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Committee on the Human Rights of Parliamentarians

MAL/15 - Anwar Ibrahim

Trial observation reports to Malaysia

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Report by Mr. Mark Trowell, QC (Australia), who observed on behalf of the Inter-Parliamentary Union the appeal proceedings against the sentencing of Mr. Anwar Ibrahim to five years' imprisonment for sodomy – hearing of 10 February 2015 at the Federal Court of Malaysia

A. Final hearing before the Federal Court on 10 February 2015

1 The judges arrived about 40 minutes late. The courtroom was called to order and the five judges took their place on the bench while Mr Anwar Ibrahim quickly went to his seat in the dock, which was located immediately in front of the public gallery. The Chief Justice immediately began to read from a summary of the Court's unanimous decision.

2 The judgment took two hours to read, but the outcome soon became apparent. The inescapable conclusion from the way it was reasoned was that the Court intended to uphold Mr Anwar's conviction. Mr Anwar sensed that as well and from time to time would look around to his lawyers and supporters for confirmation. Finally, the Chief Justice concluded his remarks confirming Mr Anwar's conviction, and it was all over.

3. Mr Anwar's lead counsel Mr Gopal Sri Ram struggled to his feet – as he suffers from an arthritic hip – and pivoting on a walking frame asked the Court to hear his client.

4. The Chief Justice agreed. Mr Anwar stood, and in a soft voice started to read from prepared notes, but as he read his voice became louder and the pace quickened. His statement was not one of acceptance of guilt or remorse, but a condemnation of the verdict and the judges.

5. The judges moved uncomfortably in their seats and were clearly agitated at what Mr Anwar was saying. The Chief Justice turned to Gopal Sri Ram who was seated in the front row of the tables reserved for lawyers exclaiming this was "not mitigation". Sri Ram replied that Mr Anwar was simply exercising his right to speak.

6. While this was being said, Mr Anwar just kept reading. It was obvious the Chief Justice could tolerate it no longer and jumped to his feet and led his fellow judges quickly from the courtroom.

7. There was no doubt that Mr Anwar was determined to continue. He knew that he would get one chance and was not going to miss it. He kept on reading with his voice rising in defiance.

8. With the cry of "never surrender" Mr Anwar's supporters chanted in unison the catchcry of his party: "Reformasi, Reformasi". It was chaotic as the police and court ushers attempted to restore order.

9. The judges did not return for about 30 minutes during which time Mr Anwar worked his mobile phone giving interviews and telephoning key supporters.

10. When the hearing resumed the Chief Justice announced that the Court would not uphold the prosecution appeal against what it claimed was an inadequate sentence, and reaffirmed the five-year sentence of imprisonment imposed by the Court of Appeal.

11. The Court adjourned, but it did not seem that anyone was in a hurry to leave. Mr Anwar walked around thanking his legal team, supporters and hugging his family who were clearly distressed and some weeping. Forty minutes later he was taken from the courtroom out a side door in the custody of several police officers.

12. Meanwhile, Mr Anwar's supporters had moved to the rear of the building to farewell their leader and were massed along the road that leads from the court exit. Regular police officers dressed in navy blue uniforms lined the roadway and kept the crowd under control.

13. The Federal Reserve Unit (FRU) is used by the government as a riot control force to deal with civil unrest. They use huge red armoured vehicles to carry troops, and which are equipped with high-pressure water hoses. Members of the FRU wear red berets or red riot helmets and are armed with shields and batons and on this day some were armed with automatic firearms.

14. The regular police had already cleared a path to allow the FRU vehicles to drive away from the court building, but for some reason the FRU decided it would confront the protesters with a phalanx-like formation of riot officers armed with shields and batons. Together they marched down the road towards the crowd banging their riot shields with their batons. High-pressure hoses were used to disperse the crowd, but only very briefly and probably as a warning more than anything else.

15. It was very dramatic, but all quite unnecessary – as one of the senior regular police officers admitted to me. It provoked a few minor skirmishes and taunts from the crowd, but that was all. It soon became apparent that Mr Anwar had been taken away from the court building by another exit and the crowds slowly drifted away.

B. Commentary

16. The unanimous judgment of the Federal Court on 10 February 2015 dismissing Mr Anwar's appeal and upholding the sentence of five years imprisonment will no doubt be discussed and dissected in detail by others.

17. However, I should provide at least some brief impression of the judgment. What I say about the judgment is by no means an exhaustive analysis of every point discussed by the Court, but focuses on the key issues.

18. Frankly, the judgment was unconvincing and lacked a detailed analysis of the facts on which it was based. It rested on two conclusions. First, that Mr Mohd Saiful was a credible witness and should be believed. Secondly, that his allegation was corroborated by independent evidence and in particular the DNA material which proved he had been anally penetrated by Mr Anwar.

19. In reaching these conclusions the Court rejected or ignored evidence that raised serious doubts about the credibility of the complainant and the reliability of the evidence upon which the prosecution relied.

C. Credibility of PW1 (Mr Mohd Saiful)

20. The Court endorsed the finding of the trial judge - which the Court of Appeal also accepted - that Mr Mohd Saiful was an honest and credible witness.

21. While the trial judge may have been of that view at the close of the prosecution case, it was at a time before the defence presented its evidence. Importantly, it was also before the defence experts raised significant doubts in their testimony about the reliability and integrity of the DNA evidence.

22. When all of the evidence was before the court and the trial judge had to decide the ultimate question of whether the prosecution had proved Mr Anwar’s guilt, he correctly cautioned himself of the need to look for independent evidence to support Mr Mr Saiful's allegation. He found it could not be relied upon. For that reason, he acquitted Mr Anwar because he could not be satisfied of his guilt.

23. The Court of Appeal could add nothing more because - as the Federal Court observed - the trial judge was in the best position to observe and assess Mr Sailful's credibility. But that assessment had to be based on the whole of the evidence.

24. The Federal Court was convinced that Mr Saiful was credible and should be believed because "he could not have described (the sexual acts) unless he was there and had gone through the ordeal". The judgment went further saying that the "minute details testified by PW1 (Mr Saiful) gave his testimony the ring of truth, as, unless he had personally experienced the incident, he would not be able to relate the (facts) and the sexual act in such minute details”.

25. That's a possible explanation, but not the only one. There are many ways that a person may have knowledge beyond their experience. In modern times, a person has access to a wide range of information. For example, the Internet is full of pornographic websites that explicitly show all kinds of sexual activity. Who better than a young person to explore this readily available source of information?

26. Young persons today are also well informed and ready to discuss what their parents would never talk about. Furthermore, a young person may be more sexually aware and experienced than persons of an older generation.

27. It is not difficult to know that the introduction of anything into the anus may cause pain and that lubricant - used by both males and females for sexual activity – facilitates penetration.

28. There was also the possibility that Mr Saiful may have had previous sexual experiences with other males. The high rectal samples taken from him by the medical examiners gave a mixed DNA profile. Apart from DNA identified as belonging to Mr Anwar ('Male Y'), the sample also contained the DNA profile of an unidentified third male, which suggested that Mr Mr Saiful had anal sex with that male before the samples were taken.

29. The Court accepted the explanation of the government chemist Dr. Seah Lay Hong that the result showing a third male was no more than a "stutter", in other words an aberration, but that was not accepted by the defence experts. Dr. Brian McDonald was not convinced at all by that explanation.

30. The mixed DNA profile raised the prospect that Mr Saiful was no stranger to the experience of anal sex, and if that were so, he would have been able to convincingly describe the sexual act.

31. The Federal Court was also convinced that Mr Saiful was telling the truth because "it takes a lot of courage for a young man, like PW1 (Mr Saiful), to make such a disparaging complaint against a well-known politician like (Mr Anwar). Knowing that such an allegation might taint him, we cannot ignore the life-long negative effect such a serious allegation would have on PW1 and his family even if the allegation were proven to be true".

32. The Court seemed to be saying that making an allegation in those circumstances made it more likely to be true. Well it does take courage to complain, and to see it through, but experience tells us that complainants at times bring false accusation and their accounts are sometimes rejected.

33. Bringing a complaint of sexual assault may bolster a complainant's credibility, but the law says it does not make the accusation true. Making allegations of sexual assault are the easiest accusations to make, but most difficult to refute.

34. That is so because the alleged sexual act usually happens in private without any independent witnesses so the case effectively becomes "word-against-word". It is for that reason that the law cautions a judge to look for independent evidence to support the accusation.

35. The Court touched upon a few points raised by the defence at the appeal, which it decided were not relevant or critical "in light of other compelling evidence". That clearly was a reference to the DNA evidence. However, while particular facts singly may not have been conclusive, together with other facts they adversely affected Mr Saiful's credibility.

36. Consider the following, which directly affected his credibility:

- No mention was made by the Court of Mr Saiful's affair with a member of the prosecution team during the trial, but it raised the prospect of collaboration between them. It tainted the prosecution case and adversely affected his credibility.
- The meetings between Mr Saiful and then Deputy Prime Minister Mr Najib Razak at his home and secret meetings and communications with senior police officers only days before the alleged sexual assault raised the prospect of collusion to fabricate evidence against Mr Anwar.
- Mr Mohd Najwan Halimi (PW6) was a university friend of Mr Saiful. He testified that during his student days Mr Saiful was pro-Barisan and "hated Mr Anwar". He told of seeing a photograph of Mr Anwar uploaded by Mr Saiful in the social media, under a caption

"Pemimpin Munafik" ("hypocrite leader"). While the Court alluded to his testimony at the trial, which suggested a motive to make false accusation, it took no account at all of it in assessing Mr Saiful's credibility.

- Mr Saiful testified at trial that he had brought a tube of KY Gel lubricant to the condominium expecting that he would have sex with Mr Anwar. He described how it was used during the sex act. He then produced a tube of the lubricant, which he claimed was the one used on the day. It was the first the defence knew of it. It had not been on the list of police exhibits and when challenged about it he claimed that Deputy Superintendent of Police Mr Pereira asked him to hold on to it until later, which seems fanciful given the strict police procedure relating to exhibits.
- Mr Saiful further testified at trial that reacting to the pain of being anally penetrated he squeezed the tube of lubricant. He thought this might have caused the tube to discharge some of its contents onto the rug (P49A). No rug was found in the condominium in which the assault was alleged to have taken place, but was located in another unit. The Federal Court found that the prosecution never explained why that was so, but it thought it was "not a critical piece of evidence… in light of other compelling evidence". It also found there was "no conclusive evidence the lubricant in fact spilled onto P49A", but the rug was never forensically tested for the presence of lubricant. It was potentially an important piece of evidence because if lubricant was found it would corroborate Mr Saiful's account. The fact that it was not tested suggests that the first the police or prosecution knew of it was when Mr Saiful mentioned it at the trial.
- Mr Saiful claimed that he had not washed his body for 54 hours after the sexual assault to "preserve the evidence" of sexual penetration, but he washed clothing worn by him on the day. Furthermore, he claimed to be a devout Muslim, which required him to wash (called 'wadu') before prayers and when handling and reading from the Qur'an. Dr Mohd Razali Ibrahim found Mr Saiful's lower rectum to be empty of faeces when he examined him at HKL. He explained that might not necessarily indicate that he had defecated, but it potentially contradicted Mr Saiful's claim not to have defecated at all. The Court made no mention of these apparent inconsistencies.
- Dr Mohd Osman was the doctor who first examined Mr Saiful at Puswari Hospital. He was a material witness, but was not called by the prosecution because he was not thought by it to be a truthful witness. It was no doubt because he had recorded Mr Saiful as saying that a plastic object had been inserted into his anus. The defence ended up calling Dr Osman, but the Court rejected his evidence. It did so, said the judgment, because Mr Saiful denied saying that to Osman; it was not something he told doctors at HKL; and nor was it in his police statement. As I have said in an earlier chapter, there was no apparent reason why Dr. Osman would lie. The prosecution never put to him in cross-examination a motive to lie nor was anything suggested to him that would even give rise to a suspicion that he was not telling the truth.
- The absence of any bodily injury to the anus and rectum did not mean that penile penetration had not taken place, but it was inconsistent with the violent forcible anal penetration described by Mr Saiful as being "laju dan rakus" ("fast and vigorous").
- Mr Saiful's demeanour the day after the alleged sexual assault was a fact that, if accepted, was inconsistent with his claim to have been sodomised without his consent, yet the Court simply mentioned the fact that the defence had raised it as an issue, but took no account of it at all.

