DATO' SERI ANWAR IBRAHIM

v.

PP & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
PAJAN SINGH GILL JCA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
[CRIMINAL APPEAL NOS: W-05-64-2000 & W-05-65-2000]
21 AUGUST 2003

CRIMINAL PROCEDURE: *Judge - Objection on ground of bias - Whether there was sufficient ground to meet the bias test*

CRIMINAL PROCEDURE: *Charge - Amendment - Charges amended after case was transferred to High Court pursuant to s. 418A Criminal Procedure Code - Whether High Court should have disallowed amendment - Whether case should have been reverted to lower court*

CRIMINAL PROCEDURE: *Trial - Refusal of adjournment - Trial judge refused to adjourn trial for party to serve second notice of alibi upon amendment to charges - Whether refusal justified*

EVIDENCE: *Adverse inference - Prosecution's failure to call certain witness - Whether presumption arose - Evidence Act 1950, s. 114(g)*

EVIDENCE: *Witness - Assessment of credibility - Whether trial judge erred in finding witness credible - Whether inconsistent statements taken into consideration - Whether conviction solely on evidence of witness justified*

EVIDENCE: *Confession - Retracted confession - Whether still admissible if convincing and voluntary*

EVIDENCE: *Confession - Use against co-accused to support conviction - Whether trial judge erred in interpreting s. 30 Evidence Act 1950 in using confession to convict co-accused - Whether confession should only be used in support of other positive evidence*

EVIDENCE: *Corroboration - Corroborative evidence implicating guilt of accused - Whether finding by trial judge justified*

CRIMINAL PROCEDURE: *Trial - Defences of alibi, conspiracy, fabrication - Whether evidence adduced sufficiently considered by trial judge*

CRIMINAL LAW: *Abetment - Sodomy - Whether evidence supported commission of offence - Whether accused was prejudiced by failure of trial judge to state specific limb under s. 107 Penal Code*

CRIMINAL PROCEDURE: *Trial - Assessment of evidence adduced - Whether trial judge erred - Whether proviso to s. 60(1) Courts of Judicature 1964 applicable*

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - Whether relevant factors taken into consideration by trial judge*

There were two appeals before this court. The appellants were appealing against their convictions and sentences by the trial judge of the High Court. The 1st appellant was the former Deputy Prime Minister of Malaysia ('DPM') who was convicted for an offence punishable under s. 377B of the Penal Code ('PC'). He was sentenced to nine years' imprisonment to commence after he had served his first sentence in respect of his conviction under the first trial. The 2nd appellant was convicted for an offence punishable under s. 109 read with s. 377B PC. He was also convicted for an offence punishable under s. 377B PC. For his first conviction, the 2nd appellant was sentenced to six years' imprisonment and two strokes of the rattan whilst for the second conviction, he was sentenced to six years' imprisonment and two strokes of the rattan. The imprisonment terms were to run concurrently.

The issues, *inter alia*, were:

(i) whether the trial judge should have disqualified himself from hearing the case on the ground of conflict of interest and likelihood of bias;

(ii) whether the amendments to the charges after the transfer of the case to the High Court from the subordinate court pursuant to s. 418A Criminal Procedure Code ('CPC') were a nullity since they should have been reverted to the subordinate court;

(iii) whether the appellants were deprived of their constitutional rights as they could not rely on the defence of alibi for want of notice to be served as required by s. 402A CPC since the trial judge had refused the 2nd appellant's application for an adjournment of the hearing to enable him to serve a second notice of alibi in connection with the amended charges;

(iv) whether the trial judge failed to invoke s. 114(g) of the Evidence Act 1950 ('EA') against the prosecution since the charges were re-amended and the prosecution failed to call certain persons as witnesses;

(v) whether the trial judge rightfully held that the testimony of the principal witness, Azizan, and his credibility as a witness was not impeached;

(vi) whether Azizan was an accomplice and his testimony required corroboration;

(vii) whether the confession of the 2nd appellant ('the confession') should not have been taken into consideration by the trial judge against the 1st appellant since it was subsequently retracted;

(viii) whether the trial judge erred in interpreting s. 30 EA in relation to the use of the confession against the 1st appellant based on the Singapore case of *Chin Seow Noi & Ors v. Public Prosecutor*.

Held:

Per Pajan Singh Gill JCA

[1] The mere fact that at one time the trial judge had shares in the company in which the Prime Minister's son was also a shareholder was not sufficient ground or circumstance to meet the bias test. Other than that, there was nothing else shown by the 1st appellant that the relationship of the shareholders in the company at the material time went beyond business interest and that it was still continuing. Neither was it shown that the Prime Minister's son had any interest in the matter that was before the trial judge. (p 434 g)

[2] Under s. 418A CPC, it is the proceeding that is transferred when a certificate is issued under that section and not the charge as contended by the 1st appellant. Hence, there was no error by the trial judge when he allowed the amendments to the charges. It has been consistently held that it is for the public prosecutor to consider what charge to prefer against an accused even upon an order of re-trial. Further, the amendments were only related to the time and the period of the commission of the alleged offences. There are authoritative decisions to show that the time and date in a charge are immaterial. (pp 436 g & 437 d-g)

[3] Section 402A CPC requirement for want of notice was enacted more for the convenience of the prosecution. Since the 1st appellant did not serve any notice of alibi nor did he request for time to serve one in respect of the amended charge, there was no merit in his contention on this issue. The 2nd appellant suffered no prejudice since the first notice of alibi had been served and he was allowed to adduce evidence pursuant to that notice. (pp 440 g-i & 441 a-e)

[4] There was no merit in the appellants' contention that the charges were stale and vague. The trial judge found the charges to be clear and unambiguous. There was no question of delay as the investigation began in 1998 and the prosecution was initiated in 1999. Further, it was for the appellants to show prejudicial effects. In any event, there should hardly be any difficulty accounting the movements of the 1st appellant since being a member of the cabinet and the DPM at the material time his whereabouts would have been recorded. As for the 2nd appellant the success or failure of his defence of alibi hinged on the alibi of the 1st appellant. (pp 442 g-h, 443 a-h & 444 a-b)

[5] There was no basis that the deputy public prosecutors acted in bad faith when they preferred the charges against the appellants. The evidence relied upon to indicate fabrication or extortion on their part did not support such an assertion. (pp 444 g-h & 445 a-b)

[6] The calling of witnesses in any prosecution is within the discretion of the public prosecutor. As such, it was not appropriate to expect the trial judge to invoke s. 114(g) EA on the prosecution's failure to call certain persons as witnesses. Further, there was no dispute that these persons were offered to the defence at the end of the prosecution's case. Hence, there was no ground for the appellants to complain that they were not available. (pp 445 h & 446 a-e)

[7] The trial judge assessed the credibility of Azizan from various aspects, *inter alia*, from the impeachment proceedings, the inconsistent statements made by Azizan, corroborative evidence, the probability of Azizan being an accomplice and his previous conviction for khalwat. Therefore, there was nothing wrong in the conclusion of the trial judge for not impeaching the credit of Azizan. Further, the trial judge accepted Azizan's explanation for the seemingly contradictory statements made by him. His acceptance of the explanation should be given significant consideration as he had the advantage of listening and seeing the demeanour of this witness in the proceedings. (pp 452 g-h, 453 a-b & 456 d-e)

[8] It would be wrong in law to reject the evidence of Azizan just because he faltered in a few instances in the course of his testimony. Discrepancies found in the testimony of a witness may be evidence of his truthfulness rather than the reverse. Further, the apparent inconsistent statements of Azizan during the first trial became the reason for the commencement of the impeachment proceedings against him. With the conclusion arrived at by the trial judge in respect of the said proceedings, any subsequent reliance on those statements as positive evidence for the trial proper should be disallowed. (p 459 b-d)

[9] There were limits to the use of evidence adduced in a previous trial. There was no assertion from the appellants that reliance was placed on the previous statements of Azizan for their truth. They were only referred to in an attempt to undermine the credibility of Azizan as a witness. Such record of the previous inconsistent statement is only admissible if the witness denies making that statement. The mere fact that the record contains the inconsistencies does not make it admissible. (p 459 e-f)

[10] On corroboration, the legal principle as restated in *TN Nathan v. Public Prosecutor* had no application in view of the trial judge's finding of Azizan being a truthful and reliable witness. (p 461 b)

[11] There was no reason to disagree with the trial judge that the act of the 1st appellant in asking Azizan to deny the contents of his statutory declaration was corroborative of Azizan's evidence and relevant by virtue of s. 8 EA. There was no challenge from either of the appellants to the prosecution's assertion that the 1st appellant had asked Azizan to deny the contents of the statutory declaration. Similarly, it was reasonable for the trial judge to find corroborative evidence in the action of the 1st appellant instructing one SAC1 Musa to cease investigations into the matter. Further, the confession of the 2nd appellant as held by the trial judge, was corroborative of Azizan's evidence as it was made voluntarily and was admitted in evidence. Although the confession was retracted, it was still good corroboration for it is settled law that a confession even if it is subsequently retracted can be a basis to convict a person so long as the court is satisfied of its voluntariness and truth. (p 463 c-d & g-h)

[12] There was no reason to disagree with the finding of the trial judge that Azizan was not an accomplice. The trial judge did warn himself of the danger of convicting an accused person in sexual cases on uncorroborated evidence. Such a direction was sufficient. Further, the mere fact that Azizan was convicted for the offence of khalwat was not a ground to undermine his credibility as a witness as held by the trial judge. (p 465 c-g)

[13] Re-examination is confined to matters touched on during cross-examination. Fresh evidence adding to or re-affirming evidence-in-chief is not permitted in re-examination. In the present case, Azizan was only asked to explain his earlier answer that appeared to be contradictory. Further, it could not be said that the appellants were totally shut out at the material time. The appellants too could have asked for leave to further cross-examine Azizan if they felt there was undue advantage taken during the re-examination. (pp 466 h & 467 a-c)

[14] After a lapse of time, medical examination is not a reliable mean and not the only method to determine whether or not a person has been sodomised. As such, there was no merit in the 1st appellant's contention that there was no best corroborative evidence available because there was no medical report of Azizan. Further, the failure to send Azizan for a medical examination was not within the scope of s. 114(g) EA. There was nothing to indicate that there was an intentional suppression of evidence or an attempt to do so. (p 468 b-f)

[15] The trial judge had given his reasons for not attaching weight to the evidence of one DSP Zull Aznam on the allegation that Azizan was bribed to make the accusation against the 1st appellant. There was no basis to differ from the finding of the trial judge as the credibility of a witness is primarily a matter for the trial judge. Furthermore, Azizan denied making such a disclosure. (pp 468 h & 469 a-c)

[16] There was no political conspiracy against the 1st appellant. The act of Azizan in consulting a lawyer for advice at the material time and the absence of any rebuttal from the 1st appellant demolished any theory of fabrication on Azizan's part. (p 469 f-g)

[17] Although the trial judge did not specifically consider why Azizan did not make the police report earlier, he found Azizan to be a truthful witness after having heard and seen him in the witness box and for other reasons. Therefore, it could be assumed that the trial judge must have taken into

account this issue before coming to his conclusion. At any rate, failure to lodge a police report is not fatal to the prosecution and it is not a prerequisite for the commencement of an investigation by the police. (p 470 d-e)

[18] As Azizan's explanation for going back to work for the 1st appellant's wife despite being sodomised was not rebutted, it could be accepted as credible explanation in the circumstances. (p 471 b)

[19] The press statements made by the Prime Minister and the then Inspector General of Police were made in relation to the earlier police report lodged against the 1st appellant and were therefore irrelevant. The result of an investigation in an earlier police report does not necessarily negate any probable positive result in an investigation based on a subsequent police report. (p 472 c-g)

[20] There was no reason to interfere with the trial judge's finding on the admissibility of the confession by the 2nd appellant. There was no legal necessity for him to expressly state that the standard of beyond reasonable doubt had been met in order for the admission to be good in law. It was implied from the finding. There was also no merit in the allegation that the 2nd appellant was compelled to give his evidence. Save for his bare denial on the truth of the material parts of the confession, the 2nd appellant adduced no further evidence to support his assertion that the contents of the confession were orchestrated by the police. Accordingly, the trial judge was correct in his appreciation of the value and weight to be attached to the confession and the resultant conclusion arising therefrom in respect of proof against the 2nd appellant. (pp 476 e-h, 477 a & 479 f-h)

[21] The trial judge erred in interpreting s. 30 EA in relation to the use of the confession against the 2nd appellant based on the Singapore case of *Chin Seow Noi & Ors v. Public Prosecutor*. The trial judge had departed from the obvious binding effect of the decisions of the highest court in this country which enunciated the principle that a confession of one accused may only be taken into consideration against the other to lend assurance to the other evidence against them in believing the accused to be guilty (*Herchun Singh & Ors v. Public Prosecutor, Yap Chai Chai & Anor v. Public Prosecutor*). However, this misdirection did not nullify the convictions of the appellants. The trial judge was prepared to act on the evidence of Azizan without the confession to prove the guilt of the 1st appellant. Nevertheless, upon this court re-evaluating the confession, it could be taken into consideration against the 1st appellant. (pp 482 c & 484 c)

[22] On the abetment charge against the 2nd appellant, it could be discerned from the findings of the trial judge that the acts and omission of the 2nd appellant came under the third limb of s. 107 Penal Code. The mere failure of the trial judge to clearly indicate the limb or limbs of the said section did not prejudice the 2nd appellant in any way. More so when the findings of the trial judge were findings of fact in which there were limited reasons to interfere. (p 496 d-g)

[23] The trial judge had taken all the relevant factors into consideration in the process of sentencing the 1st appellant. The 1st appellant's previous conviction that was taken into account by the trial judge was upheld by the highest court of the country. As to the 2nd appellant, although the trial judge did not take into account his previous conviction, the trial judge did not err in any way in his process of sentencing the 2nd appellant. (p 500 a-h)

[Appeals dismissed; sentences affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Terdapat dua rayuan di hadapan mahkamah ini. Perayu-perayu merayu terhadap sabitan dan hukuman yang dibuat oleh hakim bicara di Mahkamah Tinggi. Perayu pertama adalah bekas Timbalan Perdana Menteri Malaysia ('TPM') yang telah disabit dengan satu kesalahan di bawah s. 377B Kanun Keseksaan ('KK'). Beliau telah dihukum sembilan tahun penjara bermula selepas beliau tamat menjalani hukuman pertama beliau yang berkait dengan sabitan beliau dalam perbicaraan yang pertama. Perayu kedua disabit dengan satu kesalahan di bawah s. 109 dibaca bersama s. 377B KK. Beliau juga disabit dengan satu kesalahan di bawah s. 377B KK. Untuk sabitan pertama, perayu kedua dihukum enam tahun penjara dan dua kali rotan manakala untuk sabitan kedua, beliau dihukum enam tahun penjara dan dua kali rotan. Tempoh hukuman penjara berjalan serentak.

Isu-isunya, antara lain, adalah:

(i) sama ada hakim bicara sepatutnya menarikbalik dirinya dari mendengar kes ini atas alasan konflik kepentingan dan kemungkinan berat sebelah;

(ii) sama ada pindaan-pindaan pada pertuduhan-pertuduhan selepas kes ini dipindahkan ke Mahkamah Tinggi dari mahkamah rendah di bawah s. 418A Kanun Prosedur Jenayah ('KPJ') adalah satu pembatalan kerana ianya sepatutnya dikembalikan ke mahkamah;

(iii) sama ada perayu-perayu dilucutkan hak perlembagaan mereka kerana mereka tidak dapat bergantung kepada pembelaan alibi kerana tiada notis diserahkan sebagaimana yang diperlukan di bawah s. 402A KPJ kerana hakim bicara telah menolak permohonan perayu kedua untuk penangguhan perbicaraan bagi membolehkan beliau untuk menyerahkan notis alibi kedua berhubung dengan pertuduhan-pertuduhan yang dipinda;

(iv) sama ada hakim bicara gagal untuk menggunakan s. 114(g) Akta Keterangan 1950 ('AK') terhadap pendakwa kerana pertuduhan-pertuduhan telah dipinda dan pendakwa gagal untuk memanggil orang-orang tertentu sebagai saksi-saksi;

(v) sama ada hakim bicara telah secara betul memutuskan bahawa testimoni saksi utama, Azizan, dan kebolehpercayaan beliau sebagai saksi tidak tercabar;

(vi) sama ada Azizan adalah seorang rakan sejenayah dan testimoni beliau perlukan sokongan;

(vii) sama ada pengakuan perayu kedua ('pengakuan tersebut') sepatutnya dipertimbangkan oleh hakim bicara terhadap perayu pertama apabila pengakuan tersebut kemudiannya ditarikbalik;

(viii) sama ada hakim bicara tersilap dalam interpretasi s. 30 AK berhubung dengan penggunaan pengakuan tersebut terhadap perayu pertama berdasarkan kes Singapura *Chin Seow Noi & Ors v. Public Prosecutor*.

Diputuskan:
Oleh Pajan Singh Gill HMR

[1] Fakta semata yang bahawa pada satu masa hakim bicara mempunyai saham dalam syarikat yang anak kepada Perdana Menteri juga merupakan pemegang saham bukanlah satu alasan yang cukup atau keadaan yang memenuhi ujian berat sebelah. Sebaliknya, perayu pertama tidak menunjukkan langsung bahawa hubungan pemegang-pemegang saham di dalam syarikat tersebut pada masa-masa matan, melebihi dari kepentingan urusniaga dan ianya masih berterusan. Juga tidak ditunjukkan langsung bahawa anak Perdana Menteri mempunyai sebarang kepentingan di dalam perkara di hadapan hakim bicara.

[2] Di bawah s. 418A KPJ, ianya adalah prosiding yang dipindahkan apabila satu sijil dikeluarkan di bawah seksyen tersebut dan bukannya pertuduhan sebagaimana yang dikatakan oleh perayu pertama. Dari itu, tidak terdapat sebarang kesilapan oleh hakim bicara apabila beliau membenarkan pindaan-pindaan pada pertuduhan. Ianya telah dengan konsistennya diputuskan bahawa ianya adalah untuk pendakwa raya menimbangkan pertuduhan apa yang wajar dibuat terhadap seseorang tertuduh malahan pada masa satu perintah untuk bicara semula dibuat. Selanjutnya, pindaan-pindaan tersebut hanya berhubung dengan masa dan tempoh kesalahan yang didakwa dilakukan. Terdapat keputusan autoritatif yang menunjukkan bahawa masa dan tarikh di dalam satu pertuduhan adalah tidak material.

[3] Keperluan untuk notis di bawah s. 402A KPJ digubalkan untuk lebih memudahkan pendakwa. Oleh kerana perayu pertama tidak menyampaikan sebarang notis dan tidak memohon masa untuk menyampaikan notis berhubung dengan pertuduhan yang terpinda, tidak terdapat merit di dalam pernyataan beliau berhubung dengan isu ini. Perayu kedua tidak dimemudaratkan oleh kerana notis alibi telah pun diserahkan dan beliau dibenarkan untuk mengemukakan keterangan berhubung dengan notis tersebut.

[4] Tidak terdapat sebarang merit di dalam dakwaan perayu-perayu bahawa pertuduhan-pertuduhan tersebut tidak jelas dan lapuk. Hakim bicara mendapati pertuduhan-pertudahan tersebut jelas dan terang. Tidak terdapat persoalan berkenaan dengan kelewatan kerana penyiasatan bermula dalam tahun 1998 dan pendakwaan telah diambil dalam tahun 1999. Selanjutnya, ianya adalah untuk perayu untuk menunjukkan kesan-kesan yang memudaratkan. Bagaimanapun, adalah tidak rumit untuk menjejaki pergerakan perayu pertama oleh kerana beliau merupakan seorang ahli kabinet dan TPM pada masa matan, dan pergerakan beliau pada masa tersebut tentulah direkodkan. Mengenai perayu kedua pula, kejayaan atau kegagalan pembelaan alibi bergantung kepada alibi perayu pertama.

[5] Tidak terdapat sebarang asas bahawa timbalan pendakwa raya bertindak dengan niat jahat apabila mereka membuat pertuduhan terhadap perayu-perayu. Keterangan yang disandarkan untuk menunjukan rekaan palsu atau pemerasan oleh mereka tidak menyokong tuduhan tersebut.

[6] Pemanggilan saksi-saksi di dalam sesuatu pendakwaan adalah dalam budibicara pendakwa raya. Oleh yang demikian, ianya adalah tidak wajar untuk mengharap hakim bicara untuk menggunakan s. 114(g) AK apabila pendakwa raya gagal untuk memanggil orang-orang tertentu sebagai saksi. Selanjutnya, tidak terdapat sebarang pertikaian bahawa orang-orang ini telah ditawarkan kepada pihak defendan pada akhir kes pendakwa. Dari itu, tidak terdapat sebarang alasan untuk perayu-perayu merungut yang mereka tidak ada.

