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► CASE No. MAL/15 - ANWAR IBRAHIM - MALAYSIA

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

THE TRIAL OF ANWAR IBRAHIM

MARK TROWELL QC
August 2010

Introduction

My report was intended to relate to the critical period of the trial of Datuk Seri Anwar bin Ibrahim ("Anwar") in the High Court of Malaysia at Kuala Lumpur in August 2010 when medical and scientific experts were due to be called by the prosecution to prove the central allegation of sexual penetration.

The complainant Mohd Saiful Bukhari Azlan ("Mohd Saiful") had five months earlier testified how Anwar had forcibly penetrated his anus with his penis.

In his opening remarks at the start of the trial, the chief prosecutor told the Judge that Mohd Saiful's allegation of anal penetration would be supported by scientific evidence establishing that Anwar's DNA had been detected in specimens taken from his anus and rectum when he was medically examined two days after the incident.

He further explained that the fact that the medical examination had failed to find any evidence of physical injury to the anus or rectum was not conclusive evidence that penetration had not occurred.

The trial was fixed to be heard during the entire month of August, but another issue derailed the trial yet again. This report concerns that issue and the considerable impact it has had on the general integrity of the trial.

However, before discussing this issue, it is worth providing some background to these critical events.

General Background

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

On 2 September 2004 the Federal Court, by a majority of 2:1, upheld Anwar's appeal overturning the convictions and ordered his immediate release from prison. The Court was later to reject his appeal against conviction for acting corruptly, but he had already served that sentence.

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

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

During his lengthy period of incarceration, Anwar Ibrahim became the symbol of political opposition to the Mahathir regime. Amnesty International declared him to be a prisoner of conscience, stating that he had been arrested in order to silence him as a political opponent.

Prevented by legislation from returning to Parliament until April 2008, Anwar was still considered by many as having the potential to become the Prime Minister of Malaysia.

The ruling alliance, Barisan Nasional, called an early election for 8 March 2008, which some commentators observed was an attempt to prevent Anwar from returning to parliament.

The election was a disaster for Barisan Nasional. Opposition parties seized a third of parliamentary seats and five states in the worst ever showing for the coalition that had ruled Malaysia for half a century.

Anwar's wife, Dr. Wan Azizah Wan Ismail, who for a time had been Malaysia's first female opposition leader, declared that she would resign her Permatang Pauh parliamentary seat and force a by-election.

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

Anwar Charged

Earlier that year, and just before the national election in March 2008, a young man named Mohd Saiful Bukhari Azlan ("Mohd Saiful") was invited by a friend, employed by Anwar, to work in the opposition leader's office.

Mohd Saiful, then aged 23 years, was unemployed having left his electrical engineering studies at Universiti Tenaga Nasional because his academic performance failed to meet the required standard. He joined as a volunteer, but later became a paid member of staff as Anwar's private assistant.

On 28 June 2008, Mohd Saiful lodged a police report claiming that not only had Anwar sodomized him on the afternoon of Thursday 26 June 2008, but that he had been sexually assaulted some eight or nine times against his will by Anwar over the previous two months.

On 29 June 2008, non-government political news website Malaysiakini reported that an aide of Anwar Ibrahim had lodged a police report claiming that he had been sodomized by him.

The next day, Anwar insisted he would fight a by-election later that year and form a new government despite rumours he was soon to be charged with sodomy. He announced that he would contest a by-election for the Permatang Pauh parliamentary seat vacated by his wife and PKR leader, Dr. Wan Azizah Wan Ismail.

On 30 June 2008, the Malaysiakini news service reported that police investigations into the sodomy complaint against Anwar Ibrahim had been completed and that the papers had been delivered to the Attorney General's Chambers for further action. It further quoted senior opposition party officials as saying that Anwar might be arrested in the next 48 hours, arguing that it was to stop him contesting the by-election.

Anwar was arrested on 15 July and kept overnight but no charges were filed over the accusations made by Mohd Saiful two weeks earlier. At the time, Anwar refused to provide a DNA sample, claiming that it could be misused to fake evidence against him. Police told Anwar to report back to them within 30 days.

After his release, the former deputy premier said that the allegation was a high-level conspiracy to prevent him from entering parliament, adding that he had refused to give his DNA as he did not believe in the system.

"It should not be used as a personal vendetta against me. I was questioned for 5½ hours; I was stripped naked including the examination of my private parts. Why treat me like a major criminal and a public enemy?" [Reuters, Thursday 17 July 2008]

Anwar said that the police chief harboured a grudge against him after he lodged a report with anti-corruption agency officials saying that the police chief had fabricated evidence against him in an assault case 10 years before.

Anwar was finally brought before the Sessions Court on 7 August 2008 charged under s. 377B of the Penal Code. The charge alleged that he committed the offence of sodomy against Mohd Saiful on 26 June 2008. Anwar pleaded not guilty to the charge.

Despite the allegations of earlier sexual assaults, the prosecution chose to charge Anwar only with the last act allegedly committed at the Desa Damansara Condominium.

With Anwar in the midst of a political comeback, many supporters viewed the sodomy charge as a desperate attempt by the Government to cling to power. The timing of the charge, they suggested, was just too coincidental with his return to politics.