D. 'Corroboration' (independent evidence)

37. In the words of the Court's judgment: "corroboration is independent evidence which implicates the accused by connecting or tending to connect him with the crime". In sexual offence cases it means some fact independent of the accusation made by a complainant.

38. The law does not require the evidence of a complainant in a sexual offence case to be corroborated, but it is a matter of practice and prudence that corroboration is normally required.

39. Of course, whether it is required or not will depend on the circumstances of each case and there are instances where an accused may be convicted simply on the testimony of the

complainant. But in this case the trial judge thought it necessary to direct himself on the dangers of relying upon the uncorroborated testimony of a sexual complainant.

40. The Federal Court in its judgment listed the so-called independent evidence the trial judge relied upon to support Mr Saiful's testimony. It concluded that the trial judge was correct in relying upon these facts - as was the Court of Appeal - and that it had no reason to disagree with that finding.

41. In my view, it should have disagreed with at least some of them. The problem is that some of the facts relied upon by the trial judge could not amount to corroboration.

42. These included:

(i) The opportunity for Mr Anwar to have committed the offence. Mr Anwar had asked his chief of staff to have Mr Saiful bring an envelope he had forgotten to take with him and deliver it to him at the condominium complex on 26 June 2008. The CCTV security recordings confirmed that they were both there on that afternoon, but there was no evidence that Mr Saiful was ever in the condominium where the alleged act was said to have occurred (Unit 11-5-1). Furthermore, the law says that mere opportunity alone does not amount to corroboration.

(ii) The account given by Mr Saiful to the medical examiners at HKL that he had been sexually penetrated by a well-known public figure and there was ejaculation. Mr Saiful could not corroborate himself. It was not independent evidence because it was based on what he said and not on material evidence independent of him. The most it could be used for was 'recent complaint' - an exception to the hearsay rule - which could only bolster his credit.

(iii) The findings by the medical examiners that the absence of scarring, fissure or any sign of recent injuries to the external areas of Mr Saiful's anus was consistent with Mr Saiful's claim that lubricant was used. The absence of injury was a neutral fact and could not be used to prove that lubricant was used or that it was the reason why no injury was found. For the same reason the defence could not reason that the absence of injury proved there was no penetration. It was all too speculative.

43. There were facts, which the Federal Court also relied upon and if proved, were capable of corroborating Mr Saiful's account:

(i) The taking of rectal and anal swabs by the medical examiners and the presence of semen were undoubtedly corroborative of the penile penetration of his anus.

(ii) The matching of Mr Anwar's DNA taken from the items developed from the lock-up items with the DNA profile of 'Male Y' developed from the extract from Mr Saiful's rectum. Again, there is no doubt this would corroborate Mr Saiful's account of having been penetrated by Mr Anwar.

E. The DNA Evidence

44. The DNA evidence was the key factor relied upon by the Federal Court to convict Mr Anwar, and which it found proved the act of sodomy. If proved, it was independent evidence capable of connecting Mr Anwar to the crime and corroborating Mr Saiful's complaint of sodomy.

45. The Court relied upon the expert testimony of the chief government chemist Dr. Seah Lay Hong who conducted the analysis of the forensic samples provided to her by Deputy Superintendent of Police Mr Pereira and matched them to the DNA profile extracted from the items taken from Mr Anwar's cell.

46. The reliability and integrity of the DNA evidence was challenged by the expert testimony of Professor Wells and Dr McDonald. They raised serious concerns about the way in which the forensic samples had been handled and stored; how the government chemist had performed the DNA extraction process; and given the known history of the forensic samples how Dr. Seah interpreted the results.

F. Defence expert opinions rejected because did not perform DNA tests

47. The Court dismissed the expert testimony of Professor Wells and Dr. McDonald because:

(a) unlike the government chemist they had not performed any tests on the samples; and

(b) unlike the government chemists they had not undergone proficiency tests for some years.

48. This response was disingenuous because the defence experts were not laboratory technicians. They were called to testify because of their expertise and experience in the extraction and analysis of DNA and to comment on the adequacy and reliability of the tests conducted by the government chemist.

49. Both experts raised serious issues that were not adequately addressed by either of the appeal courts. The Federal Court did not dismiss Prof Wells and Dr McDonald as "arm-chair experts" - which the Court of Appeal did - but the effect was the same. It was an unconvincing response to their expert evidence.

G. Degradation of Samples

50. The Federal Court characterised the defence challenge to the DNA analysis as being that a DNA reading could not have been obtained because of the degradation of the samples, which it said had come about because of the time taken to analyse the samples and the conditions under which they were kept.

51. Remember that the forensic samples were not analysed until at least 96 hours after ejaculation and they had not been kept in a freezer to prevent the samples degrading. That meant the samples should have degraded significantly, and according to Wells and McDonald the chances of finding any semen cells was extremely remote, if at all possible.

52. The Federal Court found that the DNA was readable despite the degradation. It said that it agreed with the prosecution that: “it was incorrect and misleading to conclude that because of the degradation the DNA profiling is rendered unreliable. It is thus our finding that the degradation has no effect whatsoever on the DNA profiling in this case”.

53. But that was not the point at all. DNA may be extracted from a degraded sample, depending on the extent of its degradation, but in this case the samples when analysed were shown to be in a “pristine” condition. The defence experts thought this was simply inconsistent with their known history. It raised the prospect they were not the samples taken from Mr Saiful at HKL.

H. Break in chain of custody of exhibits

54. The police handling of the samples taken by the medical examiners was sloppy and unprofessional. The containers with the swabs were kept by the investigating officer Deputy Superintendent of Police Mr Pereira in a filing cabinet for 43 hours contrary to the clear instruction of the doctors to freeze them.

55. Pereira admitted during the trial that by not placing the swabs in the police station freezer and taking a storage number he violated the Inspector-General’s Standing Orders (IGSO), which the Court relied upon to justify his opening of the sample bag.

56. In reply to a question about that by Mr Anwar’s lawyer, Mr Sankara Nair, at trial he replied: “Yes, it (the samples) should be kept in a store. I broke the law, but it was my decision to do so”.

57. But there was more. Before taking the samples to the government chemists he opened the sealed package containing the containers and relabelled them.

58. The trial judge was correct when he found that this was “not necessary since the receptacles were already packed and labelled by the experts who collected them. The whole purpose of packing and labelling and sealing by the experts who collected the specimen was to maintain the integrity of the samples and the chain of custody”.

59. There was also an issue relating to Deputy Superintendent of Police Mr Pereira's integrity that was relevant to assessing his conduct in handling the forensic samples. During the earlier appeal hearing the defence informed the court of appeal that an adverse finding had been made against Pereira at a hearing before the Human Rights Commission of Malaysia (SUHAKAM) in 2009 – coincidentally chaired at the time by Mr Shafee Abdullah - which found him to be an untruthful witness. No mention at all was made of that fact in the Federal Court judgment.

60. Nevertheless, the Federal Court justified Mr Pereira's conduct, saying he did no more than follow IGSO to "put proper markings and labelling to exhibits for the purpose of identification in courts". It found that the way he opened the sample bag showed "transparency in his action" and the government chemist "did not detect any tampering of the seals of the exhibits".

61. It is my view that by his actions Mr Pereira compromised the integrity of the samples and risked contamination. He broke the chain of custody. His actions should have been sufficient to completely exclude the DNA evidence.

62. Whether the DNA evidence could be accepted would depend on the integrity of the forensic samples, the reliability of the extraction process and the interpretations of the results. The expert testimony of Prof Wells and Dr McDonald put all that evidence into contention and to my mind was sufficient to raise a reasonable doubt.

I. Evidence of a political conspiracy?

63. The defence submitted at the appeal hearing that the prosecution for the offence of sodomy was politically motivated. The Federal Court accepted that neither the trial judge nor the Court of Appeal explicitly considered what it called "the political conspiracy defence", and which it said, "if accepted, or believed, would have entitled Mr Anwar to an acquittal".

64. However, the Court said that the only evidence of a political conspiracy was that alleged in Mr Anwar's unsworn dock statement, which was "no more than a mere denial". As such, it did not amount to a credible defence, and the Court found that "the defence of political conspiracy remains a mere allegation unsubstantiated by any credible evidence".

65. But there was evidence apart from Mr Anwar's dock statement that was capable of suggesting collusion. The judgment particularised meetings and communications between Mr Saiful and "prominent persons, including adversaries of (Mr Anwar)" before and after the alleged sexual assault.

66. These particulars came from Mr Saiful's testimony at trial.

67. He testified that he met with then Deputy Prime Minister Mr Najib Tun Razak at his home on 24 June 2008 having been taken there by the latter's special officer. Also present at the house was Mr Najib's personal lawyer Shafee Abdullah, who claimed not to have spoken with Mr Saiful, but to have been in the kitchen giving legal advice to Mr Najib's wife about another matter.

68. That same evening, he secretly met with Senior Assistant Commissioner Mr Rodwin Mohd Yusof in a hotel room at Kuala Lumpur. The next day he contacted the Inspector General of Police Mr Musa Hassan. Mr Anwar later accused Mr Musa Hassan (who led the police investigation against Mr Anwar in 1998, and who together with Attorney-General Mr Gani Patail he accused of fabricating evidence against him).

69. The sexual assault was alleged to have occurred on the afternoon of 26 June 2008. The day after, he met with a senior MP and officials of the ruling party. All of these meetings and conversations happened before his complaint to the police, which was not made until 28 June 2008.

70. Mr Najib initially denied meeting with Mr Saiful, but he was later forced to admit that he had done so after a photograph emerged showing Mr Saiful with one of his senior staff. He then attempted to pass it off as an inquiry about obtaining a scholarship, but finally three days later on 3 July 2008 he conceded that Mr Saiful had come to his house, at which time he revealed to him he had been sodomised by Mr Anwar.

J. The Star, 30 June 2008; Bernama News Agency, 3 July 2008

71. I have no idea whether there was a political conspiracy or not. That is for others to decide. But the circumstances surrounding the alleged sexual assault were all very suspicious. The meetings and communications with senior politicians and police before and after the assault obviously had everything to do with Mr Anwar.

72. There was also another curious aspect. Why after making his complaint to these people, did Mr Saiful go back to his employment with Mr Anwar when there was every expectation he would be sexually assaulted again? He did not need to return because he had already reported what was happening. It just does not make sense.

73. Karpal Singh told me that these meetings were to ensure that there was sufficient evidence to convict Mr Anwar. He said it was all contrived and arranged so that the false accusation would stand up under scrutiny that would surely follow once the police complaint was made by Mr Saiful.

74. However, suspicion is not enough. The true test of whether the offence occurred was whether the evidence was sufficient to prove the charge beyond a reasonable doubt. For the reasons briefly explored in this report, my view is that it was not sufficient to that standard of proof and that Mr Anwar should have been acquitted.

K. Royal Pardon

75. Since his conviction and imprisonment Mr Anwar's family have lodged a petition for a royal pardon to the Yang di-Pertuan Agong, but the odds are against him. The petition is not based on any concession by Mr Anwar that he is guilty of the offence, but that his incarceration is a result of a miscarriage of justice. Given the Federal Court's decision that is unlikely to succeed.

