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COMMITTEE ON THE HUMAN RIGHTS OF PARLIAMENTARIANS

▶ **CASE No. MAL/15 - ANWAR IBRAHIM - MALAYSIA**

THE TRIAL OF ANWAR IBRAHIM

Report on the trial of Datuk Seri Anwar bin Ibrahim in the High Court of Malaysia observed on behalf of the Inter-Parliamentary Union (IPU)

MARK TROWELL QC
March 2011

Introduction

Datuk Seri Anwar bin Ibrahim ("Anwar Ibrahim") was in the 1990s the Deputy Prime Minister of Malaysia. In 1998 Prime Minister Dato' Seri Dr Mahathir bin Mohamad dismissed him after he was charged with allegedly sodomizing his wife's driver and acting corruptly by attempting to interfere with the police investigation. He was convicted and imprisoned after trial, but released when Malaysia's Federal Court overturned the conviction in September 2004.

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

During his lengthy period of incarceration, Anwar Ibrahim became 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.

On 26 August 2008, Anwar Ibrahim won the by-election for the parliamentary seat of Permatang Pauh with a majority of more than 15,000 votes, returning to Parliament as leader of the three-party opposition alliance known as Pakatan Rakyat (PKR).

On 7 August 2008, Anwar Ibrahim was charged with committing acts of sodomy contrary to s. 377B of the Penal Code. It was alleged that he had sodomized a male staff member named Mohd Saiful Bukhari Azlan ("Mohd Saiful") at a private condominium not far from the centre of Kuala Lumpur.

Anwar Ibrahim's case was transferred on 5 March 2009 from the Sessions Court to the High Court so that he might stand trial. Justice Datuk Mohamad Zabidin Mohd Diah ("Justice Zabidin") was appointed to hear the case, which was listed to commence on 4 February 2010 at the Courts Complex at Jalan Duta.

I first reported on the trial as an observer for the Inter-Parliamentary Union in August 2010. By then the trial had already drifted over a period of more than six months. This time it was expected that

the prosecution would call medical and scientific experts to prove the central allegation of sexual penetration. That was not to be as the trial was again delayed.

The trial had in the early months been interrupted mostly because of several appeals to the Court of Appeal and to the Federal Court against rulings made by the trial Judge, which his lawyers claimed affected the fairness of his trial.

There was a substantial delay in March 2010 when the trial clashed with the opening of Parliament and the parliamentary duties of Anwar and his lead counsel Karpal Singh (also a parliamentarian and National Chairman of the Democratic Action Party (DAP), which is a member of the opposition parliamentary alliance). Unfortunately, proceedings in August were again delayed when lead counsel Karpal Singh was suddenly taken ill with pneumonia.

Disclosure of Prosecution Evidence Generally

The international legal community generally accepts that non-disclosure or the suppression of material evidence, that fairness suggests ought to have been provided to an accused person, will in most cases occasion a miscarriage of justice. This is recognized by the common law, statute and in some jurisdictions by constitutional mandate.

Criminal Procedure and Investigations Act 1996 (UK)
Criminal Justice Act 2003 (UK)
R v. Ward [1993] 2 All ER 577 at 626 [United Kingdom]
R v. Stinchcombe [1991] 3 S.C.R. 326 [Canada]
R. v. McNeil [2009] S.C.J. No. 3, per Charron J. [Canada]
Brady v. Maryland, 373 U.S. 83, 87 (1963) [USA]
Giglio v. United States, 405 U.S. 150, 154 (1972) [USA]
Kyles v. Whitley, 514 U.S. 419, 432-33 (1995) [USA]
U.S. v. Ruiz, (2002) 536 U.S. 622, 629 {USA]
Weatherford v. Bursey, (1977) 429 U.S. 545, 559 [USA]
Agurs [1976] USSC 137; 427 US 97 at 111 [USA]
Bagley [1985] USSC 205 [USA]
Code of Criminal Procedure 1973, s. 208 [India]
Grey v The Queen [2001] HCA 65; (2001) 184 ALR 593 [Australia]
Mallard v The Queen [2005] HCA 68; (2005) 224 CLR 125 [17] [Australia]

The failure of prosecutors to disclose material evidence directly affects the fair conduct of a trial. It not only denies an accused the opportunity of knowing the prosecution case, but also directly affects his or her ability to prepare a defence. Whether a trial can be judged as fair and conducted according to law can often be judged by whether proper disclosure has been made to an accused.

The Malaysian Attorney General Tan Sri Abdul Gani Patail graciously made time for me to meet with him at his Chambers at Putrajaya in January 2010. During the meeting Tan Sri suggested that the critical test of a fair trial was whether it could be said that Anwar Ibrahim had been treated differently from any other Malaysian citizen standing trial.

He was right of course. It would not be appropriate to judge the Malaysian legal system upon standards or laws existing in other countries. However, I responded saying that nevertheless there were international standards expected of modern democratic nations like Malaysia.

Minimum human rights standards relating to procedural fairness and the rights of an accused are contained and enshrined in the United Nations Declaration of Human Rights (UNDHR) and incorporated in the European Convention on Human Rights (ECHR). There is no specific reference to pretrial disclosure in either document, but it is clearly implicit in the general right to a fair trial that an accused person should know the case that must be met and have the opportunity to properly defend the allegations. It is often seen as an incident to an accused's right to a fair trial.

Some legal systems have progressively established procedures for pretrial disclosure not only to ensure that an accused's rights are preserved, but also to ensure that the trial proceeds fairly and without delay. The obligation to disclose is regarded as a continuing obligation. If the prosecutor receives or obtains evidentiary material that is relevant to the charge even while the trial is continuing, it should be disclosed to the defence.

In most cases there are policy guidelines that impose upon the prosecution service a general duty to disclose its case to the defence. Normally, full disclosure of all relevant evidence will occur unless full disclosure before the trial will undermine the administration of justice, or when such disclosure may endanger the life or safety of a witness.

The international trend has been for a more liberal and expansive view of the ambit of material that is relevant or what might potentially be relevant. The courts have rejected any notion that what is relevant was to be assessed by reference to the case theory of the prosecution or by reference only to evidence the prosecution proposes to call in support of its case.

The State of Western Australia v JWRL, ibid, at [59-61] (Martin CJ.)

Disclosure of Prosecution Evidence in Malaysia

The law relating to the disclosure and inspection process in criminal proceedings is to be found in ss. 5, 51 and 51A of The Criminal Procedure Code (Act 593) ('CPC').

Section 51 CPC provides that when any court considers that the production of any document is necessary or desirable for the purposes of any trial, it may issue a summons for the production of that document.

Section 51A CPC was introduced in 2006. It requires the prosecution to supply to an accused person the first offence report made under s. 107 CPC, a copy of any document it intends to tender at trial as part of the prosecution case and any statement of facts favourable to the defence.

Disclosure in the Anwar Ibrahim Trial

The disclosure of prosecution material became an issue very early in the proceedings.

Soon after he had been charged in the Sessions Court Anwar Ibrahim, through his lawyers, made numerous requests to the Public Prosecutor for documents and materials. These included the prosecution list of witnesses and any evidence it would reply upon at the trial. Each of these requests was refused.

However, on 16 July 2009 Justice Zabidin ordered the prosecution to disclose to the defence various items including such things as the security CCTV recording from the condominium where it was alleged the crime occurred; DNA samples; the worksheets and case notes of the chemists who conducted DNA testing and analysis; all witness statements and medical notes of the complainant's physical examination at Hospital Kuala Lumpur.

He also ordered that copies of all documents to be tendered at trial as part of the prosecution case and a statement of facts favourable to the defence be supplied to the accused pursuant to s. 51A (1)(b) & (c) CPC.

The Judge ruled that certain items did not fall within the scope of his order, namely CCTV recordings at other locations within the Desa Damansara Condominium, the original DNA samples and the police witness statements of other witnesses not named by Anwar made under under s.112 of the CPC. No order was made in regard to the production of the "Electro Pherogram" on certain identified DNA samples, since they had already been supplied to Anwar. Finally, he made no order

in respect of the video recording of Saiful's statement since his s. 112 police witness statement had already been provided.

In reaching his decision, the trial Judge took into consideration both ss. 51 and 51A CPC. He addressed his mind to the philosophy underlying s. 51A, which in his view had changed the prosecutorial process to be one that was more transparent and fair according to the circumstances of the case.

He reasoned that it would be fair and reasonable to allow the accused access to these documents and materials so he would know the case against him in advance of trial and be better able to prepare his defence, rebuttal evidence, cross-examination and to avoid any postponement.

Pendakwa Raya v. Dato Seri Anwar Bin Ibrahim No. 05-145-2009; Dato Seri Anwar Bin Ibrahim v. Pendakwa Raya No. 05-144-2009; Federal Court, at [30]

Dissatisfied with the Judge's order, the prosecution immediately appealed this decision to the Court of Appeal (Appeal No. W-09-71-2009) essentially on two grounds of appeal, namely:

1. The trial Judge wrongly applied s. 51 of the CPC by reading it conjunctively with s. 51A and giving it too wide an ambit.
2. The trial Judge erred in ordering disclosure of documents pursuant to these provisions when he had no jurisdiction to do so

The superior courts in Malaysia ruled that the trial Judge's pretrial ruling requiring the prosecution to disclose a range of materials to the defence went beyond what was allowed by the relevant legislation. In doing so, the courts have adopted a conservative view of the legislation.

Of course these rulings relate only to pretrial orders made by a judge and do not affect his or her discretion to order disclosure during the trial. Justice Zabidin retains an overall discretion to order the prosecution to disclose material that was relevant to the defence and if he thought it should be disclosed as a matter of fairness.

During the course of the trial, the defence has several times applied for orders of disclosure, which have included such things as the prosecution witness list, the complainant's police statement and other materials.

Anwar's lawyers argued that this material was critical to the preparation of his defence. In each case, Justice Zabidin has refused to order disclosure of material that he originally thought was relevant and, as a matter of fairness, should be disclosed to the defence. There is no apparent reason for his change of mind.

The superior courts have consistently ruled that they have no jurisdiction to hear appeals against the trial Judge's rulings because they are procedural and excluded from the meaning of "decision" under Section 3 of the Courts of Judicature Act.

The Act says that "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

There is nothing novel about this approach for in most legal systems, except for some express statutory exceptions, there are no interlocutory appeals in criminal matters. The statutory right of appeal is against conviction or what is regarded to be a "final order". The intention of the "final judgment rule" is to avoid inefficient pretrial litigation and piecemeal appeals.

For example, see Criminal Appeals Act 2004 (WA), s. 7
See also 28 United States Code (USC), Section 1291

The "final judgment rule" has been adopted by the appeal courts not only on rulings on matters of 'disclosure', but to all of the rulings made by the trial Judge.

Anwar's lawyers have repeatedly asked the prosecution to provide a copy of its witness list, but it has flatly refused and the trial Judge refuses to order that it do so. Accordingly, the defence has had only a general idea of who is to be called by the prosecution to testify. So this has brought about practical difficulties for the defence during the trial.

Commentary

Witness statements are not provided to the defence in Malaysia, so that an accused person has no more than a limited idea what any witness will say.

When I met with the Attorney General at his Chambers at Putrajaya in January 2010, I also asked him why witness statements were treated as privileged and not disclosed to the defence. He denied that it was intended to deprive the defence of the tactical advantage of cross-examining a prosecution witness about any prior inconsistent statement. He explained that sometimes a statement did not accurately reflect verbatim what the witness had said, but rather was more likely to be a police officer's interpretation of the account given by the witness.

