"

If we may be permitted to say, the gist of the new evidence sought to be adduced is as follows:

(i) It is MSD's revelation that he had a meeting with the former A.G. (TSM) in the ante room of the Federal Court in which TSM called him an altruist but did not take any further action in respect of his complaint against AGP and AM.

(ii) MSD says that Justice Augustine Paul, the trial judge, was wrong in concluding that he did not know whether his client knew about DSAI's involvement with women when he wrote the letter to TSM complaining about AGP and AM.

In his lengthy submission in support of this application before us learned counsel for the Applicant, Mr. Christopher Fernando, began by saying that in this case there has been gross injustice perpetrated against the Applicant. Fundamental principles of law have been violated and abused. There has also been an abuse of the process of the court. It is most unprecedented in that the trial was allowed to be prosecuted by two unfair prosecutors in the persons of AGP and AM. Their conduct and participation had contaminated the entire proceedings. It was therefore urged upon us to use the inherent powers of this court to intervene and prevent injustice.

It was submitted by learned counsel that the fresh/additional evidence sought to be adduced in this case through MSD was not available to the Applicant during his trial. This evidence is relevant to the Applicant's case. Further such evidence is credible and believable coming from a witness who is a senior and respected Advocate and Solicitor and a former Chairman of the Bar Council. In addition this evidence would have had a decidedly important influence on the outcome of the Applicant's case.

It was further submitted by learned counsel that in this case the Applicant have met all the conditions to justify the reception of the evidence proposed to be adduced.

In considering whether to allow fresh evidence to be adduced on appeal the English Court of Criminal Appeal in *R v. Parks [1961] 3 All E.R. 633* referred to certain principles. They are:-

(i) the evidence sought to be called must be evidence which was not available at the trial;
(ii) the evidence must be relevant to the issues;
(iii) it must be credible evidence in the sense of being well capable of belief; and

(iv) the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

In The Constitution of India AIR Commentaries Vol III 2nd (1971) Edition the writer, under the heading of "Grounds of review" had this to say (at page 228). –

> "Where a litigant has obtained a judgment in a Court of Justice, he is, by law entitled not to be deprived of that judgment without solid grounds. Where, therefore, a review of a judgment is asked for by a party, the greatest care ought to be exercised by the court in granting the review especially where the ground of review is the discovery of fresh evidence. It is so easy to the party who has lost his case to see what the weak part of his case was, and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong (1). The rule that permits a new trial to be granted on account of the discovery of new evidence has, therefore, been fenced round with many limitations. Thus, the party asking for a new trial must show that there was no remissness on his part in adducing all possible evidence at the trial (2). Further, the new evidence must be such as is presumably to be believed and such that if adduced, it would practically be conclusive, i.e. evidence of such a class as to render it probable almost beyond doubt that the judgment would be different (3). Where it is very doubtful whether the evidence, if produced, would have had any effect on the judgment, there is no ground for review (4)."

In considering the exceptional conditions when an appellate court would be willing to admit additional evidence our Federal Court in *Mohamad bin Jamal v Public Prosecutor [1964] 30 MLJ 254* applied the same principles mentioned in *R v. Parks* [see also *Lau Foo Sun v Government of Malaysia (1970) 2 MLJ 70* and *Asiatic Development Bhd. & Anor v Balachandar a/l Palanysamy (1995) 3 MLJ 445].*

Reverting to the application before us the facts revealed that the new evidence mentioned in paragraph 17 of the Applicant's affidavit is not evidence that was not available at the trial. As a matter of fact the Applicant was fully aware of the existence of such evidence. The charges faced by the Applicant was one of abuse of power under Section 2(1) of Ordinance 22 of 1970. The said new evidence was available during the trial itself. More importantly the learned trial judge had rejected this evidence as being irrelevant. The Court of Appeal and the Federal Court upheld his finding. As they have no relevance to the charges faced by the Applicant, we cannot see how they can materially affect the result of the case.

Under the circumstances we find that the two issues raised in paragraph 17 of the Applicant's affidavit do not meet the conditions or principles mentioned in *R v. Parks* or *Mohamad Jamal v Public Prosecutor*. That being so they do not qualify as new or additional evidence.

In *Lo Fat Thjan & Ors. V. Public Prosecutor [1968] 1 MLJ 274* the Federal Court again had occasion to consider the issue of additional evidence. It was held Per Curiam:

> "We would deprecate generally the admission of additional evidence on appeal except in clearly exceptional circumstances. The adversary system in our trials is hardly compatible with allowing lacunae in the case of any party to be filled in by afterthoughts or countenancing reconstruction of any case after it has failed at the trial."

It is obvious to us from the above decision that even during an appeal the courts are very strict when admitting additional evidence more so in a situation like ours where the appeal process have already been fully exhausted. The above decision also speaks of exceptional circumstances which we find are totally absent in the present application. The issues raised by the Applicant are all issues that could have been obtained during the trial and will not materially affect the result of the trial had it been brought up for consideration.

We take the view that by introducing such evidence, the Applicant is seeking to reopen, reexamine and review the decision which has been conclusively decided by the final court of justice. The issues raised by the Applicant cannot be viewed as a ground to invoke rule 137. In essence, it is an attempt to persuade this court to accept the purported new evidence with a view to relitigate the appeal. As we have said earlier they are not evidence relevant to the charge and they do not qualify to be new evidence before the court. We feel that the purported new evidence ought to have been contemplated by the Applicant's able defence team during the trial itself. The purported new evidence was available to the Applicant's defence team even while the trial was going on.

The allegation of misapprehension of facts against the trial judge is not new evidence but is an issue that goes to the merits of the case and should have been canvassed throughout the appeal process. Even if the purported misapprehension was a ground of appeal, it does not lend any weight against the charges as they were one of corruption and not relating to misconduct with women.

Finally, we would say that there is no fraud or suppression of evidence and neither is there new evidence before the court which merits the court to entertain a reopening or rehearing of the case.

We shall now proceed to consider Enclosure 97(a).

By way of Enclosure 97(a) the Applicant applies for an order that he be given leave to rely on additional grounds at the hearing of his Notis Usul {Enclosure 80(a)} for an order that this Honourable Court invoke its inherent powers under rule 137 of the Rules of the Federal Court 1995 and set aside the convictions and sentences of the Applicant that were confirmed and upheld by the Federal Court on 10th July 2002.