76. Mr Anwar must serve at least 40 months of his sentence, which is two-thirds of five years. He can then be released on parole, but the release is discretionary and depends on the parole board. He cannot become a member of parliament for another five years, so effectively he will be excluded from politics for a decade.

L. Review of Federal Court decision

77. The law of Malaysia provides that Rule 137 of the Rules of the Federal Court empowers the court to review its own decision. Mr Anwar's lawyers have indicated that they will make such an application, obviously based on what they believe is a miscarriage of justice.

78. However, the Federal Court has considered the limits of its power to review previously in the Anwar Ibrahim case, when the defence sought to have the Court review its decision to uphold the prosecution's appeal against disclosure at the trial.

79. The application was heard on 25 February 2010, at the conclusion of which, it dismissed the application ruling that even if the Court had the power to review its own decision it was not satisfied there were exceptional grounds to justify the review. It also thought it was not a suitable case for review and there needed to be some finality to proceedings.

80. So Mr Anwar's lawyers will need to satisfy the Court that there are exceptional circumstances to review the decision, which is a difficult task given that the Court has previously taken the view that where its findings are questioned, whether in law or facts, that is not a matter for review.

28 February 2015

Observations on the report by Mr. Mark Trowell presented by Mr. Datuk Ir Wee Ka Siong, member of parliament and Minister in the Prime Minister's Office, during the 132nd IPU Assembly, Hanoi (28 March-1 April 2015)

C. Credibility of PW1 (Mr Mohd Saiful)

1. The trial court judge held that PW1 Saiful Bukhari (Saiful) was a credible witness as he was able to withstand, without hesitation, the continuous attacks by the Defence on his story, credibility and character during cross-examination lasting seven days. He was not questioned by just any lawyer from the Malaysian Bar but by one of the most senior criminal defence lawyers in Malaysia, Karpal Singh and his team. The judge's finding was endorsed and affirmed by the Court of Appeal and the Federal Court respectively. It is important to note that even the High Court Judge (who initially acquitted Anwar for technical reasons) found Saiful a very credible witness.

2. **Mark Trowell's opinion (paragraphs 24, 25 and 26[1])** that Saiful's vivid description of the incident could be not be true and was probably taken from pornographic websites is certainly unsupported by any evidence or facts. That probability was never raised during the trial or put to Saiful during cross-examination In addition, Saiful's testimony was corroborated by the evidence of an independent, credible witness and was consistent with medical and physical evidence. It is unclear how Mark Trowell formed this idea: his report is biased and lacks credibility.

5. It is germane to note that the Defence never disputed that Saiful was with Datuk Seri Anwar Ibrahim (Anwar) on 26 June 2008 at Unit 11-5-1, Desa Damansara Condominium. That is contrary to their initial statement that Anwar was elsewhere. It was also not disputed that Anwar favoured and took care of Saiful and gave him special privileges which other members of the opposition leader's entourage could only dream of, which might have made them envious, and which embarrassed Saiful himself.

6. Despite his lack of qualifications, Saiful was appointed Anwar's personal aide and given an individual office at the expense of more senior members of Anwar's staff.

7. Anwar personally rewarded Saiful handsomely whenever they travelled around the globe, including with an expensive Brioni suit, said to be given for Saiful's loyalty. Saiful was so trusted by Anwar that he was allowed to reply to text messages on the opposition leader's mobile phone.

8. These are facts that were and are not disputed by the Defence. One uncertain point is why Anwar gave such luxuries and special attention to Saiful. The only plausible explanation is that Anwar was attempting to seduce Saiful and subsequently exercised overwhelming dominance over Saiful for the former's sexual gratification.

9. The Defence, including Anwar himself, has always failed to provide an explanation to justify such exceptional treatment that could rival Caesar's affection for Augustus: Saiful is certainly not related to Anwar.

10. **Mark Trowell's opinion (paragraphs 28, 29 and 30)** that Saiful may have had previous sexual experiences with other men on the basis that the high rectal samples taken from him gave a mixed DNA profile is certainly misleading and contrary to forensic and DNA evidence presented during trial. What the Australian QC failed to appreciate is that all 16 samples of male DNA found in the intimate part of Saiful were complete matches with the DNA sampled from items used by Anwar in the lock-up cell. Further, Mark Trowell's appreciation of the facts seemed to be jaundiced, as the mixed profile was not found in the high rectal sample. It was found in the perianal area of Saiful (i.e. at the periphery of the mouth of the anus). The Federal Court held that a possible third person's DNA in that area could have come from the first doctor (Dr. Mohd Osman), who examined Saiful's anus without using a surgical glove, or could even be explained by Saiful having sat in a public toilet. All of the other three samples obtained from inside Saiful's anus returned matches for Anwar's and Saiful's DNA alone.

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1 Paragraph numbers in bod refer to Mark Trowell's report.

11. Moreover the so-called mixed profile was simply due to a foreign allele found in the graph of the DNA report. According to the DNA chemist, Dr. Seah, this is merely a by-product of re-amplification of the DNA, called 'stutter' (an aberration in DNA language) and nothing more.

12. Hypothetically speaking, even if Mark Trowell's opinion was true (which is denied), one cannot deny that Anwar's DNA was detected in an intimate part of Saiful. Hence the opinion that Saiful had had previous sexual experiences with other men would not change a thing or make the possibility of Anwar having committed the alleged crime on PW1 Saiful unlikely; in fact one could say that such an opinion is a mere diversion from the actual truth and nothing more.

13. **At paragraph 36,** Mark Trowell gave a long list of other reasons why Saiful is not credible. Those reasons can be summarized as follows:

(a) Saiful was romantically involved at one time with a member of the prosecution team;
(b) Saiful had met the then Deputy Prime Minister Datuk Seri Najib Razak at his home days before the alleged incident;
(c) A university friend of Saiful claimed that the complainant hated Anwar;
(d) Saiful delayed giving the investigating officer, DSP Judy Pereira, the KY Jelly used during the incident;
(e) The rug where the incident took place was found in Unit 11-5-2 instead of Unit 11-5-1;
(f) Saiful did not wash his body for 54 hours to preserve evidence of sexual penetration;
(g) SD1 Dr. Mohd Osman testified that Saiful told him that a plastic object was inserted in his anus;
(h) Saiful's anus and rectum were not injured;
(i) Saiful delayed in filing a police report.

Mark Trowell seems bent in not presenting the fullest picture, especially as held by the detailed and careful judgment of the Federal Court.

14. Our answers to the said issues above are as follows:

(a) The previous romantic relationship of Saiful with a member of the prosecution team is of no relevance, as it is not related to the facts and issue of the case itself. If at all, it shows that Saiful was a normal man, not inclined to homosexuality, and became a victim of sodomy and Anwar's sexual lust;

(b) Even if Saiful had met Datuk Seri Najib Razak (the then Deputy Prime Minister) days before, it does not change the fact that it was Anwar who instructed Saiful to come to Unit 11-5-1, it was Anwar who arranged for the one-to-one meeting, and it was Anwar, and no one else, who opted to have the meeting at a secluded residential address, accessible to only Anwar and those he trusted most. Thus the question of Saiful meeting the Deputy Prime Minister days before is of no material importance, as the Deputy Prime Minister surely had nothing to do with Anwar's personal arrangements. Further, Saiful explained that his meeting was merely to complain of Anwar's sexual harassment on many previous occasions. The Deputy Prime Minister advised him to lodge a police report;

(c) The claim by one of Saiful's university friends (Najwan Halimi) that Saiful hated Anwar was based purely on a posting made on a Facebook account alleged to be operated by Saiful. However there was no evidence to back up this claim, to show that the Facebook account was owned by Saiful and no one else or that the account existed. Thus the claim remains hearsay and is inadmissible. Mark Trowell was also wrong to describe this witness as PW6: he was in fact DW6, a defence witness. Mark Trowell is either grossly careless or attempted to overemphasis the importance of DW6's evidence;

(d) The delay in handing over the KY Jelly is not something material, as there was no dispute that the KY Jelly taken from Saiful was the same one tendered in Court; there was therefore no break in chain of custody or suggestion of tampering or fabrication of evidence. Moreover, a KY Jelly from one tube to the other is still KY Jelly. Why should Saiful's or the investigating officer's evidence be suspected?

(e) The rug where the incident took place was found in Unit 11-5-2 instead of 11-5-1 simply because it was moved (according to prosecution's submission) by the owner of the said units, En. Hassanudin, at the behest of Anwar, who feared that if the rug was found to be exactly where Saiful described it to be, Anwar would have had a tougher time in denying the charge against him. Mark Trowell was again careless: Saiful never said that the KY Jelly had been spilled on the carpet; he said that it could have been spilled on the carpet or the towel on the carpet;

(f) The fact that Saiful took no bath for 54 hours is not something peculiar or out of the ordinary. In fact, why would any victim of sexual assault destroy the very evidence that could bring the wrongdoer to face justice for his crime? Mark Trowell again misleads, as Saiful never said he did not take a bath for 54 hours; he said he did not move his bowels for 54 hours;

(g) SD1 Dr. Mohd Osman is not a truthful and credible witness, as Saiful never told him that a plastic object had been inserted into his anus. This untruthfulness is further reflected by the fact that, a month after he had examined Saiful, Dr. Osman tampered with Saiful's medical report by adding further statements to it after it had been finalised. Furthermore, three other doctors from Hospital Kuala Lumpur testified that Saiful never said anything about a plastic object being inserted into his anus, thus contradicting Dr. Mohd Osman's evidence. The Federal Court correctly found Dr. Mohd Osman's evidence unbelievable. He was the defence (Anwar's) witness;

(h) The absence of injury in the intimate part of Saiful was explained by the three doctors from Hospital Kuala Lumpur as a common occurrence with victims who had experienced sexual assault more than once over a period of time. Moreover, a lubricant KY Jelly was used. Saiful explained that Anwar committed the crime at least 9 times throughout while Saiful was employed by the opposition leader, using the lubricant each time;

(i) Saiful's delay in filing a police report is common for any victim of sexual assault, especially when the alleged wrongdoer is a person of status. Most victims fear the consequence and effect of the police report on their honour, reputation and livelihood. Saiful's fears were realised when he became the subject of hatred, animosity, public ridicule: it took eight years for justice to truly prevail;

(j) Hence in conclusion there is no doubt that Saiful is indeed a credible witness, to the point that Mark Trowell had no choice but to scrape the proverbial "bottom of the barrel".

H. Break in chain of custody of exhibits

1. **Mark Trowell's claim (paragraphs 50 to 62)** that the samples taken from the intimate part of Saiful were tampered is, without a doubt baseless, biased and jaundiced;

2. It is important for us to emphasize that, when the 12 samples were taken and packaged by the three doctors from Hospital Kuala Lumpur, they were not labelled in sufficient detail to identify the region of the intimate part from which they were extracted. Furthermore, all 12 receptacles containing the said samples were not placed in individual envelopes with appropriate labelling, but instead were placed together into one big plastic bag.

3. It was therefore necessary for the investigating officer, DSP Judy Pereira, to cut open the big plastic bag to remove and place each of the 12 receptacles in their own separate envelopes as required under Part D102, Paragraph 7 (Scientific Aids) of the Inspector General Standing Orders (IGSO).

4. The rationale for compliance with the IGSO is to ensure and distinguish the order and group from which the exhibits were taken (i.e. from a particular place or scene of a crime); that prevents any challenges or disputes arising about the credibility and reliability of exhibits or samples.