[7] Hakim bicara menilai kebolehpercayaan Azizan dari berbagai aspek, antara lain, dari prosiding pencabaran, pernyataan-pernyataan yang tidak konsisten yang dibuat oleh Azizan, keterangan-keterangan sokongan, kebarangkalian yang Azizan merupakan rakan sejenayah dan sabitan khalwat beliau yang terdahulu. Oleh yang demikian, tidak terdapat sebarang silap pada keputusan hakim bicara untuk tidak mencabar kebolehpercayaan Azizan. Selanjutnya, hakim bicara menerima penjelasan Azizan untuk pernyataan-pernyataannya yang nampak bercanggah itu. Penerimaan hakim bicara terhadap penjelasan tersebut wajar diberi pertimbangan yang penting kerana beliau mempunyai kelebihan mendengar dan melihat tingkahlaku saksi tersebut semasa prosiding.

[8] Ianya salah disisi undang-undang untuk menolak keterangan Azizan hanya kerana beliau beberapa kali teragak-agak dalam memberi testimoninya. Perselisihan yang diketemui di dalam testimoni seorang saksi mungkin keterangan mengenai kejujurannya dan bukan sebaliknya. Selanjutnya, pernyataan-pernyataan yang nyatanya tidak konsisten oleh Azizan semasa perbicaraan yang pertama menjadi sebab permulaan prosiding pencabaran terhadapnya. Dengan kesimpulan yang dibuat oleh hakim bicara berhubung dengan prosiding tersebut, sebarang sandaran kemudiannya pada kenyataan-kenyataan tersebut sebagai keterangan positif untuk perbicaraan sebenar patut tidak dibenarkan.

[9] Terdapat batas pada kegunaan keterangan yang dikemukakan di dalam perbicaraan yang terdahulu. Tidak terdapat sebarang tegasan dari perayu-perayu bahawa sandaran dibuat pada pernyataan-pernyataan terdahulu Azizan untuk kebenaran mereka. Mereka hanya dirujukkan sebagai satu percubaan untuk melemahkan kebolehpercayaan Azizan sebagai saksi. Rekod sedemikian berhubung dengan pernyataan terdahulu yang tidak konsisten hanya diboleh diterima jika saksi menafikan membuat pernyataan. Fakta semata yang rekod mengandungi percanggahan tidak membuatkannya boleh diterima.

[10] Mengenai sokongan, prinsip undang-undang yang dinyatakan di dalam *TN Nathan v. Public Prosecutor* tidak terpakai memandangkan pendapat hakim bicara bahawa Azizan adalah seorang saksi yang jujur dan boleh dipercayai.

[11] Tidak terdapat sebarang sebab untuk tidak bersetuju dengan hakim bicara bahawa perbuatan perayu pertama meminta Azizan untuk menafikan kandungan akuan berkanun beliau menyokong keterangan Azizan dan relevan melalui s. 8 AK. Tidak terdapat sebarang cabaran dari mana-mana perayu kepada tuduhan pendakwa bahawa perayu pertama telah meminta Azizan menafikan kandungan akuan berkanun. Sama juga, ianya adalah wajar bagi hakim bicara untuk menemui keterangan sokongan dalam tindakan perayu pertama memberi arahan kepada SAC1 Musa untuk memberhentikan siasatan dalam perkara ini. Selanjutnya, pengakuan perayu kedua sebagaimana yang diputuskan oleh hakim bicara, menyokong keterangan Azizan kerana ianya dibuat secara sukarela dan dibenarkan sebagai keterangan. Walaupun pengakuan telah ditarikbalik, ianya masih satu sokongan yang baik kerana undang-undang menetapkan bahawa pengakuan walaupun ianya kemudiannya ditarikbalik boleh menjadi asas untuk mensabitkan seseorang selagi mahkamah berpuashati yang ianya dibuat secara sukarela dan benar.

[12] Tidak terdapat sebarang sebab untuk tidak bersetuju dengan keputusan hakim bicara bahawa Azizan bukan rakan sejenayah. Hakim bicara telah menasihati dirinya mengenai bahaya mensabit seseorang tertuduh di dalam kes seksual berdasarkan keterangan yang tidak disokong. Arahan sedemikian sudah memadai. Selanjutnya, fakta semata yang Azizan telah disabit dengan kesalahan khalwat tidak merupakan satu alasan untuk melemahkan kebolehpercayaannya sebagai saksi sebagaimana yang diputuskan oleh hakim bicara.

[13] Pemeriksaan semula hanya terhad kepada perkara-perkara yang disentuh semasa pemeriksaan balas. Keterangan baru yang ditambah kepada atau mengesahkan semula keterangan utama tidak dibenarkan dalam pemeriksaan semula. Dalam kes semasa, Azizan hanya diminta untuk menjelaskan jawapan beliau yang terdahulu yang nampak bercanggah. Selanjutnya, ianya tidak dapat dikatakan bahawa perayu-perayu dihalang secara mutlak pada masa matan. Perayu-perayu juga boleh memohon izin untuk memeriksa balas Azizan jika mereka fikir terdapat kelebihan yang tidak wajar diambil semasa periksa balas.

[14] Selepas keluputan masa, pemeriksaan perubatan tidak boleh dipercayai dan bukan merupakan hanya satu kaedah untuk memutuskan sama ada seseorang itu telah diliwat. Oleh yang demikian, tidak terdapat merit dalam dakwaan perayu pertama bahawa tidak terdapat keterangan sokongan yang terbaik kerana tidak ada laporan perubatan mengenai Azizan. Selanjutnya, kegagalan untuk menghantar Azizan untuk pemeriksaan perubatan tidak termasuk di bawah s. 114(g) AK. Tidak terdapat apa-apa untuk menunjukkan bahawa terdapat niat untuk menyekat keterangan ataupun sebarang percubaan untuk berbuat demikian.

[15] Hakim bicara telah memberikan sebab-sebab beliau tidak meletakkan berat kepada keterangan DSP Zull Aznam pada tuduhan yang Azizan telah dirasuah untuk membuat tuduhan tersebut terhadap perayu pertama. Tidak terdapat sebarang asas untuk tidak mempersetujui keputusan hakim bicara kerana kebolehpercayaan seseorang saksi adalah perkara yang terletak terutamanya kepada hakim bicara. Tambahan pula, Azizan menafikan membuat pendedahan sedemikian.

[16] Tidak terdapat sebarang konspirasi politik terhadap perayu pertama. Tindakan Azizan meminta nasihat peguam pada masa matan dan ketidakwujudan pematahan dari perayu pertama meruntuhkan sebarang teori rekaan pada pihak Azizan.

[17] Walaupun hakim bicara tidak secara khusus mempertimbangkan mengapa Azizan tidak membuat laporan polis terdahulunya, beliau mendapati Azizan seorang saksi yang jujur setelah mendengar dan melihat beliau di dalam kandang saksi dan juga atas alasan-alasan lain. Oleh yang demikian, ianya boleh dianggap bahawa hakim bicara telah mengambilkira isu ini sebelum mencapai keputusan beliau. Walaupun begitu, kegagalan untuk membuat laporan polis tidak memudaratkan pendakwaan dan ianya bukanlah sesuatu prasyarat untuk memulakan penyiasatan polis.

[18] Oleh kerana penjelasan Azizan balik bekerja semula dengan isteri perayu pertama walaupun telah diliwat tidak dipatahkan, ianya dapat diterima sebagai penjelasan yang boleh dipercayai dalam keadaan tersebut.

[19] Pernyataan akhbar yang dibuat oleh Perdana Menteri dan Ketua Polis Negara pada masa itu dibuat berhubung dengan laporan polis terdahulu terhadap perayu pertama dan dengan itu tidak relevan. Keputusan siasatan pada laporan polis yang terdahulu tidak semestinya menafikan sebarang keputusan positif dalam siasatan yang kemudiannya.

[20] Tidak terdapat sebarang sebab untuk campurtangan dengan pendapat hakim bicara kerana membenarkan pengakuan perayu kedua. Tidak terdapat sebarang keperluan undang-undang untuk beliau secara jelas menyatakan bahawa tahap melebihi kesangsian yang wajar telah dicapai untuk membenarkan kebolehterimaan pengakuan tersebut disisi undang-undang. Ianya tersirat dalam pendapatnya. Juga, tiada merit dalam dakwaan bahawa perayu kedua telah dipaksa untuk memberi keterangan. Melainkan penafian semata beliau terhadap kebenaran bahagian material pengakuan tersebut, perayu kedua tidak mengemukakan keterangan tambahan untuk menyokong dakwaan beliau bahawa kandungan pengakuan tersebut direka oleh polis. Dari itu, hakim bicara adalah betul dalam penilaian beliau terhadap pengakuan tersebut dan kesimpulan berikutannya berkaitan bukti terhadap perayu kedua.

[21] Hakim bicara tersilap dalam interpretasi s. 30 AK berhubung penggunaan pengakuan tersebut terhadap perayu kedua berdasarkan kes Singapura *Chin Seow Noi & Ors v. Public Prosecutor*. Hakim bicara tidak mengikuti keputusan mahkamah yang tertinggi di negara ini yang menetapkan prinsip bahawa pengakuan seorang tertuduh boleh diambilkira terhadap seseorang tertuduh yang lain untuk memberi jaminan kepada lain-lain keterangan terhadap mereka dalam mempercayai mereka bersalah (*Herchun Singh & Ors lwn. Public Prosecutor, Yap Chai Chai & Anor v. Public Prosecutor*). Walau bagaimanapun, salah arahan ini tidak membatalkan sabitan-sabitan perayu-perayu. Hakim bicara telah bersedia untuk bertindak di atas keterangan Azizan tanpa pengakuan tersebut untuk membuktikan kesalahan perayu pertama. Namun demikian, selepas mahkamah ini menilai semula pengakuan tersebut, ianya boleh dipertimbangkan terhadap perayu pertama.

[22] Mengenai pertuduhan persubahatan terhadap perayu kedua, ianya dapat dilihat dari keputusan hakim bicara bahawa perbuatan-perbuatan dan peninggalan-peninggalan perayu kedua termasuk di bawah bahagian ketiga s. 107 Kanun Keseksaan. Kegagalan semata hakim bicara untuk menunjukan secara jelas bahagian mana seksyen tersebut terpakai tidak memudaratkan perayu kedua dalam apa cara pun. Lebih-lebih lagi apabila pendapat hakim bicara adalah pendapat fakta dalam mana mahkamah ini sebagai mahkamah rayuan mempunyai batasnya untuk bercampurtangan.

[23] Hakim bicara telah mengambil semua faktor yang relevan dalam membuat pertimbangan untuk menjatuhkan hukuman terhadap perayu pertama. Sabitan terdahulu perayu pertama yang diambil kira oleh hakim bicara telah disahkan oleh mahkamah yang tertinggi di negara ini. Mengenai perayu kedua pula, walaupun hakim bicara tidak mengambil kira sabitan beliau yang terdahulu, hakim bicara tidak silap dalam apa cara pun dalam proses beliau menghukum perayu kedua.

Rayuan-rayuan ditolak; hukuman-hukuman disahkan.]

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Abdul Ghani Ali & Ors v. PP [2001] 3 CLJ 769 FC ***(refd)***
Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [2002] 4 CLJ 268 CA ***(refd)***
Apren Joseph v. State of Kerala [1973] Cri LJ 185 ***(refd)***
Basil Omar v. PP [2002] 4 CLJ 418 CA ***(refd)***
Bessela v. Stern [1877] 2 CPD 265 ***(refd)***
Bandulananda Jayatilake v. PP [1982] 1 MLJ 83 ***(refd)***
Bhojraj v. Sita Ram [1936] AIR 60 PC ***(refd)***
Bhuboni Sahu v. R [1949] AIR PC 257 ***(foll)***
Chan Teng Cheong v. PP [1967] 1 MLJ 217 ***(refd)***
Chean Siong Guat v. PP [1969] 2 MLJ 63 ***(refd)***
Chin Seow Noi & Ors v. PP [1994] 1 SLR 135 ***(refd)***
Chiu Nang Hong v. PP [1965] 31 MLJ 40 ***(refd)***
Clarke v. Edinburgh Tramways [1919] SC (HL) 35 ***(refd)***
Dato' Mokhtar Hashim v. PP [1983] 2 MLJ 232 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(foll)***
Eade v. The King [1924] 34 CLR 154 ***(refd)***
Ferguson v. Weaving [1951] 1 KB 814 ***(refd)***
Goh Leng Kwang v. Teng Swee Lin & Ors [1974] 2 MLJ 5 ***(refd)***
Hairani Sulong v. PP [1993] 2 CLJ 79 HC ***(refd)***
Herchun Singh & Ors v. PP [1969] 2 MLJ 209 ***(foll)***
Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 CA ***(refd)***
Husin Sillit v. PP [1988] 2 MLJ 232 ***(refd)***
Juraimi Hussin v. PP [1998] 2 CLJ 383 CA ***(refd)***
K Saravanan S Karuppiah v. PP [2002] 4 CLJ 144 CA ***(refd)***
Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 PC ***(refd)***
Kashmira Singh State of Madhya Pradesh AIR [1952] SC 159 ***(foll)***
Khoon Chye v. PP [1961] MLJ 105 ***(refd)***
Krishnan & Anor v. PP [1981] 2 MLJ 121 FC ***(refd)***
Lai Kim Hon & Ors v. PP [1981] 1 MLJ 84 ***(refd)***
Law Kiat Lang v. PP [1966] 1 MLJ 215 ***(refd)***

Lee Weng Sang v. PP [1977] 1 MLJ 166 ***(refd)***
Lim Yow Choon v. PP [1972] 1 MLJ 205 ***(refd)***
Locabail (UK) Ltd v. Bayfield Properties Ltd & Anor [2000] 1 All ER 65 ***(refd)***
Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***
Noliana Sulaiman v. PP [2001] 1 CLJ 36 HC ***(refd)***
Ooi Choon Lye v. Lim Boon Kheng & Ors [1972] 1 MLJ 153 ***(refd)***
Osman & Anor v. PP [1967] 1 MLJ 137 ***(refd)***
Periasamy Sinnappan & Anor v. PP [1996] 3 CLJ 187 CA ***(refd)***
Powell and wife v. Streatham Manor Nursing Home [1935] AC 243 ***(refd)***
PP v. Chong Boo See [1988] 1 CLJ 679; [1988] 2 CLJ (Rep) 206 HC ***(refd)***
PP v. Datuk Hj Harun Hj Idris [1979] MLJ 180 ***(refd)***
PP v. Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166 ***(refd)***
PP v. Fam Kim Hock [1954] 23 MLJ 20 ***(refd)***
PP v. Foong Chee Cheong [1970] 1 MLJ 97 ***(refd)***
PP v. Ku Lip See [1982] 1 MLJ 194 ***(refd)***
PP v. Lai Pong Yen & Ors [1968] 1 MLJ 12 ***(refd)***
PP v. Lim Chen Len [1981] 2 MLJ 41 HC ***(refd)***
PP v. Lo Ah Eng [1965] 1 MLJ 241 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mardai [1950] MLJ 33 ***(refd)***
PP v. Nordin Johan & Anor [1983] 2 CLJ 22; [1983] CLJ (Rep) 345 FC ***(foll)***
PP v. Tee Tean Siong & Ors [1963] MLJ 201 ***(refd)***
PP v. Wan Razali Kassim [1970] 2 MLJ 79 ***(refd)***
PP v. Wong Yee Sen & Ors [1990] 1 CLJ 325; [1990] 2 CLJ (Rep) 902 HC ***(refd)***
R v. Chandler [1976] WLR 585 CA ***(refd)***
R v. Cram [1880] 14 Cox CC 390 ***(refd)***
R v. Gough [1993] 2 All ER 724 ***(refd)***
Rangapula & Anor v. PP [1981] CLJ 129; [1981] CLJ (Rep) 261 HC ***(refd)***
Rattan Singh v. PP [1971] 1 MLJ 162 ***(refd)***
RC Pollard v. Satya Gopal Mazumdar AIR [1943] Cal 594 ***(refd)***
Reg v. Mitchell [1892] 17 Cox CC 503 ***(refd)***
Regina v. P (MB) 89 CCC (3d) 28 [1994] CCC Lexis 2454 113 DLR (4th) 461 ***(refd)***
Ryan v. Ross & Anor. [1963] 2 QB 151 ***(refd)***
Sambasivam v. The PP, Federation Malaya [1950] MLJ 145 ***(refd)***
Smyth v. Ushewokunza & Anor [1997] SC ***(refd)***
Tara Singh & Ors v. PP [1949] MLJ 88 ***(refd)***
Teh Lee Tong v. PP [1956] MLJ 194 ***(refd)***
Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC ***(refd)***
The Queen v. Coney & Ors [1882] 8 QBD 534 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Tinit & Ors v. PP (No 2) [1964] MLJ 389 ***(refd)***
TN Nathan v. PP [1978] MLJ 134 ***(refd)***

Tunde Apatira & Ors v. PP [2002] 1 CLJ 381 FC ***(refd)***
Vasan Singh v. PP [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 SC ***(refd)***
Wong Kim Leng v. PP [1997] 2 MLJ 97 HC ***(refd)***
Yaacob v. PP [1966] 1 MLJ 67 ***(refd)***
Yap Chai Chai & Anor v. PP [1973] 1 MLJ 219 ***(foll)***
Yap Sow Keong & Anor v. PP [1947] MLJ 90 ***(refd)***
Yuill v. Yuill [1945] 1 All ER 183 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 2, 60(1), 103, 402A, 413A(1), 418A(1)
Evidence Act 1950, ss. 8, 91, 92, 114(g), 138
Penal Code, ss. 109, 377B
Syariah Criminal Offences (Federal Territories) Act 1997, s. 25

Evidence Act 1872 [India], s. 30

For the 1st appellant - Christopher Fernando (Karpal Singh, Gurbachan Singh, Pawan Chik Merican, Zulkifli Nordin, SN Nair & Marisa Regina); M/s SN Nair & Partners
For the 2nd appellant - Jagdeep Singh Deo (Gobind Singh Deo & Ram Karpal Singh); M/s Karpal Singh & Co
For the respondent - DPP; AG's Chambers

Reported by Usha Thiagarajah

JUDGMENT

Pajan Singh Gill JCA:

Introduction And Definitions

There were two appeals jointly heard before us both against conviction and sentence. On 18 April 2003 we dismissed both the appeals and indicated that we would give our reasons later. We do so now.

In this judgment unless otherwise stated the following terms, words, letters, and phrases bear their respective meanings assigned thereto or represent such items as defined:

(i) 'Public Prosecutor' includes the Deputies Public Prosecutor appearing with him;

(ii) 'First Appellant' means Dato' Seri Anwar Ibrahim;

(iii) 'Second Appellant' means Sukma Darmawan Sasmitaat Madja;

(iv) 'Appellants' means the first appellant and second appellant;

(v) 'Azizan' is Azizan bin Abu Bakar denoted by identification of 'SP6' in the court below or 'PW6' in this judgment;

(vi) 'these appeals' means both the appeals of the first appellant and second appellant;

(vii) 'this present case' means the appeals under consideration by the Court of Appeal;

(viii) 'learned counsel for the first appellant' includes Mr. Christopher Fernando; Mr. Karpal Singh; Mr. Gurbachan Singh; Mr. Pawan Chik Merican; Mr. Zulkifli Nordin; Mr. SN Nair and Ms. Marisa Regina;

(ix) 'learned counsel for the second appellant' includes Mr. Jagdeep Singh Deo; Mr. Gobind Singh Deo and Mr. Ram Karpal Singh;

(x) 'Prosecution' means the public prosecutor in the court below;

(xi) 'Defence' means the appellants in the court below;

(xii) 'May 1992 charge' refers to the charges preferred against the appellants which carried the date of the alleged incident to be in May 1992;

(xiii) 'CJA' means the Courts of Judicature Act 1964 as amended;

(xiv) 'EA 1950' means the Malaysian Evidence Act 1950 as amended;

(xv) 'CPC' means the Malaysian Criminal Procedure Code as amended;

(xvi) 'Penal Code' means the Malaysian Penal Code as amended;

(xvii) 'Court below' means the High Court which heard this present case;

(xviii) 'the first trial' means the trial of the first appellant under Kuala Lumpur High Court Criminal Trial No. 45-48-98 and 45-49-98 on a charge under Emergency (Essential Powers) Ordinance No 22 of 1970;

(xix) 'PW' signifies witness for the prosecution and is in substitution for 'SP' in the court below; and

(xx) 'DW' signifies witness for the appellants and is in substitution for 'SD' in the court below;

In the first appeal the first appellant appealed against his conviction and sentence on a charge preferred against him for an offence punishable under s. 377B of the Penal Code. On conviction the first appellant was sentenced to nine years imprisonment to commence after he has served his first sentence in respect of his conviction under the first trial.