The additional grounds appear in the affidavit in support of this application. They are as follows:-

1. The Federal Court's decision handed down on 10th July 2002 is in infringement of the provisions of section 94(2) of the Courts of Judicature Act, 1964 [Act 91] (Revised 1972);

2. The Federal Court was wrong in not directing its mind to the fact that the Mahkamah Rayuan did not have the opportunity of considering the remarks directed by the Federal Court in *Zainur Zakaria v Public Prosecutor [2001} 3 MLJ 604* against the learned trial judge Augustine Paul J and their effect on the trial subsequently thereby depriving the appellant an opportunity for that court to rule on the vital consideration as to the learned trial judges' suitability to have continued with the trial to its conclusion;

3. The Federal Court was wrong in not directing its mind to the fact that the remarks passed by the Federal Court in Zainur Zakaria's appeal amounted in substance to ruling that the learned trial judge had infringed the provision of rule 3(1)(d) of the Judges' Code of conduct 1994 which states,

   > 'A Judge shall not conduct himself dishonestly or in such manner as to bring the Judiciary into disrepute or to bring discredit thereto' and had thereby disqualified himself from conduct of the appellant's trial;

4. The Federal Court was wrong in considering the remarks passed against the learned trial judge in Zainur Zakaria's appeal in isolation when the proceedings to commit Zainur Zakaria for contempt of court were irretrievably linked to the appellant's trial which became hopelessly contaminated by the role played by the learned trial judge in those proceedings, particularly when considered in the light of the learned trial judge's belligerent stance, convicting and sentencing Zainur Zakaria to three month's imprisonment, an

attempt to cite the entire defence team for contempt of court and general bias against the defence; and

5. The Federal Court was wrong in not considering the appellant's trial was so fatally flawed by the bias shown by the learned trial judge which was so serious that the proviso to section 92 of the Courts of Judicature Act 1964 could not under the circumstances be invoked."

I will not consider the first ground as the matter had been dealt with by my learned sister earlier.

In considering the remaining additional grounds mentioned above it is appropriate that we refer to the relevant part of the judgment of the Federal Court reported in [2002] 3 MLJ 193 concerning the matter.

At page 222H this is what the court said:-

"We are of the view that the facts and circumstances of Zainur Zakaria cannot be equated to the facts of this case. There it was more towards the conduct of Zainur Zakaria that the learned judge was more concerned with. From what we can gather from the record, it was the learned judge's belief that Zainur Zakaria's action was to delay the proceedings and to sensationalize the trial by alleging on the conduct of the two prosecutors to fabricate evidence against the appellant. The conduct of the learned judge in Zainur Zakaria is not really relevant to the amended charges faced by the appellant. In addition thereto, there was the allegation of lack of time given for Zainur Zakaria to prepare his defence. The learned judge might well appear to lean towards the prosecution as indicated by the Federal Court but he cannot be said to be showing the same inclination on the evidence in the trial against the appellant. A good illustration is where as we stated earlier, he considered the appellant's case at length."

Further at page 223 the court continued:-

"Mr. Christopher Fernando submitted that there were threats of contempt against counsel including himself by the learned judge. We have examined Mr. Christopher Fernando's complaint but regret to say that the learned judge, being human himself, and as stated earlier, because of the wide publicity given to this case, he had to exercise a lot of restraints in controlling the proceedings and in doing so he may have uttered harsh words or even threaten counsel with contempt and all these must be taken

in that spirit. It is not so much of the learned judge leaning towards the prosecution or being prejudiced towards the defence. He has the statutory duty to see that irrelevant and inadmissible evidence is not allowed to creep in or for that matter stop counsel from challenging his rulings as otherwise the proceedings will go haywire."

Reading the excerpts from the judgment quoted above we are of the view that the court had embarked upon a full and proper consideration of the effect of the decision in Zainur Zakaria in the appeal before it. The court had categorically stated that the facts and circumstances of Zainur Zakaria cannot be equated with the facts of the Applicant's case. The court also retorted by saying that the conduct of the learned judge in Zainur Zakaria is not really relevant to the amended charges faced by the Applicant. We would add by saying that the contempt proceedings is a separate proceedings altogether. It was only against Zainur Zakaria and not the whole of the defence team. There is no nexus between the allegation of fabrication and the corruption appeal. The allegation was on fabrication of evidence in trying to get Datuk Nallakaruppan to cooperate by giving evidence on the Applicant's sexual misconduct with women. Whereas the charges in the corruption trial are that he abused his position in getting the police to obtain retraction letters from two individuals. Sexual misconduct is not an ingredient of the charges. None of the prosecution witnesses in the corruption trial made any reference to Datuk Nallakaruppan's role whatsoever.

The Federal Court also referred to the complaint raised by the Applicant's counsel that their submission on the conduct of the learned judge in the Court of Appeal was brushed aside by them. The court had examined the judgment of the Court of Appeal and agreed that there was an omission on their part to consider this issue. Nonetheless the court itself had considered this point and came to the conclusion that it had not occasioned any miscarriage of justice (see page 224).

The Federal Court in its judgment also considered the paramount question raised by the Applicant whether the conduct of the trial judge which the Applicant said was grossly unfair towards him has occasioned any miscarriage of justice which entitled him to an acquittal.

This is what the court said (at page 224G, 225B, 226C) :-

"On this issue, we are guided by S.92(1) of the Courts of Judicature Act 1964 in particular the proviso to S.92(1) which reads:

'Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellants, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.'

In addition to the above, we have S.167 of the Evidence Act 1950 that works in tandem with the proviso to S.92(1) of the Courts of Judicature Act 1964. It reads:

> 'The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.'

The two provisions set out above had recently been considered by the Court of Appeal in the famous case of *Juraimi bin Husin v PP and Mohd Affandi bin Abdul Rahman & Anor v PP [1998] 1 MLJ 537.*

The Court of Appeal thereafter concluded at *page 587* thus:

> 'To summarize the authorities cited, if in a criminal appeal an appellant has demonstrated errors in point of evidence or procedure, it is the duty of this court to determine whether, despite the error or errors in question, there exists a reasonable doubt in its mind as to the guilt of the accused, based upon the admissible evidence on the record. If the error or errors complained do not have this effect, then it is our duty to plainly say so and maintain the conviction.'
>
> The judgment of the Court of Appeal was affirmed by the Federal Court though no written grounds were made."

Having said the above the court finally concluded by saying –

> "We have examined the record of the proceedings and the grounds of judgment of the learned judge as closely as we can and the grounds of judgment of the Court of Appeal in subsequently affirming the conviction of the appellant by the learned judge. We are satisfied that the errors complained of have not occasioned a substantial miscarriage of justice and we have to plainly say so and to uphold the conviction."