5. Furthermore, even if the investigating officer kept the said samples in the locker of his office for 43 hours before handing them to the chemist Dr. Seah, it does not mean that the samples were tampered with or degraded to the point that no results could be yielded from them. On the contrary, as the samples were already naturally air-dried and placed in air-tight receptacles the likelihood of rapid degradation was low.

6. Moreover, even though the investigating officer had cut open the big envelope to segregate the receptacles into individual envelopes, no tampering of any sort can be detected on the receptacles themselves as the security seal wrapped around the lip of each receptacle was intact as testified by all doctors and the chemist/DNA expert. The security seals used are tamper-proof and unique, they are not made to be replicated or duplicated; the seals were also signed by the doctor and Saiful.

7. Thus, the Learned High Court Judge clearly misdirected himself by opining that SD2 Dr. David Lawrence testified that the security seals were not tamper-proof. Dr. Lawrence in fact testified that the security seals of the receptacles were tamper proof but that the seal of the big plastic bag was not. This misdirection was the sole reason for Anwar's acquittal at the High Court, and the Court of Appeal and Federal Court were wise enough not to repeat the same mistake.

8. The investigating officer, DSP Judy Pereira, was no doubt found not to be a truthful witness by Suhakam in a separate and unconnected inquiry. That inquiry has nothing to do with Anwar's case. In addition, DSP Pereira's role in Anwar's case was merely a formal one and is not one which is intertwined with the facts in dispute. Furthermore, there was no "put questions" or positive suggestions made by the Defence during DSP Pereira's cross-examination to suggest that she had fabricated and tampered with the samples to secure a conviction against Anwar. This is a fatal flaw in Anwar's case.

E. The DNA evidence

Reply to paragraph 44, 45 and 46:
The report by Mark Trowell on the DNA evidence can be summarized as follows:

1. The DNA experts called by the Defence (Prof. Wells and Dr. McDonald) challenged the reliability and integrity of the DNA evidence and raised serious concern over the way in which the forensic samples had been handled, stored, extracted and interpreted.

2. Altogether, there were 12 samples in 12 receptacles. But only the six samples from the rectum area were relevant. The doctors at Hospital Kuala Lumpur sealed each of the 12 individual bottles: the doctors and Saiful then placed their initials on each bottle. The seals were properly used as the signature of the doctor and Saiful were placed at all the seal areas. All 12 samples were then placed in a plastic bag which could be gummed, opened up and re-gummed. This "holding bag" is not a sealed bag in the strictest sense.

3. When the Investigating Officer received the holding bag from the Hospital Kuala Lumpur doctor he repackaged all the 12 individual items in separate envelopes compliance with the IGSO. There was therefore no tampering of evidence at all as each of the individual bottles was proven conclusively to be intact in their seals until they arrived at the chemist.

4. It is for that reason the Court of Appeal was able to reverse the High Court acquittal and deliver a finding of guilt.

5. On the issue of the reliability and integrity of the DNA evidence, the Federal Court wrote:

> *"[125] PW5 (Dr. Seah) in her testimony confirmed that she did not detect any tampering of the seals of the exhibits marked B to B10. We therefore find that there was no break in the chain of custody of those exhibits. As such, we agree with the Court of Appeal that the integrity of the samples was not compromised."*[2]

6. The Federal Court's finding on the integrity of the samples was derived from the conclusive evidence of the doctor from Hospital Kuala Lumpur, the investigating officer and the chemist (PW5)

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2 Paragraph 125, page 68, Grounds of Judgment of the Federal Court

who testified that the samples were properly labelled and sealed when they reached him (page 9, paragraph 19, Grounds of Judgement).[3]

7. The Federal Court further recognized the credibility of PW5 (Dr. Seah) as the DNA expert:

> *[172] When considering whether we should accept PW5 and PW6's evidence, we must first conclude that their evidence would fall under that of an expert's opinion, and* ***we have no doubt they are experts****.*
>
> *[173] Having considered the totality of the evidence, and having taken into consideration the above discussion we have no doubt that* ***the appellant failed to discredit PW5 and PW6. There was nothing inherently incredible about PW5 and PW6's evidence****.*[4]

F. Defence expert opinions rejected because of a lack of DNA tests

Reply to paragraphs 47, 48 and 49 of the report

1. Mark Trowell commented that the Court's response to the evidence of Prof. Wells and Dr. McDonald was disingenuous, because the defence experts were not laboratory technicians. Even the Federal Court did not dismiss their evidence as "arm-chair experts", but the effect was the same.

2. The two DNA experts called by the prosecution were proven beyond doubt to be academically qualified (Dr. Seah holds a PhD in DNA) and were also proven to be clinically experienced. The Australian experts that were brought in by Anwar were never clinical experts. The Court of Appeal described them as "arm-chair experts". In fact, their main expert, Dr. Brian Mcdonald was found to be a non-credible witness in Australia, in not less than three cases, in three written judgments.

G. Degradation of samples

Reply to paragraphs 50, 51, 52 and 53:-

1. Mark Trowell noted that, when analysed, the samples were in "pristine condition" and that the Defence expert thought this was simply inconsistent with their own history. It raised the prospect that they were not the samples taken from Saiful at Hospital Kuala Lumpur.

2. The Federal Court provided clarification on the issue of degradation of samples.[5] It was never the prosecution's case that the samples were in pristine condition. This is clear from the evidence of PW5 (Dr. Seah). She conceded under cross-examination that the samples had undergone some degradation but maintained that what is important is to see whether the DNA is readable despite the degradation. If the DNA is readable, findings can be made. Both chemists emphasized that there might have be some slight degradation, but that the damage was not substantial enough to destroy the DNA entirely. If it is possible to read the DNA, degradation has not been sufficient to destroy the DNA. DNA is robust: in one Australian rape/murder case, it lasted 13 ½ years in adverse weather conditions.

3. PW5 further affirmed that despite the possibilities of contamination and degradation, it did not affect her reading of the samples obtained from swabs taken from the high rectal and the low rectal areas. She testified that the DNA profile obtained from swabs B7, B8 and B9 was clear and

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3 Paragraphs 123-126, page 67, Grounds of Judgment of the Federal Court

4 Paragraphs 172-173, page 81,Grounds of Judgement of the Federal Court

5 Paragraphs 112-122 on page 62-67, Grounds of Judgement of the Federal Court

unambiguous. It was obviously readable. The degradation had had no effect on the DNA obtained from those samples.

4. PW6 also explained that degradation will always occur in any biological sample. However, when DNA analysis is conducted and good profiles are obtained, it means that even if degradation had occurred, it is not sufficient to affect the quality of the DNA. The Federal Court agrees with the prosecution that it is incorrect and misleading to conclude that, because of degradation, the DNA profile was rendered unreliable. It is thus the Court's finding that the degradation had no effect whatsoever on the DNA profiling in this case.

I. Evidence of a political conspiracy?

Paragraphs 63-64

Mark Trowell has misinterpreted the thrust of the Federal Court decision on Anwar's statement from the dock, where the issue of a political conspiracy arose. The statement from the dock, which was a bare denial, did not amount to a credible defence.

The Federal Court judges held that claims of a political conspiracy remained mere allegations, unsubstantiated by any credible evidence.[6] It was for this reason that Anwar's so-called argument for a political conspiracy was not convincing. The Appellant failed to frame the parameters of this argument precisely, let alone provide proof of his allegations. The allegations were no more than an attack on the government, prosecution and judiciary.

Mr. Trowell fails to observe the mechanism by which statements from the dock operate: they are unsworn and are therefore given less weight or no weight at all, as the accused is not subject to cross-examination. This was clearly not considered by Mr. Trowell at all. It is not clear why the Appellant did not give evidence on oath, as he had a full chance to do so and has done so before in civil cases.

Mr. Trowell suggests that collusion took place, i.e. that Saiful had meetings with top persons, including Prime Minister Najib, to plan and hatch his idea of sexual assault allegations by Anwar.

However, the Federal Court judgment has clearly dealt with the issue of true facts in the judgment: the bare denial of the Appellant was given very little weight. The salient factors mentioned by the Federal Court judgment include: that Anwar was at the scene of the crime at the material date and time stated in the charge; that his car was seen entering and leaving the condominium at the material time as evidenced by CCTV recordings; that he was seen entering the lift to the fifth floor of the condominium and later leaving the place. Those are some of the important factors adduced by the prosecution against Anwar's cry of political conspiracy. Saiful did not go back to the employment of the accused after the sexual assault, contrary to Mr. Trowell's views.

J. The Star, 30 June 2008; Bernama News Agency, 3 July 2008

Paragraphs 71-74 (The Star Report)

Mark Trowell concedes that he had no idea whether there was a political conspiracy or not, but states that the circumstances surrounding the sexual assault were all very suspicious and that the meetings and communications with senior politicians and police before and after the assault obviously had everything to do with Anwar. The writer does not specify details or exactly what happened at these meetings but makes vague allegations.

There is too much speculation. Mr. Trowell even takes what the late Mr. Karpal Singh said to him – that the meetings were held to ensure that there was sufficient evidence to convict Anwar – as

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6 Paragraph 205, judgment in the Federal Court

carrying weight, when in actual fact that statement was hearsay and was not even considered as evidence in court.

The single meeting referred to at Deputy Prime Minister Najib's house received much scrutiny. Saiful had gone there to confide in the Deputy Prime Minister and seek advice on his predicament. He had never set out to engage or get the support of the Prime Minister and his wife before "embarking on his story" as has been thought by opposition politicians. Mr. Trowell has stated his personal views, based on hearsay: he believed, or wanted others to believe, that the entire complaint about Anwar was a hoax and that the ruling politicians had reasons to remove him as leader of the opposition and from the political scene.

Mr. Trowell states that Saiful met persons such as SAC Rodwin Mohd Yusof and Mr. Musa Hassan, and that the day before the alleged sexual assault on 28 June 2008, he met with a senior MP and members of the ruling party before his conversation to the police. Yet again he advancing the same story of collusion and conspiracy but with no grounds: this was realised by the court.

Paragraph 67

The true facts are that neither the current Honourable Prime Minister nor Datin Seri Rosmah have been witnesses in the Sodomy (2) trial or implicated in the case. Suffice it to say, that Mr. Trowell is going on a frolic of his own and making dangerous and unwarranted defamatory allegations against the Prime Minister and others which are not supported by material evidence.

The theory of conspiracy is not viable because it would require Saiful to be working in collusions with the government, four doctors at the Hospital Kuala Lumpur, two DNA experts, and Investigating Officer and a host of other relevant witnesses. Mark Trowell is jaundiced in not considering Anwar's allegation as a most unlikely conspiracy scenario. But critically, Anwar has never explained how his semen (with spermatozoa) was found in the deepest intimate part of Saiful's anus. And that these spermatozoa were about 54 hours old and therefore consistent with Saiful's allegation that he was sodomized about 54 hours earlier. What is the explanation for the police having found Anwar's spermatozoa of that age in Saiful's anus?

Response by Mr. Mark Trowell to the observations made by Mr. Datuk Ir Wee Ka Siong to the Committee on the Human Rights of Parliamentarians at the 132nd IPU Assembly held in Hanoi (28 March to 1st April 2015)

This response is made for the purpose of replying to the submission presented to the *Committee on the Human Rights of Parliamentarians (*CHRP) by Dr. Wee Ka Siong in respect to my report on the appeal proceedings concerning the Malaysian opposition leader Datuk Seri Anwar Ibrahim.

C. Credibility of PW1 (Mohd Saiful Bukhari)

- *Was Anwar acquitted on technical reasons? (A.1)*

Contrary to the assertion made by Dr. Wee Ka Siong - who for the sake of convenience we shall assume is the author of the submission - Anwar Ibrahim was not acquitted on "technical reasons ".