Mohd Saiful's Allegations

Mohd Saiful alleged that on the day of the alleged incident he was asked by Anwar to come to a private condominium not far from the centre of Kuala Lumpur to meet with him and discuss work-related matters and deliver documents.

He alleged that he arrived at about 2.45 p.m. He stopped at the security gate and gave the password "Mokhtar", which he claimed Anwar had told him to use to enable him to enter the compound. Video cameras at the security gate recorded his arrival and later departure. Security cameras also monitored the public areas of the apartment complex.

Having parked his vehicle, Mohd Saiful took the lift to the fifth floor and, having entered the apartment, says he found Anwar seated at the dining table. He said that Anwar asked him to have sex with him and, being "angry and frightened", he complied with the demand and then went into the bedroom where the alleged offence took place.

Medical Examinations

Two days later, on 28 June 2008, Mohd Saiful went to the private hospital Pusat Rawatan Islam ("Pusrawi") in Jalan Tun Razak to be medically examined.

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

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

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

Various swabs were taken from his body for scientific analysis. These included swabs taken from his tongue, nipples, body, perianal region and rectum. High and low rectal swabs and blood samples were also taken for DNA profiling. For some reason, these samples took two days to reach the chemistry laboratory for analysis and there was some issue about the proper labelling of the exhibits.

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

It is well known that victims of sexual assault almost always wash their bodies in an attempt to "cleanse" themselves of the sexual contact. Very few have the presence of mind not to wash themselves 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.

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

Before the adjournment of the trial proceedings on 17 February 2010, Anwar's lawyer Sankara Nair claimed there were many questionable aspects of the prosecution DNA evidence and announced that the defence had appointed foreign DNA and forensic experts to debunk the prosecution's claim of a DNA match.

Mr. Nair said that the PKR leader had engaged the services of DNA expert Dr. Brian Leslie McDonald from Sydney, Australia, and two forensic experts, Professor Dr. C. Damodaran from Chennai, India and Associate Professor David Lawrence Noel Wells from Melbourne, Australia.

The Malaysian Penal Code: "unnatural offences"

Anwar Ibrahim was charged with committing an act of sodomy. It is more properly described as "carnal intercourse" contrary to Section 377B of the Penal Code.

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

Section 377A of the Penal Code states:

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

Section 377B of the Penal Code states:

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

Section 377D of the Penal Code states:

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

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

Particulars of the Charge

The charge (translated from Bahasa Malaysia) reads as follows:

"That you, on 26 June 2008 at about 3.01 p.m. to 4.30 p.m. at Unit 11-5-1, Desa Damansara Condominium, No. 99 Jalan Setiakasih, Bukit Damansara, Kuala Lumpur, in the Federal Territory of Kuala Lumpur, did intentionally commit carnal intercourse against the order of nature with Mohd Saiful Bukhari bin Azlan by inserting your penis into his anus; and thereby committed an offence punishable under Section 377B of the Penal Code.

Punishment: If found guilty, [the culprit] shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping."

Transfer of the Case to the High Court

On 5 March 2009 Anwar's case was transferred to the High Court on a Certificate under s. 418A of the Criminal Procedure Code ("CPC") signed by the Attorney General, Tan Sri Abdul Gani Patail ("Gani Patail"), in his capacity as Public Prosecutor. That provision of the CPC enabled him to transfer any matter from a subordinate court to the High Court.

One of the first complaints made by Anwar's legal team was the transfer of the proceedings to the High Court.

The Attorney General's involvement was controversial because of allegations that he had fabricated evidence against Anwar at the first sodomy trial when he was the chief prosecutor. In fact, because of that the then Prime Minister Abdullah Badawi pledged in July 2008 that Gani Patail would have no part in Anwar's trial.

The Sessions Court Judge had refused the transfer on the basis that the certificate ordering the transfer was invalid because of a legitimate expectation arising from the public promise made by the Prime Minister that Gani Patail would not be involved in the case.

He also rejected the submission that the Attorney General was exercising an administrative function in respect to the transfer, finding that he was exercising a quasi-judicial function when he signed the transfer certificate. As such, he was acting in a position of conflict (or perceived conflict) of interest and the rule against bias would disqualify him from issuing the certificate.

The High Court in *Anwar Ibrahim v PP.*, with a bench including Justices Abdul Hamid Embong, Abu Samah Nordin and Jeffrey Tan Kok Wah JJCA, unanimously overruled Judge Komathy's decision, agreeing with the prosecution's submission that the Attorney General's involvement was peripheral and simply administrative.

High Court Trial

Justice Datuk Mohamad Zabidin Mohd Diah ("Judge Zabidin") of the Malaysian High Court was appointed to hear the case, which was listed to commence on 4 February 2010 at the Courts Complex at Jalan Duta.

On that day, Datuk Seri Anwar bin Ibrahim appeared in the High Court of Malaysia to stand trial for allegedly sodomizing Mohd Saiful more than 20 months before at a private condominium at Desa Damansara.

The defence team included lead counsel Karpal Singh, Sankara N. Nair, Datuk Param Cumaraswamy and Ram Karpal. The prosecution team included lead counsel Solicitor General II Datuk Mohd Yusof Zainal Abiden, Datuk Nordin Hassan, Wan Mohamad Hanafiah Zakaria, Wong Chiang Kiat, Noorin Badaruddin and Farah Azlina Latif.