In view of what we have said above we cannot see how it can be said that the judgment of the Federal Court suffered the infirmities as alleged in the additional grounds relied by the Applicant. We also fail to see how the Federal Court's decision can be said to have irregularities under the Courts of Judicature Act 1964 as alleged.

We would reiterate that the findings and observations in the Federal Court pertaining to Zainur Zakaria's contempt proceedings have no bearing at all on the corruption appeal. By introducing new grounds, it is an attempt on the part of the Applicant to try to relitigate the issues which have been conclusively settled.

On the issue of relitigation it is useful to rely on the dicta of *Eusoffe Abdoolcader F.J. (as he then was) in Dato' Mokhtar Hashim & Anor v PP (1983) 2 MLJ 232* where the learned judge said:

> "……. This attempt to relitigate and reopen an issue conclusively decided in respect of the same proceedings and between the same parties would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of *Lord Diplock in Hunter v Chief Constable of the West Midlands Police & Ors [1982] AC 528, 542* which was applied by this court in *Tractors Malaysia Bhd. v Charles Au Yong [1982] 1 MLJ 320, 321."*

Rule 137 of the Rules of the Federal Court 1995 allows the Federal Court to exercise its inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The rule has been invoked by the Federal Court in a number of cases like *Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1* and *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yiom [2002] 2 MLJ 673.* However, it must be observed that its application was only in limited circumstances. If there were to be a liberal application of rule 137 then there would be chaos to our system of judicial hierarchy. Hence, we would think that it is on a case by case basis. Certainly it cannot be the intention of the legislature when promulgating rule 137 that every decision of this Court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final.

My learned brother Abdul Malek Ahmad PCA and my learned sister Siti Norma Yaakob FCJ have seen this judgment in draft and have expressed their agreement with it. Similarly I have had the advantage of reading their respective judgments and totally agree with the reasoning and conclusions, therein.

Finally, having given our utmost consideration to all the four applications before us we find that there are no merits to invoke the exercise of our inherent powers under rule 137.

In the result, all the four applications i.e. Enclosures 80(a), 89(a), 97(a) and 124(a) are hereby dismissed.

Dated: 15th September 2004

ALAUDDIN MOHD. SHERIFF

Judge

Federal Court Malaysia

Counsel for the Appellant	:	Karpal Singh (S.N. Nair Gobind Singh Deo Kamar Ainiah Kamaruzzaman Pawanchek Marican Zulkifli Noordin Saiful Izham Ramli Christopher Fernando and Marisa Regina with him)
Solicitors for the Appellant	:	Messrs Karpal Singh & Co.
For the Respondent Attorney-General Chambers	:	Tan Sri Abdul Gani Patail Attorney-General (Dato' Mohd. Yusoff b. Hj. Zainal Abiden Tun Abdul Majid bin Tun Hamzah and Ahmad Fairuz Zainol Abidin, Senior Federal Counsel with him).

Vernon Ong – watching brief for Bar Council.

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN JENAYAH NO.: 05-04-2000(W)

ANTARA

DATO' SERI ANWAR BIN IBRAHIM - PERAYU/PEMOHON

DAN

PENDAKWA RAYA - RESPONDEN

(Dalam Perkara Mahkamah Rayuan Jenayah No.W05-25-99 & W05-27-99)

ANTARA

DATO' SERI ANWAR BIN IBRAHIM - PERAYU

DAN

PENDAKWA RAYA - RESPONDEN

(Dalam Perkara Mahkamah Tinggi Malaya di Wilayah Persekutuan

Perbicaraan Jenayah No. 45-48-98 & 45-59-98) Antara Pendakwa Raya

Dan Dato' Seri Anwar bin Ibrahim)

CORAM

ABDUL MALEK AHMAD, PCA
SITI NORMA YAAKOB, FCJ
ALAUDDIN MOHD. SHERIFF, FCJ

JUDGMENT OF SITI NORMA YAAKOB, FCJ

Four separate notices of motion have been filed by the Applicant for the common purpose of seeking to review an earlier judgment of this Court dated 10th July, 2002 ("the impugned judgment"). The impugned judgment upheld and confirmed the convictions and sentences that had been imposed on the Applicant by the High Court after he was found guilty on four charges of corruption under section 2 of the Emergency (Essential Powers) Ordinance, 1970. Appeals by the Applicant against such convictions and sentences had also been dismissed by the Court of Appeal on 29th April, 2002.

The four notices of motion seek:-

(1) to set aside the convictions and sentences as seen from Enclosure 80(a) which is dated 9th August, 2002. The Applicant relies on twelve grounds but before us, his Counsel, Mr. Karpal Singh confined his submissions to only four grounds namely those stated at paragraphs 5(3), (4), (5) and (12) of the Applicant's affidavit in support of Enclosure 80(a).

(2) to allow fresh/additional evidence that was not available during the trial to be adduced as seen from Enclosure 89(a) which is dated 10th March, 2003.

(3) leave to rely on five additional grounds at the hearing of Enclosure 80(a). This is Enclosure 97(a) and is dated 14th March, 2003 and the five additional grounds are stated as follows.

(i) The impugned judgment infringed the provisions of the proviso to section 94(2) of the Courts of Judicature Act, 1964 ("the Act").

(ii) The three member Bench of this Court that heard the Applicant's appeals ("the first corum") had not directed its mind to the fact that the Court of Appeal did not have the opportunity to consider the remarks expressed by another panel of this Court ("the second corum") in the contempt proceedings against Zainur Zakaria, one of the Applicant's Counsel at his trial. These remarks relate to the conduct of the trial Judge and the loss of opportunity by the Court of Appeal to consider those remarks deprived that Court from making a ruling as to the suitability of the trial Judge to continue the trial to its conclusion.

(iii) The failure of the first corum to direct its mind to the same remarks had prevented the first corum from ruling that such conduct infringed the provisions of rule 3(1)(d) of the Judges' Code of Conduct, 1994.

(iv) The failure of the first corum to link the same remarks to the Applicant's trial deprived it from concluding the trial Judge's bias against the Applicant.

(v) That the trial Judge's bias was so serious that the proviso to section 92 of the Act could not be invoked.

(4) leave to rely on another additional ground at the hearing of Enclosure 80(a). That additional ground is in fact an extension of the ground in paragraph 5(12) of Enclosure 80(a) and in substance it posed the question as to whether section 94(2) including the proviso thereto of the Act is unconstitutional and void and is of no effect as it impinges on the judicial independence of individual judges of the Federal Court. This notice, Enclosure 124(a), is dated 2nd September, 2004.