That may well be so, but one would think that a witness would have the opportunity to confirm that any account recorded in the statement taken by the police was accurate and truthful. In fact, that is exactly what happens in other legal systems.

What generally happens is that the police take statements from witnesses and attempt to record accurately the account given by them. After the completion of the statement the witness is then asked to read it carefully and to adopt its contents by signing it. If something is inaccurate, then the witness can ask that it be changed so that it properly reflects what was intended. The witness then signs it declaring it to be true and correct to the best of that person's knowledge and belief.

The practice of not disclosing witness statements in Malaysia may not be so oppressive in the case of medical and scientific witnesses where reports are provided, but there is an obvious forensic disadvantage with other witnesses.

It is difficult for the defence to adequately prepare the cross-examination of a witness when it only knows what the witness will actually say when he or she testifies. It is also extremely difficult for the defence to challenge the credibility of a witness if it is not able to impeach that witness by using any prior inconsistent statement made by that person to another or taken from a statement given by the witness to the police.

A classic example of forensic disadvantage is the prosecution's refusal to disclose Mohd Saiful's police statement. It is a critical document because it purports to record his account of what happened very soon after the event and not many months later when for various reasons his account may be less reliable.

It must be said that Justice Zabidin's refusal during the trial to order disclosure of certain prosecution materials is not only inconsistent with the liberal approach adopted by him before the trial, but also inconsistent with general principles of fairness that usually operate in criminal trials.

The Malaysian appeal courts have strictly applied the "final judgment rule" in refusing to intervene in a trial before it is concluded. Again that is entirely consistent with legislation that distinguishes between procedural and substantive orders made during a trial.

There is some argument about whether applications to strike out a charge for an abuse of the court process fall within the rule, but nevertheless the accused will not be deprived of his or her right to appeal a guilty verdict where a miscarriage of justice has occurred.

In assessing whether Anwar Ibrahim has obtained a fair trial it must be said that some of the trial Judge's rulings are questionable. In some respects he has been limited by the legal procedure that operates in Malaysia, but in other instances there have been matters fully within his discretion to decide.

Anwar has had limited access to witness statements (under a claim of privilege made by the prosecution) and also to documents not intended to be tendered by the prosecution. He has not been provided with the prosecution witness list, so it seems his lawyers can only guess or speculate who might be called in support of Saiful's complaint. I understand that Deputy Prosecutor Datuk Mohd Yusof during the prosecution case told the defence how many witnesses he intended to call and also gave them some idea who was to be called and when, but this has been by way of an informal disclosure rather than some formal process.

One might expect that the failure to disclose this type material may cause difficulties for any accused. One example relates to expert evidence. The defence wanted its own forensic experts to be present in court when the prosecution experts testified. However, each of Anwar's experts was resident overseas and needed sufficient notice to travel to Malaysia (because of travel expenses and their availability).

Medical reports detailing the physical examination of the complainant and DNA reports were disclosed pursuant to s. 51A CPC, but access was denied to the materials on which the reports are based.

While accepting that sometimes circumstances may limit direct access to DNA samples there did not appear to be a valid reason not to disclose material on which the findings were based. One would think the failure to disclose this material would make it almost impossible for the accused's forensic experts to properly assess the adequacy and accuracy of the prosecution experts' methodology and conclusions and to properly question these expert witnesses at trial.

Disclosure of hospital clinical notes of Mohd Saiful at HKL

The medical and scientific witnesses were expected to testify in August 2010, but their testimony was delayed until October of that year. The practical difficulties facing the defence because of the prosecution's failure to disclose material is illustrated by what happened as these witnesses testified.

The trial recommenced on 28 October 2010.

General surgeon Dr Mohd Razali Ibrahim was the first medical witness called to testify. He was one of the medical doctors who examined Mohd Saiful at Hospital Kuala Lumpur ("HKL") on the night of 28 June 2008. The doctors assisting him were emergency specialist Dr Khairul Nizam Hassan and forensic pathologist Dr Siew Sheue Feng,

Before beginning his cross-examination of Dr Razali, senior defence counsel Karpal Singh applied to the court to compel the prosecution to supply to the defence the hospital's handwritten clinical notes (the "clinical notes") taken by the doctors at the time of the examination and which formed the basis of the Medical Report dated 13 July 2008 (the "July 13 medical report") disclosed to the defence.

In support of the application for the clinical notes, Karpal Singh referred to the Federal Court's decision dealing with Section 51(A) of the CPC that the defence could apply for documents during the course of a trial. He submitted that, applying that ruling, it was mandatory for the prosecution to supply the documents.

"The Federal Court has ruled that the defence was not entitled to the documents during the pretrial of this case. However, the apex court ruled that "we could apply for the documents in the course of a trial", Karpal Singh submitted.

He added that the clinical notes were critical in assessing the credibility of Dr Razali, particularly if there were contradictions between his evidence in court and Mohd Saiful's medical history recorded in the clinical notes. It was "more than a hunch" that there were contradictions "not only on the history but in other aspects", he said.

Karpal Singh further submitted that it was not a question of admissibility alone. He said that, because Dr Razali was an expert, the court could call on him to produce the clinical notes on which his opinion was based, submitting that:

"The advice of an expert is of an advisory capacity, and comes with the purpose of assisting the court to come to certain positions, as the court is not in a position to do so. The duty of an expert witness is to furnish the judge with the necessary scientific criteria. The credibility of a witness depends on the reasons stated. The materials furnished form the basis of the conclusions."

He accepted that an expert's report could not automatically be tendered into evidence, but that it was open to be tested in cross-examination. "Based on this, the defence can demand the supply of materials and data upon which the July 13 medical report is based. Anybody in the defence is not entitled to the materials but the court is", added Karpal.

The chief prosecutor Datuk Mohd Yusof responded saying that the prosecution's case had not concluded and that it had the right of deciding what evidence it wanted to tender.

He submitted that relevancy was the test of admissibility of documents under the Evidence Act and that the notes were inadmissible as Dr Razali was at court to testify. "We are saying that when a doctor gives evidence in court, his report is inadmissible. The best evidence rule will exclude any report or notes unless the witness wants to refer to them", said Datuk Yusof.

He added that the clinical notes could only be used by the witness to refresh his memory or to corroborate his testimony. "At the prosecution stage, who is it to decide that the notes are needed to corroborate the witness? At this stage it is our case", said Mohd Yusof, adding that conditions had to be met. He further added that: "You cannot simply allow a witness to refer. You have to show his memory has faded and caused him to forget crucial elements of the evidence, but we haven't come to that yet."

He submitted that the defence was not entitled to the clinical notes as the witness had not applied to the court to refer to them to refresh his memory under sections 155 and 161 of the CPC. "The defence cannot act on hunch alone, they must show material contradiction and discrepancy to justify their applications", he said.

The trial Judge ruled that he would not order the prosecution to produce the clinical notes to the defence. He accepted that the defence would be entitled to the notes if the witness had referred to them in examination-in-chief, but he had not done so.

Karpal Singh commenced to cross-examine Dr Mohd Razali during which the doctor admitted that he could not remember everything that transpired during the three-hour examination. He was repeatedly asked if he wanted to refer to the notes, but on each occasion he refused to do so.

The questioning was as follows:

Karpal Singh:	"Are you in a position to recollect what Mohd Saiful told you on what had happened to him at the Pusrawi Hospital?"
Dr Mohd Razali:	"I am not sure because I was not involved in taking down the history notes."
Karpal Singh:	"If you have the notes, you will be able to, isn't it?"
Dr Mohd Razali:	"What I can remember is he was examined by Pusrawi specialists, but I could not remember the details."

Karpal Singh:	"How long did you take to take the notes on Mohd Saiful's history at the HKL?"
Dr Mohd Razali:	"I could not remember because Dr Siew and Dr Khairul Nizam did it."
Karpal Singh:	"Can you remember what Mohd Saiful said when the doctors were taking his history?"
Dr Mohd Razali:	"I could not remember."
Karpal Singh:	"That is why you need the notes."

The next day, at the commencement of the hearing, Karpal Singh told the Judge that he wanted to make further submissions concerning the issue of the disclosure of the hospital clinical notes. He said there might have been a misunderstanding as to what the defence was actually seeking from the prosecution. "What we wanted are the clinical notes. The preliminary medical report is not an issue", he said. He submitted that Dr Razali had been an "evasive" witness for refusing to refer to his notes to refresh his memory. "What he said at various points made no sense, and even if it did, he persistently refused to refer to the notes so as not to give the defence an opportunity and a right to access his notes", said Karpal.

Justice Zabidin replied saying he had been clear in his ruling and he would not order production of the hospital clinical notes.

Commentary

Of course the prosecution was correct in its view that the clinical notes recorded by the doctors were inadmissible because none of the doctors had referred to or had refreshed their memory from them. They were not otherwise admissible.

However, there was obvious merit in Karpal Singh's submission that the clinical notes were admissible and relevant because it was material on which the expert opinions were based. How was the trial Judge to assess the expert medical opinions unless he was also told about the material which formed the basis of those opinions?

In this instance, however, it was a question not so much of admissibility, but rather of disclosure. No sound reason was given as to why the clinical notes should not have been disclosed to Anwar's lawyers. It was plainly material relevant to the defence at trial, but the accused lost the forensic opportunity to test critical evidence.

First, if the clinical notes were consistent with the final medical report of 13 July 2008 then there was no forensic disadvantage to the prosecution in disclosing them. To refuse to disclose the clinical notes in that case was merely being unnecessarily obstructive. It simply gave the impression, albeit false, that the prosecution had something to hide.

Secondly, the clinical notes may well have contained material that was not relevant or helpful to the prosecution, but that was no basis for refusing to disclose the notes. There may have been some material in the notes relevant to the defence, such as the mention of some facts that were not in the final medical report. If that was so, then the clinical notes should have been disclosed to the accused.

Thirdly, the clinical notes were the best evidence of the medical examination of Mohd Saiful conducted by the medical team. It was the primary document in which they recorded their findings. The final medical report of 13 July 2008 was no more than a later summary of those findings, which may not have been comprehensive or accurate.

Finally, the clinical notes were relevant to the defence because they would allow the defence experts to understand the prosecution expert opinions and the material on which those opinions were based and thereby assist in the preparation of their own reports.

Admissibility of Mohd Saiful's toxicology report

The defence also challenged the admissibility of Mohd Saiful's toxicology report. It should have been attached to the 13 July Medical Report but, for whatever reason, it was not attached to the report at the time it was handed to the defence. Dr Razali had mentioned the toxicology report when he testified.

Karpal Singh submitted that the prosecution had not complied with s. 51A of the CPC, which required it to serve on the defence any document it intended to tender to prove its case. He said that the lack of the toxicology report "contaminated" the medical report to the point that the whole report should be "expunged" as the defence had been denied a "legitimate right".

In reply, Datuk Mohd Yusof submitted that the defence case had not been prejudiced by not receiving it. He said the report was admissible as it had been referred to in the chemist report. It had simply not been attached by mistake. The chief prosecutor referred to the report as "neutral". "It merely states that no drugs or alcohol were found (in Mohd Saiful)", he said.