Strike Out Application – No Injury

Even before the commencement of the trial, Anwar applied to the trial Judge to strike out the charge for abuse of process.

The trial Judge heard the application on 1 December 2009. Karpal Singh submitted that there was no evidence of anal penetration because the medical report had found no injury to the anus or rectum. On the basis of the medical reports alone, argued Karpal, the prosecution should be struck out as oppressive and vexatious.

Deputy Prosecutor Datuk Mohamed Yusof opposed the application saying that clinical tests alone were insufficient to show there had been no penetration. He submitted that the medical reports were only part of the evidence and, to prove penetration, the prosecution would present not only the complainant's direct testimony but also forensic, circumstantial and documentary evidence. He said that there would be scientific evidence to show that material found in Saiful's anus matched Anwar's DNA. On that basis, he concluded, the prosecution would establish a *prima facie* case of anal penetration.

Judge Zabidin accepted the prosecution submission and refused to strike out the charge.

The defence then applied to stay the proceedings pending an appeal to the Court of Appeal, but the Judge ruled there were no special circumstances to stay the trial and ordered it to commence on 4 February 2010, but it was adjourned four days later pending the outcome of the appeal.

The Court of Appeal heard the appeal on 12 February before a three-judge panel of justices including Datuk Wira Abu Samah Nordin, Datuk Sulaiman Daud and Datuk Azhar Izhar Ma'ah.

Karpal Singh, on behalf of the Anwar, submitted that the sodomy charge should be struck out because of the findings of three doctors from the Kuala Lumpur Hospital, who had stated in a medical report that there were "no conclusive clinical findings suggestive of penetration to the anus".

He submitted that proof of penetration was an essential element to be proven in a sodomy charge; yet whatever the complainant might say there was no conclusive evidence of it because of the medical findings.

In reply, Datuk Mohamed Yusof submitted that the medical report alone could not be relied upon as the trial Judge needed to hear the testimony of the witnesses adduced in court before deciding whether there was sufficient evidence of penetration.

The decision of the Court of Appeal was not delivered until 17 February 2010. In a unanimous decision, it rejected Anwar's appeal to strike out the charge.

In dismissing the appeal, Justice Abu Samah said that Anwar had not shown the charge or the prosecution against him to be oppressive or an abuse of process for the court to exercise its inherent power to strike out the charge purely on the medical report.

"We agree with the prosecution that the medical report (from Hospital Kuala Lumpur) is not conclusive and the only evidence", said Justice Abu Samah, adding it was only corroborative of what the doctor might say in court. He said that the prosecution had by affidavit confirmed that the case would be based on oral testimony and forensic evidence, and not solely be based on the medical report.

Application for Judge to disqualify himself - Actual Bias

The trial resumed with the prosecution calling the complainant Mohd Saiful to testify. On the second day of the trial (5 February 2010), the trial Judge ordered that part of the proceedings be held 'in camera'. He did so based on an application by the defence to close the court to the media and members of the public because of the apparently graphic nature of the complainant's testimony concerning the alleged sexual acts.

Judge Zabidin interrupted the proceedings during Mohd Saiful's testimony to enable the court to view the alleged crime scene at the Desa Damansara condominium, which he included in his in-camera order. The media was barred from entering the condominium, but photographs were taken outside and in the public areas of the complex.

Somehow, a photographer from the Malay daily newspaper Utusan Malaysia managed to photograph Saiful in the main bedroom of the apartment pointing towards the bed, which it later published together with some captions that contained material from the in-camera proceedings.

Karpal asked the Judge to cite the newspaper for contempt not only because it had defied his in-camera order, but also because the published material was intended to show Anwar in a bad light. He added that the political party United Malays National Organisation (UMNO), of which the Prime Minister was the president, owned the newspaper and he contended that the material was politically motivated.

Judge Zabidin ruled that evidence in relation to a bed in the Desa Damansara condominium had been given in open court.

He also ruled that Utusan had not broken reporting restrictions on the visit to the condominium. He refused either to cite the newspaper for contempt or warn it not to publish this type of material.

On 8 February 2010, as the trial entered its fourth day, Karpal Singh applied for the trial Judge Zabidin to disqualify himself from further hearing the trial. He submitted the Judge's refusal to cite the newspaper for contempt for its reporting of the visit at the Desa Damansara condominium and news reports of the visit demonstrated actual bias on his part. The trial Judge refused to do so.

The defence filed an appeal to challenge Judge Zabidin's ruling, but it was subsequently withdrawn.

Allegations of political Involvement

There were some interesting twists in Mohd Saiful's testimony at trial.

For example, he revealed that he had, only days before the alleged sexual assault, met with the then Deputy Prime Minister and a senior police officer, Senior Assistant Commissioner Rodwan Mohd Yusof.

Mohd Saiful's testimony confirmed what had been suspected by the defence, namely that he was somehow connected to the former Deputy Prime Minister Najib Tun Razak.

Soon after Anwar's arrest, Mr. Najib told reporters that he was not involved in the case at all and at first denied knowing Mohd Saiful, but when the opposition alliance produced a photograph taken of the complainant with a staff member at the deputy Prime Minister's office, he said that the photograph had been taken three months earlier on the occasion of Mohd Saiful's visit to his office to apply for a government scholarship. [The Star, 30 June 2008]

However, three days later Mr. Najib admitted that, several days before the alleged incident on 26 June 2008, Mohd Saiful had in fact met with him at his residence, at which time he revealed he had been sodomized by Anwar.