As the effect of the applications in Enclosures 80(a) and 89(a) is to reopen, rehear and review appeals that have already been heard and disposed of on their merits, a preliminary objection was taken by the Respondent that we do not have the necessary jurisdiction either in law or under common law to relitigate on such appeals. The Respondent further contends that rule 137 of the Federal Court Rules, 1995 on which the two applications are grounded has no application.

My brother, Abdul Malek Ahmad, PCA has already dealt with this preliminary objection and for the reasons that he has stated in his judgment, I concur that the preliminary objection is misplaced as rule 137 does provide us with the inherent powers to review our earlier decisions provided that such an exercise can only be undertaken sparingly and only in rare and exceptional circumstances to prevent injustice.

Following our ruling that rule 137 is not ultra vires the Act or the Federal Constitution and that we can invoke our inherent powers under that rule, no objection was taken by the Respondent for the applications for leave in Enclosures 97(a) and 124(a) and we accordingly granted leave to the Applicant to rely on the additional grounds in his applications to review.

As there was overlapping in the nature of the grounds relied upon to support the applications to review, those grounds became clearer after the submissions of both Mr. Karpal Singh and Mr. Christopher Fernando, the Applicant's lead Counsel, as both of them confirmed that they were raising the following issues to support their applications to review.

(1) Whether the impugned judgment has any legal effect as it was delivered pursuant to a provision of the law which impinges on the independence of individual Judges.

(2) Whether the remarks on the conduct of the trial Judge made in the contempt proceedings against Zainur Zakaria

(i) had the effect of depriving the Applicant of one tier of appeal.

(ii) had the effect of supporting a ruling that the trial Judge had infringed the provisions of rule 3(1)(d) of the Judges' Code of Conduct, 1994 .

(iii) should have been considered by the first corum as forming a link (and not considered in isolation as was done) to establish the trial Judge's bias against the Applicant.

(3) Whether the first corum had correctly invoked the proviso to section 92(1) of the Act bearing in mind that the trial was flawed as the trial Judge was biased. I need to mention here that in Enclosure 97(a) reference is made to the proviso to section 92 of the Act as the relevant law applicable. This cannot be right as the relevant proviso must be the proviso to section 92(1) of the Act as firstly sub-section (1) of the section is the only sub-section that has a proviso to it and secondly what is meant to be conveyed is that despite the bias shown by the trial Judge, the first corum still maintained that such bias did not amount to there being a miscarriage of justice and relying on the proviso dismissed the Applicant's appeals. This the Applicant says amounts to a wrongful approach to section 92(1) of the Act.

(4) Whether there had been a suppression of evidence when the trial Judge refused to admit evidence showing the unprofessional conduct of two named prosecutors in

attempting to procure fabricated evidence tending to show the Applicant's improper sexual conduct.

Since the right to review depends on the compelling circumstances of each case, I shall in this judgment attempt to consider one aspect of Mr. Karpal Singh's arguments namely all the issues relating to the applicability of section 94 (2) of the Act and the constitutionality of the proviso thereto.

Section 94 is concerned with the manner to which judgments of this Court are to be pronounced and delivered and for convenience I reproduce the provisions of the whole section as follows.

"94 Judgment

(1) On the termination of the hearing of an appeal the Federal Court shall, either at once or on some future day which shall either then be appointed for the purpose of which notice shall subsequently be given to the parties, deliver judgment in open court.

(2) In criminal appeals and matters the Federal Court shall ordinarily give only one judgment, which may be pronounced by the Chief Justice or by such other member of the Federal Court as the Chief Justice may direct:

Provided that separate judgments shall be delivered if the Chief Justice so determines.

(3) The judgment of any member of the Federal Court who is absent may be read by any other Judge."

Our focus however is on sub-section (2) and its proviso, the origin of which can be traced to similar provisions appearing in section 31(2) of the Courts Ordinance, 1948 which has since been repealed and section 62(2) of the superseded Courts of Judicature Act No.7 of 1964.

In interpreting sub-section (2) of section 94, Mr. Karpal Singh drew our attention to the format in which judgments in criminal appeals of this Court are to be prepared and delivered. He took exception to the fact that the impugned judgment is embodied in two separate written judgments delivered by two members of the first corum whilst the third member did

not write any judgment at all. On its own, each of the two separate judgments dealt with separate subject matters, one on conviction and the other on sentence, and according to Mr. Karpal Singh neither of the judgment is complete. He contends that each judgment should have dealt with conviction and sentence jointly rather than have the subject matters of the appeals split up as was done in the Applicant's appeals. This is particularly so as the notices of appeal relate to both convictions and sentences.

Since there are two separate judgments, then by implication the Chief Justice must have so directed, exercising his powers to do so under the proviso to section 94(2). Mr. Karpal Singh then questioned the constitutionality of this proviso as it impinges on the judicial independence of individual Judges.

From the precise and unambiguous language of section 94(2), we agree that the usual and accepted practice is that there will be one judgment be it written or oral, delivered at the conclusion of the hearing of a criminal appeal or matter and this can only happen where all members of the corum have reached consensus and are unanimous in their decisions. The unanimous decision will then be delivered by the Chief Justice as a judgment of the Court and again this can only happen when he presides as a member of the corum. If he does not so preside, then he directs a member of the corum to do so and by tradition that burden falls on the most senior member of the corum to deliver the unanimous judgment. This arrangement if I am permitted to state so is in compliance with section 74(2) of the Act which provides that in *"the absence of the Chief Justice, the most senior member of the Court shall preside."*

As an extension of the arguments of the learned Attorney General, who appeared for the Respondent, it is my considered opinion that section 94(2) does not prevent or debar separate written judgments being given by the other members of the corum even though the consensus reached had been a unanimous one. This is so as the reasons relied on to arrive at the unanimous conclusion need not necessarily be the same for each member of the corum and it is only through the separate judgments that the differing reasonings can be expressed.

So far I have only alluded to the practice of pronouncing a unanimous judgment under the provisions of section 94(2). What happens when there is dissent when no unanimous majority can be reached in the outcome of an appeal.

That situation manifests itself particularly in appeals where complexities of the law need to be determined thereby invoking differing views and

conclusions. Under these circumstances reliance will be had to the proviso to section 94(2) as separate judgments need to be prepared and delivered and the Chief Justice determines who should write the separate judgments. Here there is in Mr. Karpal Singh's contention interference on the part of the senior most judge in the country to influence the outcome of the appeal, thereby impinging on the judicial independence of individual judges. He further contends that in so determining, the Chief Justice had run foul of the oath of office taken by Judges upon appointment pursuant to Article 124(2) of the Federal Constitution.