In the second appeal the second appellant appealed against his conviction and sentence on two charges preferred against him. Both charges were under the Penal Code with the first charge for an offence punishable under s. 109 read with s. 377B while the second charge was for an offence punishable under

s. 377B. For his first conviction the second appellant has been sentenced to six years imprisonment with two strokes of the rotan while for the second conviction he has also been sentenced to six years imprisonment and two strokes of the rotan. The imprisonment terms are to run concurrently.

The Charges

The charge as amended preferred against the first appellant reads:

> Bahawa kamu, pada satu malam di antara bulan Januari hingga Mac 1993, lebih kurang jam 7.45 malam, di Unit No 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar dalam Wilayah Persekutuan Kuala Lumpur telah dengan sengaja melakukan persetubuhan bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar dengan memasukkan zakar kamu ke dalam duburnya dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 377B Kanun Keseksaan (NMB Bab 45).

Translation:

> That you, on one night between the months of January to March 1993, at or about 7.45 at Unit No 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur, did voluntarily commit carnal intercourse against the order of nature with Azizan bin Abu Bakar by introducing your penis into his anus, and you have thereby committed an offence punishable under s 377B of the Penal Code (FMS Cap 45).

The charges as amended preferred against the second appellant read:

First charge:

> Bahawa, pada satu malam di antara bulan Januari hingga Mac 1993, lebih kurang jam 7.45, di Unit No 10-7-2 Tivoli Villa, Jalan Medang Tanduk, Bangsar, dalam Wilayah Persekutuan Kuala Lumpur, Dato' Seri Anwar bin Ibrahim telah melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar, dimana Dato' Seri Anwar bin Ibrahim tersebut telah memasukkan zakarnya di dalam dubur Azizan bin Abu Bakar dan kamu pada hari dan tempat yang sama, telah bersubahat melakukan kesalahan tersebut di mana kesalahan tersebut telah dilakukan hasil daripada persubahatan kamu, dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 109 dibaca bersama s. 377B Kanun Keseksaan (NMB 45).

Translation:

> That, on one night between the months of January to March 1993, at or about 7.45 at Unit No 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur Dato' Seri Anwar bin Ibrahim did commit carnal intercourse against the order of nature

with Azizan bin Abu Bakar to witness the said Dato' Seri Anwar bin Ibrahim did introduce his penis into the anus of Azizan bin Abu Bakar dan that you on the same day at the same place did abet in the commission of the said offence where the said offence was committed in consequence of your abetment and you have thereby committed an offence punishable under s. 109 read together with s. 377B of the Penal Code (FMS Cap 45).

Second charge:

Bahawa kamu pada satu malam di antara bulan Januari hingga Mac 1993 lebih kurang jam 7.45, di Unit No 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar dalam Wilayah Persekutuan Kuala Lumpur, telah dengan sengaja melakukan persetubuhan bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar dengan memasukkan zakar kamu ke dalam dubur Azizan bin Abu Bakar tersebut dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 377B Kanun Keseksaan (NMB Bab 45).

Translation:

That you, on one night between the months of January to March 1993, at or about 7.45, at Unit No 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur, did voluntarily commit carnal intercourse against the order of nature with Azizan bin Abu Bakar by introducing your penis into the anus of the said Azizan bin Abu Bakar, and you have thereby committed an offence punishable under s. 377B of the Penal Code (FMS Cap 45).

The ingredients of the offences alleged in the charges preferred against the appellants have been correctly dealt with by the learned trial judge in his grounds of judgment. There was no dispute on that point.

Thus, having heard the appeals as a whole we noted that the thrust of the complaint of both the appellants was on the learned trial judge's assessment of witnesses called, reception, appreciation and application of the evidence adduced by both the prosecution and the defence *vis-à-vis* the charges preferred against them.

For convenience we reproduce herewith the relevant sections under consideration.

In respect of the sole charge preferred against the first appellant and the second charge preferred against the second appellant the relevant sections in the Penal Code read:

377A. Carnal intercourse against the order of nature

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.

Explanation – Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.

377B. Punishment for the committing carnal intercourse against the order of nature

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.

As for the first charge preferred against the second appellant the relevant sections in the Penal Code read:

107. Abetment of a thing

A person abets the doing of a thing who:

(a) instigates any person to do that thing;

(b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

(c) intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1 – A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

109. Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation – An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Brief Background Summary

It is the version of the Prosecution that one night between the months of January 1993 and March 1993 Azizan came to the apartment of the second appellant at Unit No. 10-7-2, Tivoli Villa, Jalan Medang Tanduk, Bangsar, in the Federal Territory of Kuala Lumpur on the latter's invitation. On arrival Azizan was surprised to find the first appellant there. Anyway he was signalled by way of a hand gesture to go into a room where he was sodomized by the first appellant in the presence of the second appellant. Thereafter the second appellant proceeded to sodomize him as well.

After the incident there was no immediate complaint lodged by Azizan with the police or other relevant authorities. However by way of a statutory declaration made on 5 August 1997 ('P5') drafted by one Umi Halfida at his request, the said Azizan narrated the fact that he had been sodomized by the first appellant in 1992. Copies of the same were given to certain personalities including the Prime Minister and a lawyer Mr. Karpal Singh. Initially there was a flurry of Police investigation carried out to record statements including that of Azizan. Nevertheless, for a while the issue appeared to subside. However, it resurfaced following the Police report lodged by one Mohd Azmin bin Ali vide Dang Wangi Police Report No 144140/ 98. Azizan was then asked to give his statement to the Police. He had given statements to the Police earlier on in connection with another Police report also related to allegation of sexual misconduct of the first appellant.

The revival of the investigation resulted in a charge being preferred against the first appellant accusing him of having sodomized Azizan. But the month and year stated in the initial charge was May 1994 when the matter was first brought before the Sessions Court Kuala Lumpur on 29 September 1998. Subsequently vide a certificate issued by the public prosecutor in the exercise of his power under s. 418A(1) of the CPC the matter was transferred to the Kuala Lumpur High Court. And during the mention of the case on 27 April 1999 the prosecution applied to amend the charge in respect of the year only from 1994 to 1992. Typographical error was given as the reason.

Meanwhile on 23 April 1999 the second appellant was charged for two offences, firstly for abetting the first appellant in May 1992 in the commission of the alleged offence for which the first appellant was charged and secondly for sodomizing Azizan during the same period. The matter first came before the Sessions Court Kuala Lumpur. Later on it was transferred to the Kuala Lumpur High Court pursuant to a certificate issued by the public prosecutor under s. 413A(1) of the CPC. The second appellant then served a notice of alibi dated 27 May 1999 on the public prosecutor in connection with the charges preferred against him wherein the alleged date of incident was 'May 1992'.

A joint trial for both the matters commenced before the Kuala Lumpur High Court on 7 June 1999. At the commencement of the joint trial the prosecution applied to amend the respective May 1992 charges of the appellants to the dates 'between the months of January to March 1993'.

It is to be noted that after the first mention of the case against the first appellant on 10 October 1998 there were further mentions on 14 April 1999, 27 April 1999 and 4 May 1999. Pending the commencement of the trial proper Azizan was also called by the Investigation officer Senior Assistant Commissioner-1 ('SAC1') Musa bin Hassan to give his further statement.

Objections were made against the amendments to the respective charges but were overruled by the learned trial judge. In fact there was an application made by the defence to have the charges struck out. That was also dismissed and an appeal against that decision is pending in the Court of Appeal. The objections and application took time for consideration by the learned trial judge, hence the first witness was called only when hearing resumed on 16 June 1999.

It was also drawn to our attention during the hearing of these appeals that at the commencement of the hearing on 7 June 1999 in the court below the lead counsel for the first appellant was YM Raja Aziz Addruse. Mr. Karpal Singh was appearing for the second appellant.

The Trial Before The High Court

The trial before the learned judge in the court below took several weeks interspersed with adjournments. At the conclusion of the hearing and after deliberating on the evidence adduced the learned trial judge came to several findings on facts and law to the issues raised, and ultimately held that the prosecution had proved its case against both the appellants beyond reasonable doubt and that the defence failed to raise any reasonable doubt on the prosecution's case.

Some of the pertinent findings of the learned trial judge are as follows, *inter alia:*

(i) on the technical points:

(a) that there was no merit in the application to strike out the charges preferred against the appellants;

(b) that the reason advanced to disqualify him from hearing the case was frivolous and irrelevant; and

(c) that the notice of alibi given by the second appellant before the amendment to the May 1992 charges preferred against him remained valid and that there was no necessity for the second appellant to file a

fresh notice under s. 402A of the CPC. It is to be noted that contrary to what the learned trial judge had said but as contended by the learned public prosecutor before us which we agree, the first appellant never served a notice of alibi pursuant to s. 402A of the CPC in connection with the charge preferred against him.

(ii) on the merits:

(a) that the prosecution had proved its case against both the appellants on the following evidence adduced:

(i) the evidence of the principal witness, Azizan. The learned trial judge found this witness credible and that his testimony believable and remained un-impeached. In assessing the credibility of Azizan the learned trial judge considered the several applications and submissions by the defence advanced to negate the evidence of Azizan. Such applications included the impeachment proceeding and for his recall after his conviction for khalwat; and

(ii) the admission of the confession of the second appellant as against him and his co-accused.

(b) that the defence failed to prove its defences of alibi, fabrication and conspiracy.

The Appeals

Before us the several grounds in the petitions of appeal were categorized and given different emphasis in submissions. But ultimately we note that the main focal points in the appeals are the acceptance by the learned trial judge of Azizan as being a credible witness despite of the contradictory statements he made in the present case as well as in the first trial and the amendment of the May 1992 charges against the respective appellants. Having heard all the submissions we are of the view that the grounds can be summarized in two broad categories, namely, on technical issues and on merits.

The technical issues raised are as follows:

(i) that the trial was not according to law and thus infringed art. 5 of the Federal Constitution in that:

(a) the learned trial judge should have disqualified himself from hearing the case on the ground of conflict of interest and likelihood of bias; and

(b) the learned trial judge disregarded the basic elements of the law on procedure and evidence in particular as regards the standard of proof at the close of the prosecution's case.

ii. that the amendments to the May 1992 charges after the transfer to High

Court pursuant to s. 418A of the CPC was a nullity since the same should have been reverted to the lower court from where they originated before the amendment were made;

iii. that with the amendments to the charges the trial was a nullity since no opportunity was given for notice of alibi to be served as required by law;

iv. that the admission of alibi evidence without notice being given was a serious error in law as the learned trial judge had no discretion to admit such evidence;

v. that the charges preferred against the appellants were vague and stale and the public prosecutor and his deputies acted in bad faith when preferring the charges against the appellants;

vi. that there was a failure by the learned trial judge to appreciate the burden and standard of proof required of the prosecution and the defence respectively in order to succeed in their stands; and

vii. that there was a failure by the learned trial judge to invoke s. 114(g) of EA 1950 when it was appropriate to do so.

On merits the primary heads of complaints are:

(a) on the approach and analysis by the learned trial judge on the testimony of Azizan in respect of:

i. his credibility as a witness;

ii. the impeachment proceeding;

iii. the law on corroboration vis-à-vis the evidence of Azizan; and

iv. the law of accomplice and the confession of the second appellant.

(b) on the admission and truth of the confession of the second appellant and the reliance on the confession against the first appellant;

(c) the failure of the learned trial judge to properly consider and evaluate the evidence adduced to substantiate the defences of fabrication and conspiracy raised by the first appellant;

(d) the appreciation of the evidence on the alibi adduced by the appellants; and

(e) the lack of evidence against the second appellant in respect of the charge of abetment.

The grievances on the sentences imposed will be dealt with later.

The technical issues – contentions and findings

(i) Was the trial according to law?

(a) Disqualification of the trial judge

Learned counsel for the first appellant contended that the learned trial judge should have disqualified himself from hearing the case in view of his past ownership of shares in Dataprep, a company in which one of the sons of the Prime Minister was also a shareholder. And this was added by the fact that the learned trial judge failed to disclose such fact voluntarily. According to learned counsel there was a failure to meet the bias test as understood in law.

In response the learned public prosecutor argued that in his application to disqualify the learned trial judge the first appellant failed to show that there was a real danger of bias on the part of the learned trial judge in proceeding to hear the case. The cases of *R v. Gough* [1993] 2 All ER 724 and *Mohamed Ezam bin Mohd. Nor & Ors. v. Ketua Polis Negara* [2001] 4 CLJ 701 FC were cited.

In his grounds of judgment the learned trial judge ruled that the application was without logic since neither the Prime Minister's son nor the company was a party to the matter before him. And he went on to say this:

> The principle in *Pinochet*'s case does not apply.
>
> The real danger and reasonable apprehension and suspicion that I may be biased as alleged although it is not alleged, I am biased is a mere allegation by the counsel without any basis. It is raised for the purpose to embarrass me and for no apparent reasons and to delay this proceedings *(sic).*

We have considered this issue and we are of the view that there is no merit in it. We agree with the learned trial judge that such an issue should not arise in the first place since the matter before him did not involve the entity or personality that he had once associated with. Hence the mere fact that at one time he had shares in the company in which the son of the Prime Minister was also a shareholder could not be held to be a sufficient ground or circumstance to meet the test, namely, whether 'there was a real danger of bias on the part of the learned trial judge'. (See: *Mohamed Ezam bin Mohd. Nor & Ors. v. Public Prosecutor (supra); R v. Gough (supra)*). We would go further and say that the allegation and the factual circumstance simply could not have 'caused a fair-minded and informed bystander to entertain a fear of real danger of bias'. (See: *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [2002] 4 CLJ 268; *Locabail (UK) Ltd. v. Bayfield Properties Ltd & Anor.* [2000] 1 All ER 65).

Indeed other than the fact that the learned trial judge was a shareholder in the said company there was nothing else shown by the first appellant that indeed the relationship of the shareholders in the company at the material time went beyond business interest. And that it is still continuing. It was also not shown that the Prime Minister's son had any interest in the matter that was before the learned trial judge as to allow a fair-minded and informed bystander to entertain a fear of a real danger of bias on the part of the learned trial judge.

In our view it is not for any reason or assertion that a judge should be disqualified from hearing a case. Indeed a judge was even allowed to try a case involving a person he had contacts with previously. (See: *R.C Pollard v. Satya Gopal Mazumdar* AIR [1943] Cal 594). And this court had also expressed its abhorrence to the unhealthy trend of parties to disqualify judges for minor reasons. In *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900 this is what the court said:

> I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt. per Gopal Sri Ram JCA at p. 220.

(b) Observance of elements of procedure and evidence

Next, the assertion on the failure by the learned trial judge to observe the basic elements of procedure and evidence when conducting the trial. We find this complaint devoid of any merit. It is too general and could only be dealt with specifically on the various grounds advanced by the appellants. We propose to do just that. At any rate we find no fault in respect of the standard of proof adopted by the learned trial judge at the end of the prosecution's case. He said this:

> … the standard of proof required of the prosecution at the end of its case in the instant case before me is proof beyond a reasonable doubt on the charges against both accused as the alleged offences committed by the accused were between the month of January to March 1993.

(c) Section 418A and the amendments to the charges

Briefly put, it was the contention of learned counsel for the first appellant that pursuant to the certificate issued under s. 418A CPC it was the charges containing the allegations of wrongdoing in 1994 and/or May 1992 that were transferred to the High Court from the subordinate court. As such the High Court should have declined the application to amend those charges. Otherwise it would be an infringement of s. 418A resulting in the subsequent trial illegal. Any amendment should entail the reverting of the matter to the subordinate court.

In reply the learned public prosecutor submitted that pursuant to the certificate issued under s. 418A, what was transmitted to the High Court was the proceeding and not the charges.

This issue was not directly addressed in the grounds of judgment of the learned trial judge. But in the earlier miscellaneous applications by the appellants to have the proceeding struck out due to the amendments to the charges preferred, the learned trial judge dismissed them on the ground that they were devoid of any merits. There is a pending appeal on that dismissal. Be that as it may the issue lies before us for consideration.

Section 418A reads:

> Trials by High Court on a certificate by the Public Prosecutor
>
> (1) Notwithstanding the provisions of section 417 and subject to section 418b, the Public Prosecutor may in any particular case triable by a criminal Court subordinate to the High Court issue a certificate specifying the High Court in which **the proceedings are to be instituted or transferred** and requiring that the accused person be caused to appear or be produced before such High Court.
>
> (2) The power of the Public Prosecutor under subsection (1) shall be exercised by him personally.
>
> (3) The certificate of the Public Prosecutor issued under subsection (1) shall be tendered to the Subordinate Court before which the case is triable whereupon the Court shall transfer the case to the High Court specified in the certificate and cause the accused person to appear or be brought before such Court as soon as may be practicable.
>
> (4) When the accused person appears or is brought before the High Court in accordance with subsection (3), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX. (emphasis added).

From our reading of the section it is patently clear that it is the proceeding that is being transmitted when a certificate is issued and not the charge. That can be implied in the judgment of his Lordship Ahmad Fairuz FCJ (as he then was) in the case of *Abdul Ghani bin Ali & Ors v. Public Prosecutor* [2001] 3 CLJ 769 where at p. 811 his Lordship said this:

> In s. 418A of the CPC, a public prosecutor's certificate would effect a **transfer of a case pending** in a subordinate court to a High Court and thereafter the trial in the case shall be held in accordance with the procedure under Chapter XX of the CPC. (emphasis added).

To agree therefore with the contention of learned counsel for the first appellant would mean to curtail the powers of the High Court in the further conduct of the trial, for instance, the power under s. 158 of CPC which reads:

> Court may alter or add to charge
>
> (1) **Any Court** may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused. (emphasis added).

There is also nothing to indicate in the foregoing section that it is subject to s. 418A.

In respect of the application by the prosecution to amend the charges preferred against the appellants the learned trial judge, in the exercise of his discretion, allowed it. He also ruled that there was no necessity for the prosecution to explain the reason for such amendments. However in this case explanation was given when the application was made.

Hence, we find no error in the conclusion of the learned trial judge in allowing the amendments to the charges. It has been consistently held that it is for the public prosecutor to consider what charge to prefer against an accused person even upon an order of retrial. That question was posed and answered in the affirmative in the case of *Lee Weng Sang v. Public Prosecutor* [1977] 1 MLJ 166. His Lordship Hashim Yeop Sani J (as he then was) said this at p. 167:

> To sum up, an order of retrial would result in the trial to commence de novo and it is my opinion that even if the appellate judge had thought it fit to frame the charge or charges appropriate in his view for retrial that would not deprive the Public Prosecutor from exercising his own power under the Criminal Procedure Code to amend, alter, reduce or enhance the charges or even to offer no evidence in the proceedings.

In any event the amendments were only related to the time and period of the commission of the alleged offences by the respective appellants. And there are authoritative decisions of our courts wherein time and date in a charge were held to be immaterial. In *Hussin bin Sillit v. Public Prosecutor* [1988] 2 MLJ 232 his Lordship Mohd. Azmi SCJ at p. 236 said this:

> It should be borne in mind that where the charge relates to only one offence, merely amending the date, place or time in the charge would not necessarily constitute amending the offence, and under section 156 of the Criminal Procedure Code, "no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission." Thus, under

illustration (d) of section 156, it is illustrated, "'A' is charged with the murder of John Smith on 6 June 1910. In fact the murdered person's name was James Smith and the date of the murder was 5 June 1910. 'A' was never charged with any murder but one, and had heard the inquiry before the magistrate which referred exclusively to the case of James Smith. The court may infer from these facts that 'A' was not misled, and that the error in the charge was immaterial." Clearly, each situation must depend on the facts and circumstances of the particular case in determining whether any amendment as to time, date or place affected before or in the course of the trial entails changing the offence with which the accused is charged into an entirely different offence. There is no reason to suppose that every amendment, either before or after commencement of the trial, must necessarily change the occasion in the original charge into an entirely different occasion so as to exclude evidence pertaining to it from being "evidence in support of a defence of alibi".

And in *Law Kiat Lang v. Public Prosecutor* [1966] 1 MLJ 215 his Lordship Thomson LP at p. 216 made reference to an English case and said this:

> With regard to the first of these charges, the dates are wrong and the charge was at no time amended. This in itself, however, is without importance. As was observed by Atkin J in the case of *Severo Dossi* [1918] 13 Cr. App. R 158, 159:
>
> > From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.