Mr. Najib told a press conference at his Parliament office that:

"I received his (Mohd Saiful's) visit in my capacity as a leader and he as an ordinary citizen who wanted to tell me something ... I don't know him before this." [Bernama News Agency, 3 July 2008, 23:20]

The Deputy Prime Minister denied he had advised Mohd Saiful to lodge a police report.

It further emerged that, the day before the alleged incident with Anwar on 26 June 2008, Saiful met Senior Assistant Commissioner Rodwan Mohd Yusof (then Deputy Director of the Criminal Investigation Department of the Royal Malaysian Police Force, now CPO Melaka) in Room 619 of the Concorde Hotel at Kuala Lumpur.

SAC Mohd Rodwan refused to comment to media when asked about the meeting. Anwar supporters claimed this was further evidence of a conspiracy to discredit the opposition leader. Rodwan had played a key role in the police team in Anwar's earlier trials in 1998. He is particularly remembered for allegations of having illegally used Anwar's blood sample for DNA testing and allegations of planting fabricated DNA samples on the mattress brought to court.

Anwar maintained throughout the proceedings that "... this is a malicious, trumped up case and shouldn't have started in the first place." [Reuters, 26 March 2010]

In the weeks leading up to the commencement of the trial, Anwar told the media that he intended to subpoena Prime Minister Najib and his wife as witnesses at his trial. [New Straits Times, 3 February 2010]

Delay in Trial Process

By August 2010, the trial had already drifted over a period of more than six months, interrupted at times for various reasons, but for the most part because of delays pending the resolution of appeals against rulings made by the trial Judge.

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

There was also considerable manoeuvring by both parties in the first few months of the trial. The proceedings were subject to delays while Anwar's lawyers lodged several appeals relating to issues which, they claimed, affected the fairness of his trial.

So far the defence has not succeeded on any application to the trial Judge made during the hearing or on any appeal to the higher courts. Anwar's lawyers claim that this confirms a general bias of the justice system against their client.

Refusal of Prosecution to disclose material - No witness list

I have already referred to various applications and subsequent appeals, including whether the prosecution should be struck out for an abuse of process and whether the trial judge should disqualify himself for actual bias.

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

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

On 16 July 2009, the trial Judge ordered the prosecution to disclose to the defence various items including such things as the security CCTV recording from the condominium where it was alleged the crime occurred; DNA samples; the worksheets and case notes of the chemists who conducted DNA

testing and analysis; all witness statements, and medical notes of the complainant's physical examination at Hospital Kuala Lumpur.

The prosecution immediately lodged an appeal challenging Judge Zabidin's ruling.

The Court of Appeal and Federal Court overruled the trial Judge's order upholding the prosecution appeal and denying Anwar the material he argued was critical to the preparation of his defence.

Essentially, the courts took the view that the Judge's ruling had gone beyond what was required of the prosecution under the relevant legislation to disclose material before trial. Both courts found he had exceeded his jurisdiction.

It must be said that the prosecution appeal related only to the trial Judge's liberal interpretation of the legislation governing pretrial disclosure. That did not affect the Judge's discretion to order disclosure during the trial. Judge Zabidin retained an overall discretion to order the prosecution to disclose material that was relevant to the defence and if he thought that, as a matter of fairness, it should be disclosed.

However, when the defence made identical applications for disclosure during the trial, Judge Zabidin appeared to have had a change of mind. He refused to order the disclosure of material which he originally thought was relevant and, as a matter of fairness, should be disclosed to the defence. There seems to be no apparent reason for his change of mind.

Throughout the course of the trial, the defence has repeatedly asked the prosecution to provide a copy of its witness list, but it has flatly refused to do so. Judge Zabidin continues to refuse applications to order the prosecution to provide a witness list. Accordingly, the defence only has partial knowledge of who is to be called.

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

That may not be so oppressive in the case of the medical and scientific witnesses, where reports are provided, but there is an obvious forensic disadvantage with other witnesses. It is difficult for the defence to adequately prepare the cross-examination of a witness when it only knows what the witness will say when he or she testifies. It is also extremely difficult for the defence to challenge the credibility of a witness if the witness cannot be impeached over previous inconsistent statements.

A classic example of forensic disadvantage is the prosecution's refusal to disclose Mohd Saiful's police statement made during the police investigation.

Federal Court Appeal - Mohd Saiful's Police Statement

By August 2010 most of the disclosure issues had been played out in the appeal courts and on each occasion the defence appeals were rejected, but there were still some procedural obstacles to overcome.

As late as 19 August 2010, the defence was arguing an appeal before the Federal Court concerning the disclosure of Saiful's police statement, which it claimed was critical to an assessment of his credibility. Not only that, but the defence claimed that, if it was proved right, the prosecution case would collapse.

The prosecution had refused to disclose the statement and Judge Zabidin would not order its disclosure; so the defence appealed his decision to the Court of Appeal and when that was unsuccessful then to the Federal Court.

As the appeal was argued and heard in the week of my observation of the trial, it is worth reporting it in brief detail because it is illustrative of the general approach taken by the appeal courts in refusing to intervene in the trial.