The element of interference should not arise where the Chief Justice presides over a criminal appeal where unanimity could not be reached. By virtue of his office and seniority he presides over all criminal appeals that are fixed before him and as such there is nothing objectionable to him directing who should prepare and deliver the separate judgments over the criminal appeals he presides. However can the same consideration apply when he directs who should prepare the separate judgments in a criminal appeal where he does not preside? The Applicant maintains that he has no business to direct who should prepare the separate judgments as such direction amounts to interfering with the independence of individual Judges. In this context when one speaks on the independence of the individual Judge it must mean independence to decide a case without fear or favour, without reference from any quarter including any interference from the Head of the Judiciary.

Perhaps the situation can be logically analysed by looking at the role of the Chief Justice when he decides to act under the proviso. He is not, as Mr. Karpal Singh wants us to believe, dictating how a judge should decide a case, he is not asking the Judge to decide favourably for a given person or authority. He is exercising a function which the law allows him to do i.e. to direct who should prepare and deliver separate judgments; no more no less. I regard such function as the performance of a non judicial duty affecting the administration of justice. It may well be that the complexity of the case warrants the production of more than one judgment and when he determines that should be the case, this determination in my considered opinion should not be regarded as being the basis of an interference which go to the very root of a judge's function as one who is fair and independent.

Finally I come to the two separate judgments delivered in the Applicant's appeals and the first question that brings to mind is whether they are concurrent judgments expressing the unanimous decision of the first corum.

To answer this question, the two judgments have to be read in their entirety and the concurrence and unanimity of the decisions made are to be gauged from the language used.

The judgment of Haidar Mohd Noor, JFC , the most junior member of the first corum runs into 59 pages and dealt with the main issue on conviction. It is headed JUDGMENT OF THE COURT , and throughout the judgment, there is a strong preference in the use of the subjective plural *"we"* as opposed to the subjective singular *"I"* together with the corresponding possessive pronoun *"our"* as opposed to *"my".* Thus phrases like *"we* need not consider, *we* do not propose, *we* would in answer say, it is not, in *our* respectful view, *we* agree", are some of such phrases used throughout the judgment and coupled with the heading of the judgment, it is my considered opinion that it is a concurrent judgment concluded after all the three members had discussed the issues raised and unanimously concluded that the convictions stand. The fact that the concurrence of the other two members is not expressed in the judgment makes no difference to my finding as such concurrence has been more than adequately revealed in the language of the judgment.

Mohd Dzaiddin Abdullah, the then Chief Justice who presided in the appeals delivered the second judgment on sentence and although he had headed his judgment in his name his concluding remarks bear all the resemblance of a concurrent judgment. This is how he ended the judgment.

> *"We are in full agreement with the statement of principle enunciated above.*
>
> *After considering the reasons given by the learned judge, we are satisfied that the imposition of the sentence of 6 years' imprisonment to commence from the date of conviction has not occasioned an error or principle of law. Therefore, we see no reason to interfere with the exercise of discretion vested in him.*
>
> *Accordingly, we dismiss the appeal against sentence."*

Since both judgments have adequately and unanimously decided on the main issues of conviction and sentence, and read together they represent the judgment of the court, the absence of a written judgment from the Chief Judge of Sabah and Sarawak, the third member in the first corum cannot affect the legality of the judgment and neither can it be taken to mean that he has dissented. The fact that he had not produced a written judgment points to the conclusion that since he was in complete agreement to the views of the two members, no purpose would be

achieved by a third judgment as he would be merely repeating what has already been adequately expressed in the judgments of Haidar Mohd Noor, FCJ and Mohd Dzaiddin Abdullah, CJM.

My brothers, Abdul Malek Ahmad, P.C.A. and Alauddin Mohd. Sheriff, FCJ who have had sight of this judgment agree that for the reasons stated in this judgment, it is our considered opinion that section 94(2) and its proviso do not have the effect of curtailing the judicial independence of any individual Judge when the Chief Justice determines who should prepare and deliver separate judgments in a criminal appeal or matter. To that extent, the Applicant cannot rely on his objection to section 94(2) and its proviso to support his claim to have his appeals reviewed before another panel of this Court. My learned brother, Alauddin Mohd. Sheriff, FCJ will now consider the remaining grounds in the applications to review.

Sgd.

Dated: 15th September, 2004 **(DATO' SITI NORMA YAAKOB)**

JUDGE

FEDERAL COURT MALAYSIA

PUTRAJAYA

Counsel

Karpal Singh (S.N. Nair, Gobind Singh Deo, Kamar Ainiah Kamaruzaman, Pawancheek Marican, Zulkifli Noordin, Saiful Izham Ramli, Christopher Fernando and Marisa Regina with him) for the appellant
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Tan Sri Abdul Gani Patail , Attorney-General (Dato' Mohd Yusof Hj Zainal Abiden, Tun Abdul Majid Tun Hamzah and Ahmad Fairuz Zainol Abidin, Senior Federal Counsel with him) for the respondent
Attorney- General Chambers

Vernon Ong – watching brief for Bar Council

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN JENAYAH NO.:05-4-2000 (W)

ANTARA

DATO' SERI ANWAR IBRAHIM … PERAYU/PEMOHON

DAN

PENDAKWA RAYA … RESPONDEN

(Dalam Perkara Mahkamah Rayuan Jenayah No. W05-25-99 & W05-27-99)

Antara

Dato' Seri Anwar Ibrahim - Perayu

dan

Pendakwa Raya - Responden

(Dalam perkara Mahkamah Tinggi Malaya di Wilayah Persekutuan Perbicaraan Jenayah No. 45-48-98 & 45-59-98) Antara Pendakwa Raya Dan Dato' Seri Anwar bin Ibrahim)

Coram

Abdul Malek Ahmad, PCA

Siti Norma Yaakob, FCJ

Alauddin Mohd. Sheriff, FCJ

JUDGMENT OF ALAUDDIN MOHD. SHERIFF, FCJ

By Enclosure 89(a) the Applicant prays for an order that this Honourable Court invoke its inherent powers under rule 137 of the Rules of the Federal Court 1995, to allow fresh/additional evidence affecting the trial to be adduced as such evidence was not available during the trial. This application is supported by the affidavit of the Applicant himself sworn on 10th March 2003 which is in Enclosure 89(b).

Briefly, the Applicant's affidavit reveals the following facts:-

> The Applicant was charged under Section 2 of the Emergency (Essential Powers) Ordinance No. 22 of 1970 at the High Court of Malaya at Wilayah Persekutuan on 14.4.1999 on four charges of corruption. The Applicant was found guilty of the said charges, convicted and sentenced to 6 years imprisonment on each charge, with the sentences being ordered to run concurrently.
>
> The Applicant appealed against the decision of the High Court to the Court of Appeal which dismissed the appeal on 29th April 2002. He then appealed to the Federal Court against the decision of the Court of Appeal. On 10th July 2002 his appeal to the Federal Court was dismissed with the convictions and the sentences being confirmed.