Justice Zabidin accepted there had been no prejudice to the defendant and refused to exclude the toxicology report. He rejected the defence submission that the 13 July Medical Report was "contaminated" because of the failure to attach the toxicology report and that it should be "expunged" on that basis.

Commentary

This was a technical objection. There was no legal reason why the prosecution's failure to attach the toxicology report to the 13 July medical report should have caused it to be excluded. It had simply not been attached by mistake. In any event, since the toxicology report apparently contained little relevant information, its omission could not be said to prejudice the accused.

Testimony of forensic pathologist Dr Siew Sheue Feng

Forensic pathologist Dr Siew Sheue Feng was one of the medical doctors who examined Mohd Saiful at HKL on the night of 28 June 2008. He was called to testify on 22 November 2010.

When cross-examined Dr Siew was unable to answer some of the questions asked him by Karpal Singh. He asked permission from the Judge to refer to the 13 July medical report. Karpal suggested to the witness that he could refresh his memory from the details recorded on the hospital proforma notes on the night of the examination. The hospital proforma form is the standard questionnaire used by medical staff at the rape crisis centre to take a history from the alleged victim before conducting a physical examination.

The following exchange took place:

Karpal Singh:	"Why do you want to refer to your clinical notes and not proforma notes that I'm referring to?"
Dr Siew:	"I don't want to. I only want to refer to my clinical notes."

Karpal Singh repeated the question a number of times, but each time Dr Siew gave the same answer. There were some heated exchanges between Karpal and chief prosecutor Mohd Yusof, who objected to this form of questioning saying it was unfair to the witness as the questions were unclear.

"I am not being unfair to him. He is being unfair to himself by refusing to refer to the form that he filled up during the examination but insists to refer to the clinical report", replied Karpal Singh.

As the cross-examination continued Dr Siew maintained that he did not want to refresh his memory by referring to the proforma notes, but instead said that he could answer the questions on the basis of his memory.

At one stage the court briefly adjourned, during which time Dr Siew was seen outside the courtroom refreshing his memory from the proforma notes. When questioned by Karpal Singh after the resumption of the hearing, Dr Siew admitted that he had done just that. Karpal immediately requested that the proforma notes be produced because the witness had refreshed his memory from them during the course of his testimony, albeit during an adjournment.

Justice Zabidin heard submissions from both parties on the matter.

Relevant to this issue were the provisions of the Malaysian Evidence Act 1950, relating to the use of documents to refresh the memory of a witness. Relevantly, the Act provides that:

A witness while under examination may refresh his or her memory from contemporaneous notes and may testify to the facts contained therein although he or she has no specific recollection of the facts themselves.

See Evidence Act 1950, ss. 159 & 160

Once the witness has refreshed his or her memory from those contemporaneous notes the document must be produced and shown to the adverse party if he requires it and that party is entitled to cross-examine the witness about the document.

See Evidence Act 1950, s. 161

Karpal Singh accepted Mohd Yusof's submission that the witness was entitled to refresh his memory from contemporaneous documents. However, he maintained that he could only do so if he was testifying and not when he was out of court.

Nevertheless, he argued that even if the court was adjourned or had stood down "the witness was still under the oath" and the defence was thereby entitled to the notes used by the witness to refresh his memory.

The prosecution responded saying that a witness was not confined to refreshing his memory from documents only during cross-examination, but in any event Dr Siew had referred to a document that was in his possession and not a document that had been given to him.

Karpal Singh submitted that the witness should be investigated for contempt of court under the Penal Code for interfering with justice. "He has refreshed his memory by looking at the document outside court, when he earlier insisted he would not refer to his proforma notes to refresh his memory during the cross examination", he said. Karpal submitted that the defence team was entitled to the document that was referred by the witness to refresh his memory.

The Judge reserved his decision until the following day. When the court resumed Justice Zibidin delivered his decision granting the defence access to the proforma notes prepared by Dr Siew Sheue Feng, but he declined to cite the doctor for contempt of court.

He said that "To my mind the witness can look at the notes during the cross-examination... (the) application to cite witness for contempt of court is hereby dismissed."

However, Justice Zabidin ruled that Section 161 of the Evidence Act gave the defence the right to examine the document.

Commentary

Justice Zabidin's decision to allow the defence access to the proforma notes was obviously correct. Dr Siew by his own admission had refreshed his memory from the notes, albeit during an adjournment. It was improper for him to do so without permission while he was under cross-examination. Whether the trial Judge should have cited him for contempt is arguable.

Application for Judge to disqualify himself

On Tuesday 23 November 2010, Karpal Singh submitted to Justice Mohd Zabidin that he should disqualify himself from hearing the trial for dismissing Anwar's application for access to the Hospital Kuala Lumpur doctors' medical notes.

He claimed that in dismissing Anwar's application and in rejecting his request to reconsider the decision, the trial Judge had misinterpreted a 1993 Supreme Court ruling and that he had instructions from Anwar to file the recusal application.

The veteran lawyer also reminded the trial Judge that the world was watching the events unfolding at the trial. "Your Lordship is under scrutiny and Malaysia's legal system is on trial as a result of this case", he said, citing US Secretary of State Hillary Clinton's call for Anwar to be given a fair trial and the presence of US embassy officials in the courtroom as proof. In view of this, he said if there was real danger of bias, the judge must recuse himself.

Justice Zabidin replied saying that Karpal Singh was responsible for his client and that he could be cited for contempt. Karpal responded saying that that comment amounted to intimidation of counsel and gave rise to a real danger of bias. It then became the basis of the recusal application.

"Our allegation is one of substance, not plucked out of thin air. It happened in this very courtroom and it is even on record", he said. Justice Zabidin withdrew the threat conceding that it was "not proper".

It was not until the next day that the defence filed a notice of motion for the recusal application and the hearing of it was listed before the trial Judge for Friday, 26 November.

At the hearing that morning Karpal Singh detailed the basis of his application.

He referred to the affidavit filed by his client. In his affidavit, Anwar Ibrahim supported the recusal application saying that by his remarks the Judge had intimidated his counsel by suggesting that his application to disqualify the Judge could amount to contempt of court. As such he had serious concerns that he would not get a fair trial if the judge were to continue to preside over the trial. He further said that even though the Judge had withdrawn the comment, there was a real danger of bias if the judge was to still hear his case.

Karpal Singh submitted that the Judge should disqualify himself saying that there had been judges, who under similar circumstances, had chosen voluntarily to step down from hearing the case, even without needing to hear the prosecution's reply. "We urge Your Lordship to step down without our opponent replying. Your Lordship should be man enough to rise up to the occasion and make the decision to step down. This is the first time that such an application is founded on the intimidation of a counsel by a judge", he said. He further said that if the judge was found to be biased, but insisted on hearing the trial, he should be "prepared to face the consequences". "The fact that Your Lordship backtracked and withdrew (that remark) does not mean that the bias and prejudice in Your Lordship's mind is erased. It is there", he said.

The prosecution in reply said the defence was only applying to disqualify the Judge to buy time and that it was a "delay tactic". Deputy Public Prosecutor Mohd Hanafiah Zakaria said the trial Judge was only commenting on the law and this did not amount to intimidation.

He said the defence had resorted to disqualifying the Judge because there were instances when Mohd Zabidin made rulings against Anwar and that the defence's reasoning to disqualify the judge had been inconsistent.

"It is well-settled law that there is clearly no basis to recuse a trial judge merely because rulings were made against an applicant. Your lordship had merely commented on the current law as it stands...there is no shred of any intimidation whatsoever", said the DPP. He said if any intimidation

had occurred, it would have come from the "brazen conduct" of lead defence counsel Karpal Singh, who had insisted that Mohd Zabidin "step down" from hearing Anwar's case.

"It is abundantly clear that the grounds put forward by the applicant to recuse your lordship are not only inconsistent but frivolous. This application indeed is actuated by mala fide to delay the trial of the case. Plainly, on the flimsiest of reason, the applicant sought to recuse your lordship from hearing this case and this is the second time he is doing so", Mohd Hanafiah said.

This was the second time Anwar had filed an application to recuse the trial Judge. The first application was in March 2010, with Anwar accusing the judge of bias for not initiating contempt action against the Malay daily newspaper *Utusan Malaysia* for being mischievous and causing disruption to a fair trial. That application was refused by the trial Judge and ultimately withdrawn by the defence.

After hearing submissions, Justice Zibidin adjourned proceedings until 6 December 2010 to enable him to decide upon the accused's application to disqualify himself from continuing to hear the trial. His Honour ruled that the trial proper would also resume on that day, if his decision was not to disqualify himself.

Trial Judge refuses to disqualify himself from hearing the trial

When the court assembled again on 6 December 2010, Justice Zibiden delivered his decision. I was present at court to observe the proceedings on behalf of the Inter-Parliamentary Union.

In summary the Judge incorporated the transcript of proceedings, which included the so-called 'threat' made by him, so he said as to "understand the proper context in which those words were spoken".

The transcript records Karpal Singh giving the trial Judge notice of his client's intention to file an application that he recuse (disqualify) himself from further hearing the case. The Judge then responds:

Justice Zabidin: "You will file it (the notice of motion) tomorrow morning. So we can proceed with the trial today, now. And may consider the contempt proceeding also for filing application to recuse a judge on the ground that the judge makes a decision which (is) contrary to authority, which is wrong."

Karpal Singh: "More details given in application. Dato' Seri Anwar is afraid that he is not getting a fair trial. So we have instruction from our client to make that application, which we are entitled to make. Your Lordship may refuse it. That is Your Lordship's domain and prerogative. Your Lordship should at least have it heard. The question of contempt does not arise. This is a matter which Your Lordship will have to view objectively, without being personally involved in it. We have a role to play as defence counsel and we have to attend to instructions. If instructions are given, we have to abide by those instructions."

Justice Zabidin: "But you are responsible for whatever instruction (is) given. Like (the) Zainur Zakaria case. Whatever you file, even though on (the) instruction of client, you will take the responsibility. Zainur's case is very clear on that."

A bit later there was a further exchange between them:

Karpal Singh: "Just that remark, to threaten us with contempt at this stage is entirely misplaced".

Justice Zabidin: "I am not saying that is contempt."

Karpal Singh: "For this threat of contempt is entirely unwarranted. To intimidate counsel is a very serious matter. We observed the court as much as you Lordship is… This threat of contempt. Yang Arif should withdraw that. Not proper."

Justice Zabidin: "Okay, I withdraw. It is not proper."

Having reviewed the transcript His Honour concluded that:

"I think a reasonable man who reads those words in its proper context would not have the impression that there was a real danger of bias, just because there was an exchanged (sic) of those words between a counsel and a trial judge. Therefore this application is dismissed." [4]

The defence then asked for and was granted an adjournment so that it could file appeal papers to challenge the trial Judge's decision. The proceedings were otherwise adjourned pending an appeal.

Court of Appeal dismisses recusal appeal

On 14 January 2011, the Court of Appeal dismissed Anwar Ibrahim's appeal to have Justice Mohamad Zabidin disqualified from further hearing the ongoing sodomy trial. A three-judge Bench comprising Justices Low Hop Bing, Abdul Malik Ishak and Ahmad Maarop unanimously upheld the prosecution's preliminary objection. In his judgment, Justice Low concurred with the Deputy Public Prosecutor Mohamad Hanafiah Zakaria that the matter was an interlocutory one, and was therefore not appealable.