Recall that Anwar was charged with voluntarily performing carnal intercourse against the order of nature. However, Mohd Saiful testified at the trial that the sexual act was committed without his consent.

The defence believed that Mohd Saiful's statement, taken by police at the initial stage of the investigation, must have been consistent with the charge preferred by the Public Prosecutor, which alleged consensual sex. It submitted that if Mohd Saiful's statement contradicted his testimony then the prosecution case would collapse.

The prosecution responded by saying that, whatever the witness might say happened, it was the Public Prosecutor who decided what charge was appropriate in the circumstances of each case.

The Court of Appeal refused to intervene to overrule the trial Judge's decision because, as it considered it not to be a final order, it was not something an appeal court could review.

Court of Appeal Judge Datuk Sulong Matjeraie said the High Court's ruling to dismiss Anwar's application to obtain Saiful's statement did not come within the meaning of a "decision" in the Courts of Judicature Act 1964.

The Court of Appeal produced brief reasons for decision, which are worth reporting.

"Broad Reasons for our decision:

We have anxiously considered the submissions of both parties to this appeal. After careful deliberations:-

1. We are of the view that the ruling of the learned trial Judge was made in the course of a trial where the rights of the Appellant has (sic) not been finally disposed off (sic). Therefore the ruling in refusing to allow the statements of the complainant recorded under section 112 Criminal Procedure Code, to be produced for inspection by the Appellant is not within what is envisaged by the definition of "decision" as provided for by section 3 of the Courts of Judicature Act 1964.
2. Our jurisdiction to hear and determine the appeal is governed by section 50 Courts of Judicature Act 1964. We have no jurisdiction to hear an appeal that is not against a decision made by the High Court. The term decision is clearly defined by section 3 of the same Act which says:

"decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties. We are fortified in our decision that the accompanying Explanatory Statement when the word "decision" in section 3 of the Courts of Judicature Act 1964 was amended. The reasons for the amendment were stated thus:

"At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This causes a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts."

See also the decision of Rose C.J. in Public Prosecutor v Hoo Chang Chwen [1962] 28 MLJ 284; Saad bin Abas & Anor v Public Prosecutor [1999] 1 MLJ 129 C.A.; and the decision of the English Court of Appeal in Regina v Collins [1970] 1 QB 710

3. It cannot be gainsaid that the appeal filed by the Appellant herein is really an interlocutory appeal as it is an "appeal that occurs before the trial court's final ruling on the entire case."
4. Therefore, we have no jurisdiction to hear and determine this appeal.
5. As such it is our unanimous decision to dismiss this appeal.

In Long bin Samat's case, Suffian L.P. said "In our view, this clause from the supreme law (referring to Article 145(3) of the Malaysian Constitution) clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the court cannot compel him to institute any criminal proceedings, which he does not wish to institute or to go on with any criminal proceedings, which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pages 32-3 in *Smedley Ltd v Breed* [1974] 2 All ER 21.) Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature."

- (a) The discretion of the Public Prosecutor to prefer a lesser charge against the Appellant is no basis to warrant the request of the defence to be supplied with all the statements of the complainant;
- (b) There is no power reposed in the Court to grant the application by the Appellant. The appeal is clearly untenable and misconceived.

We are unanimous in our decision to dismiss this Appeal."

It is interesting to note that, having stated that the court had no jurisdiction to hear the appeal, the judges then went on to offer their joint opinion as to whether the defence's argument for requesting disclosure would ultimately succeed, concluding that it would not.

The defence then brought an appeal in the Federal Court, which was heard on 19 August 2010 before a bench including the Chief Judge of Malaya Tan Sri Arifin Zakaria, Tan Sri James Foonga and Datuk Raus Sharif.

Karpal Singh for the defence submitted that the brief two-page reasons of the Court of Appeal did not constitute sufficient reasons and asked the Federal Court to direct it to provide proper grounds.

Deputy Public Prosecutor Mohd Yusof submitted that the reasons provided, although brief, constituted a judgment of the court and that the Federal Court would set an unfortunate precedent should it direct the Court of Appeal to write a judgment. He also submitted that Anwar could not appeal the High Court decision, as it was not a final order.

Datuk Mohd Yusof said it was well established that the defence could not appeal if it failed in an impeachment proceedings because it was made in the course of the trial. "So how can the defence now claim that the failure to obtain the statement be considered as a final decision", he asked the court.

He further submitted that it was the prerogative of the Public Prosecutor to frame a charge of sodomy whether alleging consent or no consent. "In a sodomy case, the main ingredient for the prosecution to prove is penetration of the penis into the anus", he submitted.

Of course, the Public Prosecutor was technically correct on this point because in Malaysia anal penetration is a criminal offence whether consensual or non-consensual. In some other legal jurisdictions consent is the relevant issue because anal penetration by consenting adults is not a criminal act. Penetration in Malaysia also includes fellatio or oral sex, which is an offence between consenting heterosexual and homosexual adults alike.

The Federal Court has reserved its decision but, given the approach taken by it in the past, it is unlikely to uphold the appeal almost certainly on grounds that it lacks jurisdiction to hear an interlocutory order made during a trial.