It has been brought to the Applicant's knowledge that one of his counsel, Encik Zainur Zakaria (ZZ), had faxed copies of two letters he received from Mr. Manjeet Singh Dhillon (MSD) to Mr. Christopher Fernando, his lead counsel, just before the hearing of his appeal in the Court of Appeal. The letter sent to ZZ contained an enclosure which is a letter written by MSD to Y.A.A. the Chief Justice where MSD made a formal complaint against Justice Augustine Paul, the trial judge, for improper conduct in the Re ZZ case which occurred during the Applicant's trial.

In the light of this new evidence contained in MSD's letter the Applicant instructed his counsel to file this application to urge this court to allow him to adduce such evidence in the interest of justice under rule 137 of the Rules of the Federal Court 1995.

As stated in paragraph 17 of the Applicant's affidavit the evidence that is sought to be adduced is to the following effect:-

(i) That MSD was requested by Tan Sri Mohtar (TSM) to see him before the proposed contempt proceedings against himself and ZZ began that morning. The request was made through MSD's counsel, Mr. Jagjeet Singh (JS). MSD reluctantly agreed and met with TSM. They met at the ante room at the courthouse in the

presence of Datuk Abdul Gani Patail (AGP), Datuk Azhar Mohamad (AM) and JS. Upon seeing MSD, TSM went up and hugged him and turned around and told AGP and AM that MSD was an altruist and apologized to MSD for not having done anything on MSD's letter in which he had levelled accusations against AGP. TSM added that he had not as yet taken this matter up with his officers. MSD responded by reminding TSM that he had made very serious allegations against his officers and had written to him expecting something to be done but that nothing had been done. This letter referred to is the letter where MSD complained to TSM that AGP and AM had attempted to extort fabricated evidence from his client Datuk Nallakaruppan (DN) through him to be used against Datuk Seri Anwar Ibrahim (DSAI) in exchange for DN's life. TSM did not deny or refute MSD's allegations against his officers and both AGP and AM remained silent.

(ii) That as early as September 1998 DN had made a signed statement denying any involvement in any sexual improprieties involving the Applicant. This statement was in response to the affidavits of SAC Musa Hassan dated 2nd September 1998 making allegations against the Applicant and DN and the affidavit of TSM making vague hearsay allegations. This evidence is clearly pertinent and relevant to the Applicant's case. In summarily dismissing the Applicant's application to stop AGP and AM from further conducting the prosecution against him the learned judge had this to say, (the relevant portion of which reads), "Secondly the conclusion of MSD as contained in para 4 of the letter may be justifiable only if he arrived at after he had discussed the matter with his client in order to ascertain what his client knew. The letter is dated 12th October 1998. However, para 8 of the statutory declaration stated that MSD met his client on the 13th October 1998 to convey AGP's demands to him. This shows that MSD came to his conclusion even before he discussed the matter with his client to find out what the latter knew. I found support of this in para 8 of the statutory declaration where MSD had said that there was nothing his client could have done… short of lying. This clearly shows that up to 13th October 1998, MSD did not know what his client knew…"

If we may be permitted to say, the gist of the new evidence sought to be adduced is as follows:

(i) It is MSD's revelation that he had a meeting with the former A.G. (TSM) in the ante room of the Federal Court in which TSM called him an altruist but did not take any further action in respect of his complaint against AGP and AM.

(ii) MSD says that Justice Augustine Paul, the trial judge, was wrong in concluding that he did not know whether his client knew about DSAI's involvement with women when he wrote the letter to TSM complaining about AGP and AM.

In his lengthy submission in support of this application before us learned counsel for the Applicant, Mr. Christopher Fernando, began by saying that in this case there has been gross injustice perpetrated against the Applicant. Fundamental principles of law have been violated and abused. There has also been an abuse of the process of the court. It is most unprecedented in that the trial was allowed to be prosecuted by two unfair prosecutors in the persons of AGP and AM. Their conduct and participation had contaminated the entire proceedings. It was therefore urged upon us to use the inherent powers of this court to intervene and prevent injustice.

It was submitted by learned counsel that the fresh/additional evidence sought to be adduced in this case through MSD was not available to the Applicant during his trial. This evidence is relevant to the Applicant's case. Further such evidence is credible and believable coming from a witness who is a senior and respected Advocate and Solicitor and a former Chairman of the Bar Council. In addition this evidence would have had a decidedly important influence on the outcome of the Applicant's case.

It was further submitted by learned counsel that in this case the Applicant have met all the conditions to justify the reception of the evidence proposed to be adduced.

In considering whether to allow fresh evidence to be adduced on appeal the English Court of Criminal Appeal in *R v. Parks [1961] 3 All E.R. 633* referred to certain principles. They are:-

(i) the evidence sought to be called must be evidence which was not available at the trial;

(ii) the evidence must be relevant to the issues;

(iii) it must be credible evidence in the sense of being well capable of belief; and

(iv) the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

In The Constitution of India AIR Commentaries Vol III 2nd (1971) Edition the writer, under the heading of "Grounds of review" had this to say (at page 228). –

> "Where a litigant has obtained a judgment in a Court of Justice, he is, by law entitled not to be deprived of that judgment without solid grounds. Where, therefore, a review of a judgment is asked for by a party, the greatest care ought to be exercised by the court in granting the review especially where the ground of review is the discovery of fresh evidence. It is so easy to the party who has lost his case to see what the weak part of his case was, and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong (1). The rule that permits a new trial to be granted on account of the discovery of new evidence has, therefore, been fenced round with many limitations. Thus, the party asking for a new trial must show that there was no remissness on his part in adducing all possible evidence at the trial (2). Further, the new evidence must be such as is presumably to be believed and such that if adduced, it would practically be conclusive, i.e. evidence of such a class as to render it probable almost beyond doubt that the judgment would be different (3). Where it is very doubtful whether the evidence, if produced, would have had any effect on the judgment, there is no ground for review (4)."