Accordingly, we find no merit in the contention of learned counsel for the Appellants to the above mentioned issue.

(d) Amendment of the charges and the defence of alibi

Firstly, Mr. Karpal Singh who, in these appeals appeared for the first appellant, submitted before us that upon amendments to the charges being allowed an application was made by the second appellant for an adjournment of the hearing for a period of 12 days to enable the service of notice of alibi in connection with the amended charges but was refused when hearing resumed on 16 June 1999. It was therefore submitted before us that there was deprivation to the appellants of their constitutional rights in that they could not rely on the defence of alibi for want of notice to be served as required by s. 402A of CPC. Learned counsel therefore went on to say that as a result the trial was a nullity.

Secondly, it was contended that notwithstanding the stand taken by the public prosecutor in not demanding for notice of alibi to be served and for not objecting to the admission of evidence pertaining to the defence of alibi, that should not detract from the fact that there was a serious breach of a mandatory statutory provision which entailed the trial a nullity. According to learned

counsel the statutory provision could not be construed to endow the court or the prosecution with discretion on admission of alibi evidence without due compliance with the prerequisite of notice to be served.

The learned public prosecutor in his response to the above arguments submitted that in respect of the first appellant the issue did not arise simply because he did not serve or file any notice of alibi. And neither was there an application by him or his then learned counsel for an adjournment of the hearing for the purpose of serving a notice of alibi on the amended charge. Thus it was the contention of the learned public prosecutor that he would concede that the learned trial judge misdirected himself in allowing the admission of the alibi evidence tendered by the first appellant when no notice was served in compliance with s. 402A of the CPC.

Incidentally, it was also in the submission of the learned public prosecutor that although it was the stand of the defence that a notice of alibi was served by the first appellant in respect of the May 1992 charge, the prosecution never received it. Notwithstanding the denial of receipt the issue was also left for the court to decide. With respect we have already expressed our view on this point hereinabove and we need not reiterate it.

Now, in particular reference to the contention advanced for the second appellant the learned trial judge ruled, *inter alia*:

(i) that he was of the view that the notice of alibi served earlier on the public prosecutor in relation to the May 1992 charge was still valid and remained effective despite the amendment to the charges at the commencement of the trial. And that it was not necessary for the second appellant to serve a fresh notice as in the circumstances the requirements of s. 402A(1) of the CPC had been duly complied with and that the second appellant was entitled to adduce evidence in support of his alibi;

(ii) that in the circumstances of the case he failed to see how the defence could be said to have been put in a disadvantage position with the amendment to the dates in the charges since the appellants were allowed to adduce evidence in support of their alibi;

(iii) that the purpose of giving notice of alibi is to 'divert the mischief of the defence disclosing his defence of alibi at a late stage of the trial';

(iv) that once 'the defence of alibi is properly raised by the defence the prosecution has the discretion to investigate into the alibi if they feel like doing so. However, investigation into the alibi would be entirely the discretion of the Police under the direction of the public prosecutor;

(v) that whether to investigate or not, would be entirely for the public

prosecutor to decide and within his prerogative. No one could force the public prosecutor to investigate as he should know what evidence he possessed to challenge the defence of alibi. And it would be 'the prosecution's own funeral if as a result of non investigation the evidence adduced by the defence in support of the alibi is not challenged'.

(vi) that the court would decide on the success or failure of the defence of alibi based on the evidence before it.

In order to appreciate the true intention of and the mischief addressed by s. 402A of CPC it is appropriate to reproduce it here. And it reads:

> (1) Where in any criminal trial **the accused seeks** to put forward a defence of alibi, evidence in support of it **shall not be admitted** unless the accused shall have given notice in writing of it to the Public Prosecutor at least ten days before the commencement of the trial.
>
> (2) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi. (emphasis added).

On plain reading of the section it can be discerned that its only purpose is to prevent surprise to the prosecution in a criminal trial. That view was expressed by his Lordship Salleh Abas FJ (as he then was) in the case of *Krishnan & Anor v. Public Prosecutor* [1981] 2 MLJ 121 when he said this at p. 122:

> The object of the notice is merely to enable the prosecution to check upon the veracity of the alibi.

And the beneficial aspects of that measure are to prevent unnecessary prosecution of a person who could clearly show that he was not at the scene of the crime, to allow the prosecution to prepare its rebuttal evidence on the alibi evidence and perhaps costs saving as adjournment would be avoided. If it is not made mandatory for an accused person to comply with the requirement then the primary purpose of that section would be defeated. In short, the section was enacted more for the convenience of the prosecution. To that extent we are in agreement with the above reasoning of the learned trial judge.

In respect of the first appellant, as noted earlier on, he did not serve any notice of alibi. Neither did he indicate that he would definitely want to serve a notice of alibi on the public prosecutor in connection with the amended charge preferred against him. As submitted by the learned public prosecutor the then lead counsel of the first appellant only contended that a specific date should be given in the charge otherwise the first appellant might not be able to serve

a notice of alibi. With respect, that is not the same as requesting for time to enable the service of a notice of alibi on the amended charge. Indeed no adjournment was asked for. And that could be explained by the fact that at that time the main objection was that the charge should not have been amended at all. Accordingly in respect of the first appellant and as contended by the learned public prosecutor we are inclined to think that since no notice of alibi was ever served and no request for time to serve one in respect of the amended charge there is therefore no merit in the contention advanced on his behalf on the issue. In respect of the reception of the evidence adduced by the first appellant despite the absence of the required notice and whether that should result in annulling the trial, we will deal with it later on in this judgment.

On the other hand the second appellant did ask for an adjournment. But it was the contention of the learned public prosecutor that his inability to serve a second notice of alibi did not prejudice him in anyway and at any rate his defence was not one of alibi. The case of *Vasan Singh v. Public Prosecutor* [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 was cited.

Now, in addition to what we have said earlier on, we are inclined to agree that the second appellant suffered no prejudice since there was already the first notice of alibi served. Further, the second appellant was allowed to adduce evidence of his alibi pursuant to the first notice. Of course whether or not such evidence was indeed evidence of alibi will be dealt with later on in this judgment.

As regards the cases cited to us such as *Wong Kim Leng v. Public Prosecutor* [1997] 2 MLJ 97, *Public Prosecutor v. Lim Chen Len* [1981] 2 MLJ 41 and *Rangapula & Anor v. Public Prosecutor* [1981] CLJ 129; [1981] CLJ (Rep) 261 we have no doubt that they accurately stated the law on the prerequisites to adducing evidence of alibi. However on the facts of the present case these authorities are distinguishable. In respect of the second appellant they are also not directly relevant in that there is no dispute that the second appellant served a notice of alibi albeit for the May 1992 charge.

Accordingly we do not think the approach taken by the learned trial Judge on this issue of alibi and the notice thereof was entirely wrong particularly in respect of the second appellant as to warrant a ruling that the whole trial was a nullity. Perhaps we should remind ourselves of what his Lordship H.T. Ong CJ (Malaya) had to say on excessive legalism in the case of *Yap Chai Chai & Anor v. Public Prosecutor* [1973] 1 MLJ 219 at p. 221:

> What is always of paramount importance in the administration of criminal justice is a fair trial – not such excessive legalism as to give the ordinary meaning of words the sacrosanctity of a ritual.

On the issue of the amendment to the charges in respect of the date alleged in the commission of the offences subsequent to the notice of alibi we need only to adopt the view expressed by the majority in the Supreme Court of Canada in the case of *Regina v. P (M.B)* 89 C.C.C. (3d) 289; [1994] C.C.C. LEXIS 2454; 113 D.L.R. (4th) 461, where Lamer CJ opined thus (at p. 297):

> *The fact that an accused may have an alibi for the period (or part of the period) described in the indictment does not automatically "freeze" the dates specified in the indictment. That is to say, there is no vested right to a given alibi. Alibi evidence must respond to the case as presented by the Crown and not the other way around.* (emphasis added).

Accordingly, we hold that the mere giving of the notice of alibi by the second appellant should not be construed as having the effect of limiting or 'freezing' the date or time specified in the charges preferred against them. As such in our view the hype on the three times changes to the dates in the charges was a result of a misapprehension of the true position of the law in respect of time factor when a charge is preferred against a person. Thus, in the instant case we find no compelling ground to accept the contention of learned counsel for the first appellant on the forgoing issue.

Stale And Vague Charges

Next is on the contention that the charges preferred against the appellants were stale, vague and done with bad faith.

In respect of the first assertion it was premised on the time lapse between the alleged commission of the offences and the arraignment of the accused. It was also contended that the charges were vague in term of time and other particulars.

Now, on this issue of charge being vague we are not convinced that there is any merit in it. The learned trial judge came to his finding on the issue in this way:

> In this instant case it is clear that in the charges it is specified the offences were alleged to have been committed one night at about 7.45pm between the months of January and March 1993 at Tivoli Villa, in the Federal Territory of Kuala Lumpur, I am of the view that these are particulars sufficient to clothe the charges with clarity and certainty. The charges as amended are clear and unambiguous and as such both the accused have not in any way misled by the charges as framed. Both the accused know what the charges are against them. They are not in any way prejudiced by the failure of the prosecution

to state the exact date and this omission has not occasioned a miscarriage of justice. In any event a date in the charge has never been material. In *R v. Severo Dossi* [1918] 13 Cr App R 158 (quoted in *Law Kiat Lang v. PP* [1966] 1 MLJ 215 and *Ho Ming Siang v. PP* [1966] 1 MLJ 252) Lord Atkin J observed:

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

With due respect we find nothing gravely erroneous in the finding as to warrant an interference by this court.

As regards the allegation of stale charges it was also the submission of the learned public prosecutor that the allegation of stale charge should not arise since the investigation of the case only commenced in 1998 with the publication of the 'Buku 50 Dalil' and the prosecution was launched in 1999. And it was also contended that in criminal law there is no time limitation.

Having considered the facts and circumstances as adduced in evidence we are inclined to agree with the learned public prosecutor. We would add that the assertions of stale charge and delay in the prosecution are of similar nature and hence our view on the effect of the alleged delay is therefore equally applicable.

For the sake of completeness we should briefly note the submissions of learned counsel on the issue of delay. It was submitted for the appellants that the time lapse between the alleged commission of the offences and the prosecution was too long. The delay according to learned counsel had prejudicial effect to the defence particularly in recalling events for the defence of alibi.

In answer to that argument learned public prosecutor submitted that it was for the defence to show that there was such delay that it amounted to an abuse of process and had caused undue prejudice and unfairness to the appellants.

To begin, we would think that there should be no question of delay going by what the learned public prosecutor had submitted. The investigation began in 1998 and the prosecution was initiated in 1999. Further, we are inclined to agree that on such allegation it would be for the appellants to show prejudicial effect or effects. Indeed it has been said that delay in the prosecution of a person for an offence such as sexual offence should not necessarily be deemed to be prejudicial to an accused. 'It is a matter for the trial judge having heard the evidence to determine whether the memory of the complainants or of the respondent has dimmed with the passage of time and that the respondent is thereby deprived of a fair trial.' – per Goodridge CJN in the case of *Regina*

v. W.G.G. 58 C.C.C. (3d) 263; [1990] C.C.C. LEXIS 3316 (Newfoundland Court of Appeal). In any event for the first appellant there should have been hardly any difficulty in accounting for his movements since it was not in dispute that being a member of the Cabinet and the Deputy Prime Minister at the material time his where-abouts at any time were recorded. And as for the second appellant we would agree that the success or failure of his defence of alibi should hinge on the alibi of the first appellant.

Bad Faith

As for the second complaint it was submitted that the learned Deputies Public Prosecutor who conducted the prosecution of these cases were involved in the fabrication and extortion of evidence against the first appellant and thus tainted with bad faith in the conduct of their duties. And this contention was based on the evidence of Mr. Manjeet Singh ('DW31') referring to his meeting with the then Attorney General, the present Attorney General and Dato' Azhar Mohamad. The case of *Smyth v. Ushewokunza & Anor* [1997] SC (we were not given a complete citation of the case) – a decision of the Supreme Court of Zimbabwe, was cited in support this complaint. Learned counsel argued that the principle of fair hearing should be given due respect. Unfortunately learned counsel for the appellants could only manage to secure a digest of the case. Hence it is therefore quite difficult for us to consider if indeed this case is of any help. Anyway even based on the digest copy it would appear that the facts of that case differed from the present case in that there it was stated that the prosecutor had personal cause or crusade against the accused. There was no allegation of that nature in the present case. Thus we are very much in doubt if the principle in that case is of any relevance to the case before us.

In reply to the foregoing complaint the learned public prosecutor submitted that the evidence adduced did not tally with the allegation of fabrication or extortion for evidence and the learned trial judge was correct in finding that such evidence, for instance the statutory declaration of DW31, was irrelevant. It was alleged in the declaration that the evidence asked for was on womanizing habit of the first appellant and nothing to do with sodomy.

Having carefully perused the evidence adduced and the contentions of the respective learned counsel and the learned public prosecutor we have no hesitation to agree with the finding of the learned trial judge. We are also in agreement with the submission of the learned public prosecutor that the evidence relied upon to indicate fabrication or extortion on the part of the two learned deputies, Dato' Gani Patail and Dato' Azahar Mohamad, who prosecuted this case, did not support such assertion. The allegation was a demand by the learned deputies for evidence of womanizing habit of the 1st appellant whereas

the charge preferred against him was for sodomy. If indeed the learned deputies were anxiously gathering evidence against the first appellant then it would have been a futile exercise in what they were alleged to have done. Further, we are inclined to agree with the learned public prosecutor that it was DW31's own deduction and opinion when he said that he was asked to compel his client to give the required information.

Thus it is our considered opinion that the assertions and allegations, in particular of being tainted with bad faith, raised by learned counsel for the appellants have no basis.

(e) Section 114(g) of the EA 1950

Learned counsel for the appellants argued that the learned trial judge failed to invoke s. 114(g) of the EA 1950 against the prosecution when it was appropriate such as when the charges were re-amended and the failure to call certain persons as witnesses for the prosecution.

Now, it should be borne in mind that adverse inference is not to be invoked liberally by the courts. Indeed it is not in all cases of where there is an act complained of or a failure or omission to produce or adduce evidence that that section is relied upon. Only in cases where there has been an intentional suppression of material or crucial evidence that it may be invoked. Thus, in the case of *Public Prosecutor v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233 this is what his Lordship Chong Siew Fai CJ (Sabah and Sarawak) at p. 254 had to say on the application of that section:

> Much had been canvassed before us respecting the drawing of adverse inference under s. 114(g) of the Evidence Act 1950 from the non-calling of Cholar and Amran Whether or not such an inference should be drawn is not a matter of an inflexible rule but depends upon the circumstances of each particular case. In determining this issue, the question to consider is whether the existence of a fact or a state of things (ie, Cholar introducing PW9 and was present at the meetings; Amran staying in room 'K') makes the existence of another fact or state of things so likely that it may be presumed to exist. The answer must naturally vary according to the circumstances, the nature of the fact required to be proved and its importance in the controversy, the usual and commonly recognized mode of proving it, the nature, quality and cogency of the evidence which had not been produced and its accessibility to the party concerned.

Thus it depends on the facts and circumstances of each case. And it should also be remembered that the calling of witnesses in any prosecution is within the discretion of the public prosecutor. That was stated in the case of *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 where Edgar Joseph Jr SCJ delivering the grounds of judgment of the court said this at p. 5:

> We recognize that the function of the prosecution is to prosecute, and that does not mean that it must discharge the functions both of the prosecution and the defence.
>
> On the other hand, it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not. (See *Teh Lee Tong v. PP* [1956] MLJ 194.) That discretion, however, must be exercised having regard in the interests of justice, which includes being fair to the accused (per Lord Parker CJ in *R v. Oliva* [1965] 3 All ER 116 at p. 122; [1965] 2 WLR 1028 at p. 1035), and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v. R* [1936] 3 All ER 36 at p. 49, applied in *R v. Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789). (emphasis added).

In particular, to the complaint on the re-amendment of the charges, as discussed above, it is the prerogative of the prosecution to do so. As such we do not think it is appropriate to expect the learned trial judge to invoke s. 114(g) in such instance. Hence, we find no basis to agree with the contention of learned counsel for the appellants.

On the failure to call certain persons as witnesses it is to be noted that there is no dispute that these persons were offered to the defence at the end of the prosecution's case. Hence there is no ground for the appellants to complain that they were not available. As to whether they were required in the 'unfolding of the narrative on which the prosecution is based' we are of the view that having considered the nature of the offences as per charges preferred and the witnesses called, in particular the victim, there was no necessity for the prosecution to call them as witnesses. Accordingly we do not think the invocation of s. 114(g) of EA should arise.

Overall therefore we are not persuaded that there is any merit in any of the points raised by learned counsel for the appellants under the technical issues identified hereinabove as to warrant allowing these appeals.

Issues On Merits – The Evidence

As an opening remark we say that it should be appreciated that the commission of an offence which is sexual in nature involves a minimum of two persons. And generally during commission there is no independent witness present 'like a fly on the wall observing the incriminating episode described' by a victim or complainant. Invariably therefore the truth or falsity of such charge will depend on which version is to be accepted by the court. Credibility of the victim or complainant as a witness is therefore of paramount importance. And that explains the need for corroboration or at least a warning of the danger of

convicting on uncorroborated evidence of such witness. (See: *PP v. Mardai* [1950] MLJ 33; *Chiu Nang Hong v. PP* [1965] 31 MLJ 40). As opined by the learned trial Judge in the present case it is a charge that is easy to make but difficult to refute. In order to secure a conviction the evidence must therefore be convincing particularly the evidence of the victim or complainant. Hence it is not surprising in these appeals that the credibility of Azizan, one of the three persons in the alleged incident, became a crucial factor. And indeed the prosecution heavily relied on his testimony coupled by the retracted confession of the second appellant and such other corroborative evidence implicating the guilt of the appellants. On such evidence the learned trial judge found beyond reasonable doubt the guilt of the appellants as charged. Thus central to these appeals on the issues of merits are the grievances of the Appellants as to the appreciation by the learned trial judge of the testimony of Azizan and his credibility as a witness, the admissibility, truth and trustworthy of the confession of the second appellant as against the maker and the first appellant and the probabilities of the defences of alibi, conspiracy and fabrication raised by the appellants. Of course his identification of corroborative evidence or the lack of it played an important supportive role.

The Testimony Of Azizan And His Credibility As A Witness

In coming to his finding on the guilt of the appellants the learned trial judge relied on the testimony of Azizan. Indeed he was prepared to find conviction of the first appellant solely on the evidence of Azizan. It became therefore the main thrust of the complaint of the appellants in these appeals that the approach and appreciation by the learned trial judge of the testimony of the principal witness and the alleged victim of the offences allegedly committed by the appellants namely, Azizan, was highly unsatisfactorily in fact and in law. And for that it is perhaps appropriate to reproduce verbatim the opening remarks of Mr. Fernando when he began his lengthy submissions thus:

> 'prosecution's case rests on evidence of PW6 – Azizan. Entire case turns on credibility of Azizan. Learned Judge found PW6 credible, reliable and honest. We say no. Most unreliable. Riddled with major inconsistencies and outright lies ... In previous trial before Augustine Paul J he gave evidence which he admitted during this trial that he was not sodomized by the Appellant. He said three times and that was why he continued visiting Appellant between 1992 and 1994. Otherwise he would have kept far away from him. PW6 admitted in most unequivocal term. Judge taken aback. Told the Judge to record it. then Judge said he might have misunderstood. So I put again and his answer was clear and unequivocal. I asked the third time to be fair to him. His answer was unequivocal yes. Then after several days during re-examination a leading question was asked which I felt most unfair and ought to have been rejected. The leading question:
>
> After 1992 were you sodomized again?

Defence objected. Judge allowed. PW6 response was:

> Yes I was sodomized but from September 1992 until today (1998) I was never sodomized.

Witness continued:

> One incident I will never forget is that I was sodomized by Appellants at Tivoli Villa.

It was therefore obvious that what were highlighted by the learned counsel were the apparent inconsistent statements made by Azizan in the first trial as well as in the present case.

It was also submitted by learned counsel for the appellants that undue weight was placed on the credibility of Azizan when none was due and instead he should have been impeached, that there was hardly any corroboration of his evidence and that he was an accomplice in the commission of the alleged offences.

Accordingly the issue of credibility of Azizan was therefore strenuously pursued. Every possible implication of what he told the learned trial judge was unfolded before us irrespective of the context in which it was said.