Saiful's Affair with Prosecutor Farah Azlina Latif

On 3 August 2010, Anwar's defence team filed an application that the sodomy charge be struck out on the basis that the integrity and impartiality of the trial had been compromised because of the revelation of an affair between a member of the prosecution team and the complainant Mohd Saiful.

The defence team had been scheduled to cross-examine Hospital Kuala Lumpur (HKL) general surgeon Dr. Mohd Razali Ibrahim, who was one of the doctors who had physically examined Mohd Saiful and taken samples for analysis from his body and clothing. However, lead defence counsel Karpal Singh urged the court to hear the application before continuing the trial.

The allegation had first surfaced in late July 2010 when fugitive blogger Raja Petra Kamarudin alleged in *The Malaysian Insider* that Junior Deputy Public Prosecutor Farah Azlina Latif was having an "affair" with Mohd Saiful.

Farah Azlina Latif was part of an eight-person prosecution team, which includes Datuk Mohd Yusof, Datuk Nordin Hassan, Mohamed Hanafiah Zakaria, Wong, Noorin, Mira Mirna Musa and Naidatul Athirah Azmad.

The Attorney General reacted immediately removing her from the trial team. In doing so, he made no admission that there was any truth in the allegation. He also said that:

"The Attorney General's Chambers cannot compromise on any issue that can tarnish the image or credibility of the department and we are looking at such matters very seriously. This can be very difficult for us but any personal matter, if it can have any implication in whatever form on the department, will be handled very seriously." [The Associated Press, 27 July 2010]

He told the media at a press conference at his office that Farah Azlina had to be dropped not because she was found guilty, but to avoid any negative public perception of the prosecution team.

"This move is also to ensure that the smooth running of the case is not affected," he said. However, he said Farah Azlina had very limited involvement in the case, pointing out that she only assisted in recording all notes on the proceedings. "She had no access at all to the investigation papers or any confidential information that the prosecution has," he said. [The Star, 28 July 2008]

In the proceedings before Judge Zabidin, Karpal Singh said that as a result of the alleged affair between Farah Azlina and the complainant, Mohd Saiful, the integrity of the prosecution team had been attacked.

"Following this, the entire prosecution team should step down and Solicitor General II (the lead prosecutor) should be blamed with regard to the allegations," he said.

Deputy Prosecutor Mohamed Yusof, responded saying that claims of an affair were but "mere allegations without any substance". Furthermore, he said that Farah Azlina's role in the case was limited to taking notes on the proceedings. He said that Ms. Farah was a junior member of the team with no access to confidential information.

Anwar told reporters outside the court that the alleged affair between Mohd Saiful and the prosecutor was evidence of a conspiracy against him. "It just supports our contention right from the beginning that this is all a farce, a politically motivated trial, trumped-up charges," he said. "This is an additional fact or evidence to support our case, to show the prosecution is not and cannot be impartial."

At the application hearing, Karpal Singh told Judge Zabidin that Farah Azlina would have been privy, as part of the prosecution team, to investigation papers and other key documents in the case.

"There is a strong likelihood that Mohd Saiful had access to all documents, including the statement by Datuk Seri Anwar," he submitted, adding that both would have committed an offence under Section 8(1) and (2) of the Official Secrets Act (OSA) 1972, as investigation papers were classified under the Act.

Section 8(1) of the Act relates to any person who has in his possession or controls any official secret, and communicates it, while Section 8(2) relates to any person who receives any official secret.

On Monday 2 August 2010, Anwar filed a complaint with the police against Mohd Saiful and Farah Azlina. He said that the defence was concerned that Ms. Farah might have passed court documents to Mr. Saiful, and that he wanted the police to investigate whether the two had violated the Official Secrets Act.

The disclosure of the relationship between the prosecutor and the complainant prompted a response from the Malaysia Bar Council President Ragunath Kesavan, who said that being romantically linked to a key witness in a prosecution was "definitely an ethical matter, as prosecutions are done in the interest of justice. You are there to put your case before the court in the interest of justice. As there is no client here, there should be no relationship between prosecutor and complainant," he said. [The Sun, 28 July 2010]

Karpal Singh also challenged the pair to deny the affair by filing affidavits, but the only affidavits filed were from other members of the Attorney General's Chambers, which did not deal with the truth or otherwise of the alleged affair.

Judge's Ruling on Application to Strike out Prosecution

Judge Zabidin dismissed Anwar's application to strike out the sodomy charge saying that the defence had failed to show the prosecution had abused the court process.

In his judgment, which he read to the court on 16 August 2010, the trial Judge said that the prosecution had not denied or confirmed the existence of an affair between Farah Azlina and Mohd Saiful, but had merely stated in affidavits filed in response to the application that, following a probe conducted by the Attorney General's office, she had been dropped from the prosecution team to prevent any negative perception. However, he accepted that the allegation of an affair was true.

Nevertheless, the trial Judge accepted statements in the prosecution affidavits that Farah Azlina had no access to investigation papers and other key documents. He accepted that Farah had a minor role in the prosecution team.

Judge Zabidin said that:

"She (Farah) was not involved in any briefing with regard to strategies adopted by the prosecution in conducting the case. The conduct of the case is not determined by Farah. She is not a deputy public prosecutor who examines witnesses."

The Judge went on to say that he accepted that Mohd Saiful had no influence over Farah as she was not the public prosecutor who decided to frame the charge against Anwar. As such, he concluded, the issue of prejudice against Anwar and the question of whether he would get a fair trial did not arise.