The decision was consistent with the previous rulings of the Court of Appeal, which has refused to intervene to overrule the trial Judge's decisions because, as it considered them not to be final orders, they were not something an appeal court could review.

"We are of the view that the ruling of the High Court judge (in dismissing the recusal application) was made in the course of a trial. Therefore, we hold that this court has no jurisdiction to hear the appeal, and the accused has no right to appeal in an interlocutory stage", said Justice Low.

Commentary

Justice Zabidin's refusal to disqualify himself from hearing the trial was a judgment for him to make. He conceded his remark was improper and immediately withdrew it. He accepted that he had spoken of contempt, but he found that it was part of an exchange of words between counsel and a trial judge and that a reasonable person would not consider it indicated bias.

At times during this trial there have been robust exchanges between the trial Judge and counsel. That is to be expected in a criminal trial. Karpal Singh is a vigorous and fearless advocate. During the trial he has said things to the trial Judge that were often inflammatory and even offensive at times. It is difficult to accept that he would have felt 'intimidated' by the threat of contempt. In any event, consistent with its earlier rulings the Court of Appeal maintained it had no jurisdiction to hear the appeal. The question of bias will no doubt be an appeal ground should the accused be convicted by the trial Judge.

Forensic evidence of DNA excluded – then decision reversed

When Anwar Ibrahim was taken into custody after having been charged in July 2008, he was placed in a cell overnight. He was released the next day, but physical items used by him were obtained and submitted by the police for DNA analysis. These items included a toothbrush, a mineral water bottle and a hand towel taken from the cell.

Anwar Ibrahim's lawyers challenged the admissibility of the DNA analysis submitting that the items from which samples of DNA were taken were improperly obtained.

At the end of the "trial-within-a-trial" to consider the admissibility of evidence, Justice Zabidin upheld the objection ruling that that the three items taken from the lock-up were inadmissible as they were obtained through unfair means, which meant that any DNA evidence obtained from the items was also inadmissible.

Following the close of the prosecution case, chief prosecutor Mohd Yusof made two applications. First, he requested the trial Judge to review his decision of 8 March 2011 to exclude the DNA evidence obtained from the three items taken from Anwar Ibrahim's cell. Secondly, he also applied for an order that, pursuant to s. 50 of the Evidence Act, Anwar Ibrahim provide a DNA sample for analysis. The hearing was adjourned to enable the parties to provide written submissions to the trial Judge.

Only days before the court hearing of the applications, the prosecution's submissions were published in the *New Straits Times* and *Utusan Malaysia* dailies and online portal *Malaysia Today*. The *New Straits Times* carried a page-4 exclusive, entitled "New bid to get Anwar's DNA", which outlined details of lead prosecutor Datuk Mohd Yusof's yet-to-be presented submissions.

Anwar Ibrahim's lawyers expressed outrage at the publication of the prosecution's submissions. The lead counsel for the defence, Sankara Nair, said that it is likely that they would push for orders of contempt of court. Counsel Sankara Nair told *The Malaysian Insider*:

"This is a repeat of 1998 where affidavits were leaked. Trial by media at its highest. It may be contempt (of court). We will be discussing with our legal team before deciding, but most probably we will ask the court to stand down to discuss this. That is totally out of line. The A-G is behaving like a political arm of the government."

At the hearing lead counsel Karpal Singh urged the court today to take action over the leaked submissions.

"This is the first time in legal history where submissions of the A-G were in the Internet even before today", said Karpal. He also submitted that the article in *Utusan Malaysia*, claiming that the Umno-owned daily's coverage of a rally by Perkasa demanding that Anwar surrender his DNA samples could affect the judge's ruling in the prosecution's latest application. Karpal blamed chief prosecutor Datuk Yusof, accusing him of having leaked his own submissions over the weekend.

"For my learned friend to have leaked out submissions to the Internet, *Malaysia Today*... there's no point in filing an application. The court must call upon those who have leaked the report [over] contempt of court, before my learned friend comes up with submissions that are already in public knowledge", said Karpal.

In response, Datuk Yusof said that while he took full responsibility over the leaked submissions, he maintained that as lead prosecutor, he was not being "used by anybody". "I do my battle in court, not outside. I have stated last Friday we are going to make application, mentioned (the) section. I am not being used by anybody. I answer to no one except this honourable court. I don't think it's anything. Just that it (the submissions) came out earlier than when it should", said Mohd Yusof.

Justice Mohd Zabidin warned all parties not to do anything which could lead to possible contempt of court. "The trial is ongoing, [I must] remind parties... anything done in contempt of court, those responsible will face the music", said the Judge.

A few days later, the Prime Minister Datuk Seri Najib Razak added to the debate publicly saying that the opposition leader should surrender his DNA samples for analysis. His comments provoked an immediate response from Anwar Ibrahim's lawyers.

Karpal Singh said that the Prime Minister had gone against Justice Zabidin's recent warning to all parties not to comment publicly on the trial, and that doing so was tantamount to an act of contempt of court.

He raised the issue when the court resumed. He submitted to Justice Zabidin that "…the prime minister should be hauled up here for comments...in telling Anwar to provide DNA. Your Lordship should make a ruling for contempt of court for the prime minister. All parties concerned must not commit contempt of court".

But Justice Zabidin said that if the defence wanted to initiate such proceedings it needed to first file a fresh application to the court. "If you really feel that way, then you can file an application to the court", said the Judge.

Anwar Ibrahim's lawyer Sankara Nair later told the media outside the court that the defence would not push for contempt proceedings against the Prime Minister for the time being but would do so if he repeated his comments.

At the resumed hearing the chief prosecutor, in support of his application for the trial Judge to review his decision to exclude any evidence of DNA material taken from the items used by Anwar, submitted that while the Judge could not ask Anwar to surrender his DNA samples, he could order someone else to obtain them from him. What was relevant, according to Datuk Yusof, was whether the DNA obtained from Saiful's anus could be matched to the accused (Anwar). Yusof said that the trial Judge should not be concerned with how evidence samples in the trial were obtained "as long as it is relevant, it is admissible".

Anwar's lawyers had stressed that there was no need for Anwar Ibrahim to provide DNA samples, citing the example of his first sodomy trial where it was stated on record that Anwar's DNA profile was "abused" by the police.

Government scientist Dr Seah Lay Hong testified in October 2010 that she had found two unknown male DNA profiles around Saiful's anus, one of which she had earlier called "Male Y".

Anwar had refused to provide DNA samples in his first sodomy trial in 1998 for fear they could be manipulated. In January 2010, former Kuala Lumpur CID chief Datuk Mat Zain Ibrahim claimed that DNA evidence had been fabricated in Anwar's first sodomy trial.

The DNA Identification Act 2008 was passed to compel suspects to provide DNA samples, despite protests from opposition lawmakers who undoubtedly were influenced by the attempts to falsify Anwar Ibrahim's samples at his first trial.

For the most part, the Act is very similar to legislation introduced in other jurisdictions relating to the establishment of a DNA databank and empowering the police to take DNA samples from any suspects and to record them in the general database as a resource material in the investigation of crime. Since the Act has no retrospective effect, it cannot be used to compel Anwar Ibrahim to provide a sample of his DNA.

On 23 March 2011, Justice Zabidin reversed his earlier ruling and allowed a toothbrush, a towel and mineral water bottle, which were ordered to be excluded earlier, to be admitted as evidence at the trial. However, he rejected an application by the prosecution to compel Anwar to give a DNA sample.

He said the earlier ruling was made without the evidence of the Investigating Officer Superintendent Jude Pereira. "In the light of the evidence of the IO and arresting officer (Superintendent Ahmad Taufik Abdullah) the arrest is lawful", said Justice Zabidin, adding that the detention was for a lawful purpose. "Those items and all the evidences relating to the items are now admissible. My earlier ruling is reversed", he said.

Justice Zabidin also said that he had read Section 73 of the Evidence Act over and over again, but could find no legal authority for the court to make such an order. Section 73 deals with taking samples from a person for the purposes of comparing handwriting and fingerprints.

The chief prosecutor said he would call chemist Nor Aidora Saedon and former Bukit Aman Crime Scene Investigation Unit chief Amidon Anan, to tender the exhibits.

Commentary

The 'leaking' of the prosecution legal submissions in support the application for the trial Judge to order that Anwar Ibrahim provide DNA samples was highly unusual and unfortunate.

If the 'leaking' was deliberate, it was an insult to Justice Zabidin who was yet to hear the application. If it was accidental, then it showed very lax security in the Attorney General's Chambers worthy of a top-level police investigation.

Curiously, the trial Judge was never given an adequate explanation of how it had happened. All that Datuk Mohd Yusof could say was that he was not being used by anyone and that the submissions just "came out earlier than when it should".

It was also unfortunate that the Prime Minister should publicly comment on the case by saying that Anwar Ibrahim should provide a DNA sample. Of course, this has been a very political case and the boundaries between the law and politics have often been crossed, but the PM's remarks were contrary to the expressed official view that the courts must in this case act independently without any political interference. Fortunately, there was no jury to be influenced by the comments.

No forensic test for lubricant

Mohd Saiful had told the doctors when examined by them that lubricant had been used when he was anally penetrated.

It was potentially important evidence because if lubricant was found in the samples taken from his anus and rectum it would have potentially corroborated his allegation of anal penetration. It may have also explained why there was no evidence of injury.

Commentary

There was no mandatory requirement that the samples be tested for the presence of lubricant, but the failure of the investigators to do so was sloppy police work. It should have been done, but was not.

Undoubtedly, the failure of the prosecution to provide evidence of lubricant will be something the trial Judge will take into account in determining whether the prosecution had satisfied him that Mohd Saiful was truthful in his account.

Had Saiful defecated before he was examined at HKL?

Only hours before being examined at HKL on 28 June 2008, Mohd Saiful went to the private hospital Pusat Rawatan Islam ("Pusrawi") in Jalan Tun Razak to be medically examined.

During the examination, he told general surgeon Dr Mohamed Osman Abdul Hamid that for the past few days his anus was painful and that a "plastic" item had been inserted into it.

A proctoscopy examination by Dr Osman showed no physical signs of penetration and a normal anus and rectum. After the examination, Saiful then told Dr. Osman that he had been sodomized by a "VIP". Dr Osman recommended that because of the allegation of sodomy he should be re-examined at a government hospital.

More than two hours later, Mohd Saiful arrived at Hospital Kuala Lumpur ("HKL"), which was very close to Hospital Puswari. Three specialist doctors examined him later that night, but again they found no evidence of injury and in their own words there was "…no conclusive clinical findings suggestive of penetration to the anus and no significant defensive wound on the body of the patient".

Various swabs were taken from his body for scientific analysis. These included swabs taken from his tongue, nipples, body, perianal region and private parts. High and low rectal swabs and blood samples were also taken for DNA profiling. For some reason, these samples did not reach the chemistry laboratory for analysis until two days later. There was also some issue about the proper labelling of the exhibits.

Commentary

It is interesting to note that Mohd Saiful testified at the trial that he told the medical examiners he had not washed his anus or defecated before the examination. He said under cross-examination that he had not washed so as to preserve the evidence, which was a curious attitude on the part of a victim of sexual assault.

It is well known that victims of sexual assault almost always wash their bodies in an attempt to "cleanse" themselves of the sexual contact. Very few have the presence of mind not to wash so as to preserve evidence of sexual contact. Mohd Saiful's explanation was also curious because he claimed to be a devout Muslim, which meant that he would need to wash himself before being called to daily prayers.