The Basic Summary Of The Complaints On The Credibility Of Azizan

Learned counsel contended that the learned trial judge gravely erred in fact and in law in accepting the evidence of Azizan despite the following, namely:

a. the inconsistencies in his evidence particularly on whether he was in fact sodomized by any of the appellants. References were made to the evidence of Azizan in the first trial, in particular to his statement when he said this:

> selepas bulan September 1992 sehingga sekarang tertuduh tidak meliwat saya.;

In the present case Azizan told the learned trial judge that he was sodomized between the months of January and March 1993;

b. for having given three versions of the alleged incident in that three dates were mentioned as indicated by the amendments to the charges;

c. for not having given any statement to the police that he was sodomized yet the dates of 1992 and 1994 appeared in the initial charges and that the date of 1993 came about on the insistence of or at the behest of the police;

d. for visiting the house of the first appellant even after the alleged incident while maintaining that he was scared of being left with him; and

e. the disclosure by Azizan of bribery to him for his role in making the allegation against the first appellant.

It was also contended that the learned trial judge erred in finding Azizan a credible witness of truth without appreciating the following, namely:

i. for accepting the explanation of Azizan on the inconsistencies in his evidence and finding that Azizan had all to lose when in fact he benefited in that he was made a director and manager of a development company;

ii. for making contradictory findings on the credibility of Azizan. In the course of the proceeding the learned trial judge made a remark that Azizan was very evasive and contradictory in his answers yet in his grounds of judgment the learned trial judge found Azizan to be a highly credible and reliable witness;

iii. for not taking immediate action against Azizan when he made obvious contradictory statements in court and to the police, that is, whether or not he was sodomized;

iv. for accepting the explanation of Azizan as to why he continued to visit the house of the first appellant between 1992 and 1997;

v. for having two versions in the impeachment proceeding, firstly, the learned trial judge agreed there were material contradictions in the statements of Azizan, hence for the impeachment proceeding. However at the end of the proceeding the learned trial judge ruled that there was no contradiction and even if there was it had been explained by Azizan;

vi. for making an incomprehensible finding on the inconsistencies in the testimony of Azizan when it was clear that during the first trial Azizan made one statement and in the present case he made another contradictory statement, principally on the issue of whether he was sodomized after September 1992;

vii. for not allowing the appellants to adduce evidence on the subsequent conviction of Azizan for khalwat. Such conviction would have gone into the issue of credibility of Azizan; and

viii. for having mis-recorded the evidence during the impeachment proceeding which could have bolster the finding on credibility of Azizan as a witness.

The Law

Before we considered the various complaints of the appellants pertaining to the finding of the learned trial judge on the credibility of Azizan we propose to have a quick review of the approach adopted by appellate courts in other common law jurisdictions in so far as it relates to credibility assessment of a

witness by a trial judge. We need only to refer to a few judicial decisions of high authority.

In *Clarke v. Edinburgh Tramways* [1919] SC (HL) 35 at p. 36, Lord Shaw of Dunfermline had this to say at p. 36:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, *Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.* (emphasis added).

And in *Powell and wife v. Streatham Manor Nursing Home* [1935] AC 243 at p. 249 Viscount Sankey LC said this:

> What then should be the attitude of the Court of Appeal towards the judgment arrived at in the court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing court. There are different meanings to be attached to the word 'rehearing'. For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone

and a verdict after a trial before a judge and jury. *On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way.* (emphasis added).

And nearer home the same legal principles have been adopted both in criminal and civil cases. For instance in the case of *Herchun Singh & Ors v. Public Prosecutor* [1969] 2 MLJ 209 at p. 211 his Lordship HT Ong CJ (Malaya) said:

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

Again in *Lai Kim Hon & Ors v. Public Prosecutor* [1981] 1 MLJ 84 his Lordship Abdul Hamid FJ (as he then was) expressed the law in this fashion at p. 93:

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

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

And in *Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd* [1983] 2 CLJ 55; ([1983] CLJ (Rep) 7) PC Lord Brightman said this at p. 57 (pp. 11-12):

There is the further problem, that the Federal Court's finding involved their acceptance of the defendant's evidence and their rejection of the plaintiff's evidence. The issue was one which depended entirely on an assessment by the judge of the credibility of the witnesses. The trial judge had found the

> defendant to be a most untruthful witness, while he accepted the plaintiff as a witness of truth. Their Lordships readily defer to the Federal Court's superior knowledge of local conditions and attitudes, and recognise their experience in evaluating the evidence of witnesses drawn from different cultures. *But they feel it important to emphasise the pre-eminent weight which must be attributed to a trial judge's finding of fact based upon the credibility of witnesses whom he has seen and heard under examination and cross-examination, particularly in relation to a question of fact the answer to which is wholly dependent on the testimony of such witnesses.* Their Lordships respectfully draw attention to *Watt v. Thomas* [1947] AC 484 and in particular to the speech of Lord Thankerton at pages 487 and 488. In their Lordships' opinion the Federal Court was not justified in rejecting the finding of the trial judge that the July Document was not intended by the plaintiff and the defendant to be binding upon them. (emphasis added).

Another decision of high authority is the case of *Goh Leng Kwang v. Teng Swee Lin & Ors* [1974] 2 MLJ 5 although a civil case from Singapore we find the legal principle restated therein is equally applicable to the present case. A dispute before the court which entailed a determination on title to a piece of land the evidence turned on the oral testimonies of the opposing parties and their witnesses. The trial judge believed one version and rejected the other. On appeal to the Singapore Court of Appeal by the aggrieved party, the defendant, the appellate court ruled that 'for the defendant to succeed in this appeal, he has to convince us, as an appellate tribunal which has only the trial judge's notes of the evidence to work upon and has not seen or heard the witnesses, that the trial judge was wrong in his crucial findings of fact ... . We are quite unable to say that on all the evidence before him and having regard to his assessment of the witnesses and evaluation of their evidence that the trial judge's crucial findings of fact are wrong ... . In the final analysis, **it was for the trial judge to balance the probabilities and to evaluate the weight of the evidence on either side and it is not for this court to do so.** The trial judge has found the two principal witnesses of the plaintiffs were truthful witnesses and believed their evidence and he has rejected the defendant's evidence having found the defendant was not a witness of truth.' (emphasis added).

Now, did the learned trial judge err in assessing the credibility of Azizan to such extent that this court should rightly interfere? To better understand the approach adopted we propose to examine in greater detail what were said by the learned trial judge. From the grounds of judgment it is apparent that he has dealt with it primarily from various aspects, *inter alia*:

(i) from the angle of the impeachment proceeding;

(ii) on the submissions of learned counsel for the appellants that Azizan made not only inconsistent statements in the present case but during the first trial as well. And that his statements in the first trial were inconsistent with his statements in the present case;

(iii) on the alleged inconsistencies in Azizan's testimony and that of another witness;

(iv) corroborative evidence;

(v) the probability of Azizan being an accomplice; and

(vi) his conviction for khalwat.

The Impeachment Proceeding

In respect of the impeachment proceeding and the credibility of Azizan the learned trial judge said, *inter alia*:

> It can be seen that he made two statements in the earlier trial:
>
> (a) In examination in chief at p 242 of D6 he said:
>
> Saya setuju bahawa Dato' Seri Anwar tidak meliwat saya sebab itulah saya masih pergi ke rumahnya antara tahun 1992 dan 1997. Jika tidak saya tentu menjauhkan diri dari rumahnya. ('the first statement')
>
> (b) In re-examination at p 273 of D6 he said:
>
> Selepas bulan sembilan 1992 sehingga sekarang tertuduh tidak meliwat saya. ('the second statement')
>
> In his testimony from the witness box in the present trial Azizan said he was sodomized between the months of January and March 1993. I asked Azizan to explain the contradictions.
>
> On examining D6 it appears to me there are material contradictions between the statements he made in the earlier trial and his evidence in the present trial.
>
> ...
>
> … the question that has to be determined is whether what Azizan had said in the earlier trial firstly that he was not sodomized by Dato' Seri Anwar and that was why he continued to go to Dato' Seri Anwar's house between 1992 and 1997 and secondly that he was not sodomized after September 1992 was inconsistent with his evidence in the present trial when he said he was sodomized between the months of January and March 1993. If there is inconsistency then the evidence in this instant trial would be disregarded as unreliable. To determine whether there is such an inconsistency, it is necessary to look at Azizan's explanation. His explanation can be found in his testimony in his own words from the witness box which reads as follows:

Apabila saya katakan saya tidak diliwat selepas Mei 1992, di dalam perbicaraan dahulu saya maksudkan kejadian diliwat tidak berlaku di rumahnya. Itu adalah bagi menjawab soalan peguambela mengapa saya masih berkunjung ke rumah Dato' Seri Anwar. Kejadian liwat memang berlaku terhadap saya selepas Mei 1992 dan selepas saya berhenti kerja tetapi bukan berlaku di rumahnya. Saya juga ada memberitahu semasa perbicaraan dahulu kejadian tidak dapat saya lupakan berlaku di rumah Sukma di Tivoli Villa dan saya tidak ditanya tahun bila liwat itu berlaku. Apabila saya memberi keterangan di hadapan mahkamah ini itulah sebabnya saya beritahu liwat berlaku di dalam tahun 1993 di antara bulan Januari dan Mac 1993.

Azizan was cross-examined by Mr Fernando and for the purpose of the impeachment proceeding it is necessary to refer only to his testimony in connection with the incident of sodomy which took place in Sukma's apartment at Tivoli Villa as stated in his explanation. He agreed with the suggestion of the learned counsel that he was not sodomized by Dato' Seri Anwar and Sukma in May 1992 at Tivoli Villa. As regards the incident which took place at Sukma's apartment, Azizan was emphatic that he was sodomized at Tivoli Villa between the months of January and March 1993 as can be gathered from the following question and answer:

Question: Adakah awak beritahu polis awak diliwat di antara Januari hingga Mac 1993 di Tivoli Villa?

Answer: Ya, ada.

It was contended by Mr Fernando that Azizan was not telling the truth, it was SAC-1 Musa, the investigation officer who forced Azizan to change the date from May 1992 to between January and March 1993. On this point Azizan was asked:

Question: Jikalau awak cakap benar kenapa SAC-1 Musa suruh awak pinda tarikh itu dari Mei 1992 ke Januari hingga Mac 1993?

Answer: SAC-1 Musa suruh saya mengingatkan dengan jelas tentang saya diliwat oleh Dato' Seri Anwar dan Sukma di Tivoli Villa.

Question: Ini bermakna jikalau SAC-1 Musa tidak suruh kamu pada 1 Jun 1999 pinda tarikh itu tentu kamu tidak akan buat apa-apa?

Answer: Tidak setuju.

Question: Kamu setuju atas tindakan SAC-1 Musa memaksa kamu meminda tarikh itu daripada Mei 1992 ke Januari hingga Mac 1993 kerana Tivoli Villa tidak wujud pada bulan Mei 1992?

Answer: Tidak setuju.

It is clear from the answers given by Azizan that he was not forced or asked by SAC-1 Musa to say that the incident took place between the months of January and March 1993. SAC-1 Musa only reminded Azizan to be sure of the incident of sodomy by both the accused at Tivoli Villa. In his evidence Azizan was emphatic that he was sodomized at Tivoli Villa between January and March 1993. I find that it was Azizan who told SAC-1 Musa about the incident at Tivoli Villa and not SAC-1 Musa who forced him to say that he was sodomized.

...

… both the statements he made in the earlier trial were in answer to questions which are inter-connected in the sense that they relate to Azizan's visit to Dato' Seri Anwar's house between 1992 and 1997. The first statement was made in answer to the question put to the witness in cross examination namely 'I put it to you, you were not sodomized by Dato' Seri Anwar Ibrahim and that is why you continued to visit him in his house between 1992 and 1997 otherwise you would have kept far away'.

The second statement was in answer to the question in re-examination:

> Adakah peristiwa liwat terhadap kamu oleh tertuduh masih berlaku selepas bulan sembilan 1992?
>
> …

To my mind the two statements are the same in the sense that they are related to the same incident namely Azizan was sodomized after September 1992. Azizan in his explanation said what he meant when he said in the earlier trial that he was not sodomized after May 1992 was that he was not sodomized in Dato' Seri Anwar's house when he was asked 'mengapa saya masih berkunjung ke rumah Dato' Seri Anwar'. He further said without any reservation in his explanation that 'kejadian liwat memang berlaku terhadap saya selepas Mei 1992 dan selepas saya berhenti kerja tetapi bukan di rumahnya'.

It is to be noted that it is in evidence that Azizan stopped work as a driver to Datin Seri Dr Wan Azizah at the end of September 1992. It is therefore crystal clear that his explanation covers the second statement as well. Under these circumstances, it is futile for the defence counsel to maintain that Azizan has not explained the second statement he made in the earlier trial. It can be gathered clearly from his explanation he was sodomized after September 1992 but not in Dato' Seri Anwar's house but elsewhere. Azizan is very consistent with his story that he was not sodomized in the house but elsewhere after September 1992. He said this in the earlier trial where he said:

> Salah satu perbuatan yang tidak dapat saya lupakan ialah peristiwa di rumah Sukma di Tivoli Villa di mana tertuduh telah meliwat saya dahulu dan diikuti dengan adik angkatnya meliwat saya.

He also gave similar evidence to this effect in his testimony before this court with the addition that he was sodomized at Tivoli Villa between the months of January and March 1993.

On a close scrutiny of the explanation by Azizan, I find no difficulty in accepting it under the circumstances and on the evidence available. The explanation is logical and not inherently incredible bearing in mind the questions that were posed to him. The statements in question which form the basis of the impeachment of Azizan must be read in the context of the questions that were asked. I find that there is in fact no contradiction at all between what he had said in the previous trial and the evidence he gave in this instant proceedings in respect of the act of sodomy as stated in the charges against both accused. In any event, even assuming that there is a material contradiction I am more than satisfied that Azizan has successfully explained the contradiction for reasons stated above beyond any doubt. I, therefore, ruled that the impeachment proceeding failed and the credit of Azizan was saved and remained intact and further that in truth, in fact and in substance Azizan was a truthful witness.

With respect we find nothing wrong in the conclusion of the learned trial judge for not impeaching the credit of Azizan. He accepted his explanation for the seemingly contradictory statements which gave the apparent impression that they were contrary to his allegation against the appellants. Indeed in such proceedings it is the trial judge who has the advantage of listening and seeing the demeanour of the witness giving his explanation for his inconsistent statements. Hence his acceptance of the explanation should be given significant consideration. In *Ooi Choon Lye v. Lim Boon Kheng & Ors* [1972] 1 MLJ 153 it was observed that as the learned trial judge 'based his decision on the opinion he formed as to the comparative reliability of witnesses, it was not open to the Federal Court, as an appellate court, to interfere with that decision'. In the present case we have no reason to depart from that observation.

It was also contended that the learned trial judge made two inconsistent findings in the impeachment proceeding in that on one hand he found contradictions in the statements of Azizan and on the other he found none.

With respect such submission omitted the fact that it was essential for the learned trial judge to note the contradictions before he could allow the impeachment proceeding. Indeed the very purpose of an impeachment proceeding is to enable a witness to explain any material contradiction in his testimony presently given or in relation to his previous statement on the same issue. And it is up to the learned trial judge having heard the explanation to assess his credit 'as a whole with the rest of the evidence at the appropriate stage, that is to say, at the close of the case for the prosecution or for the defence as the case may be. No immediate order of a summary nature can or should be made

… and the right of cross examination or re-examination according to the circumstances should not be denied as it might well be that in the exercise of such right his credit might be repaired, restored or re-establish' – per Eusoff Abdoolcader FJ in *Dato' Mokhtar Hashim v. PP* [1983] 2 MLJ 232. Accordingly we find no merit in such submission.

The Inconsistent Statements Of Azizan

It was the contention of learned counsel for the appellants that Azizan should not be accepted as a reliable witness since he made inconsistent statements. References were made to his evidence as recorded in the notes of evidence of the first trial and his evidence in the present case.

In addressing the issue the learned trial judge, *inter alia*, relied on his findings in the impeachment proceeding wherein he concluded that by his refusal to impeach Azizan his credit was therefore saved. And in respect of the change in the date of the alleged incident the learned trial judge came to a finding thus, *inter alia*:

> … It can be gathered from his explanation that what he meant by saying that it was SAC-1 Musa who asked him to change the date was that SAC-1 Musa asked him to remember the date clearly with regard to the incident that took place at Tivoli Villa for the first time.

It was found by the learned trial judge that the evidence of SAC1 Musa corroborated the explanation of Azizan on the issue, hence there was no question of Azizan making an inconsistent statement. In making his finding the learned trial judge said this:

> This evidence corroborates what Azizan had said that it was he who told SAC-1 Musa of the date, ie between January and March 1993 as stated in the charges against both the accused. I accept the evidence of SAC-1 Musa on this issue as I find there is no reason why he should ask Azizan to change the date. He was only carrying out his duties as an Investigation Officer. He felt that there is a likelihood the date stated in the charge may not be accurate after carrying out further investigations on receipt of the notice of alibi. It is clear on the evidence adduced and under the circumstances of the case Azizan was not asked by SAC-1 Musa to change the date. I am convinced that it was Azizan who told SAC-1 Musa that he was sodomized by both the accused between January and March 1993 at Tivoli Villa. I find as a fact that Azizan was telling the truth.

It was also submitted that while under cross-examination Azizan gave inconsistent answers. However the learned trial judge came to his findings thus:

> A close scrutiny of the evidence would reveal that he was asked repeatedly in cross examination whether he told the police he was sodomized in May 1994 and May 1992.

...

It is to be observed that May 1994 and May 1992 are not the months we are concerned with in the instant charges against both the accused. These months are relevant only in respect of the earlier charges which have been amended. We are not concerned with these charges.

…

In his testimony Azizan said he was confused because he was asked about the months of May 1994 and May 1992 repeatedly as stated above. **I find as a fact that he was confused.** When a witness is confused, it does not mean he was lying. The naked truth is that he could not remember what he had said. I am satisfied he was not lying. In any event, the issue whether he told the police he was sodomized in May 1994 and May 1992 are not the issues in the current charges against both the accused. The issue is whether he was sodomized by both the accused between the months of January and March 1993 at Tivoli Villa. I therefore rule the credit of Azizan is not affected on this score. (emphasis added).

Next dealt with but still on the issue of inconsistent statements and the credibility of Azizan was in reference to his statements to the police and the evidence of the Investigation Officer, SAC1 Musa, on the allegation of sodomy. Having considered the evidence the learned trial judge came to this finding:

Be that as it may, the evidence of SAC-1 Musa clearly states that Azizan was consistent in his statements on the issue of sodomy although he was not sure of the exact dates. The relevant dates we are concerned with in the present charges are between the months of January and March 1993. Azizan emphatically said in evidence that he was sodomized by both Dato' Seri Anwar and Sukma at Tivoli Villa between these dates and he gave the reasons for remembering the dates. This evidence was not successfully challenged. It is therefore established on this evidence that Azizan was sodomized by both Dato' Seri Anwar and Sukma in Tivoli Villa between January to March 1993. Whether he was sodomized in May 1994 or May 1992 is not relevant as these dates are not in issue to be decided in this case.

We find the analysis by the learned trial judge on the inconsistent statements comprehensive and well reasoned. It was also partly based on his finding of the factual situation when Azizan gave his evidence. As to the discrepancies on the details we need only to note what was said by his Lordship Abdul Hamid J (as he then was) in *Chean Siong Guat v. PP* [1969] 2 MLJ 63 at p. 64:

Absolute truth is, I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common occurrence. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognized by the court.

And in the case of *Khoon Chye Hin v. Public Prosecutor* [1961] MLJ 105 it was held that "… If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence "must in law be rejected" is to go too far and is wrong." per Thomson CJ at p. 107.

Surely therefore it would be wrong in law to wholesale reject the evidence of Azizan just because he faltered in few instances in the course of his testimony. Indeed discrepancies found in the testimony of a witness may be evidence of his truthfulness rather than the reverse. (See also: *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor (supra).*

It should also be noted that those apparent inconsistent statements of Azizan during the first trial became the reason for the commencement of the impeachment proceeding. But with the conclusion arrived at by the learned trial judge in respect of the impeachment proceeding, any subsequent reliance on those very statements as positive evidence for the trial proper should be disallowed. (See: *Public Prosecutor v. Lo Ah Eng* [1965] 1 MLJ 241; *Public Prosecutor v. Wong Yee Sen and Ors.* [1990] 1 CLJ 325; [1990] 2 CLJ (Rep) 902). There are also limits to the use of evidence adduced in a previous trial. (See: *Sambasivam v. The Public Prosecutor, Federation of Malaya* [1950] MLJ 145; *Thavanathan a/l Balasubramaniam v. Public Prosecutor* [1997] 3 CLJ 150). And there was no assertion from learned counsel for the appellants that reliance was placed on the previous statements of Azizan for their truth. Basically it was only referred to in an attempt to undermine the credibility of Azizan as a witness. And such record of the previous inconsistent statement is only admissible if the witness denies making that inconsistent statement. The mere fact that the record contains the inconsistencies does not make it admissible wholesale. More so in the present case the admission of D6 was not for the purpose of making those transcripts positive evidence for the trial.