Application to Stay Proceedings Pending Appeal

Immediately after delivering his reasons, Karpal Singh told the Judge that there was an apparent inconsistency in his ruling and applied to stay the proceedings to allow the defence to lodge an appeal against his refusal to strike out the charge.

Karpal told the Judge that he knew that the defence in making the application must have before the court a motion supported by affidavit evidence showing 'special circumstances', but that he needed some time to do that. The prosecution opposed the adjournment.

The Judge refused to adjourn, but Karpal continued to argue the point telling him that Anwar was entitled to a fair trial and part of that was the right to appeal saying "I am not going to sit back and see an injustice perpetrated", which prompted a warning from the Judge that his comments were too provocative.

Judge Zabidin ordered the trial to proceed but was again asked by Karpal to adjourn, this time so that he could take instructions from his client. The Judge attempted to impose conditions on the adjournment insisting that, if he agreed to adjourn, Karpal should undertake, immediately after the resumption of the hearing, to commence to cross-examine the witness. Karpal refused to be bound by such a condition saying it would depend on the defence case strategy. The Judge finally agreed to adjourn for a brief period.

When the proceedings resumed Karpal renewed his application for a stay. He asked the Judge why there was "this unholy haste". He reminded the Judge that, since he had previously granted a stay in similar circumstances, he had set his own precedent. On the assurance that the appeal papers would be ready that afternoon, Judge Zibidin adjourned the trial until after lunch.

At the resumption of proceedings after lunch, the Judge agreed to order a stay pending appeal, accepting that the defence had made out special circumstances. "If I carry on with the trial", he said "and if the appeal is allowed later, much of judicial and prosecutorial time will be wasted. There will also be a waste of public funds." Judge Zibidin said that it was more appropriate for the Court of Appeal to make a ruling since the striking out application evolved around the integrity of the prosecution.

The trial was then adjourned for mention to 20 September 2010, but the appeal is not expected to be heard for at least another two or three months

Commentary

Judge Zibidin was rightly concerned with the question of whether any actual unfairness had resulted to Anwar because of the affair between the complainant and a junior prosecutor, but his analysis should have gone further and taken account of the appearance of unfairness.

The prosecution did not confront the allegation of an affair and somewhat disingenuously did not file affidavits in reply either from Mohd Saiful or Farah Azlina.

Instead the prosecution filed affidavits from Deputy Public Prosecutor Mohamad Hanafiah Zakaria and investigating officer Jude Pereira from the Attorney General's Chambers that detailed the role of Farah Azlina in the prosecution team, but there was nothing in the affidavits relating to the allegation of her affair with the complainant. The affidavits focused solely on her role within the prosecution team and access to sensitive material.

The prosecution downplayed her role describing it as one of simply keeping notes at trial. They explained that she had no access to any important documents and played no part in deciding prosecution tactics at trial.

Given that the prosecution had neither confirmed nor denied the existence of an affair between Mohd Saiful and Farah Azlina, the Judge accepted that it was true. It was only appropriate that he did so in circumstances where the prosecution had simply ignored the allegation, rather than admit or deny it.

However, whatever the reality of the situation, the fact is that a public perception had been created that the trial may have been compromised by their relationship.

Undoubtedly, she would have had access to all the prosecution materials and, if not part of tactical discussions, would have been aware, if only in a general sense, of what was planned and obtained some insight of the nature of the prosecution case.

By necessity, she must have had access to the material comprising the prosecution brief, including medical reports, scientific reports, police reports and witness statements.

The prosecution claimed that she did not have access to the "investigation papers" or any "confidential information". What does that mean?

First, the phrase "investigation papers" undoubtedly means police investigation notes, but it may also include witness statements prepared by the police. Witness statements in Malaysia are prepared by the police and form part of the prosecution brief, but they are classed as privileged and are not disclosed to the defence. Given that these documents form the essential part of the prosecution brief, it is highly unlikely Farah Azlina would not have had access to this material.

Secondly, what is there in the prosecution material that could be categorized as "confidential information" other than what has already been identified or disclosed? Again it seems implausible that Farah Azlina would not have had access to all of the prosecution material. If there was material kept confidential by the prosecution and not disclosed to the defence, why would that be so?

Therefore, notwithstanding her junior status, Farah Azlina was not just an employee of the Attorney General's Chambers, but an actual member of the prosecution team.

Then there is her relationship with Mohd Saiful.

How was it that she was able to develop a romantic relationship with Mohd Saiful during the course of the trial? It must be assumed there was frequent contact between them for a relationship to develop, but that hardly seems likely if she was no more than a mere "note-taker". It must also be assumed that, initially at least, any contact between them was solely for work purposes relevant to the trial, but it would also be relevant to know whether there were occasions when they met socially apart from the trial? These are important questions because they would explain the nature and extent of their relationship.

It is unlikely that she would have proofed or prepared Mohd Saiful to testify as a witness at trial. A more senior member of the team would most probably have undertaken that task. However, they would undoubtedly have talked about the case. After all, it was the event that had brought them together and it was the principal focus of their lives at that time. Given that situation therefore, it is highly likely that in whatever context the conversation between them would have drifted to the subject of the trial and his role in it.