That assertion demonstrates either a complete misunderstanding of the standard and onus of proof in criminal trials or is intended to misrepresent the trial judge's reasons for decision.

Anwar Ibrahim was acquitted by the trial Judge because the evidence was not sufficient to prove his guilt beyond a reasonable doubt, which is the standard of proof in criminal trials.

- *Was Saiful credible because survived cross-examination by Karpal Singh? (A.1)*

Dr. Wee suggests that Mohd Saiful was more credible a witness because he was cross-examined by "one of the most senior criminal defence lawyer (sic) known in Malaysia, namely Karpal Singh".

This proposition demonstrates a complete ignorance of the criminal law, as credibility is not to be judged by who cross-examined a witness, but solely by the evidence at trial.

- *Finding by trial judge that Saiful credible at end of prosecution case (A.1)*

The trial Judge found Mohd Saiful to be a credible witness at the close of the prosecution case and before the defence evidence was led. The judge at that stage was not deciding the ultimate issue of guilt or innocence, but only whether the evidence was sufficient to require the defence to call evidence. In other words, he only had half the story.

When it came to deciding the ultimate question of guilt or innocence the trial Judge - having for sound reasons rejected the DNA evidence - found that Saiful's allegation was not corroborated by independent evidence.

In my view, his decision was quite correct. In fact, once the DNA evidence was excluded - which in my view it should have been - then contrary to what is asserted in this submission there was no evidence capable of corroborating Saiful.

- *Detailed description of sexual act (A.2)*

It may well be speculative for me to suggest that Saiful was able to describe the sexual act because his knowledge was obtained from other sources, which included the Internet. But I suggested that possibility because it illustrates the absurdity of the Chief Justice's conclusion that the only explanation for Saiful's detailed testimony of the sexual act was that it must have happened.

It is tantamount to saying 'he was able to describe it in detail so it must be true'. That is why the courts treat 'recent complaint' only as a bolster to a complainant's credibility, rather than truth of the allegation. The access to pornography on the Internet was one possible explanation, but there were others.

- *Presence of third male in DNA sample (A.10)*

More compelling was the finding of the presence of a third male's DNA in the sample taken from Saiful's rectum. That wasn't mere speculation. It was potentially direct evidence of prior sexual experience of anal penetration with another male at the time he was allegedly being sexually assaulted by Anwar. It is an explanation soundly based on fact.

It is not – as Dr. Wee suggests – something that is "misleading and contrary to forensic and DNA evidence tendered during trial". (A.10-11) There was a conflict in the evidence between the prosecution and defence expert witnesses.

Dr. Seah's view was that the result was no more than a "stutter", but Dr. McDonald was not convinced by that explanation. He was critical of the reporting criteria adopted by the government chemists saying they had failed to apply or conform to internationally recognized reporting standards and testing guidelines. In fact, he noted that they gave contradictory evidence regarding the testing of samples.

In one instance, he said that the government chemist Nor Aidora, when faced with evidence that clearly indicated a mixture of DNA from different persons, simply ignored her own laboratory guidelines and reported that it was from a single donor.

The mixed DNA profile obtained from swabs taken from Saiful was potential evidence that he had sex with another male. Dr. Wee, to counter that distinct possibility, suggests that it may have come about through contamination. For example, he suggests that as it came from a swab taken from the perianal (around or surrounding the anus at the opening of the rectum), and not the high rectum, so it possibly came from "sitting in a public toilet".

That really is a ridiculous proposition because no-one puts their perianal region on a toilet seat either to defecate or urinate. Dr. Wee should also understand that it is an accepted medical phenomenon that the rectum discharges semen from the anus after ejaculation, which may explain why semen was found on Saiful's perianal region.

Adopting the suggestion made by the Federal Court, he then says that the mixed DNA profile could have come from contamination by Dr. Mohd Osman who was the first person to examine Saiful's anus. He says that Dr. Osman "examined Saiful's anus without wearing a surgical glove", but that wasn't the evidence at trial. It is just another example of Dr. Wee misrepresenting the facts.

Shafee Abdullah's submission to the Federal Court was that: "Dr. Osman washed his hands after examining Saiful. There is a possibility that he was not using gloves. We do not have a statement that he used gloves or sterilized the proctoscope. So it was possible that the third DNA is from Dr. Osman".

Shafee never went as far as Dr. Wee to claim that the evidence proved that Dr. Oman wasn't wearing gloves. He knew it didn't and only put it forward as no more than a 'possibility'. In either case, it wasn't an inference capable of being drawn from the known facts. It is nothing but mere speculation.

- *Grooming Saiful (A.5)*

Dr. Wee either misunderstands the evidence given at trial or chooses to misconstrue it. The evidence is clear that both Anwar and Saiful were at the Demansara condominium complex on the day of the alleged sexual assault, but there is no independent proof that either man was ever in the condominium in which Saiful claimed he was sexually assaulted. Furthermore, the criminal law says that mere opportunity alone does not amount to corroboration.

Dr. Wee repeats the "grooming" allegation made by Deputy Prosecutor Shafee Abdullah at the appeal hearings alleging that Saiful was shown preferential treatment and was given presents as part of a deliberate process by Anwar to groom with the intention of sexually assaulting him.

Dr. Wee chooses to rely on the prosecution submissions, rather than the evidence at the trial. Shafee Abdullah kept referring to Saiful as having been given an expensive Brioni suit, but at no stage was such a garment ever produced at court. The only item of clothing produced was a pair of trousers that were unlabeled and not proved to be from Brioni. They were in fact labelled by police as a "seluar tidak berjenama" or a "pair of trousers without a label". (A.7)

An attempt is made in the submission to draw parallels between the alleged relationship of Anwar and Saiful to the affection shown by Julius Caesar to his grand-nephew Augustus. It wasn't a particularly clever allusion, but the obvious purpose was to suggest that it was sexual in nature. (A.9)

It was Mark Antony – one of Caesar's assassins - who later charged that Augustus had earned his adoption through sexual favours, though the Roman historian Suetonius in his great work The *Life of the Caesars (De Vita Caesarum)*, describes Antony's accusation as "political slander", which is probably the correct parallel to make in this case.

- *Saiful's previous sexual experience (A.10)*

These complaints relate to my interpretation of the DNA analysis by the government scientist. Again, Dr. Wee just repeats the prosecution submissions, and like the courts of appeal fails to adequately, if at all, respond to the doubts cast on that evidence by the defence expert witnesses.

The court of appeal simply ignored the evidence from recognized experts in the field of DNA dismissing them as "arm-chair experts". That was an offensive remark. It demonstrated that rather than rely on a proper legal analysis of that evidence, the court could only respond in a parochial and unnecessary way.

The Federal Court was equally disingenuous in rejecting the evidence of the foreign experts on the basis they hadn't tested the samples and it had been some years since they had performed DNA testing. That was just nonsense because they were experts, not laboratory technicians.

Responses to my criticisms of Saiful's credibility (A.13-14)

- *Saiful's affair with the Prosecutor [A.14(a)]:*

First, Dr. Wee rejects my submission that Saiful's affair with a prosecutor during the trial in any way affected his credit. There is no doubting it happened because the trial Judge found it occurred, and the Attorney-General didn't deny it. In fact, when the liaison became public, the prosecutor Ms. Farah Azlina Latif was immediately removed from the prosecution team.

The critical question is whether it in any way compromised the trial.

Their relationship during the trial was quite improper. The Malaysian Bar President Ragunath Kesavan responded saying that being romantically linked to a key witness in a prosecution case was "definitely an ethical matter… and that there should be no relationship between prosecutor and complainant". *The Sun*, 28 July 2010

The prosecution claimed that she did not have access to the "investigation papers" or any "confidential information", but Farah Azlina would almost certainly have had access to all of the material comprising the prosecution brief, including medical reports, scientific reports, police reports and witness statements.

There is always the prospect of confidential information being spoken of in what the Americans call 'pillow talk'. This is not to suggest that there was a sexual intimacy between them, only that a romantic connection would have created a trust between them that may have led to some indiscreet remarks by the prosecutor about the trial.

Essentially, the necessary formality between prosecutor and complainant would have been absent. They may have discussed nothing of consequence, but critically the opportunity was there to do so. That situation should never have occurred. Farah Azlina's relationship with Mohd Saiful completely compromised the prosecution.

Dropping her from the prosecution team did not solve the problem because the perception that the prosecution case had been compromised by the affair was inescapable.

Dr. Wee asserts that the affair shows that Saiful "was a normal male, not inclined to homosexuality". He continues to overlook the obvious. Perhaps he hasn't considered another obvious possibility; that this young man was bi-sexual?

- *Mr. Najib's involvement [A.14(b)]:*

Dr. Wee says that Mr. Najib had nothing to do with arranging a meeting between Anwar and Saiful at the Demansara condominium complex. That is certainly true.

However, something I did find interesting was Dr. Wee's statement that Mr. Najib at the meeting advised Saiful to lodge a police report. In saying that he directly contradicts the Prime Minister. When interviewed at the press conference held at his parliament office in early July 2008 Mr. Najib denied ever telling Saiful to do that. Reported by *Bernama*, on 3 July 2008.

- *The testimony of Najwan Halimi [A.14(c)]:*

Dr. Wee is quite wrong when he says that the testimony of Najwan Halimi was hearsay and inadmissible. That is not the law, which is why his evidence was admitted at the trial.

It was direct evidence of motive. If accepted as being true, it meant that Saiful wasn't an Anwar supporter, but was rather very much against him and had every motive to lie and give false testimony.

- *The 'KY' Jelly [A.14(d)]:*

Dr. Wee says "that there is no dispute that the same 'KY' jelly taken from Saiful was the same one tendered in court, thus there is no break in the chain of custody to suggest tampering or fabrication of evidence". That statement makes no sense at all.

When he testified at trial, Saiful was handed a tube of lubricant by the prosecutor and identified it as being the same one used at the Demansara condominium when the sexual act occurred. It was a generic tube without any special markings, so how he was able to do that is questionable.

The point is that the tube was not listed in the prosecution exhibits by the police, which meant that it had not been seized as an exhibit and taken into police custody. The first the defence knew of its existence was when it was presented at court.

When asked where the tube of lubricant had come from, Saiful explained that he was the person who had given it to the prosecutor. He claimed to have previously offered it to DSP Pereria, but was told by him to hang on to it.

That was hardly a convincing explanation. It is inconceivable that an experienced senior police officer responsible for exhibits would not have taken possession of a key piece of evidence and properly recorded it in the exhibits log.

Dr. Wee submits there was no "break in the chain of custody". That's correct because there wasn't a chain of custody at all for this item. It gave rise to the suspicion that the production of the tube of lubricant was just an afterthought by somebody to bolster Saiful's allegation.

- *Moving the Rug [A.14(e)]:*

Dr. Wee says that the rug on which the incident allegedly occurred was moved by the owner of the units from one unit to another at the behest of Anwar "who feared that if the rug was found exactly where Saiful described it to be, Anwar would have a tougher time in denying the charge against him".

That is just mere speculation without any evidence to support it. It is completely misleading to present the arguments of the prosecution as if they were the evidence before the court. The Federal Court accepted there was no evidence that the rug was ever moved from one apartment to another. This is what the Court said:

[59] Secondly, it was the prosecution's case that the act of sodomy took place in Unit 11-5-1 on the carpet (P49A). P49A was however recovered from Unit 11-5-2. The prosecution had not explained

how P49A came to be in Unit 11-5-2. There was therefore a gap in the prosecution's case, which was not explained as the owner of Unit 11-5-2 was not called. Counsel for the appellant remarked, "I don't believe in flying carpet." It was then submitted that with this gap PW1 could not have been telling the truth in that the act took place in Unit 11-5-1 and on P49A.