On Corroboration

As regards the testimony of Azizan and the law of corroboration it was the contention of learned counsel for the appellants that being an unreliable witness there should be no question of corroboration of the evidence of Azizan. The case of *TN Nathan v. Public Prosecutor* [1978] 1 MLJ 134 was cited in support. Alternatively it was submitted that in view of the nature of the offences as per charges the law demands that the evidence of Azizan must be corroborated. And in this case there was no corroborative evidence contrary to the finding of the learned trial judge.

Now, in his grounds of judgment the learned trial judge restated the law thus:

> It is therefore trite law that a complainant's evidence in a sexual offence requires corroboration although a conviction founded on the uncorroborated evidence of the complainant is not illegal provided that the presiding judge must warn himself of the danger of convicting on such uncorroborated evidence (see *Chiu Nang Hong v. PP* [1965] 31 MLJ 40).

We have no doubt on the correctness of the restatement of the law. What therefore is the position of Azizan in this context? Was the overall finding of the learned trial judge of him being a truthful and reliable witness justified? For if Azizan was not a reliable and truthful witness then there should be no issue of corroboration of his evidence.

Azizan A Reliable And Truthful Witness?

We have dealt with this issue earlier on in this judgment in response to the criticism on the credibility of Azizan advanced by learned counsel for the appellants. Put shortly it was the finding of the learned trial judge that Azizan was a reliable, credible and truthful witness notwithstanding some of the discrepancies and contradictions that were highlighted by the defence.

Bearing therefore in the forefront of our minds such finding, we therefore ask ourselves: Can we – 'who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong?'

We have given our anxious consideration to the complaints of the appellants, whether or not specifically dealt with herein, on the findings of the learned trial judge in relation to his assessment on the credibility of Azizan but we are unable to say that the learned trial judge was plainly wrong in coming to his findings as he did. In fact we find that the learned trial judge went quite far to ensure that Azizan was duly scrutinized as a witness. He allowed an impeachment proceeding to be conducted so that all parties could be heard on the apparent discrepancies in the statements and testimonies of Azizan. If indeed he was inclined from the start to favour Azizan as a witness then it would have been convenient for him just to rule that the discrepancies as found were minor and required no further proceeding. He did not, but instead went into detail examination of the evidence given by Azizan in order to arrived at a proper conclusion. Plainly therefore being an appellate court we should be slow in substituting our own assessment of Azizan as a witness. (See: *Periasamy s/o Sinnappan & Anor v. PP* [1996] 3 CLJ 187 CA). As such that finding should be accepted as the correct assessment of Azizan. After all on the issue of whether to accept or reject the evidence of a witness the 'real tests are how consistent the story is with itself, how it stands the test of cross-examination

and how far it fits in with the rest of the evidence and the circumstances of the case' per Lord Roche in *Bhojraj v. Sita Ram* [1936] AIR 60 PC at p. 62. (See also: *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor (supra).*

Thus, as we agree with the learned trial Judge that in view of his finding of Azizan being a truthful and reliable witness the legal principle as restated in *TN Nathan v. Public Prosecutor (supra)* has no application.

There was a complaint by the appellants that the learned trial judge could not have found Azizan a truthful and credible witness in view of his remark of him being 'evasive and appears to me not to answer simple question put to him' during the hearing.

From the notes of proceeding there is no denial that such remark was made. However the question is in what context and whether the learned trial judge was bound by it even with the advantage of considering the testimony of Azizan as a whole.

If the contention of learned counsel for the appellants were to be acceded then that would run contrary to an established legal principle expounded in a civil case of *Yuill v. Yuill* [1945] 1 All ER 183 and ruled as equally applicable in criminal cases by a local case of *Tara Singh & Ors v. Public Prosecutor* [1949] MLJ 88 in that 'an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question'. (See also: *Public Prosecutor v. Ku Lip See* [1982] 1 MLJ 194).

Accordingly the complaint is inconsequential in so far as it relates to the finding by the learned trial judge on the credibility of Azizan.

The Corroborative Evidence

The next issue is whether the learned trial judge was correct in his finding of corroborative evidence adduced. He found the following as corroborative evidence to the testimony of Azizan:

(i) The conduct of first appellant in 'asking Azizan to deny his 'Pengakuan Bersumpah' ('P5') which was sent to the Prime Minister, and secondly, by asking SAC1 Musa, the investigation officer to close the investigation related to the police report lodged by his aide DSP Zull Aznam. The report was lodged after an anonymous letter entitled 'Talqin Kutuk Anwar Ibrahim' surfaced wherein it made allegations of sexual misconduct on the part of the first appellant. It was the evidence of SAC1 Musa as summarized by the learned trial judge that 'his findings that the allegations against Dato' Seri Anwar contained therein were not totally unfounded. The allegations were not fully and completely investigated despite the existence

of ample evidence that warranted a full investigation because Dato' Seri Anwar requested him to stop investigation'. The learned trial judge went on to say this:

> This is evidence which is relevant to help the court to come to a finding of fact whether there was indeed fabrication of evidence in respect of sodomy alleged to be committed by Dato' Seri Anwar Ibrahim. It is startling to note that the defence did not touch on this aspect of the evidence. Be that as it may, in my opinion, this evidence of conduct of Dato' Seri Anwar is a circumstance telling against him which he has to explain. This evidence is relevant where it would lend support to show that the accused is guilty (see *Chandrasekaran & Ors v. PP* [1971] 1 MLJ 153).

(ii) The confession of Sukma (P4). It was the conclusion of the learned trial judge that the confession of the second appellant was made voluntarily, hence admissible. Further it was his finding that 'the relevant part of the confession which is in respect of the commission of sodomy by both Dato' Seri Anwar and Sukma on Azizan is true and reliable'. And he held that 'the confession (P4) sufficiently supports and corroborates Azizan's evidence.

The Law On Corroborative Evidence

The nature of corroborative evidence is a subject which has been exhaustively discussed in major cases by the apex courts in several jurisdictions. And the learned trial judge in the present case rightly referred to some of them when he said this:

> The word corroboration had no special technical meaning; by itself it meant no more than evidence tending to confirm other evidence (see *Director of Public Prosecutions v. Kilbourne* [1973] 1 All ER 440). It has also been said that what is required is some additional evidence rendering it probable that the story of the complainant is true and that it is reasonably safe for the court to act upon the evidence. In the celebrated case of *R v. Baskerville* [1916] 2 KB 658 at p. 667 Viscount Reading LCJ said:
>
> > We hold that the evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.
>
> It has also been held that corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. Corroboration can equally be well afforded by established facts and the logic of established facts sometimes speaks even more eloquently than words (see *Brabakaran v. PP* [1966] 1 MLJ 64.

Further, corroboration 'may be found in independent evidence or in admissions of the prisoner, or in inferences properly drawn from his conduct and statements. And it is, in our opinion, for the jury in the present case to say what complexion the conduct and statements of the prisoner bear'. (See: *Eade v. The King* [1924] 34 CLR 154, at p. 158). In other words, whether or not the conduct and statement of an accused person has the effect of being corroborative evidence is for the trial court to consider.

The Statutory Declaration (P5) Of Azizan And The Conduct Of First Appellant In Asking Him To Retract It And For SAC1 Musa To Stop Investigation: Corroborative Evidence?

It is to be noted that the learned trial judge found that the act of the first appellant in asking Azizan to deny the content of P5 was corroborative evidence in nature and that it was relevant by virtue of s. 8 of EA 1950. With respect we are inclined to agree with his finding. There was no challenge from either of the appellants to the prosecution's assertion that the first appellant had asked Azizan to deny the content of P5.

Similarly it was also found by the learned trial judge as relevant under s. 8 of EA 1950 as well as being corroborative evidence the action of first appellant in instructing SAC1 Musa to cease investigation in connection with the police report No. 2706/96 lodged earlier on by ASP Aznam. We agree with his conclusion. Surely it should be reasonable for the learned trial judge having heard the evidence to make an inference from such unchallenged facts that such conduct had an ulterior motive and done for the benefit of the first appellant and thus categorizing the same as 'evidence tending to confirm other evidence' although such evidence could not be said to be directly in relation to the offence as per charge.

Confession Of Second Appellant: Corroborative Evidence?

And as for the confession of Sukma (P4) we also agree with the learned trial judge that after finding the confession as having being made voluntarily and admitted in evidence the same should have corroborative effective on the evidence of Azizan. But it was also submitted that once retracted as in the present case such confession could no longer corroborate.

With respect we are of the view that such approach is not in consonant with the accepted legal principle. In the case of *Tinit & Ors v. Public Prosecutor (No. 2)* [1964] MLJ 389 McGilligan J was of the opinion that retracted confessions 'once found to have been voluntarily made – were very good corroboration'. That in our view makes sense for it is settled law that a confession on its own, even if subsequently retracted so long as the court is satisfied of its voluntariness and truth, can be a basis to convict an accused person. (See: *Osman & Anor v. Public Prosecutor* [1967] 1 MLJ 137 FC;

[1968] 2 MLJ 137 PC; *Yap Sow Keong & Anor v. Public Prosecutor* [1947] MLJ 90; *Dato' Mokhtar Hashim v. PP (supra)*. There is therefore is no reason why it cannot be good corroborative evidence.

Accordingly in the present case the finding of the learned trial judge as to the corroborative effect of the confession of the second appellant to the evidence of Azizan is justified. Hence we are therefore unable to accept the submission of learned counsel for the appellants that the confession having been retracted should not have been taken as corroborative evidence.

Evidence Of PW2 – Dr. Mohd. Fadzil And PW3 – Tun Hanif Omar

The prosecution also submitted as corroborative evidence the evidence of Dr. Mohd. Fadzil – PW2. However the learned trial judge held that his evidence could not corroborate the evidence of Azizan as it 'does not confirm the story of Azizan that he was sodomized by both the accused'. From that perspective that may be correct. However we are of the view that in so far as it relates to the confession of the second appellant (P4), it is definitely relevant. Thus on that score we differ with the learned trial judge. Otherwise we agree with his reasoning pertaining to the admissibility of the testimony of PW2 on other issues.

As for the testimony of Tun Hanif Omar – PW3, it was ruled by the learned trial judge as hearsay his evidence on the issue of unusual sex activities involving the first appellant with three named persons based on a Special Branch investigation. The learned trial judge reasoned that none of the officers involved in the investigation or the alleged three persons who allegedly had sexual activities with the first appellant was called to testify. On that basis we are inclined to agree with him.

However, the fact that Tun Hanif did speak to the first appellant and the response he received should be admitted as relevant. There was no dispute to the assertion of Tun Hanif that the first appellant did not protest when he was told to stop his wayward activity. Surely one would have registered his disapproval to the assertion instead of just asking whether he would be subject to blackmail by the police. In *R v. Chandler* [1976] 1 WLR 585 CA Lawton LJ in the course of his judgment said this at p. 589:

> The law has long accepted that an accused person is not bound to incriminate himself; but it does not follow that a failure to answer an accusation or question when an answer could reasonably be expected may not provide some evidence in support of an accusation. Whether it does will depend upon the circumstances.

(See also: *Reg. v. Mitchell* [1892] 17 Cox CC 503, 508; *R v. Cramp* [1880] 14 Cox CC 390; *Bessela v. Stern* [1877] 2 CPD 265).

Azizan An Accomplice?

It was also the contention of learned counsel for the appellants that Azizan was an accomplice and hence his evidence would require corroboration or at least a warning by the learned trial judge of the danger of convicting based on uncorroborated evidence of an accomplice. It was also reiterated that the charges, of sexual offences in nature, corroboration or at least a warning of the danger to convict on uncorroborated evidence would be prudent.

We have carefully reviewed the grounds of judgment of the learned trial judge on these points and we find no reason to differ from his conclusions. The learned trial judge held that Azizan was not an accomplice in these words:

> The case laid down the principle that when an accomplice acts under a form of pressure which it would require some firmness to resist reliance can be placed on his uncorroborated evidence.
>
> In the instant case the evidence shows that Azizan was invited to visit Tivoli Villa by Sukma. Azizan went there to see Sukma's new apartment. He went there not with the intention of committing sodomy with both the accused. His actus reus alone is not sufficient to make him an accomplice, there must also be the intention on his part (see *Ng Kok Lian*'s case). For the reasons I therefore find that Azizan is not an accomplice.

In any event, overall, the learned trial judge did warn himself of the danger of convicting an accused person in sexual cases on uncorroborated evidence. In our view such a direction should suffice for the purpose of the present case.

The Conviction Of Azizan For Khalwat

The conviction of Azizan for the offence of khalwat before the Syariah Court in Alor Gajah Melaka was also brought up by learned counsel for the appellants with the view to undermine his credibility as a witness. The learned trial judge held that:

> What transpired in the Syariah Court would not be relevant in assessing the credibility of Azizan. It has been held that a conviction of a witness for an offence is not a ground for disbelieving a witness (see *Gipp v. R* [1998] 155 ALR 15 – High Court of Australia). It follows therefore the mere fact that Azizan was convicted in the Syariah Court under the Syariah law is no ground for discrediting his evidence given in the instant trial and to disbelieve him.

With respect we are inclined to agree with the conclusion arrived thereat on the issue.

Question On Re-examination Of Azizan And Allegation Of Mis-recording

As regards the issue of re-examination learned counsel for the first appellant was relating more to the event in the first trial which was the cause for the impeachment proceeding during the hearing of the present case. In short it was

the submission of learned counsel that due to what transpired in the first trial the answer of Azizan after the re-examination thereof should not be believed as he was then only parroting the words of the then learned Deputy Prosecutor.

For clarity it is perhaps appropriate here to briefly refer to that portion of the evidence of Azizan during his cross-examination in the first trial, *inter alia*:

> … Saya setuju bahawa Dato' Seri Anwar tidak meliwat saya sebab itulah saya masih pergi ke rumahnya antara tahun 1992 dan 1997. Jika tidak saya tentu menjauhkan diri saya dari rumahnya.

In re-examination Azizan was asked to explain what he meant by that answer. And he said this, *inter alia*:

> Selepas bulan sembilan 1992 sehingga sekarang tertuduh tidak meliwat saya … Salah satu perbuatan yang tidak dapat saya lupakan ialah peristiwa di rumah Sukma di Tivoli Villa di mana tertuduh telah meliwat saya dahulu dan diikuti dengan adik angkatnya meliwat saya.

It was the last part of the answer that was strenuously objected to by learned counsel for the appellants contending that that was not part of the cross-examination. And it became one of the foundations for the impeachment proceeding in the present case. Hence Azizan was therefore asked to explain the contradiction.

The explanation given was *inter alia*:

> Kejadian liwat memang berlaku terhadap saya selepas bulan Mei 1992 dan selepas saya berhenti kerja tetapi bukan berlaku di rumahnya.

It was the argument of learned counsel for the appellants that such explanation should not be given any credence in view of what transpired in the first trial. However the learned trial judge came to his finding on the issue in this way:

> To my mind the two statements are the same in the sense that they are related to the same incident namely Azizan was sodomized after September 1992. Azizan in his explanation said what he meant when he said in the earlier trial that he was not sodomized after May 1992 was that he was not sodomized in Dato' Seri Anwar's house when he was asked 'mengapa saya masih berkunjung ke rumah Dato' Seri Anwar'. He further said without any reservation in his explanation that 'kejadian liwat memang berlaku terhadap saya selepas Mei 1992 dan selepas saya berhenti kerja tetapi bukan di rumahnya'.

Now, the rule in re-examination is clear in that it is confined to matters touched on during cross-examination. Fresh evidence adding to or re-affirming evidence-in-chief is not permitted in re-examination.

Learned Public Prosecutor however argued that the question asked was to clarify on matters pertaining to being sodomized and permissible under s. 138 of EA 1950 which reads:

> The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Having considered the respective contentions we are inclined to agree with the argument of the latter. The question is not totally out of context on matters raised earlier. Azizan was only asked to explain his earlier answer which prima facie appeared to be contradictory. At any rate it could not be said that learned counsel for the appellants were totally shut out at the material time. Surely they could have asked for leave to further cross-examine Azizan if indeed they felt that undue advantage was taken during the re-examination.

Accordingly we find no material substance in the complaint relating to the re-examination of Azizan and in our view no miscarriage of justice had occasioned when the learned trial judge overruled the objection.

There was also a complaint from learned counsel for the first appellant that the learned trial judge mis-recorded the evidence during the impeachment proceeding by the addition of two words to the evidence of Azizan, hence gave him greater credibility. According to learned counsel at p. 1028 of the Appeal Record the two words added were 'dan bukan' to his question which reads in the context as follows:

> S: Adakah awak beritahu pihak polis kamu diliwat oleh Dato' Seri Anwar **dan bukan** dalam tahun 1994?
>
> J: Ada.
>
> S: Adakah tidak sebelum hari ini awak ada memberitahu mahkamah ini bahawa awak tidak ada memberitahu polis bahawa awak di liwat oleh Dato' Seri Anwar dan Sukma pada tahun 1994?
>
> J: Ada. (Words complained of are in bold).

With respect we are unable to agree that the mere addition of the two words gave Azizan greater credibility. Surely the whole of his testimony has to be considered and not those words alone. Further, they have to be considered in the context of what were said overall. In addition, the legal principle on the finality to the contents of the notes of evidence recorded by a trial judge is quite clear. Not being the trial court, an appellate court has to rely on the learned trial Judge's notes of evidence. (See: *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; *Loh Kwang Seang v. Public Prosecutor* [1960] MLJ 271).

Hence, we cannot accede to the request of learned counsel for the first appellant that those two words should be ignored or that they had an impact in the perception of the learned trial judge on the credibility of Azizan. In passing we note that this point was not raised at the first opportunity available thereby affecting its credence.

No Medical Examination Of Azizan

It was also the submission of learned counsel for the first appellant that since there was no medical report of Azizan and since he was not sent for medical examination there was no best corroborative evidence available. Further, it was urged upon this court that adverse inference should be drawn for such failure. And it was also submitted that the learned trial judge should have found SAC1 Musa, the investigation officer, in contempt of court since he openly contradicted himself in court.

The learned trial judge found that there was no contradiction in the answers of SAC1 Musa as he was answering different questions. Further, it was also his finding that medical evidence was not the only method in which penetration could be established. And such view is not without any basis. In fact we find merit in the argument of the learned public prosecutor that based on the evidence of an expert called by the appellants, namely Dr. Zahari (DW3) it is obvious that after a lapse of time medical examination is not a reliable mean and not the only method to determine whether or not a person has been sodomized.

In respect of an adverse inference to be drawn for the failure of SAC1 Musa to send Azizan for medical examination we do not think it is within the scope of s. 114(g) of EA 1950. In view of what transpired there was nothing to indicate that there was an intentional suppression of evidence or an attempt to do so. (See: *Pendakwa Raya v. Mansor Mohd Rashid & Anor* [1997] 1 CLJ 233) *(supra).*

Disclosure Of Bribery By Azizan

Another criticism in the finding of the learned trial judge on the reliability of Azizan as a witness is his failure to properly consider the bribery allegation. It was submitted for the first appellant that it was wrong for the learned trial judge to lightly put aside the evidence of DSP Zull Aznam who testified that Azizan had told him that it was on a promise of payment that he made the accusation against the first appellant.

In his finding the learned trial judge did not attach any weight to the evidence of DSP Zull Aznam on the issue of bribery. Reasons for doing so were given and having considered them we have no basis to differ. After all the 'credibility of a witness is primarily a matter for the trial judge'. (See: *Dato Mokhtar bin*

Hashim & Anor v. Public Prosecutor) *(supra)*. We also agree with the learned trial judge that being a senior police officer DSP Zull Aznam would have no problem in having such crucial piece of information recorded when he gave his two statements to the police in connection with his police report No. 2706/97 (exh. D44) dated 15 August 1997. DSP Zull Aznam's explanation for the failure was that he was not sure of the truth of what Azizan told him. In our view such reason is weak and unconvincing. It is not therefore surprising for the learned trial judge to come to such conclusion as he did.

In addition, it was the evidence of Azizan that he made no such disclosure and could not have done so since he did not meet DSP Zull Aznam after his meeting with the first appellant. And he denied such suggestion under cross-examination.

Fabrication Of The Allegation By Azizan?

Learned counsel for the first appellant also submitted that the accusation of Azizan against the first appellant was a fabrication, pure and simple. And that it was a political conspiracy against the first appellant.