If he had not defecated, it meant that any traces of semen and DNA had a better chance of surviving. Whereas, if Mohd Saiful had defecated it made it less likely that traces would be found.

It also meant that Mohd Saiful had lied.

When Dr Rozali from HKL testified he said that he found Mohd Saiful's rectum to be empty despite the fact that the complainant had said that he had not defecated since being sodomized. That was confirmed by a proctoscopy examination. When cross-examined he said that, even if Mohd Saiful had not defecated for two days, "it was not necessary there be faeces in the rectum area..." He explained that there might be faeces in the upper rectum, but it would not reach the lower rectum where the swabs were taken, as the lower rectum was only to facilitate defecation and not for storing faeces.

Whether that is so or not there is a potential inconsistency that is significant as it relates to the credibility of the complainant.

Presence of seminal fluids in Mohd. Saiful's rectum

But in any event if Anwar's DNA was to be found inside the rectum of the complainant that would undoubtedly be persuasive evidence of sexual contact, if it could be proved.

One of the difficulties for the prosecution was the period of time between the alleged sexual penetration and the taking of the swabs to obtain specimens for DNA and seminal analysis. Dr Mohd Razali Ibrahim told the court that he inspected Mohd Saiful's anus and took samples 54 hours after the alleged act of penetration took place.

He maintained that, despite the lapse of time, it was still possible that that traces of semen could be found. Dr Mohd Razali explained that there might be faeces in the upper rectum but it would not reach the lower rectum, where swabs were taken, as the lower rectum was only to facilitate defecation and was not meant for storing faeces.

"In some cases, you can still get samples within the 72 hours as the anal canal is not straight", said the doctor. He also said it was still possible for a person to pass motion and still retrieve seminal fluids from the rectum, as some samples may remain "stuck" there. "When I did the examination, I did not know what to expect or whether I would find any samples", said Dr Razali.

"There can still be specimen present as the bowel is not in a straight line", he said during his re-examination by the chief prosecutor. However, when questioned by Anwar's counsel Sankara Nair, Dr Mohd Razali said that the 72-hour duration was based on his readings, and not on his own medical experience as he was not trained in medical forensics.

Commentary

Dr Mohd Razali was a general surgeon. On his own admission he had limited forensic medical experience. He had simply taken the samples from the complainant's body. His opinion about how long one would expect to find traces of semen in the rectum should carry little weight.

The other factor that remains uncertain is whether one would expect to find traces of seminal fluid in the rectum given it was obvious that the complainant had defecated. Dr Mohd Razali accepted that the likelihood of seminal fluids remaining in the rectum depended on a person's anal functions, or when a "mass movement" occurred.

Inadequate storage of DNA samples

A significant issue concerning the integrity of the DNA samples taken from Mohd Saiful's rectum emerged at the trial when investigating officer Deputy Superintendent Jude Pereira testified. He was the senior police officer entrusted with the safekeeping of the samples after the medical team at HKL had obtained them on 28 June 2008.

It was revealed that the DNA samples had not been adequately stored and that degradation might have occurred.

On 10 March 2010 DSP Pereira testified that he had ignored Dr Siew Sheue Feng's specific instructions to place the swabs containing the DNA material into a freezer, but had rather placed the swabs in a metal cabinet in his office to guard them personally.

He said that he had collected the swabs from Hospital Kuala Lumpur (HKL) on 29 June 2008 from Dr Siew and placed them in his office, then in the Brickfields police headquarters. "Doctor Siew said they have to be put in a freezer so that (certain) ingredients won't be missing", said Pereira.

DSP Pereira said that the swabs had been lying in his cabinet for 34 hours before he sent them to the Chemistry Department. "It's actually 43 hours", countered Anwar's lawyer Sankara Nair.

He also admitted that degradation of the DNA samples might have occurred because the metal cabinet was not a freezer. He told the court there was a freezer at the police station, but he had decided to place the swabs in his office, which was air-conditioned. He said that the temperature in his cabinet was similar to the temperature in his office. When asked how he knew, he said because he had put his hand into the cabinet.

Anwar's lawyer Sankara Nair pointed out that DSP Pereira had violated the Inspector-General's Standing Orders (IGSO) as he did not place the swabs in the police station freezer despite taking a storage number. "Yes, it should be kept in a store. I broke the law, but it was my decision to do so", said Pereira. He also admitted that he had not informed government chemist Dr Seah Lay Hong of the conditions in which the swabs were kept.

Sankara also pointed out that DSP Pereira had failed to note that the date labels on some of the swabs were wrong. The labels on two of the swabs recorded the date of the alleged offence (26 August), rather than the date on which the samples were collected from the hospital. When asked why he did not state the mistake, Pereira replied that he "didn't see it".

Anwar Ibrahim's lead counsel Karpal Singh attacked DSP Pereira's integrity, referring to the findings of the Human Rights Commission of Malaysia (SUHAKAM) inquiry in 2009 which found that Pereira had lied in his testimony. "Jude Pereira consciously was not telling the truth or suffered from a serious problem of loss of memory", said Karpal, reading from the findings of the inquiry.

Commentary

If Anwar Ibrahim's DNA was to be found inside the rectum of the complainant that would undoubtedly be persuasive evidence of sexual contact, if it could be proved.

Anwar Ibrahim's lawyers have been concerned about the integrity of the forensic samples obtained and analysed by the police. Anwar refused to provide DNA samples in his first sodomy trial in 1998 for fear they could be manipulated and did so again this time for the same reason. His caution was justified and confirmed when former Kuala Lumpur CID chief Datuk Mat Zain Ibrahim claimed last January that DNA evidence had been fabricated in Anwar's first sodomy trial.

The prosecution claimed that the DNA sample extracted from Mohd Saiful's anus corroborated his allegation and incriminated Anwar by providing evidence of penetration. Chief Prosecutor Datuk Mohd Yusof told the court in his opening address on 3 February, 2010 that:

"The prosecution will also bring specimens of semen from Saiful Bukhari Azlan's anus which is verified by the chemistry department as belonging to the accused."

There is no doubt that many unanswered questions remain about the prosecution DNA evidence.

For example, the prosecution has refused to provide a sample of the material from which it is claimed DNA was extracted so that Anwar's lawyers might have it independently tested. There may be sound reasons for that. For example, it may be that the sample size is so small that there is simply not enough of it to provide any to the defence for testing while at the same time preserving the integrity of the exhibit, but no explanation at all has been given by the prosecution for refusing to provide a sample.

Whatever the reason, Anwar's lawyers claim that the prosecution's refusal to provide a part of the sample to them for testing disadvantages their client in challenging the opinions of the prosecution experts.

There are also questions about the 'chain of custody' of the forensic samples taken by the doctors at HKL. Reports say the samples were not delivered to the chemists for analysis for at least 48 hours. DSP Pereira having taken possession of the samples from Dr Siew simply placed them in a filing cabinet in his office, rather than in a secure location. Anwar's lawyers raise the issue of continuity because it affects the integrity of the samples that were finally analysed by the government scientists. Anwar's lawyers also claim the refusal by the prosecution to provide notes made by the scientists in reaching their conclusion also fails to exclude the potential for contamination of the samples.

Anwar's lawyers further say that it is highly unlikely that DNA could have been obtained from material taken from Mohd Saiful's rectum 48 hours after the act of penetration. Most experts confirm that the rectal cavity is an extremely hostile environment and that semen degradation is relatively swift, so that it would be highly unlikely that DNA would survive in it after that period of time.

Finally, the court has now been told that the samples taken from Mohd Saiful were inappropriately stored and, contrary to the instructions of the medical team, simply placed in an unrefrigerated filing cabinet with every prospect that the samples had degraded. The government chemist Dr Seah Lay Hong was unaware of the poor conditions in which the swabs were kept before he analysed them because he was not told about it.

DSP Pereira, by his casual storage of the samples in his office filing cabinet, confirms that the samples were not sufficiently secured and protected from accidental or deliberate contamination. It also raises issues of whether the 'chain of custody' was maintained or broken by his manner of storage.

The 'chain of custody' can be the single most important aspect of a criminal case. Ensuring the physical integrity of biological evidence throughout the forensics process is critical.

It starts when a police officer takes charge of a piece of evidence. It is followed by the creation of a paper trail showing the seizure, custody, control, transfer, analysis, and disposition of that evidence. Securing evidence under these standardized procedures is sufficient to ensure that evidence was not substituted, contaminated, tampered with, replaced, or altered in any material way.

DSP Pereira may well have thought he was doing the right thing in storing the samples in his unrefrigerated filing cabinet, but it was an appalling lapse of proper procedure by a senior police officer whom one would have expected to have known better. It is particularly concerning that he ignored the specific instructions of the forensic pathologist on how to preserve the samples.

Little if any weight should be given to the DNA evidence in this case. That is because of the appalling lapse of police procedure in storing the samples, the significant potential for contamination and degradation of the samples because of where and how they were stored, and the obvious breach of the 'chain of custody'.

No-case submission at trial

In criminal trials the accused's lawyers at the conclusion of the prosecution case might conclude that the evidence presented is such that no reasonable court properly directed could find the accused guilty. At this point, the defence will make a no-case submission in an attempt to persuade the court not to call on accused to enter a defence.

There is no express provision in CPC permitting defence counsel to make a submission of no case to answer at the close of the prosecution case. But the practice in Malaysia has always been to allow defence counsel to do so. It is the discretion of judge to allow a submission of no case and not a matter of right.

Having heard submissions from both parties, the trial judge will have to decide whether there is a case to call on the accused to enter his defence. It depends whether the prosecution has satisfied the court there is a prima facie case to answer. At that stage the judge may either order an acquittal or call upon the accused to enter a defence. See s. 173 (f) CPC.

Justice Zabidin has ordered that the parties are to submit written submissions no later than 18 April 2011, when he will hear further argument and make his decision whether to acquit Anwar Ibrahim or require him to enter a defence.

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ENGLISH ONLY

Observations provided by the Malaysian delegation to the 124th IPU Assembly (Panama, April 2011)

COMMENTS ON THE REPORT PREPARED BY MARK TROWELL QC DATED MARCH 2011 ON THE TRIAL OF ANWAR IBRAHIM

INTRODUCTION

[1] This is the 3rd response to the reports from Inter-Parliamentary Union (IPU), the last two of which were prepared by Mark Trowell QC on behalf of IPU. From the earlier court records, Mark Trowell QC was holding a watching brief for LAWASIA. It has not been reflected in the court records that Mark Trowell QC was an observer for IPU.

[2] However, the general impression that could be gleaned from these 2 reports prepared by Mark Trowell QC, would be that the reports were actually prepared by one of the members in the Anwar Ibrahim's defence team and not by an objective observer to the trial.

[3] This report by Mark Trowell QC dated March 2011 and his earlier report dated August 2010, essentially paraphrased and reflected the sentiments and stand of Anwar Ibrahim's defence

team, although some concessions were made here and there when issues are clearly untenable.