In considering the exceptional conditions when an appellate court would be willing to admit additional evidence our Federal Court in *Mohamad bin Jamal v Public Prosecutor [1964] 30 MLJ 254* applied the same principles mentioned in *R v. Parks* [see also *Lau Foo Sun v Government of Malaysia (1970) 2 MLJ 70* and *Asiatic Development Bhd. & Anor v Balachandar a/l Palanysamy (1995) 3 MLJ 445].*

Reverting to the application before us the facts revealed that the new evidence mentioned in paragraph 17 of the Applicant's affidavit is not evidence that was not available at the trial. As a matter of fact the Applicant was fully aware of the existence of such evidence. The charges faced by the Applicant was one of abuse of power under Section 2(1) of Ordinance 22 of 1970. The said new evidence was available during the trial itself. More importantly the learned trial judge had rejected this evidence as being irrelevant. The Court of Appeal and the Federal Court upheld his finding.

As they have no relevance to the charges faced by the Applicant, we cannot see how they can materially affect the result of the case.

Under the circumstances we find that the two issues raised in paragraph 17 of the Applicant's affidavit do not meet the conditions or principles mentioned

in *R v. Parks* or *Mohamad Jamal v Public Prosecutor*. That being so they do not qualify as new or additional evidence.

In *Lo Fat Thjan & Ors. V. Public Prosecutor [1968] 1 MLJ 274* the Federal Court again had occasion to consider the issue of additional evidence. It was held Per Curiam:

> "We would deprecate generally the admission of additional evidence on appeal except in clearly exceptional circumstances. The adversary system in our trials is hardly compatible with allowing lacunae in the case of any party to be filled in by afterthoughts or countenancing reconstruction of any case after it has failed at the trial."

It is obvious to us from the above decision that even during an appeal the courts are very strict when admitting additional evidence more so in a situation like ours where the appeal process have already been fully exhausted. The above decision also speaks of exceptional circumstances which we find are totally absent in the present application. The issues raised by the Applicant are all issues that could have been obtained during the trial and will not materially affect the result of the trial had it been brought up for consideration.

We take the view that by introducing such evidence, the Applicant is seeking to reopen, reexamine and review the decision which has been conclusively decided by the final court of justice. The issues raised by the Applicant cannot be viewed as a ground to invoke rule 137. In essence, it is an attempt to persuade this court to accept the purported new evidence with a view to relitigate the appeal. As we have said earlier they are not evidence relevant to the charge and they do not qualify to be new evidence before the court. We feel that the purported new evidence ought to have been contemplated by the Applicant's able defence team during the trial itself. The purported new evidence was available to the Applicant's defence team even while the trial was going on.

The allegation of misapprehension of facts against the trial judge is not new evidence but is an issue that goes to the merits of the case and should have been canvassed throughout the appeal process. Even if the purported misapprehension was a ground of appeal, it does not lend any weight against the charges as they were one of corruption and not relating to misconduct with women.

Finally, we would say that there is no fraud or suppression of evidence and neither is there new evidence before the court which merits the court to entertain a reopening or rehearing of the case.

We shall now proceed to consider Enclosure 97(a).

By way of Enclosure 97(a) the Applicant applies for an order that he be given leave to rely on additional grounds at the hearing of his Notis Usul {Enclosure 80(a)} for an order that this Honourable Court invoke its inherent powers under rule 137 of the Rules of the Federal Court 1995 and set aside the convictions and sentences of the Applicant that were confirmed and upheld by the Federal Court on 10th July 2002.

The additional grounds appear in the affidavit in support of this application. They are as follows:-

1. The Federal Court's decision handed down on 10th July 2002 is in infringement of the provisions of section 94(2) of the Courts of Judicature Act, 1964 [Act 91] (Revised 1972);

2. The Federal Court was wrong in not directing its mind to the fact that the Mahkamah Rayuan did not have the opportunity of considering the remarks directed by the Federal Court in *Zainur Zakaria v Public Prosecutor [2001} 3 MLJ 604* against the learned trial judge Augustine Paul J and their effect on the trial subsequently thereby depriving the appellant an opportunity for that court to rule on the vital consideration as to the learned trial judges' suitability to have continued with the trial to its conclusion;

3. The Federal Court was wrong in not directing its mind to the fact that the remarks passed by the Federal Court in Zainur Zakaria's appeal amounted in substance to ruling that the learned trial judge had infringed the provision of rule 3(1)(d) of the Judges' Code of conduct 1994 which states,

   > 'A Judge shall not conduct himself dishonestly or in such manner as to bring the Judiciary into disrepute or to bring discredit thereto' and had thereby disqualified himself from conduct of the appellant's trial;

4. The Federal Court was wrong in considering the remarks passed against the learned trial judge in Zainur Zakaria's appeal in isolation when the proceedings to commit Zainur Zakaria for contempt of court were irretrievably linked to the appellant's trial which became hopelessly contaminated by the role played by the learned trial judge in those proceedings, particularly when considered in the light of the learned trial judge's belligerent stance, convicting and sentencing Zainur Zakaria to three month's imprisonment, an attempt to cite the entire defence team for contempt of court and general bias against the defence; and

5. The Federal Court was wrong in not considering the appellant's trial was so fatally flawed by the bias shown by the learned trial judge which was so serious that the proviso to section 92 of the Courts of Judicature Act 1964 could not under the circumstances be invoked."

I will not consider the first ground as the matter had been dealt with by my learned sister earlier.

In considering the remaining additional grounds mentioned above it is appropriate that we refer to the relevant part of the judgment of the Federal Court reported in [2002] 3 MLJ 193 concerning the matter.

At page 222H this is what the court said:-

"We are of the view that the facts and circumstances of Zainur Zakaria cannot be equated to the facts of this case. There it was more towards the conduct of Zainur Zakaria that the learned judge was more concerned with. From what we can gather from the record, it was the learned judge's belief that Zainur Zakaria's action was to delay the proceedings and to sensationalize the trial by alleging on the conduct of the two prosecutors to fabricate evidence against the appellant. The conduct of the learned judge in Zainur Zakaria is not really relevant to the amended charges faced by the appellant. In addition thereto, there was the allegation of lack of time given for Zainur Zakaria to prepare his defence. The learned judge might well appear to lean towards the prosecution as indicated by the Federal Court but he cannot be said to be showing the same inclination on the evidence in the trial against the appellant. A good illustration is where as we stated earlier, he considered the appellant's case at length."

Further at page 223 the court continued:-

"Mr. Christopher Fernando submitted that there were threats of contempt against counsel including himself by the learned judge. We have examined Mr. Christopher Fernando's complaint but regret to say that the learned judge, being human himself, and as stated earlier, because of the wide publicity given to this case, he had to exercise a lot of restraints in

> controlling the proceedings and in doing so he may have uttered harsh words or even threaten counsel with contempt and all these must be taken in that spirit. It is not so much of the learned judge leaning towards the prosecution or being prejudiced towards the defence. He has the statutory duty to see that irrelevant and inadmissible evidence is not allowed to creep in or for that matter stop counsel from challenging his rulings as otherwise the proceedings will go haywire."