There was no denial that after the making of P5 Azizan went to see Mr. Karpal Singh who was then a Member of Parliament and a practising lawyer for advice. Learned public prosecutor submitted that if indeed there was a political conspiracy and that what Azizan alleged was part of it and a fabrication, there was no reason for him to see Mr. Karpal Singh to seek for advice and probably assistance. It was also the evidence of Azizan that Mr. Karpal Singh promised to bring up the matter in Parliament.

This aspect of the case was not addressed to by learned counsel for the first appellant at the appeal. Accordingly we are of the view that what the learned public prosecutor has surmised is not without merit. The move by Azizan to see Mr. Karpal Singh and the absence of any rebuttal from the first appellant on this issue made the assertion of fabrication a non-starter. And indeed it must have been the case since SAC1 Musa found no trace of evidence of conspiracy or fabrication of sort.

We are therefore of the view that this act of Azizan in consulting a lawyer for advice at that time when there was no hint of any prosecution against anyone only adds to his credibility and at the same time demolishing any theory of fabrication on his part or that he was under the influence of someone else writing the script for the downfall of the first appellant.

Azizan Did Not Make Police Report Earlier

It is not in dispute that Azizan did not lodge any police report pertaining to his allegation of having being sodomized by the appellants. And for this failure it was contended for the appellants that his allegation must be taken with suspicion.

In the course of his testimony Azizan was asked for his failure to lodge any Police report. He gave his explanation one of which was that he did not think anyone would believe him let alone the police. He was conscious of the important position of the first appellant at that time. It was only after his conversation with one Umi Halifida that he had the idea of making P5 which was then sent to the Prime Minister. He was of the view that the Prime Minister was higher than the first appellant at that time. But P5 did not bring the desired result in that Azizan was instead arrested and made to retract its contents.

This issue was not specifically considered by the learned trial judge when he dealt with the credibility of Azizan. Nevertheless having heard and seen Azizan in the witness box and for other reasons that he gave, he found Azizan to be a truthful witness. Surely therefore it can be safely assumed that he must have taken into account this issue before coming to his conclusion. On our part we have read the explanation of Azizan and we are of the opinion that it is perfectly plausible taking into account his station in life.

At any rate failure to lodge a police report is not fatal to the prosecution and it is not a prerequisite for the commencement of an investigation by the police. After all at best a police report is either to show consistency or to contradict an informant's evidence in court. (See: *Apren Joseph v. State of Kerala* [1973] Cri LJ 185; *Hairani bin Sulong v. Public Prosecutor* [1993] 2 CLJ 79). In the case of *Public Prosecutor v. Foong Chee Cheong* [1970] 1 MLJ 97 it was held that '… However important a document a first information report is, it can never be treated as a piece of substantive evidence and the fact that no first information report was made is not in itself a ground for throwing out a case.' per Gill J (as he then was) at p. 97. In our view that is a correct expression of the law on the point.

Azizan Coming Back To Work For Datin Azizah

A question was also posed by learned counsel for the first appellant to drive home a point that Azizan should not be believed. He argued that if indeed Azizan was sodomized by the first appellant there was no reason for him to return to work for Datin Seri Wan Azizah in 1994.

Azizan was asked the same question in the witness box. His reply was that he tried to return to work but could only withstand for two weeks as he was worried of what had happened to him before might occur again. In fact prior

to being asked this question he was asked why he continued to work for Datin Seri Wan Azizah after the first time he was sodomized by the first appellant. His answer was that he was then still confused and distraught. He also had great respect for Datin Seri Wan Azizah and that her children were close to him.

There appears to be no specific finding by the learned trial judge on this point. But one thing is clear. There was no contrary evidence tendered by the first appellant to rebut the explanation given. Hence it can safely be accepted as a credible explanation under such circumstances. (See: *Rattan Singh v. Public Prosecutor* [1971] 1 MLJ 162; *Ryan v. Ross & Anor.* [1963] 2 QB 151).

The Details Of The Incident Given By Azizan And Finding Of Facts In Relation To Azizan's Credibility

The learned trial judge further came to his finding on the credibility of Azizan based on his detailed account of the incident. Learned counsel for the first appellant submitted that such account should not be accepted as anyone could have done the same by just watching pornographic movies.

With respect we do not think it would be that simple. If Azizan were rehearsing it from a movie that he had seen then surely he could not have withstood the cross-examination from the defence team that spanned for seven days. It would not have been easy for anyone, let alone a mere driver, to maintain consistency in his answers of the incident if indeed the details were 'acted' from a movie. Moreover the learned trial judge was there to watch his demeanour and other indicators while in the witness box. These are factors which we are not privileged to observe at the appellate stage, hence the finding of the learned trial judge has to be given serious consideration and weight that it deserves. (See: *Bhojraj v. Sitaram (supra); Ooi Choon Lye v. Lim Boon Kheng & Ors (supra)*.

There are also other findings of facts of the learned trial judge that led him to believe Azizan and finding him credible. And these findings did not come by without justifications. The learned trial judge was well aware that for an offence as in this case it would be easy to allege but difficult to rebut. And for that he took all the precautions to ensure that all the legal requirements in determining the truthfulness of Azizan were met. He also allowed impeachment proceeding thus enabling all parties to hear the explanation of Azizan for the apparent contradictions in his statements. And in the process he found factual situations which this court is not in the position to question. For instance the learned trial judge found as a fact that there was no challenge to the evidence of SAC1 Musa that the first appellant directed him to stop investigation on the police report lodged by DSP Zull Adnam. It was also the finding of fact of the learned trial judge that P5, the statutory declaration of Azizan, was not

altered. And it was also his finding of fact that Azizan did not tell DSP Zull that it was due to money that he made the allegation. The foregoing factors enhance the finding of the learned trial judge on the credibility and truthfulness of Azizan which this court cannot and should not conveniently overturn. It is trite law that an appellate court should be slow in interfering with any finding of fact by a trial court. (See: *Public Prosecutor v. Wan Razali Kassim* [1970] 2 MLJ 79).

Press Statements

Learned counsel for the first appellant argued that from the press statements made by the Prime Minister and the then Inspector General of police (D14, D18, D41, D42) it was clear that there was no evidence found by the Special Branch on the allegations against the first appellant. Obviously this submission was raised to undermine the credibility of Azizan as a witness. However it should be noted that these press statements were made in relation to the Travers Police report No. 2706/97 lodged by ASP (now DSP) Zull Aznam in connection with the leaflet entitled 'Talqin kutuk Anwar Ibrahim'. Whereas the charges preferred against the appellants arose from the Dang Wangi Report No 14140/ 98 lodged by Mohamed Azmin bin Ali on 19 June 1998.

In his judgment the learned trial judge approached such issue in this way:

> With all humility, I am of the view that these press statements have no connection with the charges on which Dato' Seri Anwar is being tried. They are irrelevant. The charge against Dato' Seri Anwar was brought about as a result of a second investigation carried out by the police in respect of Dang Wangi Report No 14140/ 98 lodged by Mohamed Azmin bin Ali on 19 June 1998. The court has to decide on the charge according to the evidence adduced in court and nothing else. The press statements cannot be regarded as evidence in this trial, as they are, as what I said, irrelevant.

It was also submitted by the learned public prosecutor that the contents of D41 should be regarded as hearsay evidence as it was based on the Special Branch report which was not before the court.

With respect we are inclined to agree with the reasoning of the learned trial judge. We are of the opinion that the result of an investigation in an earlier police report does not necessarily negate any probable positive result in an investigation based on a subsequent police report. Indeed as the learned trial judge concluded that the earlier report would be irrelevant to the later report.

Hence overall we find no merit in this complaint and specifically in relation to the credibility of Azizan.

Other Complaints On The Finding Of Credibility Of Azizan

It was the complaint of learned counsel for the first appellant that the learned trial judge repetitively said that Azizan was a reliable witness thus indicating that he was confused.

With respect we are unable to accept such submission. No doubt the learned trial judge mentioned on several occasions in his grounds of judgment that he found Azizan a reliable witness. However they were not without relevance. Each reference was related to a point raised by the defence pertaining to the credibility of Azizan. We therefore find the contention to be without merit as well.

Next complaint was the allegation that the prosecution failed to call critical witnesses that could have helped in determining the credibility of Azizan. And that included the Special Branch report.

We have already dealt with this point in relation to s. 114(g) of EA 1950. At any rate there was nothing to prevent the defence from calling those witnesses who were considered by them to be crucial on the credibility of Azizan. There was no reason for them to expect the prosecution to call each and every witness available. (See: *Teh Lee Tong v. PP* [1956] MLJ 194).

In his summary on the testimony of Azizan *vis-à-vis* his credibility and reliability as a witness of truth the learned trial judge came to his finding thus:

> ... it is my firm finding in relation to the charges against both accused that he is a wholly reliable, credible and truthful witness taking into consideration the whole of his evidence not withstanding inconsistencies, discrepancies and contradictions which did not detract the weight and truth of his evidence in relation to the ingredients of the charges against both accused.
>
> Azizan has truthfully and without embellishment, distortion or exaggeration in his evidence narrated in minute detail how he was sodomized by Dato' Seri Anwar and Sukma at the date and place as stated in the charges against both accused. Azizan in his evidence gave so much graphic detail of the preliminaries, and a vivid description how both accused penetrated his anus with their respective penises. His description and direct experience of being sodomized completely negatives any probability that Azizan was tutored or coached as claimed by the defence counsel. No reasonable person or judge could on the evidence come to any other finding than the firm and unescapable *(sic)* conclusion that both accused sodomized Azizan gaily whetting their appetites at Tivoli Villa. Only persons directly and actively subjected to these acts of sodomy would be able to narrate the details of the whole episode.
>
> I am of the firm view that Azizan was speaking the whole truth when he said in evidence that he was sodomized at Tivoli Villa between the months of January and March 1993 by both accused as stated in the charge.
>
> ...

> He has nothing to gain whatsoever but stood to lose everything if his evidence was not true as this would affect his self respect and his good name and standing in the eyes of the public and would also bring embarrassment to his family members. Further one cannot conceive that one would fabricate a serious charge of sodomy against the Minister of Finance and Deputy Prime Minister of Malaysia.
>
> It cannot be denied that there are discrepancies in Azizan's testimony. I have considered these discrepancies earlier and had made my finding on them. Apart from that, I do not find any serious discrepancies that would affect Azizan's credibility or reliability as a witness of truth on the ingredients of the charges against both the accused.
>
> … taking into account the credible manner in which he gave evidence, his demeanour while giving evidence and his unchallenged and unshaken evidence on the details of sodomy committed at Tivoli Villa which is consistent with itself and the other evidence adduced by the prosecution, I have no hesitation in coming to the conclusion and a finding that Azizan's evidence is wholly credible on all the facts relating to the act of sodomy committed on him by both the accused.

The ultimate question to ask then is whether the learned trial judge was justified in arriving at such finding. As shown in this judgment we have considered all the complaints and contentions advanced for the appellants which were aimed at impugning the findings of the court below in connection with the testimony of Azizan, his credibility and reliability as a witness and for the reasons given it is our conclusion that the learned trial judge was correct and justified to come to his finding as he did in that 'Azizan's evidence is wholly credible on all the facts relating to the act of sodomy committed on him by both the accused'.

The Confession Of Second Appellant ('P4')

We now deal with another evidence relied upon by the learned trial judge. This is the confession of the second appellant (P4). There are three issues to consider, namely, its admissibility, its value as against the second appellant being the maker and as against the first appellant being the co-accused.

The Admissibility Of P4

The admission of P4 by the learned trial judge was questioned by the learned counsel for the appellants contending, *inter alia*, that it was not made voluntarily and as a preliminary objection the issue of jurisdiction of the trial court to conduct a trial within a trial was also raised.

On the jurisdiction issue it was the conclusion of the learned trial judge that the trial court had jurisdiction to determine the admissibility of P4. It was his view that the word 'inquiry' in s. 2 of CPC should not be confined to preliminary inquiry as submitted by learned counsel for the appellants. Thus

he opined that '… Once the statement or confession is recorded by the magistrate it can be used in any court if it is relevant and it becomes a duty of the trial court or the court which hears the inquiry to determine the admissibility of the statement or confession'.

We have considered the view of the learned trial judge and the argument of the learned counsel for the appellants. We find no reason to interfere with the conclusion of the court below.

On the issue of admissibility of P4 the objection remained, namely, that it was not voluntarily given and that the recording was contrary to procedure.

Before admitting P4 the learned trial Judge conducted a trial-within-a-trial solely to determine the issue of whether it was given voluntarily.

However the defence added other points in objecting to the admission of P4, including the failure of the recording Magistrate to note down in P4 itself the motive of the second appellant in making it. It was further contended that it was wrong for the learned trial judge to accept the evidence of the recording Magistrate given from the witness box as regards motive since that would be contrary to ss. 91 and 92 of the EA 1950.

Before us the same arguments were put forward. In addition it was submitted, *inter alia*, that before admitting P4 the learned trial judge should have made a ruling whether the prosecution had proved beyond reasonable doubt that P4 was made voluntarily and that such admission should have been reviewed upon the production of the letter (D28) written by the second appellant to the first appellant. And it was also contended that it was wrong for the learned trial judge to compel the second appellant to give his testimony during the trial-within-trial. It was the submission of learned counsel for the second appellant that there is a right to remain silent for a maker of a confession at the end of the prosecution's case in a trial-within-trial.

Now, it is settled law that '(N)o 'statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement (*Ibrahim v. R* [1914] AC 599, 609 per Lord Sumner)] and this test was accepted by the House of Lords as the correct approach in Director of *Public Prosecutions v. Ping Ling* [1975] 3 All ER 175; [1976] AC 574 in which the House said that is not necessary before a statement is held to be inadmissible because it is not shown to have been voluntary, that it should be thought or held that there was impropriety in the conduct of the person to whom the statement was made, and that what has to be considered is whether a statement is shown to have been voluntary rather than one brought about in one of the ways referred to. It appears from the decision in *Ping Lin* (ante) that the classic test of the admissibility of an accused's confession that

the prosecution must establish beyond reasonable doubt that it was voluntary, in the sense that it was not obtained from him either by fear or prejudice or hope of advantage created by a person in authority, or by oppression, should be applied in a manner which is part objective, part subjective … *It is open to an appellate court to interfere with the finding on a question of fact as to the voluntariness of a confession if the impugned finding has been reached without applying the true and relevant legal tests and consideration of relevant matters* (*Sarwan Singh v. State of Punjab* AIR [1957] SC 637, 643; *Public Prosecutor v. Thum Soo Chye* [1954] MLS 96, 99).' per Abdoolcader FJ in *Dato' Mokhtar Hashim v. Public Prosecutor* [1983] 2 MLJ 232 at p. 272. (emphasis added).

And it is also the law that the 'question of admissibility of evidence is for the judge and not the jury to decide. ... *Where this calls for a decision as to whether the statement is free and voluntary a question of fact is involved and that question must be decided, like any other question of fact, on evidence.* And to decide it the judge must listen not only to any evidence tendered by the prosecution but also to any evidence relating to the issue tendered by the defence, including if tendered the evidence of the prisoner.' per Thomson LP at p. 68 in *Yaacob v. PP* [1966] 1 MLJ 67. (emphasis added).

Accordingly and keeping the principles of law in the forefront of our minds we have given serious consideration to the various points raised and have carefully perused the manner in which the learned trial judge dealt with them and overall we have no reason to interfere with his findings. He was in the position of seeing and hearing the witnesses called and made certain findings of facts. Such findings an appellate court should be slow to interfere. In *Chan Teng Cheong v Public Prosecutor* [1967] 1 MLJ 217 his Lordship Azmi CJ (Malaya) (as he then was) said this at p. 219:

> In our view this is a question of fact and of credibility. The learned judge had seen these two witnesses who gave their evidence, and he had in his finding on this point, found there was no such inducement. We see no reason why this court should interfere with that finding of fact made by the learned judge.

In respect of the other contentions described as errors on the part of the learned trial judge, we do not think there are any merits in them. And that perhaps explains for the lack of any good authority submitted to us. In our view once the learned trial judge ruled that P4 was given voluntarily that should meet the requirement. There is no legal necessity for him to expressly state that the standard of beyond reasonable doubt had been met in order for the admission to be good in law. It is implied from the finding.

On the allegation of compulsion for the second appellant to give his evidence, we find no merit in it. In the Record of Appeal it is clear that what the learned trial judge said was that the second appellant was to give his evidence if he so desired.

As for D28 the point was already well considered by the learned trial judge and he made his findings. We have no reason to differ. Indeed D28 was not produced during the trial-within-trial and there was no good reason for the failure. Further, we agree with the learned trial judge that the contents of D28 are mere repetition of what were said by the second appellant during the trial-within-trial.

Hence, we hold that P4 was properly admitted in evidence by the learned trial judge in the exercise of his discretion. As an appellate court we are not convinced that the decision by the learned trial judge to admit P4 was 'reached without applying the true and relevant legal tests and consideration of relevant matters'. Accordingly we find that there is no basis for the grievance of the appellants on the issue admissibility of P4.

P4 As Against The Second Appellant

For a confession to be of any use it is also necessary for it to be true and trustworthy. However a trial court is also entitled to accept part of it and reject the rest. (See: *Lim Yow Choon v. Public Prosecutor* [1972] 1 MLJ 205).

Now, a confession of a maker having been duly admitted in evidence is sufficient to convict him if the court is satisfied that it is true and trustworthy. And even if the maker were to retract it subsequently it can still be used to convict him so long as the court is satisfied of its truth. This is settled law. The then Federal Court in *Osman & Anor v. Public Prosecutor* [1967] 1 MLJ 137 while disagreeing with the Indian cases cited, adopted the pronouncement of the principle in *Yap Sow Keong v. Public Prosecutor* [1947] MLJ 90 that stated as follows:

> In our view the law as to the admissibility of retracted confessions in evidence is clear, and put shortly it is that an accused person can be convicted on his own confession, even when it is retracted, if the Court is satisfied of its truth. We do not agree with those Indian decisions which lay down that before a person can be convicted on his retracted confession there must be corroborative evidence to support it.

It is interesting to note that in *Osman & Anor v. Public Prosecutor (supra)* the Privy Council did not expressly disagree with the view of the then Federal Court on the issue. (See also: *Tinit & Ors v. Public Prosecutor (No. 2) (supra)*; *Dato' Mokhtar Hashim v. Public Prosecutor (supra)*).

There are of course views expressed that although in principle it is possible for an accused person to be convicted on his confession standing alone provided the court is of the opinion that the incriminating parts thereof are true, in practice the court always looks for corroboration. (See: *Public Prosecutor v. Chong Boo See* [1988] 1 CLJ 679; [1988] 2 CLJ (Rep) 206, *Public Prosecutor v. Lai Pong Yuen & Ors*. [1968] 1 MLJ 12). With respect these cases made no reference to the earlier decisions of the higher courts.

On our part we find no justification to depart from those earlier decisions of high authority which in any event are binding on this court. At any rate the caveat stipulated in those contrary views indicates that such additional requirement is only a matter of practice and prudence. Common sense of course dictates that where corroborative evidence is found it should not be ignored.

Before us it was also the contention of learned counsel for the second appellant that P4 should not be relied upon to find the guilt of his client simply because it was not given voluntarily.

In view of our agreement with the finding of the learned trial judge on the admissibility of P4 we do not think such submission can prevail. In any event we have examined the careful and thorough approach undertaken by the learned trial judge before coming to his conclusion and we are inclined to agree with him.

It was also submitted that P4 ought not to be relied upon as it did not contain the truth, for instance, the statement therein pertaining to the residence of the first appellant during the period referred to which was incorrect and that the medical report on the second appellant indicated that he was not sodomized.

We note that the learned trial judge was careful in his analysis of the facts and circumstances before coming to his conclusion as to the truth of the statements in P4. We would also say that any discrepancies should be taken as indicators that no force, inducement or threat was used when P4 was given. And we agree with learned trial judge's findings that the details in P4 are indicative of the fact that what were said by second appellant could not have been couched or of recent origin. (See: *Juraimi bin Hussin v. Public Prosecutor* [1998] 2 CLJ 383; *Dato' Mokhtar Hashim v. Public Prosecutor (supra)*. On our part having perused the contents of P4 and the evidence adduced as a whole we are convinced that it contains the truth particularly pertaining to the incident as per charges. Indeed the sequence given by the second appellant in P4 when the offences were committed tallies with the version of Azizan. For instance both Azizan and the second appellant said that the first appellant was in the toilet after having sodomized Azizan. If that is not the truth then it would have been too much of a coincidence for both Azizan and the second appellant to

make such reference. Such minute detail could not have come easily if there was no truth in what both were saying and there was no assertion that the two colluded when making their respective statements or that the prosecution gave Azizan such information. Anyway collusion could not have been possible since there were also differences in the statements of the two persons in term of other details. Those would have been avoided if indeed Azizan was duly informed of what the second appellant had said in P4. One such difference is that in P4 the second appellant said that he did not ejaculate while Azizan said otherwise. We would therefore say that P4 corroborated the testimony of Azizan.