Disclosure of Prosecution Evidence

[4] This issue on the non-disclosure of prosecution evidence is not a new issue. We refer to our 1st reply on this issue pursuant to the resolution adopted by the IPU Governing Council at its 186th Session in Bangkok on 1st April 2010, whereby we have explained that:

> "d) <u>Access to evidence, documents and things</u>
>
> **i) The position on disclosure of materials is governed by both sections 51 and 51A of the Criminal Procedure Code. Briefly, section 51 requires the prosecution to furnish all the materials mentioned in the charge and also to allow the accused person to know exactly what the charge he is facing before trial.**

ii) On the other hand, as we have stated earlier, under section 51A of the Criminal Procedure Code, the prosecution is obliged to supply to an accused person: (a) a copy of the information made under section 107 of the Criminal Procedure Code which we usually called it the 'First Information Report'; (b) a copy of any document which would be tendered as part of the evidence for the prosecution; and (c) a written statement of facts favourable to the defence of the accused. It is well settled that statements recorded from witnesses under section 112 of the Criminal Procedure Code are privilege documents. The law does not permit disclosure of such documents. The prosecution had complied with all the relevant provisions of disclosure as stated in sections 51 and 51A of the said Code.

iii) Even in England, it must be observed that there is also no necessity for 'disclosure of material which is either neutral in its effect or which is adverse to the defendant, whether because it strengthens the prosecution or weakens the defence.' (Please see the case of R v H; R v C [2004] 1 All E R 1269 at page 1278)

iv) The refusal of the prosecution to supply the original samples to Mr. Anwar Ibrahim at this stage of the trial is with the view to preserve the integrity of the samples so as to prevent any allegation of tampering. Once the samples have been tendered, Mr. Anwar Ibrahim and his counsels would have all the liberty to examine the exhibits and ask for the exhibits to be examined by their own expert witnesses. Mr. Anwar Ibrahim is entitled under the law to such request during the trial, whether at the prosecution stage or at the defence stage. The prosecution would have no objection to such request."

[5] In our 2nd response to the IPU's report which was prepared by Mark Trowell QC and dated August 2010, we have stated that:

"DISCLOSURE OF MATERIALS AND WITNESS LIST

39. The position on disclosure of materials in a trial is governed by both sections 51 and 51A of the Criminal Procedure Code. Briefly, section 51 requires the prosecution to furnish all the materials mentioned in the

charge and also to allow the accused person to know exactly what the charge he is facing before trial.

40. On the other hand, under section 51A of the Criminal Procedure Code, the prosecution is obliged to supply to an accused person: (a) a copy of the information made under section 107 of the Criminal Procedure Code which we usually called it the 'First Information Report'; (b) a copy of any document which would be tendered as part of the evidence for the prosecution; and (c) a written statement of facts favourable to the defence of the accused.

41. Section 51A(1)(b) of the Criminal Procedure Code, in particular, mandated that the prosecution must supply a copy of any document which the prosecution wishes to tender at the trial. Hence, it is clearly not correct for Mr. Mark Trowell QC to allege that the prosecution refused to supply evidence which it would rely upon at the trial.

42. It is well settled that statements recorded from witnesses under section 112 of the Criminal Procedure Code are privilege documents. The law does not permit disclosure of such documents. The court conferred

privilege on witnesses' statement because of public policy consideration. Otherwise, for a small country like Malaysia, the members of the public would be utmost reluctant to be witnesses to a crime.

43. The prosecution had complied with all the relevant provisions of disclosure as stated in sections 51 and 51A of the Criminal Procedure Code.

44. These are the documents and materials supplied by the prosecution to the defence together with their respective dates:

List of Documents and Materials supplied by the Prosecution to the Defence

Date	Contents
14.11.2008	1. First Information Report – police report Travers Report No. 4350/2008 2. Sketch Plan Log for Unit 11-5-1, Desa Damansara Condominium 3. Sketch Plan Log for Unit 11-5-2, Desa Damansara Condominium 4. Handling Form for Specimen Medico – Reference Legal No. K08/08 5. Request Form for Toxicology/Forensic Examination KL Hospital 6. Duty Roaster June 2008, Medical Forensic Department, KL Hospital 7. Examination List dated 30 June 2008 for Chinese Silk Carpet, Duvet and Blue Cover 8. Examination List dated 30 June 2008 – Log Book Desa Damansara Condominium 9. Examination List dated 30 June 2008 – hard disk CCTV – guard house 10. Examination List dated 30 June 2008 – hard disk CCTV – administration office 11. Examination List dated 29 June 2008 at No.48, Jalan BU 7/6, Bandar Utama, Damansara 12. Handover List for exhibit dated 30 June 2008 13. Crime Scene Photograph and Exhibit

	14. CCTV Recording Photograph 15. Sample Form And / Or Exhibit for Examination or Extraction B – B10 16. Sample Form And / Or Exhibit for Examination or Extraction B 12 17. Sample Form And / Or Exhibit for Examination or Extraction A – A7 18. Malaysia Chemist Department Official Receipt B-B11 19. Malaysia Chemist Department Official Receipt A-A7 20. A copy of Log Book Desa Damansara Condominium, KL [page 39-106] 21. Sample Form And / Or Exhibit for Examination or Extraction D-D4 22. Malaysia Chemist Department Official Receipt D-D3 23. Handover exhibit list dated 17 July 2008 marked 4-7 24. Handover exhibit list dated 17 July 2008 marked 8-10 25. A copy of Travers Report 4350/08 26. Accused statement recorded under Section 112 Criminal Procedure Code. 27. Copies of the sketch plan of the lock-up dated 17/7/2008. 28. 14 copies of photographs of the lock-up during inspection dated 17/7/2008 29. A report under Section 399 of the Criminal Procedure Code dated 7.7.2008 30. Report of Clinical Forensic case No. K 08/08 31. Report under Section 399 of the Criminal Procedure Code dated 22.7.2008
16.06.2009	1. Electro Pherogram for each samples 2. Medical report from the Pusrawi Hospital 3. CCTV recording dated 26 June 2008 4. Clearer copies of statement recorded from DSAI
24.12.2009	1. A Medical Report on Dato Seri Anwar Ibrahim relating to Travers Rpt:4350/08
12.01.2010	1. Copy of POL 59 (Examination of Mohd Saiful Bukhari at 28 June 2008) 2. Acknowledgment receipt of Exhibits from Dr. Siew at 29 June 2008 3. Request form for Forensic/Toxicology examination 4. Station diary at 12 July 2008 until 18 July 2008 5. Lock-up visit book at 16 July 2008 until 18 July 2008 6. Pocket book of L/Kpl Nik Rosmady at 16 July 2008 until 18 July 2008

	7. Pocket book of L/Kpl Mohd Jasni at 16 July 2008 until 18 July 2008 8. Hand-over exhibits form from Supt. Amidon to Investigating Officer dated 30 June 2008 9. Hand-over exhibits form from Supt. Amidon to Investigating Officer (exhibits which were taken at the Lock-up on 17 July 2008) 10. Hand-over form between chemistry department and Investigating Officer dated 30 June 2008 11. Hand-over form between chemistry department and Investigating Officer dated 1 July 2008 12. Hand-over form between chemistry department and Investigating Officer dated 17 July 2008 13. (4) copies of POL 31 request for examination of exhibits to the Chemistry Department 14. A copy of request of exhibits for examination/analysis (MF01) 15. A copy of log book for movement of vehicle dated 30 June 2008 16. A copy of inspection list of Hard Disc brand Western Digital dated 30 June 2008 17. A copy of inspection list of Hard Disc brand Seagate dated 30 June 2008
02.02.2010	1. Acknowledgement letter of hard disc dated 3/7/08 2. Acknowledgement letter of hard disc dated 24/9/08 3. Certificate under Section 90A Evidence Act by C/Insp Fauziah

45. It must be explained that the refusal of the prosecution to supply the original samples to the defence at this stage of the trial, is with the view to preserve the integrity of the samples so as to prevent

any allegation of tampering. Once the samples have been tendered, Anwar and his counsels would have all the liberty to examine the exhibits and ask for the exhibits to be examined by their own expert witnesses. Anwar is entitled under the law to such request during the trial, whether at the prosecution stage or at the defence stage. The prosecution would have no objection to such request.

FEDERAL COURT APPEAL – THE VICTIM'S POLICE STATEMENT

46. As we have stated earlier, witnesses' statements are privilege documents.

47. However, in limited circumstances, defence may gain access to witnesses' statements when application is made to impeach the credit of the witness by relying on his previous statement which is liable to be contradicted under sections 145 and 155 of the Evidence Act. When witness refreshes his memory by referring to his previous statement, under section 161 of

the Evidence Act, the adverse party must be shown the said statement.

48. Any contradiction between the evidence of a witness and the charge preferred against an accused person is no ground for the defence to be given access to that witness' statement.

49. Furthermore, we have explained earlier that the element of consent or otherwise is not relevant to the charge, except that non-consensual act would carry with it an enhanced punishment. Section 377B of the Penal Code is a section for general punishment of the offence, whereas, section 377C is an enhanced punishment section involving non-consensual act. In this case Anwar was charge for an offence punishable under section 377B and consent or otherwise is not an element of the offence.

50. Such being the case, there is no basis upon which Anwar's counsel could claim that he is entitled to the victim's statement. With this in mind and the discretion of the Public Prosecutor pursuant to Article 145 of the Federal Constitution to institute the charge against

Anwar, there is no merit in the application of Anwar's counsel to be given access to the victim's statement.

51. In addition, this ruling by the trial Judge is purely interlocutory in nature and the Court of Appeal and Federal Court have no jurisdiction to entertain interlocutory appeals by virtue of the definition of the word 'decision' in section 3 of the Court of Judicature Act. Otherwise, interlocutory application and its consequential appeal would delay the trial of a matter as experienced in the present case

52. It must be emphasized that Anwar is not prevented from raising all these issues at the end of the trial and to take those issues to the appellate courts for the purpose of appeal, if necessary.

[6] As for the witness list, the Federal Court had ruled that the prosecution is not obliged to supply the witness list to the defence. Notwithstanding the Federal Court's decision, in most cases, witness list would be supplied by the prosecution to the defence but in view of the prevalent danger of witness tampering by the defence in this case, the prosecution did not provide the defence with the witness list.

[7] In addition, it is not a case where the defence is totally in the dark as to the number of witnesses to be called and who to be called as the lead prosecutor had, as a matter of courtesy, informed the lead defence counsel earlier, who the prosecution would be calling at its witnesses, although strictly speaking, the lead prosecutor was not obliged to do so.

[8] More importantly, a cursory perusal of all the documents served on the defence would, unquestionably, reveal the witnesses of the prosecution.

Comments on the 1st Commentary

[9] We have adverted earlier why witness statements are not supplied to the defence, primarily, because of public policy consideration. The Federal Court in **Husdi v Public Prosecutor [1980] 2 MLJ 80** through the judgment of Suffian Lord President explained at p 82 that:

> **"If the prosecution is obliged to supply copies of police statements to the defence without the intervention of the court, the defence may be tempted to ask for, and the**

prosecution will be obliged to supply, copies of every statement in the police investigation file, and Malaysian will be more reluctant to come forward with evidence to incriminate their fellows."

[10] Moreover, in a criminal trial, the best evidence is still the oral evidence of the witness as the veracity and credibility of the witness evidence can be tested through cross-examination.

[11] There is no bar to the defence to request for a short adjournment in order to enable the defence to be adequately prepared for cross-examination of the prosecution witness. The defence had in fact requested for such adjournment a few times in the course of this trial.

Comments on the 2nd Commentary

[12] It must be remembered that the prosecution has just closed its case and the case is now fixed for submission at the conclusion of the prosecution case on 25 April 2011.