[60] We agree with counsel for the appellant that there was no evidence led as to how P49A "moved" from Unit 11-5-1 to Unit 11-5-2. From the evidence, it is not in dispute that Unit 11-5-1 and 11-5-2 are adjacent to each other, and belonged to the same owner, Hassanuddin Abdul Hamid. P49A was sent to the chemist for analysis but no trace of KY Jelly was found on it. There was also no conclusive evidence that the KY Jelly had in fact spilled onto P49A. What PW1 said in his testimony was that the KY Jelly could have spilled on either P49A or the towel.

Mohd Saiful described the sexual act as having occurred on a rug. He stated that he squeezed the tube of lubricant – which he had brought with him to the apartment - when reacting to the force of the anal penetration. He was unsure whether it spilled onto the rug, but there was a definite prospect that it had.

The presence of lubricant on the rug would have corroborated Mohd Saiful's claim to having been sexually penetrated. It was potentially a critical piece of prosecution evidence.

But the Federal Court was incorrect in saying that: "P49A was sent to the chemist for analysis but no trace of KY Jelly was found on it". The truth is that no attempt was ever made to test the rug for traces of KY Jelly.

The police did seize the rug from the adjacent apartment. It was sent for DNA analysis, but no forensic tests were ever conducted to confirm the presence of lubricant. In fact, there was never a request to test for lubricant.

That may have been because DSP Pereira was, at that point of time, probably unaware of Saiful's claim that lubricant had been used. Still, there was nothing to stop him requesting further tests once he knew about it – which probably wasn't until the trial.

The general lax attitude of the authorities to testing for lubricant is further illustrated by the answer given by forensic pathologist Dr. Siew Sheue Feng when asked by defence counsel Sankara Nair why he did not conduct a lubricant test. He responded: "I did not think it was important".

There is also no evidence to prove that the rug found in the other apartment was in fact the rug described by Saiful. And contrary to Dr. Wee's assertion, how would Anwar know what Saiful had said about the incident and whether he had even mentioned a rug because his police statement was never disclosed to the defence?

- *Not bathing for 48 hours [A.14(f)]:*

Dr. Wee says that Saiful's decision not to bathe so as to preserve the evidence was "not something peculiar or out of the ordinary". That statement demonstrates a complete lack of understanding of the psychology of the victims of sexual assault.

This was a curious thing for a victim of sexual assault to do. It is well known that victims of sexual assault will, if they have the chance, almost always wash their bodies in an attempt to 'cleanse' themselves of the sexual contact.

Very few victims 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.

The other curious thing is that if he was so intent on preserving the evidence, why did he wash the underwear he had worn on the day he claimed to have been sexually assaulted? That garment was a key pieced of evidence.

Dr. Wee says that I have attempted to "mislead" by saying that Saiful claimed not to have washed for 54 hours. I challenge that because my notes clearly record his testimony at trial as being that he didn't

wash or evacuate his bowels from the time of the assault until the time of his medical examination – which was 54 hours.

- *Dr. Osman [A.14(g)]:*

Dr. Osman was an important witness. He was the first person to medically examine Mohd Saiful. Of course, he was not the first person to whom he had complained about being sexually assaulted either before or after the alleged assault.

There is no doubt that what he said to Dr. Osman was important, but the prosecution refused to call him as a witness claiming that he was not a truthful person.

What obviously concerned the prosecution was Dr. Osman's claim that Saiful had told him that a plastic object had been inserted into his anus. Saiful at trial denied ever saying that.

Dr. Osman was called as a witness for the defence. When challenged by the prosecutor about this he was unshaken and responded saying that: "Saiful told me that and I recorded it [in my notes] at the same time and date". So there was a conflict in the evidence.

The prosecution never put to him any motive to lie nor was anything suggested to him that would even give rise to a suspicion that he had a reason not to tell the truth.

Deputy Prosecutor Shafee Abdullah told the appeal courts that Dr. Osman wasn't to be believed because he had not recorded that comment in his medical notes at the time of the examination, but added them later giving rise to the suspicion that someone had asked him to include it.

Anwar's lawyers maintain that Dr. Osman was not called because his account of the medical examination of Mohd Saiful did not fit within the prosecution case theory.

The Federal Court's judgment about that was as follows:

[218] PW1 (Saiful) in his evidence denied ever telling DW1 (Dr. Osman) that he had been assaulted with the insertion of a plastic object into his anus. The doctors at Hospital Kuala Lumpur who on the same day examined PW1 never said that PW1 told any of them that he had been assaulted by the insertion of a plastic object. Neither was this stated in PW1's police report. Based on that we hold that DW1 is not telling the truth. Further had that allegation been true, DW1 would not have advised PW1 to go for forensic examination at a government hospital.

[219] In the circumstances, we agree with the prosecution that DW1 is an unreliable and untruthful person. That explains why the prosecution had chosen not to call him as its witness. It is trite that the discretion to call any witness lies with the prosecution and the court will not interfere with the exercise of that discretion

The Court's finding was that Dr. Osman was untruthful because Saiful didn't tell the three medical examiners at HKL about the insertion of the plastic object, and because it was also not mentioned in his police report.

So the reasoning of the Court was that because Saiful didn't mention it to anyone else, then he couldn't have said it to Dr. Osman. That is hardly convincing. It may be equally plausible to say that Saiful, having recognized his mistake in mentioning the plastic object, was careful not to repeat it when he was examined at HKL and when giving his police statement.

The other factor referred to by the Court was that if he had been told about the insertion of the plastic object Dr. Osman "would not have advised Saiful to go for a forensic examination at a government hospital". I don't see how that follows, because that was not the only complaint made by Saiful.

Osman testified that Saiful had also told him he had been penetrated by a "VIP", and if this was true then there was every reason to send him off for a forensic examination.

- *Absence of injury to anus and rectum [A.14 (h)]:*

I was surprised to see Dr. Wee include in his list of complaints the absence of any injury to Saiful's anus and rectum. He obviously assumes that I consider that to be a fact that adversely affects Saiful's credit.

That is not the case at all.

My criticism was directed at the Federal Court's conclusion that the findings by the medical examiners that there was no scarring, fissure or any sign of recent injuries to the external areas of Mohd Saiful's anus was consistent with his claim that lubricant was used.

The absence of injury was a neutral fact and could not be used to prove that lubricant was used and which is why no injury was found. For the same reason the defence could not reason that the absence of injury proved there was no penetration. I have never accepted that it could. It was all too speculative.

The point made in my final report was that while the absence of any bodily injury to the anus and rectum doesn't mean that penile penetration had not taken place, it was inconsistent with the violent forcible anal penetration described by Mohd Saiful as being "*laud Dan rakes*" ("fast and vigorous").

- *Saiful's delay in filing police report [A.14 (i)]:*

There may have been many reasons why Mohd. Saiful delayed filing a police report. In most cases, delay is not something for which a complainant in a sexual assault case may be criticised. In fact, I can't find anything in my reports complaining about Saiful's delay in filing a police report.

I did refer to Saiful's complaint to the medical examiners at HKL that he had been sexually penetrated by a well-known public figure and there was ejaculation. It wasn't independent evidence because it was based on what he said and not on material evidence independent of him – which is the definition of corroborative evidence.

The most it could be used for was 'recent complaint' — an exception to the hearsay rule — which could only bolster his credit, but his complaint could not make it true. The law says the same about the police report. Mohd Saiful could not corroborate himself.

E. The DNA Evidence

The DNA evidence was always critical because without it the case against Anwar Ibrahim depended only upon the credibility of the complainant, which was inherently unreliable.

The prosecution experts on the face of it gave a detailed and convincing explanation of the DNA evidence. It involved no more than matching the DNA samples. However, there were significant issues about the collection, labelling, storage, and analysis of the samples, which the appeal courts were unable to satisfactorily resolve.

The source of the samples was twofold. First, from objects seized by police from Anwar's cell on the morning after his arrest when he was detained overnight. Secondly, from swabs taken from the complainant Mohd Saiful by the medical doctors at HKL.

Dr. Wee attempts to diminish DSP Pereira's role in Anwar's case by suggesting that it "was merely a formal one and is not one which is intertwined with the facts in dispute" (See E.8). That assertion is simply false. It shows either a complete lack of understanding of the evidence or is an attempt to mislead.

DSP Pereria's role was central to the police investigation. He was the chief investigation officer who was in charge of the case. Importantly, it was his role to collect and secure the forensic evidence on which the prosecution case so much depended.

His primary responsibility was to preserve the integrity of the exhibits and ensure continuity was kept. However, his mishandling of the samples broke the evidentiary 'chain of custody', which was essential to maintain confidence in the integrity of the exhibits.

Swab collection and the way it is handled post-collection can determine if a sample will maintain its integrity and be useful in a courtroom or be deemed useless due to complications such as contamination, degradation, and insufficient yield.

The swabs from HKL were taken by DSP Pereria to his office with strict instructions from the doctors to freeze the samples to prevent the degradation process of bacteria. At trial, he admitted that he had breached police standing orders by not logging the samples into storage, but instead left them in a filing cabinet in his office for the next 43 hours. He compounded this by never telling Dr. Seah about the poor conditions in which the samples had been kept.

Before the swabs were sent for analysis DSP Pereria also opened the sealed bag into which the receptacles containing the swabs taken by the medical examiners had been placed for the purpose – so he claimed - of relabelling the receptacles.

The Federal Court justified DSP Pereria's opening of the sealed bag on the basis that he was obliged to follow police standing orders (IGPSO) to relabel the containers.

The IGPSO may have spoken about the general marking of exhibits, but it did not authorise the opening of secure exhibit bags containing forensic samples. But the judges ignored the fact that he also, on his own admission, breached those very same standing orders in the way he dealt with the samples. The Court made no mention of that at all.

DSP Pereria was present when the doctors examined Saiful and took the several swabs from him. He also witnessed the doctors placing each swab into a plastic receptacle, labelling them, signing the labels and then placing them into the sealed bag.

That process was adopted to ensure that each of the receptacles was properly labelled and the location from which the swabs were taken correctly identified.

Pereria was given the task of putting the receptacles into separate envelopes so that each might later be correctly identified. The appropriate time to do that was at the hospital when the doctors could witness that happening.

If he had done that then he would not have broken the chain of custody by later opening the sealed bag. For some inexplicable reason, he waited until he was alone with the receptacles at his office to do that. It is little wonder that suspicion was cast upon him.

Dr. Wee states that the samples were "naturally air-dried and placed in air-tight receptacles and that the chance of rapid degradation is unlikely". That wasn't true. There is no evidence at all that any of the swabs were air-dried before being placed into their containers. (B.5)

After the ends were cut off the swabs they were immediately put into the receptacles, which meant that they were still moist and full of bacteria. It also meant that the samples were certain to degrade significantly, particularly when contrary to instructions the receptacles were not frozen.

The Federal Court determined that there could have been no tampering because the label on each receptacle was intact, but the stickers on the receptacles were not tamper-proof.

Professor David Wells (who is incorrectly described in Dr. Wee's submission as "Dr. David Lawrence") was in fact correct when he testified that the seals on the receptacles were not tamper proof. Pages 2234-35 of the court transcript (Volume 12) records this exchange relating to the receptacles, which Justice Zabidin also thought was important):

Sankara Nair: Not tamper proof?

Prof. Wells: It's not tamper-proof and would not be tamper-evident. You could remove this (the seal), reseal it, and you wouldn't know.

At the trial, counsel for Anwar, Sankara Nair, also demonstrated how the type of tape used to seal the containers could easily be removed and then resealed. (B.6-7)

In fact he also highlighted the fact to Dr. Seah that on at least two of the containers the seal – on which signatures were written – had not be torn through the signatures, which was contrary to proper procedure.