There was always the prospect of confidential information being spoken of in what the Americans call "pillow talk". That is not to suggest that there was 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. Her relationship with Mohd Saiful completely compromised the prosecution. Dropping her from the prosecution team has not solved the problem at all because the perception that the prosecution had been compromised by the affair is inescapable.

It is a fundamental principle of natural justice that the mere appearance of bias is sufficient to overturn a judicial decision. It prompts the oft-quoted aphorism "Not only must Justice be done; it must also be seen to be done". It is worth quoting in full:

"...it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done, but upon what might appear to be done. *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233 per Lord Justice Hewart

The prosecution must always be the model litigant. It must never be seen or be perceived to have compromised its impartiality to the facts, albeit that it is prosecuting a case against an accused person.

It must not be seen to have acted in any way that might suggest it has acted improperly or inappropriately. For that reason, the public perception of its role as a model litigant is critical to upholding the integrity of the justice system.

It was appropriate that Judge Zabidin assess the junior prosecutor's role at the trial and within the prosecution team to decide whether the trial had been actually compromised. Obviously, had she had a more senior role his decision would almost certainly have been different, but whatever her status she was nevertheless a member of the prosecution team.

Notwithstanding the reassurances of the Attorney General's Chambers, she was by reason of her membership of the prosecution team and the intimate nature of her relationship with the complainant completely compromised and that immediately created the perception that the prosecution itself had been compromised, even if in reality it had not.

For that reason alone, the trial should have been abandoned. In Malaysia there are no means by which a judge can simply abandon or abort a trial, but the judge can strike out the charge. It would then be up to the Attorney-General to decide whether to charge the person again and appoint a new prosecution team to take the matter to trial.

I am firmly of the view that the circumstances were such that the charge should have been struck out by the trial Judge.

I also believe that the conduct of the prosecution is sufficiently serious to justify the Attorney General's discontinuing the criminal prosecution.

First, if it is accepted that the complainant improperly obtained confidential information from Farah Azlina which enabled him to tailor his testimony to fit within the physical evidence, then the case has been compromised to the extent that Anwar could never obtain a fair trial. Even if Mohd Saiful did not gain confidential information from Farah Azlina, the perception that he did would taint any subsequent trial in the same way.

Secondly, this incident has happened in a trial where there have been serious allegations of political interference at the highest level. The prosecution of Anwar has occurred within a context of the admitted involvement of the Prime Minister and his staff, the Attorney General, the Senior Assistant Commissioner and the bringing of a charge at a time when Anwar had just returned to parliament to challenge the ruling coalition when its fortunes were flagging.

Mohd Saiful admitted when cross-examined at the trial that he had met with the then Deputy Prime Minister and the Senior Assistant Commissioner only days before the offence allegedly occurred. He went on to say that he, a junior member of the opposition leader's staff, had in fact met with the Prime Minister at his home and the Senior Assistant Commissioner secretly at a room at a city hotel. The defence claims that these meetings, which occurred so proximate to the alleged offending behaviour, suggest contrivance.

The defence has also complained of the involvement of the Attorney General in transferring the charge to the High Court, in circumstances where it has been alleged that he fabricated evidence against Anwar at his previous trial. Although the Court of Appeal accepted that he had merely acted administratively, it again brought into focus complaints of political interference.

The direct involvement of the Prime Minister, the Attorney General and the Senior Assistant Commissioner has allowed the defence to question their role in the bringing of the charge against Anwar. It is something that has the potential to bring into disrepute the Malaysian justice system, which is definitely not in the public interest.

Thirdly, there is a sound basis to discontinue the prosecution against Anwar on public interest grounds.

The prosecution has obviously been compromised, even by the mere perception that a member of its team has been guilty of wrongdoing. Removing Farah Azlina from the team has not solved the problem because her wrongdoing has tainted the entire prosecution team and the integrity of the trial.

Anwar has also been subject to intense personal stress, substantial legal costs and the disruption to his daily life by a trial that has now lasted more than six months. If the trial were to end now it could never be said that it was something that occurred because of anything Anwar had done. The responsibility rests entirely with the prosecution to maintain the integrity of the justice system.

As the Court of Appeal noted in its decision concerning the disclosure of Saiful's police statement, the Attorney General has a very wide discretion over the control and direction of all criminal prosecutions.

Not only may he institute and conduct any proceedings for an offence, but he may also discontinue criminal proceedings that he has instituted, and the court cannot compel him to institute any criminal proceedings that he does not wish to institute or to go on with any criminal proceedings that he has decided to discontinue.

The general principle that the Attorney General must, in performing his duty, act in the public interest applies with particular force to his powers under clause 3 of Article 145 of the Malaysian Federal Constitution.

Clause 3 of Article 145 of the Federal Constitution
Section 376 (1), Criminal Procedure Code

"In deciding whether to institute or discontinue a prosecution against an accused the Attorney General is always guided by legal principles, but the public interest shall also be the paramount consideration."

(Azmi bin Ariffin, Effective Administration of the Police and the Prosecution in Criminal Justice in Malaysia, UNAFEI Annual Report 2001, Deputy Public Prosecutor, State Legal Advisor's Office, Kelantan, p. 149)

My view is that since the prosecution case has been completely compromised the public interest would justify discontinuing the proceedings.

MARK TROWELL QC