[13] We have explained in our earlier reply that the trial should be allowed to take its proper course rather than to make imprudent remarks and cast aspersion on the competency of the trial judge and the criminal justice system at every turn of event. When rulings are made in the course of a trial, parties who are dissatisfied can appeal against the said rulings. Although appellate court does not entertain interlocutory appeal, the dissatisfied party is not precluded from raising the issue at the substantive appeal stage. To make unwarranted remarks and to cast aspersion on the integrity of the court for every ruling made is not only improper but also subjudice.

[14] It is useful at this juncture to reflect on what we have stated in our earlier reply as follows:

> **"37. It must be remembered the trial has just begun. Only four witnesses have been called so far. There are more witnesses to be called. Let the trial take its course. Let us not prejudge the case at this juncture. The criminal justice system of Malaysia allows Anwar to the benefit of one trial and two appeals. We are only at a very early stage of the trial and yet we have report**

casting aspersion on the criminal justice system of Malaysia."

[15] Hence, it is clearly improper and ill-advised for Mark Trowell QC to remark at this stage of the trial that **"In assessing whether Anwar Ibrahim has obtained a fair trial it must be said that some of the trial Judge's rulings are questionable."**

[16] Such a remark at this stage of the trial could not have come from an independent observer, more so a QC as such, who must be very well verse in the criminal trial process. We have reiterated earlier that Anwar Ibrahim is entitled to a trial and 2 appeals before any decision could be rendered conclusive.

[17] More importantly, it is clearly a fallacy for Mark Trowell to suggest that 'the failure to disclose this material would make it almost impossible for the accused's forensic experts to properly assess the adequacy and accuracy of the prosecution experts methodology and to properly question these expert witnesses at trial,' as it merely repeated the stand of the Anwar Ibrahim's defence team.

[18] It must be remembered that experts' methodology and the standard adopted are universal and known to every expert in the world.

[19] The assessment on the adequacy and competency of an expert and the conclusions drawn by him, as always, are elicited through cross-examination.

[20] The defence is at liberty to question and challenge the adequacy, competency and conclusions drawn by the prosecution experts in cross-examination. Whatever methods used and standard adopted by the prosecution witness could be elicited through cross-examination.

[21] Hence, it is clear that the remarks of Mark Trowell on the disclosure of material, was made without taking into consideration the explanations of the prosecution put forward at the trial.

Disclosure of hospital clinical notes of Mohd Saiful at HKL

[22] Looking at this part of the report and the commentary by Mark Trowell, again, it is a mere repetition and elaboration of the submission by Mr. Karpal Singh who is the lead counsel for Anwar Ibrahim.

[23] This issue had been comprehensively dealt with at the trial and also formed part of the prosecution submission in the Court of Appeal. The relevant parts of which are as follows:

"[37] In this regard, it is useful at this juncture to refer to the decision of the Federal Court on the issue of relevancy in the case of Dato Seri Anwar Ibrahim v PP (supra) at p 282, whereby it was explained with reference to the submission of the Respondent as follows:

[38] The learned Solicitor General II in concluding his submission on s. 51 CPC had stated that:

> The court would exercise its discretion under section 51 of the Code only if the court is of the view that it is necessary or desirable to have the document produced, having regards to sections 152 to 154 of the Code at the pre-trial stage, whereas the court must subject the application to the relevancy test, having regards to the issues for adjudication in the course of the trial. (Emphasis added)

[39] In coming to that conclusion reference was made to the discussion on the Indian s. 91 Code of Criminal Procedure 1973 (equivalent to s. 51CPC) in the case of State of Orissa v Debendra Nath Padhi [2004] 4 LRI 860, and the following passages were read to us:

> Any document or thing envisaged under the aforesaid provisions can be ordered to be produced on finding that the same is necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for production. *If any document is necessary or desirable for the defence of the accused, the question of invoking s. 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. (Emphasis added)*

The next passage reads

In so far as the accused is concerned, his entitlement to seek order under section 91 would ordinarily not come till the stage of defence. **When the section talks of the document being necessary and desirable, it is implicit that the necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or the accused."** (Emphasis supplied)

[24] The prosecution in this case had also submitted at length on the accused's entitlement to documents as follows:

[53] Similarly, in the case of Public Prosecutor v Ramasami a/l Simmathri & Ors and another application [2001] 4 MLJ 412 at p 420, the issue of the admissibility of the post mortem report was discussed and it was held that:

"In the case before me, the post mortem reports are not admissible in evidence under s 399 of the CPC because

they have not been served on the accused persons at least ten days before the commencement of the trial. The question of supplying copies of these post mortem reports to the defence does not arise at all."

[54] The court in Public Prosecutor v Ramasami a/l Simmathri & Ors and another application (supra) at p 422, proceeded further to consider the application by the defence for the chemist reports, the report of the forensic pathologist, the report of the dental expert and the DNA profiling reports, where it was reiterated that:

"In my view, these are also not admissible for the same reasons as the post mortem reports and my reasons for disallowing the application of the defence in respect of the post mortem reports also apply to the third category of reports.

In the ultimate analysis, I am of the respectful view that although in the case of post mortem reports, chemist reports, DNA profiling reports, dental reports and the

like, there is no real risk or danger of tampering with witnesses, bearing in mind that the makers are neutral witnesses being professional witnesses, on the authority of Bryant v Dickson, cited with approval in the Khoo Siew Bee case, *there is no duty on the part of the prosecution to supply the defence with copies of the reports."* (Emphasis supplied)

[55] A similar stand was also adopted by Spencer Wilkinson J in Wong Kok Keong v Regina [1955] 21 MLJ 13 at p 14 where it was held that:

"Reading Section 427(1) as a whole I think it is clear from the wording of the sub-section that the giving in evidence of these documents is subject to the proviso that a copy shall be delivered not less than ten clear days before the commencement of the trial. If this be correct then it is clear that in the case now before me the report was not admissible in evidence, because the proviso on the sub-section had not been complied with."

[56] Where a specific document is ruled to be admissible, the defence is entitled to the said document or alternatively as stated in item (ii) above, the defence is entitled to inspect any document when the witness chose to refresh his memory before the court with regard to the said document. It had been explained by Spencer Wilkinson J in Saw Thean Teik v Regina [1953] 19 MLJ 124 at p 125 that:

"In the first place the Medical Officer having been called as a witness his report should not have been put in. I think it is quite clear from the wording of section 427 of the Criminal Procedure Code that under that section a Medical Officer's report is admissible only if that officer is not called as a witness. When a Medical Officer is giving oral evidence then of course any notes which he may have made at the time of his examination he can refer to refresh his memory. Moreover, if his report is made at about the time when the examination took place the report could be put in not as primary evidence of its contents but to corroborate the oral evidence already given under section 157 of the Evidence Ordinance."

[57] Spencer Wilkinson J further explained at p 126 that:

"Technically, however, it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence. Clearly, if the witness is in the witness box the best evidence is his oral evidence as to what he saw or discovered (see section 60 of the Evidence Ordinance). Where witnesses of this kind are brought to Court their reports should only be used, if at all, either to refresh memory or as corroboration."

[58] The Federal Court had in the case of Balachandran v Public Prosecutor [2005] 2 MLJ 301 laid down similar principle, albeit, with reference to the admissibility of an arrest report as opposed to a first information report at p 311 as follows:

"It must be added only the first information report is admissible under s 108A in addition to ss 145 and 157 of the Evidence Act 1950 while other reports are

admissible only under the latter provisions of the law."

[59] At p 2468 in Sarkar's Law of Evidence (16th Edition)(Vol 2), under the heading – Post-morten Notes etc, the authors expressed that:

"It is extremely undesirable that post-mortem notes of medical examination should be put in evidence en bloc through the medical officer. Ss 159, 161 only permit a limited use being made of them for refreshing memory or for contradicting the witness who made it [Md Yusuf v R, A 1929 S 225; R v Jadab Dass, 27 C 295: 4 CWN 129]. *It is the doctor's statement in court which is substantive evidence and not the report which can only be used for refreshing his memory* [R v Jadab Dass ante: In re Ranggappa, 59 M 349; Raghuni v R, 9 C 455; 11 CLR 569; Hadi v S, A 1966 Or 21; see also 2 WR Cr Letters P 14 and 6 WR Cr Letters p 3] or to contradict whatever he might say in witness-box, but it cannot by itself be substantive evidence [In re Ramaswami, A 1938 M 336]. *The practice of the court referring to statements in the*

first information reports, medico-legal reports, &c, as if they were evidence is not justified by law. **The proper course is for the witness to refer to the document which he has prepared at the time under s 159 and state in court everything material [Mohammad v R, A 1937 L 475]. (Emphasis supplied)**

[25] No clarification is required on the report and commentary concerning the 'Admissibilty of Mohd Saiful's toxicology report'

[26] No clarification is required on the report and commentary concerning the 'Testimony of forensic pathologist Dr. Siew Sheue Feng' as the proforma form referred to by Dr. Siew was ordered to be supplied to the defence.

Application for Judge to disqualify himself and the Commentary

[27] There is nothing much to add to this part of Mark Trowell's report and commentary, except to reproduce the relevant parts of the prosecution submission at the Court of Appeal concerning the allegation of intimidation by the accused's counsel as follows:

"[34] It could be seen that the original/initial reason given by learned counsel for the Appellant to recuse the trial Judge was premised on the fact that the said Judge had dismissed the Appellant's application to be given access to the doctor's notes.

[35] It well settled law that there is absolutely no basis to recuse a trial Judge merely because ruling was made against an applicant in a matter. In Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd and Ors [2003] 1 MLJ 78 at p 87, the Court of Appeal explained that:

"From what has just been said it must be equally obvious that whether a decision is favourable or adverse depends upon whom it is perceived i.e, by the respondents or by the applicants. Where it is favourable to one party, there would be no application for recusal for sure; but where it is adverse to the other party there might be, as in the case of the applicant here. Surely, a decision that is adverse to a party is not per se

ordinarily a ground to disqualify a judge as observed by Lord Bingham CJ and Mason J above."

[36] The Respondent (the Prosecution) had informed the trial Judge, in no uncertain terms that it was preposterous to apply for the recusal of a Judge merely because the judgment or ruling was made against Appellant. It was an interpretation of the law and had nothing to do with the conduct of the Judge in handling a case. As revealed in p 62 of the Record of Appeal, before the trial Judge, Datuk Yusof had submitted on behalf of the prosecution as follows:

"It is the first time I am hearing this kind of and the way the application is grounded upon the fact that the judge should be recused on the ground that involved a matter of interpretation with a judgment. This is (sic) nothing to do with the conduct of the judge but is matter of the judge interpreting an authority and says that this authority does not support the proposition. And I have never heard of such a thing. So, I do not think there is even a ground. Because if you are not happy, you

appeal, if it can be appealed. If not, then you have to wait until the end of the trial. But that cannot be the ground because a judge interprets the authority differently."

[37] Having said so, it is not disputed that the trial Judge had commented on the current law as it stands that an application to recuse a Judge can tantamount to contempt of the court in the following words: (Please see p 61 of the Record of Appeal)

"Mahkamah: "Court: (English Translation)

You will file it tomorrow morning. So, we can proceed with the trial today, now. And may consider the contempt proceeding also for filing application to recuse a Judge on the ground that a judge makes a decision which contrary to authority, which is wrong."