The trial Judge was also aware of that fact, which led him to accept the possibility that the integrity of the samples had been compromised. See paragraph 206 of his trial judgment. He mistakenly refers to DW3, but obviously meant DW2, who is Prof. Wells.

His Honour found there was no need for the plastic exhibit bag to be opened and the receptacles relabelled. He said that: “by cutting open the plastic bag, confidence in the integrity of the samples was gone”.

If the labels could so easily be removed and resealed then the Federal Court’s reliance on the integrity of the receptacles is completely misplaced. Dr. Wee relies on the finding of the Federal Court that Dr. Seah “did not detect any tampering of the seals on the exhibits marked B to B10. We therefore find that there was no break in the chain of custody of those exhibits”. (See E.5)

Dr. Seah may well have seen seals that were intact on the receptacles, but is that enough? How did she know there had not been any tampering with or replacement of the seals? Did she recognise the signatures – if there were any – on the seals or did anyone identify the seals to her as being the originals placed on the receptacles at HKL? The answer is that none of these things happened. She just assumed they were the original seals.

When Dr. Seah received the receptacles she noticed that some of the dates on a few of the labels were incorrect, but she didn’t check to find out why that was so relying entirely on what the police had told her. She then relabelled the receptacles with her own identification ignoring what had been written on them.

At trial, it was further discovered that DSP Pereria also got the dates wrong when he relabelled the receptacles. Anwar’s counsel, Sankara Nair, pointed out to him that he had failed to notice that the date labels on some of the swabs were wrong.

Pereira was asked to read out the dates of two labels, both of which read “August 26”. The date written on each container should have been “June 28”, which was the date on which doctors at HKL took the forensic samples. Pereira was asked why he did not notice the error. He replied that he “didn’t see the mistake”

It just became a mess, which is why the issue of continuity and chain of evidence was so important. Unless the description on the receptacles could be relied upon, it was not possible to identify the exact location from which the swabs were taken, or if they had been taken at all.

DSP Pereria’s credibility was very much in issue. The Human Rights Commission of Malaysia (SUHAKAM) – ironically chaired by Shafee Abdullah at the time – found him to be an untruthful witness in a case involving the arrest of five lawyers who were assisting those arrested during a candlelight vigil outside the Brickfields police station.

At the time Pereira was head of crime division at the police station. It is true – as Dr. Wee states – the finding related to a matter unrelated to Anwar’s sodomy case, but it was still relevant to a general assessment of the credibility of a man the prosecution completely relied upon to prove the integrity of the DNA samples. (B.8)

The appeal courts concluded that the forensic samples were not compromised, but in order to do that they needed to be satisfied that Pereria’s explanation of what he did and why he did it was a truthful account. How could they be satisfied given the SUHAKAM finding and the proven facts?

- *Defence Expert Opinions*

Dr. Seah may well have been suitably qualified, but so too were the defence experts with considerably more experience and expertise. The court of appeal offensively discarded their opinions on the basis that they were no more than “arm-chair experts”, but made no attempt to properly consider the issues they had raised in their testimony.

The Federal Court wasn’t so parochial, but was equally dismissive of their expert opinions for the disingenuous reason that they hadn’t actually performed the actual DNA extraction.

As I pointed out in my report, this was a task a laboratory technician could easily do, but interpreting the results is an entirely different matter. Both men were more than qualified and experienced to offer expert opinion about the extraction process and analysis of the results.

Dr. Brian McDonald is a molecular geneticist specializing in DNA testing for forensic and diagnostic purposes. He has over 20 years’ experience in testing and analyzing DNA data. He has since 1996 run his own laboratory that performs DNA testing and provides forensic opinion work.

He is concerned principally with identity testing in his daily work. He has held a number of research positions in molecular biology. Between 1984 and 1990 he was a molecular biology team leader as Senior Scientist at the Oncology Research Centre at the Prince of Wales Hospital, Sydney.

He has been involved in about 5000 family law cases and about 500 criminal cases in various parts of Australia, Singapore and Brunei. He is a NATA assessor (NATA is the authority responsible for the accreditation of laboratories, inspection bodies, calibration services, producers of certified reference materials and proficiency testing scheme providers throughout Australia). He is the author of large number of academic papers about DNA.

After 1996 he became director of three of Australia’s leading DNA testing facilities, all were accredited to the ISO17025 and ISO 15189 standards. Dr. McDonald sat on the Federal Attorney General's committee that wrote the supplementary guidelines for the ISO 17025 standard for Forensic DNA testing.

Dr. Seah’s laboratory was never accredited to the ISO 17025 standard during the testing of these samples, but operated on probationary accreditation until it finally met the conditions when the original verdict was handed down.

No reasons were ever disclosed for not obtaining accreditation for any protocols used by the laboratory, but it was continually implied at trial they had accreditation to this standard. The protocols mentioned in her testimony were not followed e.g. stutter guideline or the dropout threshold or any recognized assessment of a mixture.

The deputy-prosecutor Shafee Abdullah set out to denigrate Dr. McDonald in his appeal submissions by claiming he had been discredited in judgments in some cases in Australia. Dr. Wee has picked up that theme by claiming that Dr. McDonald was ‘found to be a non-credible witness in his own country, Australia in not less than 3 cases, in 3 written judgments”. (F.2)

Dr. Wee speaks of “not less than 3 cases”. Unfortunately, he doesn’t cite any case references, but I assume he is referring to the cases relied upon by Shafee Abdullah in his appeal submissions – and I recall there were only two cases, not three. If one actually reads the cases, it is apparent that his claim just isn’t true.

His submission – and that of Shafee Abdullah - betrays a complete misunderstanding of those cases or is intended to mislead. In none of the cases relied upon by the prosecution was there ever a finding in the court judgment that Dr. McDonald’s was found not to be a credible witness.

The first case relied upon by Shafee Abdullah was *Bropho v. The State of Western Australia* [2007] WADC 77. In that case, Dr. McDonald’s expertise in the “evaluation of statistical data” was challenged. The issue in that case was not about DNA testing, but concerned the statistical model of the aboriginal population in Western Australia.

The judge thought that was an assessment that should be left to a mathematician specializing in genetics. There was no finding by the Judge that called into question McDonald's credibility.

The other case referred to by Shafee Abdullah was The *Queen v. Gallagher* [2001] NSWSC 462. In that case, Dr. McDonald – with other experts - gave expert testimony at preliminary hearing before trial (known as a *voir dire*) concerning the validation of the Profiler Plus system for DNA detection and comparison.

At issue was whether the system was sufficiently reliable to warrant the admission of DNA evidence taken from a crime scene. After the hearing of that preliminary issue, the trial judge ruled that he preferred the testimony of experts called by the prosecution and was satisfied that the evidence was probative and admissible. There was no finding that Dr. McDonald was a "non-credible witness".

The other defence expert at trial was Professor David Wells OAM. He is the head of forensic medicine at the Victorian Institute of Forensic Medicine and an associate professor in forensic medicine at Monash University, Melbourne. He has dealt with sexual assault cases for over 25 years and is accepted internationally as a recognized expert in his field. In 2008, he was awarded the Medal of the Order of Australia (OAM) for services to forensic medicine.

Shafee Abdullah didn't challenge Professor Wells' expertise and experience. In fact, he made little mention of him at the appeals and simply ignored his testimony, but what Professor Wells had to say was highly critical of the prosecution forensic evidence.

Apart from exposing the fact that the receptacles containing the samples were not tamper proof, he was also critical of what he described as inadequate and unsatisfactory recording of information by the medical doctors at HKL. He wasn't sure whether the ambiguity in describing the physical findings was brought about by "clumsiness, inexperience or bias".

He raised doubts about the ability of the examining doctor (Dr. Mohd Razali Ibrahim) because of the inadequacy of the medical record and the way in which the samples were taken. He had the impression the medical examiner was someone without experience.

- *Degradation of Samples*

While it is true that Dr. Seah wasn't prepared to go so far as to describe the samples as being in "pristine condition" – that was Dr. McDonald's description - she was prepared to concede there had been minimal degradation.

That was entirely inconsistent with the known history of the samples. And that is the point that Dr. Wee still doesn't get. It wasn't that the samples were readable, but that given the history of the samples they should have degraded to the extent that no reading should have been possible.

The results shown on the electropherograms – which plot of results by graphs from an analysis done by electrophoresis automatic sequencing - produced by Dr. Seah couldn't possibly have come from the samples taken from Saiful. That is because there was little, if any, degradation in the results. In the words of Dr. McDonald it was "pristine" – and it shouldn't have been.

Professor Wells commented about the samples being stored at room temperature for 43 hours. He thought the samples would have degraded quite quickly and that he would be "exceedingly surprised if DNA could be extracted after 48 hours". He said he expected that the samples would survive for no more than 24 to 36 hours, and that after 72 hours it would be "hardly worthwhile to test for DNA".

He was also concerned that the police had opened the "tamperproof" bag to relabel the receptacles before they were sent for analysis. He thought that the "integrity of the sample was critical" and that he would be "horrified if a sample of mine arrived at the laboratory other than intact in the way it was [originally] sealed". He was also concerned that at least two of the containers apparently had the wrong date marked on them and that no checks were made by the scientist who received them to clarify the matter.

When asked why semen might be found in the rectal passage other than by penile penetration, he replied there were other equally plausible explanations. For example, semen may have been

introduced into the rectum when the medical examination took place; it could have been present on the patient's skin in the anal region and introduced into the rectum when the examiner inserted the proctoscope.

He explained that the situation was complicated by the fact that two proctoscopes had been used to examine Mohd Saiful's rectum. Semen could also have been introduced by the insertion of any other object into the rectum or the sample may have been contaminated during the DNA extraction process.

Dr. McDonald shared the same views.

He was also critical of the way the forensic samples were labeled and handled and in particular Dr. Seah's failure to enquire about the apparent mislabeling of two sample receptacles.

She testified that when she noticed the apparent error in labeling, she gave the benefit of the doubt to the person who labeled the containers. She confirmed that she did not make any checks and simply "assumed" that they were samples taken by the medical doctors at the examination.

Dr. McDonald said that it just was not acceptable for a scientist to assume anything and in his view would be a "sackable offence". It was "absolutely fundamental to laboratory practice" to check if there had been a mistake and to ignore it was "not an option open to the receiving scientist".

At the trial, defence counsel Ramkarpal Singh asked him further about this aspect of the evidence.

Ramkarpal: If this was a mistake, what should have been done?

Dr. McDonald: We have to first verify with the person who wrote it, and if there is a mistake, we have to make a correction and document it. This is a basic procedure.

Ramkarpal: In this case, was there any evidence that it was corrected?

Dr. McDonald: No.

When asked about how the samples were kept he said that storing samples in an airtight container only hastened the degradation because the swabs would remain moist. He would not expect to see sperm 56 hours after ejaculation if the sample was kept at room temperature because that would enhance bacterial activity.

Ramkarpal: Do you agree that DNA samples are likely to degrade if they are not frozen?

Dr. McDonald: Yes, because bacteria will grow.

Ramkarpal: What would be the state of samples taken 56 hours after the alleged incident and [if they] were later kept at room temperature for about 48 hours, before they were sent for analysis?

Dr. McDonald: I would not expect to see sperm or DNA from these samples. If I did, it would have been grossly degraded.

It is accepted by DNA experts that all biological evidence should be packaged in paper bags or envelopes and not plastic. The packaging of biological evidence in plastic or airtight containers should always be avoided because the accumulation of residual moisture could contribute to the growth of DNA destroying bacteria and fungi.

Wet samples can degrade quickly, but the medical examiners at HKL used plastic containers, which may well illustrate their inexperience in taking DNA samples. Plastic containers are only advisable for packaging tissue samples and blood.