Reading the excerpts from the judgment quoted above we are of the view that the court had embarked upon a full and proper consideration of the effect of the decision in Zainur Zakaria in the appeal before it. The court had categorically stated that the facts and circumstances of Zainur Zakaria cannot be equated with the facts of the Applicant's case. The court also retorted by saying that the conduct of the learned judge in Zainur Zakaria is not really relevant to the amended charges faced by the Applicant. We would add by saying that the contempt proceedings is a separate proceedings altogether. It was only against Zainur Zakaria and not the whole of the defence team. There is no nexus between the allegation of fabrication and the corruption appeal. The allegation was on fabrication of evidence in trying to get Datuk Nallakaruppan to cooperate by giving evidence on the Applicant's sexual misconduct with women. Whereas the charges in the corruption trial are that he abused his position in getting the police to obtain retraction letters from two individuals. Sexual misconduct is not an ingredient of the charges. None of the prosecution witnesses in the corruption trial made any reference to Datuk Nallakaruppan's role whatsoever.

The Federal Court also referred to the complaint raised by the Applicant's counsel that their submission on the conduct of the learned judge in the Court of Appeal was brushed aside by them. The court had examined the judgment of the Court of Appeal and agreed that there was an omission on their part to consider this issue. Nonetheless the court itself had considered this point and came to the conclusion that it had not occasioned any miscarriage of justice (see page 224).

The Federal Court in its judgment also considered the paramount question raised by the Applicant whether the conduct of the trial judge which the Applicant said was grossly unfair towards him has occasioned any miscarriage of justice which entitled him to an acquittal.

This is what the court said (at page 224G, 225B, 226C) :-

> "On this issue, we are guided by S.92(1) of the Courts of Judicature Act 1964 in particular the proviso to S.92(1) which reads:

> 'Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellants, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.'

In addition to the above, we have S.167 of the Evidence Act 1950 that works in tandem with the proviso to S.92(1) of the Courts of Judicature Act 1964. It reads:

> 'The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.'

The two provisions set out above had recently been considered by the Court of Appeal in the famous case of *Juraimi bin Husin v PP and Mohd Affandi bin Abdul Rahman & Anor v PP [1998] 1 MLJ 537.*

The Court of Appeal thereafter concluded at *page 587* thus:

> 'To summarize the authorities cited, if in a criminal appeal an appellant has demonstrated errors in point of evidence or procedure, it is the duty of this court to determine whether, despite the error or errors in question, there exists a reasonable doubt in its mind as to the guilt of the accused, based upon the admissible evidence on the record. If the error or errors complained do not have this effect, then it is our duty to plainly say so and maintain the conviction.'

The judgment of the Court of Appeal was affirmed by the Federal Court though no written grounds were made."

Having said the above the court finally concluded by saying –

> "We have examined the record of the proceedings and the grounds of judgment of the learned judge as closely as we can and the grounds of judgment of the Court of Appeal in subsequently affirming the conviction of the appellant by the learned judge. We are satisfied that the errors complained of have not occasioned a substantial miscarriage of justice and we have to plainly say so and to uphold the conviction."

In view of what we have said above we cannot see how it can be said that the judgment of the Federal Court suffered the infirmities as alleged in the

additional grounds relied by the Applicant. We also fail to see how the Federal Court's decision can be said to have irregularities under the Courts of Judicature Act 1964 as alleged.

We would reiterate that the findings and observations in the Federal Court pertaining to Zainur Zakaria's contempt proceedings have no bearing at all on the corruption appeal. By introducing new grounds, it is an attempt on the part of the Applicant to try to relitigate the issues which have been conclusively settled.

On the issue of relitigation it is useful to rely on the dicta of *Eusoffe Abdoolcader F.J. (as he then was) in Dato' Mokhtar Hashim & Anor v PP (1983) 2 MLJ 232* where the learned judge said:

> "……. This attempt to relitigate and reopen an issue conclusively decided in respect of the same proceedings and between the same parties would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of *Lord Diplock in Hunter v Chief Constable of the West Midlands Police & Ors [1982] AC 528, 542* which was applied by this court in *Tractors Malaysia Bhd. v Charles Au Yong [1982] 1 MLJ 320, 321."*

Rule 137 of the Rules of the Federal Court 1995 allows the Federal Court to exercise its inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The rule has been invoked by the Federal Court in a number of cases like *Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1* and *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yiom [2002] 2 MLJ 673.* However, it must be observed that its application was only in limited circumstances. If there were to be a liberal application of rule 137 then there would be chaos to our system of judicial hierarchy. Hence, we would think that it is on a case by case basis. Certainly it cannot be the intention of the legislature when promulgating rule 137 that every decision of this Court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final.

My learned brother Abdul Malek Ahmad PCA and my learned sister Siti Norma Yaakob FCJ have seen this judgment in draft and have expressed their agreement with it. Similarly I have had the advantage of reading their respective judgments and totally agree with the reasoning and conclusions, therein.

Finally, having given our utmost consideration to all the four applications before us we find that there are no merits to invoke the exercise of our inherent powers under rule 137.

In the result, all the four applications i.e. Enclosures 80(a), 89(a), 97(a) and 124(a) are hereby dismissed.

Dated: 15th September 2004

ALAUDDIN MOHD. SHERIFF

Judge

Federal Court Malaysia

Counsel for the Appellant	:	Karpal Singh (S.N. Nair Gobind Singh Deo Kamar Ainiah Kamaruzzaman Pawanchek Marican Zulkifli Noordin Saiful Izham Ramli Christopher Fernando and Marisa Regina with him)
Solicitors for the Appellant	:	Messrs Karpal Singh & Co.
For the Respondent Attorney-General Chambers	:	Tan Sri Abdul Gani Patail Attorney-General (Dato' Mohd. Yusoff b. Hj. Zainal Abiden Tun Abdul Majid bin Tun Hamzah and Ahmad Fairuz Zainol Abidin, Senior Federal Counsel with him).

Vernon Ong – watching brief for Bar Council.

Report on Datuk Seri Anwar bin Ibrahim's Appeal against conviction observed on behalf of the Australian Bar Association and International Commission of Jurists

Appendix C

Karpal Singh Report No 1

ANWAR IBRAHIM'S LONG STRUGGLE FOR JUSTICE

Report on Datuk Seri Anwar bin Ibrahim's Appeal against conviction observed on behalf of the Australian Bar Association and International Commission of Jurists

Appendix D

Karpal Singh Report No 2