[38] It was from this initial exchange of words that learned counsel for the Appellant alleged that there was intimidation by the court.

[39] As the learned trial Judge had rightly concluded, taking the whole episode as to what transpired in court on 23 November 2010 'in its proper context', there was clearly no intimidation and more importantly, no impression exhibited that there was any real danger of bias on the part of the learned trial Judge in the handling of the trial.

[40] It was clearly an advise and reminder at its highest, like when a Judge reminded a witness on the consequences of telling lies in court and NOT INTIMIDATION as alleged by learned counsel for the Appellant. The Court of Appeal in Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors [2008] 5 MLJ 206 at p 221, expressed the same sentiment vis-a-vis the advise given by the trial Judge in the present case as follows:

"[37] It is significant to that any allegation of reasonable apprehension of bias would bring into sharp focus and would call into *QUESTION NOT ONLY THE PERSONAL INTEGRITY OF THE JUDGE BUT ALSO THE INTEGRITY OF THE ENTIRE ADMINISTRATION OF*

JUSTICE. It is advisable that any counsel who proposes to embark on this perilous course of action must be certain lest he runs foul of the law and be *CITED FOR CONTEMPT*." (Emphasis supplied)

[41] Similar view was also expressed by the Court of Appeal in Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 at p 225 as follows:

"The law will not suppose a possibility of bias in a judge who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea: B1 Comm 361. In consequence, the court has regarded with particular seriousness allegations of partiality or bias on the part of a judge or a court as punishable contempts of court: see 9 Halsbury's Laws of England (4th ed) at p 21, para 27."

[42] In Public Prosecutor v Seeralan [1985] 2 MLJ 30 at p 32, the Supreme Court commented on the conduct of

the counsel who made similar allegation of bias at the Magistrate Court in the following words:

"There is absolutely no justification for him to make the accusation. Whilst *we accept that counsel can plead for his client without fear and favour, he certainly has no right to abuse the court and interrupt the proceedings. An allegation of bias, in our opinion, is just not a mere act of discourtesy but a contempt of court*. (Re Kumarendran, and Reece v McKenna, ex-parte Reece, cited in Borrie and Lowe's Law of Contempt, second edition, p 30)." (Emphasis supplied)

[43] The trial Judge had merely commented on the trend of the law as it stands as revealed in the 3 cases above. There is no shred of any intimidation whatsoever from the court.

Forensic evidence of DNA excluded – then decision reversed

[28] The merits of the decision of the trial Judge to reverse his earlier decision was not questioned by Mark Trowell, as it could be observed that new evidence emerged later on in the trial, showing that Anwar Ibrahim was legally arrested. In addition, there was evidence that a warrant of arrest had been issued by the Magistrate earlier for the arrest of Anwar Ibrahim, which then constrained the trial Judge to reverse his earlier ruling on this issue. (See: **R v Watson [1980] 2 All. E R 293.)**

[29] The so called leaking of the prosecution submission had caught even the prosecution by surprise. In any event, the lead prosecutor had assumed full responsibility for the so-called leaking.

[30] In most cases, the Court would direct parties to file in their written submissions before the hearing or trial date. The publication of such written submission would not prejudice any party. More importantly, this is not a jury trial.

[31] We would not take issue and prejudge the matter concerning the remarks made by the Prime Minister that the accused volunteered his DNA sample for analysis. The accused is still at liberty to file in a formal complaint and application with the court.

[32] In any event, the trial Judge had ruled that the accused is not required to give his DNA sample.

No forensic test for lubricant

[33] The commentary by Mark Trowell concerning the absence of test carried out on the use of lubricant in this case, clearly revealed his partiality in this report.

[34] Mark Trowell QC commented at page 17 of this report that, **"There was no mandatory requirement that the samples be tested for the presence of lubricant, but the failure of the investigators to do so *was sloppy police work*. It should have been done, but was not."** (Emphasis supplied)

[35] It could be noted that very strong words were used to describe the police work carried out in this case. These remarks were clearly improper, unwarranted and reflected obviously the proclivity of Mark Trowell QC.

[36] Mark Trowell QC is very much aware of the fact that the victim, Mohd Saiful was examined earlier by Dr. Mohamed Osman at the private hospital (Pusat Rawatan Islam –PUSRAWI) before going to Hospital Kuala Lumpur (HKL). In the process of

examination, lubricant must have been used to assist Dr. Mohamed Osman in his examination of the victim's anus and if test was to be carried out at the Hospital Kuala Lumpur subsequently, for the presence of lubricant, and to suggest that that lubricant was used in the course of carnal intercourse by the accused, unquestionably, such a finding would be affront to all common sense and justice. It is exactly for this reason that no test for lubricant was carried out at HKL.

Had Saiful defecated before he was examined at HKL and the Commentary

[37] This issue had been raised by Mark Trowell QC in his previous report dated August 2010.

[38] Suffice at this juncture for us to refer to our earlier reply on this issue as follows:

> **"13. It is appropriate to point out at this juncture that the evidence of the victim (Mohd Saiful) who was the prosecution's first witness, as recounted by Mr. Mark Trowell QC that it was the victim who told Dr. Osman**

'that a "plastic" item had been inserted' into his anus is not reflected in the notes of proceedings. On the contrary, the victim denied ever telling Dr. Osman 'that a "plastic" item had been inserted' into his anus, although, there is such a notation in Dr.Osman's notes.

14. The three specialists who examined the victim had jointly prepared a medical report. As one of the conclusions arrived at by the three specialists and correctly pointed out in the report of Mr. Mark Trowell QC, whereby, it was stated that "no conclusive clinical findings suggestive of penetration to the anus/rectum and no significant defensive wound on the body of the patient"

15. It is also important to note that there is this other conclusion arrived at by the three specialists and also stated in their joint medical report, which was omitted by Mr. Mark Trowell QC.

16. The three specialists also arrived at the conclusion that "the presence of Male DNA types from swabs "B5", "B7", "B8" and "B9" are best interpreted with the identification of the site of sampling."

17. In the said medical report, the laboratory analysis on the blood samples and swabs taken from the victim was also revealed as follows:

LABORATORY ANALYSIS REVEALED THE FOLLOWING:

- NO DETECTABLE ALCOHOL AND OTHER COMMON DRUGS IN THE BLOOD SAMPLED FROM THE PATIENT.
- PRESENCE OF SEMEN ON SWABS "B5", "B7", "B8" AND "B9".
- NO FOREIGN SOURCE DNA FROM SWABS "B", "B1", "B2", "B3", "B4" AND "B6"
- A MIXTURE OF MALE DNA TYPES FROM SWAB "B5".
- MALE DNA TYPES FROM TWO INDIVIDUALS FROM SWABS "B7", "B8" AND "B9"

18. The authors in the book, 'Forensic Medicine for Lawyers' (Butterworths) (1983) (2nd Edition) at p 228 under the heading: Homosexual offences, explained that:

"The presence of traces of lubricant may provide suggestive evidence and the finding of spermatozoa on swabs prepared either from within the canal or from the anal mucosa will prove the act almost beyond dispute."

19. Mr. Mark Trowell QC had also adverted in his report that:

"But in any event, if Anwar's DNA were to be found inside the rectum of the complainant, that would undoubtedly be persuasive evidence of sexual contact, if it could be proved."

20. The discomfort and reservation raised by Mr. Mark Trowell QC in his report, concerning the delay of two day for the samples to reach the chemist laboratory, issue on the proper labeling of exhibits and testimonies of the victim that he had not washed himself so as to preserve the evidence, are all issues that would be raised by Anwar's lawyer in the course of this trial.

21. Rather than immersing ourselves and taking an argumentative stance on these issues, suffice at this juncture to say that those issues pointed by Mr. Mark Trowell QC would be addressed by the prosecution in the course of the present trial. Essentially, those issues involved the credibility of the witnesses and the integrity of exhibits tendered at the trial.

Presence of seminal fluids in Mohd Saiful's rectum and Commentary

[39] It must be remembered that at this point of time, parties are in the midst of preparing their submissions at the conclusion of the prosecution case and for Mark Trowell QC to comment that, "***Dr. Mohd Razali was a general surgeon. On his own admission he had limited forensic medical experience. He had simply taken the samples from the complainant's body. His opinion about how long one would expect to find traces of semen in the rectum should carry little weight",*** demonstratively revealed once again Mark Trowell QC's inclination in this case.

[40] The manner the report is prepared by Mark Trowell QC with all the nuances, insinuations and the inevitable conclusions drawn by him is clearly calculated to undermine and to influence the trial process. The trial Judge has yet to make a decision whether Anwar Ibrahim ought to be called to enter his defence! And we have the report from Mark Trowell QC suggesting 'little weight' to be given to the opinion of Dr. Razali.

Inadequate storage of DNA samples and Commentary

[41] Again, Mark Trowell had made unsubstantiated allegations when he remarked that:

> **"Little if any weight should be given to the DNA evidence in this case. That is because of the appalling lapse of police procedure in storing the samples, the significant potential for contamination and degradation of the samples because of where and how there were stored and the obvious breach of the 'chain of custody'.**

[42] These sort of remarks surely could not have been made by an independent observer to the trial.

[43] Be that as it may, the proper procedure of storing exhibits in this case is essentially to optimize and to preserve the quality of the samples in order to avoid degradation.

[44] The Investigation Officer did not break the law as suggested by Mark Trowell. The Investigation Officer merely did not follow the Inspector-General's Standing Order requiring exhibits of this nature to be kept in the store and not in his personal cabinet as in this case.

[45] However, the Investigation Officer had explained in Court that he kept the exhibits in his personal cabinet and not in the store or in the freezer, primarily, to maintain the integrity of the exhibits and to avoid tampering by 3rd parties of the exhibits.

[46] Prosecution had explained earlier that the original samples taken from the victim could not be given to the defence before the trial in order to preserve the integrity of the samples. Now that the samples have been tendered in court, the defence can apply to the court for the original samples to be handed to the defence for further independent testing, if required. For Mark Trowell QC to state that 'no explanation at all has been given by the prosecution'

on this point is clearly not true. (Please see also paragraph 5 of this Reply which incorporated our earlier reply on this point)

[47] Whether the exhibits were kept with the Investigation Officer for 34 hours, 43 hours or 48 hours would only affect the degradation of the samples and not the chain of custody. The degradation of samples would then affect the results of the DNA to be developed and nothing more.

[48] On the allegation attributed by Mark Trowell QC to Anwar's lawyers that 'it is highly unlikely that DNA could have been obtained from material taken from Mohd Saiful's rectum 48 hours after the act of penetration, it is useful to refer to the following literatures on this issue as follows:

(i) The longest times after intercourse that spermatozoa have been found on rectal swab was **65 hours** and on anal swabs was **46 hours**.

**(Forensic Science International (1982)
Pages 135 and 139
G.M. Willot and J.E. Allard
The Metropolitan Police Forensic
Science Laboratory, London)**

[11] Spermatozoa may be identified on anal/rectal swabs taken up to three days after anal intercourse, even defaecation has occurred.

(Clinical Forensic Medical
3rd edition, pg 146)

[42] Parties will be making their submission on 25 April 2011 before the trial Judge whether a prima facie case has been made out by the prosecution against the accused. Until the decision is made by the trial Judge and until a final and conclusive outcome is rendered by the Federal Court on appeal, it is best to let the process of the trial and appeals take its own course without interference from any parties.