See internationally acclaimed forensic DNA expert Dr. John Butler, *Fundamentals of Forensic DNA Typing*, Academic Press, September 2014; also *Handbook of Forensic Services* (1999), Federal Bureau of Investigation, U.S. Department of Justice.

Dr. McDonald was particularly concerned that the results of the swabs taken from Mohd Saiful were "pristine" and showed no signs of degradation even though they were delivered to Dr. Seah for analysis almost 100 hours after the swabs were taken.

When examined by Ramkarpal Singh he responded saying that "the DNA taken from the rectal region showed pristine results. This was inconsistent as a high level of degradation ought to have been seen."

Ramkarpal: Would the DNA result for the rectal area be consistent with the history of the case?

Dr. McDonald: No. For samples that have been kept that long, it does not reflect the case history.

I. Evidence of a political conspiracy

Dr. Wee accuses me of "misinterpreting the thrust of the Federal Court decision on the (sic) Anwar's statement from the dock wherein this issue of 'political conspiracy' arose".

That isn't true. The court's "thrust" was abundantly clear to me. I understood it to be that the only source of an allegation of political conspiracy was from Anwar's dock statement and as it was in the form of a bare denial it carried no weight and didn't amount to a credible defence.

Dr. Wee makes the same error of law adopted by Shafee Abdullah when he criticizes Anwar for choosing the option of giving a statement dock, rather than testifying on oath.

There was no onus upon Anwar to prove anything, let alone his innocence. It was for the prosecution to prove his guilt. They are the accepted principles of law that apply in Malaysia, and many other countries.

My criticism of the Court was when it asserted there was no evidence of a political conspiracy – having dismissed Anwar's dock statement – that just wasn't true.

It completely ignored or overlooked the testimony of Mohd Saiful who gave exquisite detail of the meetings and communications with DPM Najib Razak, senior police and UMNO politicians. It was a glaring omission to make and it was contrary to the evidence at trial.

Dr. Wee states that contrary to my assertion Mohd Saiful did not return to Anwar's employment after the sexual assault. That is untrue. The evidence clearly confirms that he did and in fact he was photographed at a meeting or function with Anwar and other party officials the very next day.

More important is the fact that he returned to Anwar's employment only two days after having met with DPM Najib Razak and senior police officers with complaints of sexual abuse at the hands of his employer. There was absolutely no reason for him to return to the employment of a person who he expected would again sexually assault him – as he claimed had happened eight times before.

I have no idea what took place at those meetings – which are not denied by any of the persons Saiful claimed were there. I never said there was evidence of a political conspiracy, but simply reported what others had said about it.

Dr. Wee seems to have some inside knowledge because he gives the explanation that Saiful went there "to confide in the DPM and seek advice on the predicament he was in. He had never set out to engage or get the support of the PM and his wife before 'embarking on his story' as has been thought by opposition politicians".

Dr. Wee's explanation needs to be considered in the context of what Mr. Najib said about his contact with Saiful at that time. He first told reporters that he was not involved in the case at all and denied knowing Mohd Saiful.

But when the opposition produced a photograph showing the complainant with a staff member at the DPM's office, Mr. Najib said that the photograph was taken three months earlier on the occasion of Mohd Saiful's visit to his office to apply for a government scholarship.

This was reported in '*The Star'* newspaper on 30 June 2008, which is majority-owned by the Malaysian Chinese Association (MCA), the third-largest party in the ruling Barisan Nasional alliance.

Three days later, however, Mr. Najib admitted that several days before the alleged incident, Mohd Saiful had in fact met with him at his residence, at which time he revealed being sodomized by Anwar.

At a press conference held at his office at parliament, the then DPM said: "I received his visit in my capacity as a leader and he as an ordinary citizen who wanted to tell me something ... I don't (sic) know him before this."

The Prime Minister denied he had advised Mohd Saiful to lodge a police report. This interview was reported in *Bernama*, on 3 July 2008, which is the news agency of the Malaysian Government.

It further emerged that the day before the alleged incident with Anwar, Mohd Saiful met with SAC Mohd Rodwan in Room 619 of the Concorde Hotel in Kuala Lumpur.

Mohd Rodwan had played a key role in the police team in Anwar's earlier trials in 1998. He is particularly remembered for allegations against him of illegally using Anwar's blood sample for DNA testing and allegations of planting fabricated DNA samples on the mattress that was brought to court.

Furthermore, the Prime Minister had the opportunity to put the record straight and testify about the purpose of his meeting with Saiful and what was said between them, but he fought attempts by the defence to call him as a witness and even engaged lawyers to appear on his behalf at court to have the witness summons set aside.

My view, which is explicitly stated in my report, is that the allegation of a political conspiracy is not proved on the evidence. Suspicion doesn't amount to proof of that happening.

But the failure of the persons at the meetings – apart from Mohd Saiful - to properly respond to these accusations and not give their own accounts only invites speculation about what happened. They only have themselves to blame.

Anyway, the defence of Anwar Ibrahim doesn't need to depend on the existence of a political conspiracy. The case can be judged by having regard only to the evidence proved at trial. The prosecution case relied primarily upon the doubtful credibility of the complainant Mohd Saiful.

It also relied on the DNA evidence, which potentially could have corroborated his account, but it was exposed as being unsound. At the end of the day, the evidence was not sufficient to prove the case against Anwar Ibrahim and his acquittal at trial should have been upheld.

• Conclusion

Dr. Wee concludes his critique of my report by stating that: "what is critical is Anwar never explained how his semen (with spermatozoa) were found in the deepest intimate part of Saiful's anus. And that these spermatozoa were about 54 hours or so old and therefore consistent with Saiful's allegation that he was sodomized about 54 hours earlier or so. Where would the government, or the police find Anwar's spermatozoa of that age to be placed in Saiful's anus?"

This conclusion assumes a number of facts.

(a) that spermatozoa were found in the samples obtained from HKL;
(b) that the spermatozoa were "about 54 hours old";
(c) that Saiful was anally penetrated to ejaculation "54 hours earlier or so"; and
(d) that the spermatozoa belonged to Anwar.

First, there was doubt as to whether it would have been possible to find any evidence of spermatozoa given the time frame and the known history of the samples provided to Dr. Seah.

No slides were taken of the samples at the time the swabs were taken from Mohd Saiful or soon after to test for spermatozoa. Dr. McDonald testified that it had been standard practice for at least 30 years

to microscopically examine the samples by using slides before sending them to the laboratory for analysis.

He said it was the only way one would know what was on the swabs. It was, he said, absolutely essential in cases of alleged sexual assault.

Dr. McDonald explained that it was critical for examining doctors, who were taking forensic samples from a complainant, to make slides to identify and preserve the alleged spermatozoa in those samples. He said that the reason for immediately making slides was to stop bacterial growth that would destroy the cells and DNA.

He added that the history of the samples and their poor storage for 43 hours would have caused the samples to degrade. However, that was something not seen by Dr. Seah when she later made slides and examined them under the microscope. Professor Wells also cast doubt on whether spermatozoa would have been observed given the time frame and known history.

When cross-examined, Professor Wells was asked about a scientific article by UK researchers that found evidence of spermatozoa from rectal swabs after 65 hours.

The article, “Spermatozoa: Their Persistence After Sexual Intercourse”, from the *Forensic Science International Journal* (1982) by G.M. Willot and J.E. Allard of the Metropolitan Police Forensic Science Laboratory, London, reported a finding of spermatozoa on a rectal swab after 65 hours and 46 hours on an anal swab. Based on the article, the prosecution suggested to him that there could have been detectable traces much longer than he thought possible.

He responded that he was aware of the article, but that in the 30 or so years since that single result, to his knowledge no other similar case had been reported nor had he or his colleagues ever found a similar result. He stated that an aberration did not establish a scientific fact.

He considered that apart from this one exception, the medical literature concluded that spermatozoa had a shelf life of about 36 hours. He said that to get an extraction after 36 and up to 48 hours was “exceedingly rare” and that “after 54 hours the chance of obtaining DNA from a living person was zero”.

He emphasized that those times were reduced if the sample was not kept in anything other than optimal circumstances.

Secondly, there is no evidence that the spermatozoa – which Dr. Seah claimed to have observed under the microscope – were “about 54 hours old”. All she said is that the spermatozoa had lost their tails, but she gave no estimation of how old the spermatozoa might be. In fact, she received the samples 96 hours after the sexual penetration occurred, not 54 hours as claimed by Dr. Wee.

Thirdly, Saiful may well have had anal sex with another male during that time frame, which was consistent with the finding of third male in the mixture of DNA cells taken from the high rectal swabs.

Dr. Wee complains about speculation, but repeats the possibility given by the Federal Court that the presence of a third male make have come from contamination by Dr. Osman – who was the first to examine him. But the then goes on with more fanciful explanations such as contamination from a toilet seat.

Fourthly, the government chemists Dr. Seah Lay Hong and Nor Aidora Saedon testified that they were able to positively match Anwar’s DNA with DNA obtained from semen from the complainant’s anus (“Male Y”).

Dr. McDonald questioned that conclusion. He said that the process of attributing a particular profile from an unknown sample to the donor of a reference sample is essentially never done and does not conform to accepted international methodology.

He said: “It is a matter of statistically measuring the likelihood of a match. The possibility is expressed in terms of “not excluded, but not proven ... you can never say it is that person”. Dr. McDonald was concerned that these witnesses had expressed so confident an opinion without performing any statistical analysis.

Proper extraction?

The other reason to doubt a positive match to "Male Y" was whether or not Dr. Seah properly carried out the extraction process sufficiently to distinguish between sperm cells and non-sperm cells.

Dr. McDonald was critical of her extraction technique saying that she did not do the differential extraction process (DEP) test from the samples taken to resolve the issue of sperm and non-sperm cells — meaning the DNA could have come from something other than sperm cells.

At the trial, Anwar's counsel Ramkarpal Singh went through the results of Dr. Seah's DNA analysis, focusing on the samples taken from Mohd Saiful's rectal area. These had been translated into a graphic format known as an electropherogram that plots DNA fragments by size.

Dr. McDonald said he was surprised to see there was no evidence at all of any degradation and found that to be inconsistent with the known history of the samples.

He then explained that in sexual assault cases, a process called differential extraction had to be done to separate sperm cells and non-sperm cells to obtain DNA profiles. He was not satisfied that the first extraction performed by Dr. Seah was sufficient to remove all of the epithelial cells within the liquid.

He said that according to Dr. Seah, some of the DNA within the mixture did not come from sperm cells. He was asked about that.

Ramkarpal: What if the sample shows a mixture of sperm and non-sperm cells?

Dr. McDonald: In this case, some of the DNA did not come from sperm. So there was no appropriate separation.

Ramkarpal: Did the chemist conduct a proper extraction process?

Dr. McDonald: She did not do it properly as the complainant's DNA should not have been there. I would say her evidence is a guess.

Ramkarpal: Why is that so?

Dr. McDonald: She did not test a sample for sperm cells on a slide to determine if it was totally pure.

The point is that the DNA profile of 'Male Y' may not have come from sperm cells, but rather from non-sperm or epithelial cells. These epithelial cells could have come from mere contact or contamination. If this is so, then Anwar's DNA profile was not extracted from spermatozoa at all.

Finally, Dr. Seah conducted the prostatic acid phosphatase (AP) test, which she claimed was positive to semen. However, Dr. McDonald said that based on the literature one would not expect to see much evidence of spermatozoa or AP after about eight hours from ejaculation.

He concluded: "What we have here is a serious disconnect. Whatever Dr. Seah saw wasn't semen obtained 56 hours after the assault and after being kept 43 hours at room temperature. The positive AP activity [she saw] was inconsistent with the history. Bells would be ringing. It would alert a scientist that the result was inconsistent with the known history."

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