In P4, the second appellant admitted to have had previous homosexual relationships. However, the second appellant in his defence make no specific denial of the above mentioned statement. Further, there is also the evidence of PW2 – Dr. Mohd. Fadzil bin Man to consider who in his evidence, under cross-examination, stated that he had the notes made by him in regard to the Second appellant. Hence we are in agreement with the learned trial judge in his view on the importance of the evidence of PW2 when he said:

> The importance of the evidence of this witness cannot be overlooked and it is this, it establishes the fact that Sukma was involved in homosexual activities with his adopted brother (adik angkat) and his business partner ... What Sukma told this witness that he was involved in homosexual activities is a confession as defined under s. 17 of the Evidence Act 1950 and its voluntariness is not disputed. This evidence is admissible to establish the fact that Sukma is a homosexual and is relevant to the issue of sodomy which is the subject matter of the charges against him.

And save for his bare denial on the truth of the material parts of P4, the second appellant adduced no further evidence to support his assertion that the contents were orchestrated by the police. With respect we do not think such stand assisted his case in anyway.

As regards the medical reports on the second appellant the learned trial Judge found that their nett effect was neutral, hence he did not accept them. Having perused the evidence of the doctors called and from their reports we are inclined to agree with the conclusion of the learned trial judge.

We are therefore of the view that the learned trial judge was correct in his appreciation of the value and weight to be attached to P4 and the resultant conclusion arising there-from in respect of proof against the second appellant. Thus we find no merit in the complaint of the second appellant on this issue.

P4 In Relation To The First Appellant

In his approach on this issue the learned trial judge first came to a conclusion that he required no aid from P4 in dealing with the charge against the first appellant. He said that the evidence of Azizan was sufficient for that purpose. Alternatively, he was inclined to follow the interpretation of s. 30 of the EA 1950 by the Singapore Court starting with the case of *Chin Seow Noi & Ors v. Public Prosecutor* [1994] 1 SLR 135. And the learned trial judge came to the finding thus:

> As a result I conclude that a confession by an accused is capable of standing on its own and be used against a co-accused to support a conviction provided the evidence emanating from the confession satisfies the court beyond reasonable doubt of the accused's guilt. The confession of Sukma can therefore be used standing on its own against Dato' Seri Anwar.

The alternative approach undertaken by the learned trial judge was severely attacked by learned counsel for the appellants submitting that in so doing the principle of binding precedent was infringed. Learned counsel of course was referring to the earlier decisions of the then apex court of this country. In *Herchun Singh & Ors v. Public Prosecutor (supra)* his Lordship HT Ong CJ (Malaya) at p. 210 said:

> In our judgment, however, the proper interpretation of section 30 is that of Bose J. in Kashmira Singh, as follows:
>
> > The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether 'if it is believed', a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, 'if believed', it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

And in *Yap Chai Chai & Anor v. Public Prosecutor (supra)* at p. 222 the principle was reiterated in these words:

> On behalf of the first appellant, it was further argued that the second appellant's confessional statement should not have been used or considered as evidence, against the first appellant, of common intention. We rejected this contention: the question having been concluded by authority, being a decision of this court in *Herchun Singh & Ors v. Public Prosecutor* [1969] 2 MLJ 209, 211 on the proper interpretation and application of section 30 of the Evidence Ordinance 1950 (now the Evidence Act No. 56) which reads:

> 30.(1) When more persons than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself and some other of those persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession.
>
> The statement of principle therein enunciated was that the learned trial judge was right in taking the confession of one accused into consideration against the other to lend assurance to the other evidence against them in believing the accused to be guilty.

His Lordship Hashim Yeop Sani J (as he then was) in *Dato' Mokhtar Hashim v. Public Prosecutor (supra)* expressed his view on the rationale of the principle when he said this at p. 268:

> Stated simply the principle is as follows. It would be proper for the trial judge to take the confession of one accused into consideration against the other accused to lend assurance to other evidence the other co-accused. ... As to why the law is strict on the application of a confession of an accused person as against a co-accused is not difficult to appreciate because it is based on a very sound principle. Since a confession is neither required to be given on oath nor to be made in the presence of the other co-accused whom it implicates it is therefore not wrong to describe it as a very weak type of evidence which should not be allowed to form the basis or foundation of a conviction but should only be used in support of other positive evidence. This, in my opinion, is the intention of section 30 of the Evidence Act when it used the words "may take into consideration.

And in *Public Prosecutor v. Nordin bin Johan & Anor* [1983] 2 CLJ 22; [1983] CLJ (Rep) 345 his Lordship Raja Azlan Shah LP (as his Majesty then was) also gave his instructive view on s. 30 in this fashion:

> Section 30 provides that this statement may be taken into consideration against the two respondents but on the decided authorities the pre-requisite to this is that there must be some cogent evidence against them quite apart from the statement of the third accused. The nature of this evidence which would be extraneous to the confession of a co-accused and its qualitative and probative value in relation to the charge must *ex necessitate rei* be a factual matter in the context and circumstances of the particular case.

(See also: *Juraimi bin Hussin v. Public Prosecutor (supra).*

It is therefore obvious that the learned trial judge in the present case had departed from the earlier decisions of the highest court in this country preferring to follow the interpretation and reasoning of the Singapore Court of Appeal. Unfortunately the learned trial judge missed the point. In *Chin Seow Noi & Ors (supra)* the learned judge there did not follow *Herchun Singh & Ors (supra)* as he took the view that it was not binding on Singapore courts being

a decision of the then Malaysian Federal Court rendered after Singapore became an independent nation. In addition it was observed that the Indian cases on the interpretation of s. 30 should not be applicable in view of the crucial differences between the Indian Evidence Act 1872 and the Singapore Evidence Act including the definition of 'evidence' therein. In short the Singapore Court of Appeal declined to adopt the 'narrow construction' propounded in the leading cases of *Bhuboni Sahu v. R* [1949] AIR PC 257 and *Kashmira Singh v. State of Madhya Pradesh* AIR [1952] SC 159 which were followed in *Herchun Singh & Ors (supra).*

With respect we are of the view that it was incorrect for the learned trial judge in the present case to depart from the obvious binding effect of the decisions in *Herchun Singh & Ors (supra)* and *Yap Chai Chai & Anor (supra)*. As for his reference to the case of *Noliana bte Sulaiman v. Public Prosecutor* [2001] 1 CLJ 36 we do not think the learned judge there went as far as saying 'that a confession by an accused is capable of standing on its own and be used against a co-accused to support a conviction provided the evidence emanating from the confession satisfies the court beyond reasonable doubt of the accused's guilt'. But if there was an impression given to that effect then we say that that would be erroneous in law and not reflective of the current law of this country. As to the need for the lower courts to observe the principle of *stare decisis*, we need only to refer to *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645 in which the Federal Court reminded the lower tiers in these words:

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.

Now, the question to ask is whether such misdirection should inevitably lead to the reversal of the finding of guilt of the first appellant or whether as an appellate court we can reevaluate P4 as against the first appellant bearing in mind the principle enunciated in *Herchun Singh & Ors (supra)* and *Yap Chai Chai & Anor (supra)*. It is to be noted that the guilt of the first appellant as found by the learned trial judge was not entirely based on P4. In fact he made it plainly clear that he was prepared to find the guilt of the first appellant solely on the testimony of Azizan whom he found to be a credible witness of truth. He said this:

> Apart from the confession there is the evidence of Azizan who testified that he was sodomized by Dato' Seri Anwar at Sukma's apartment at Tivoli Villa at about 7.30 pm between January and March 1993 as stated in the charge against him. This evidence was not successfully challenged by the defence, though an attempt was made to challenge it. I accepted his evidence for the

reasons which I had stated when I dealt with the issue of Azizan's credibility in the earlier part of this judgment and made a ruling that Azizan is a reliable and truthful witness. His evidence is wholly reliable and capable of belief, which I accept. It is indeed a very strong piece of independent evidence to prove that Dato' Seri Anwar committed sodomy on Azizan as stated in the charge against him. I am prepared to act on this evidence alone independently, disregarding and ignoring the confession on the principle as laid down in *Herchun Singh*'s case. It is therefore not necessary for me to call the confession in aid.

We have given this issue our anxious consideration and we are of the view that we can re-evaluate the value of P4 in relation to the first appellant on the same rationale that we are entitled to review the admissibility and weight to be given to a confession.

As indicated earlier, in his grounds of judgment the learned trial judge held that even without P4 he was prepared to act on the evidence of Azizan independently to prove that the first appellant 'committed sodomy on Azizan as stated in the charge against him'. The question is: was he right in making such a finding?

We have already expressed our view on the criticism levelled against the evidence of Azizan and our concurrence with the finding the learned trial judge. Hence we are of the view that the learned trial judge was right in coming to such a finding.

Next, should P4 be taken into 'consideration against the other (the first appellant) to lend assurance to the other evidence against them in believing the accused (first appellant) to be guilty'? We find no reason why it should not be done. And as we have given our view on the standing of P4 in terms of its admissibility and its truth cum trustworthiness, it does therefore lend assurance to the other evidence, specifically to the testimony of Azizan, in believing the guilt of the first appellant.

We are also of the view that the testimony of PW2 is quite relevant in this respect. The learned trial judge found that what the second appellant told PW2 amounted to a confession under s. 17 of the EA 1950. And in his statement to PW2 the second appellant told him that he had been having homosexual relationship with his adopted brother. The second appellant denied making such disclosure to PW2. However in the face of the notes taken by PW2 so soon after examining the second appellant and with only a bare denial being offered to counter the evidence of PW2 we are inclined to agree with the finding of the learned trial judge that the evidence of PW2 'establishes the fact that Sukma was involved in homosexual activities with his adopted brother'. And who was the adopted brother referred to? There was no suggestion that the second

appellant had another adopted brother besides the first appellant. Further the first appellant never denied that the second appellant was his adopted brother. Bearing in mind the above mentioned facts alluded to by the second appellant and viewing the evidence on this aspect in totality we are of the view that the learned trial judge did not err in his conclusion that the adopted brother referred to therein was none other than the first appellant. No doubt the testimony of PW2 is not directly on the allegation as per charge. But it does have strong bearing on some of the material statements in P4 particularly on the history of sexual relationship of the second appellant and the first appellant thereby removing or diluting any suggestion that P4 is inherently incredible in contents.

In summary, though we agree with the submission of learned counsel for the appellants on the application of s. 30 of the EA 1950 we do not think such misdirection by the learned trial judge should nullify the whole of the convictions of the appellants. And as we have done, we find P4 does lend assurance to the other evidence on the guilt of the first appellant in that 'cogent evidence' existed against him 'quite apart from the statement' of the second appellant.

The Defences Proffered By The First Appellant

(a) Defence Of Alibi

In view of what we have said earlier on, namely, that the first appellant never served a notice of alibi or applied for an adjournment to serve one in connection with the amended charge, any admission of evidence pertaining to a defence of alibi would be contrary to the established legal principle. As such there is no basis for the first appellant to complain that he has been deprived of his constitutional right to a fair trial. He chose not to raise such defence or failed to comply with the relevant statutory provision. No blame should therefore be imposed upon anyone else. Accordingly we do not think the invocation of the proviso to s. 60(1) of the CJA should be ruled out.

It was obliquely submitted that it was a joint trial, hence the application by the second appellant would suffice. With respect the contention missed a point in that at the commencement of the trial such a stand was not taken. There was just no application by the first appellant for an adjournment and he did not even associate himself with the application by the second appellant. As for the refusal by the learned trial judge to grant an adjournment to the second appellant reason was given and we will deal with that shortly.

In the event that we are wrong in our view above in respect of the first appellant, then arising from what had transpired before the learned trial judge, the first appellant could not complain that his trial was conducted unfairly thus nullifying the trial as a whole. If at all it was to his advantage in that despite the absence of the required notice the learned trial judge proceeded to hear the alibi evidence tendered. That was of course possible as the public prosecutor

did not object to such evidence being adduced. Further, if indeed the first appellant or his team of learned counsel seriously believed that it was absolutely wrong in law thus nullifying the trial, for the learned trial judge to accept such evidence in the absence of a notice, there was no explanation given for doing what they did, in that they proceeded to adduce alibi evidence.

Witnesses were called to show that the first appellant could not have had the opportunity to commit the offence as he was elsewhere. Attempts were made to account for the days the first appellant was in the country. Being the then Deputy Prime Minister his movements were recorded. Diaries were referred to and allegation made that they had been seized by the police during the investigation of the case. And that appears to be true with the existence of IDD11 dated 5 September 1998 – the search list which we note was never formally tendered and marked as an exhibit. Anyway for all its worth the list does not show that the 1993 diary was seized. That would have been a crucial piece of evidence on the defence of alibi. Thus, it remains a pure assertion by the defence that the 1993 diary was taken by the police. During the hearing of these appeals the learned public prosecutor informed the court that all the records in their possession were given to the defence.

Be that as it may the learned trial judge made the following findings:

(a) that for the period from 4 February to 31 March 1993 the whereabouts of the first appellant were proved by the witnesses called;

(b) that 15 February 1993 was excluded on account of the evidence of Azizan that he was working the day before the incident;

(c) that 19 February 1993 should not be excluded even though it was a Friday as Azizan could have prayed his Zohor prayer in the office. Objection was taken on this finding due to prior observation by the learned trial judge in respect of Friday prayer. However nothing serious turned on this as finally the learned trial judge was only interested in the period from January 1993 to 3rd February 1993;

(d) that the prosecution did not challenge the alibi for the period from 4 February 1993 to 31 March 1993, hence deemed accepted;

(e) that the period between the whole of January 1993 and 3 February 1993 remained unaccounted for and no evidence was adduced by the first appellant on his movements during that period; and

(f) 'the defence of alibi fails to raise a reasonable doubt as to his guilt or in the truth of the prosecution case'.

Before us learned counsel for the first appellant submitted that the proceeding on the defence of alibi was a nullity or that the finding arrived at by the learned trial judge was contrary to established legal principle on burden of proof for the following reasons, *inter alia*:

(a) that the learned trial judge erred in placing a heavier burden of proof on the defence by expecting a proof of beyond reasonable doubt. And this could be discerned from the use of the word 'conclusive';

(b) that there was no rebuttal evidence adduced by the prosecution on the evidence tendered by the defence;

(c) that between January 1993 and 3 February 1993 there was extensive work carried out in the apartment of the second appellant thus no necessity for alibi;

(d) that the learned trial judge doubted on the receipt tendered by the defence although there was no rebuttal evidence from the prosecution; and

(e) that it was the evidence of the second appellant that he only entered the apartment in April 1993 yet the learned trial judge refused to accept such assertion when there was no rebuttal evidence adduced by the prosecution.

With respect we are unable to agree with the submission that the findings of the learned trial judge on the evidence of alibi of the first appellant were flawed. Some of those findings are findings of facts in which this court should be slow to interfere. On the use of the word 'conclusive' by the learned trial judge in the course of his analysis of the evidence we do not think he intended it to mean that it should be automatically equated at all times to the phrase 'beyond reasonable doubt' as ordinarily understood in evidential term. It has to be taken in the context of its usage. For instance, when the learned trial judge in his grounds of judgment used the phrase 'his evidence when he said there was no bed in the apartment cannot be accepted as conclusive that there was no bed or mattresses in the other rooms' it could not be understood to mean that the learned trial judge expected the witness to prove the issue 'beyond reasonable doubt' as required of the prosecution. All it means is that such evidence on its own is not sufficient as proof of the fact asserted and that more is needed before it can be said that such fact is proved to the standard required of the party asserting it. And in the context of the foregoing phrase it should be understood to mean the standard of proof expected of the defence which is 'on the balance of probabilities'. We are fortified in our view with the correct reference by the learned trial judge of the relevant law.

Now, from the evidence tendered we do not think the learned trial judge should be faulted when he came to the conclusion that for the period from January 1993 to 3 February 1993 the first appellant failed to account for his movements or where abouts. The only explanation given by the first appellant was that

during that period the apartment was being extensively renovated. The learned trial judge considered the evidence adduced on that issue and made his finding. We will deal with this point in greater detail later on in this judgment. Incidentally, in view of the period which the learned trial judge was looking at and which we have no doubt to be correct, the dispute on the relevance of 19 February 1993 was no longer of concern.

Accordingly we are inclined to agree with the conclusion of the learned trial Judge that for the period from the whole of January 1993 to 3 February 1993 nothing was shown on the movement of the first appellant.

Appellants At Tivoli Villa?

The alleged renovation of the apartment at Tivoli Villa became the common ground for the appellants in relation to their respective defence of alibi. In passing we do not think such evidence can strictly be construed as alibi evidence as ordinarily understood.

Several witnesses, (Encik Rahimazlan (DW4), Encik Tan Seng Khoon (DW9) and Encik Chee Too Nam @ Chin Too Nam (DW8)) were called aimed at showing that indeed for the period from January 1993 to 3 February 1993 the apartment was under extensive renovation. It was also produced a letter from Bandar Raya Developments Bhd. (exh. D36). Even the purchase of a bed became an issue. The learned trial judge went on to consider each and every one of the evidence adduced and came to his findings, *inter alia*:

(i) that in the face of the evidence of Azizan and P4 the denial by the first appellant to be at the apartment as alleged in the charge must be rejected;

(ii) that 'from the evidence of DW4 and DW9 the technical supervisor of Bandar Raya Developments Bhd at the material time it was established that there was a major renovation of the bathroom to the master bedroom only';

(iii) that the second appellant had unrestricted and free access to the apartment;

(iv) that the receipt (D35) purportedly issued on the purchase of the beds and divans appeared to be new and nothing shown who issued it;

(iv) that the testimony of DW4, being an interested witness should be treated 'with suspicion and caution';

(v) that the evidence of DW9 'when he said there was no bed in the apartment cannot be accepted as conclusive that there was no bed or mattresses in the other rooms' since 'he only noticed the renovation works in the master bathroom'; and

(vi) that the evidence of Azizan was preferred to that of DW4 and DW9.

Before us learned counsel for the appellants complained that the learned trial judge committed errors in assessing the evidence adduced on alibi. The basic complaints are as follows, *inter alia*,:

(a) that it was unchallenged the evidence of the second appellant that there was no bed in the apartment before 12 February 1993;

(b) that the evidence of DW4 was not rejected but only treated with suspicion; and

(c) that the learned trial judge did not assess the evidence of Azizan with the other evidence available.

Overall from our reading of the evidence adduced in relation to the apartment at Tivoli Villa we are unable to agree with the contention that the findings of the learned trial judge were made without any consideration of the other evidence adduced. He did assess the evidence of the second appellant and the other witnesses called as to the availability of the apartment on the one hand and the evidence of Azizan's and P4 on the other and came to his conclusion that he preferred the evidence of Azizan. That of course was his assessment of witnesses which as an appellate court we should be slow to interfere. And we have no reason to say that the conclusion of the learned trial judge as to his preferred version is entirely erroneous on the evidence adduced. For instance, on the access to the apartment it was in fact the evidence of the second appellant that he took the keys in December 1992. Further, it is also quite clear from the evidence of DW9 that he confined his inspection to certain parts of the apartment, specifically the master bedroom and the bathroom. Indeed we are inclined to agree with the submission of the learned public prosecutor that there was no reference at all to the third room in the apartment that did not have a bathroom attached. We note that it was during the cross-examination of Azizan that the details on the apartment came to light and the defence did not counter those descriptions. It might have been a different situation if Azizan had given a description of a room with bathroom attached. In fact this is another piece of the evidence of Azizan that would have swayed any trier of facts that he was indeed relating a real incident and not borne out of imagination or motive.

Incidentally, learned counsel for the second appellant strenuously submitted that evidence were available but were not considered by the learned trial judge such as the receipts and building plans on the renovation works. But hardly any of these alleged documents were tendered as exhibits. And one document that was relied upon quite heavily was IDD 37A. But that document was not admitted as an exhibit. It came into the picture purely for identification purpose. As such we are inclined to agree with the learned trial judge that it should be excluded as part of the trial record.

The doubt cast upon the testimony of DW4 by the learned trial judge was not without reason. This witness was vague, if not, evasive, on the period taken for the completion of the renovation works. Further, he failed to explain the contents of D35 in that therein showed two mattresses and three divans. Hence it was not without basis for the learned public prosecutor to submit that the third divan must have been for the third room which had no bathroom attached but already had a bed and mattress at the material time.

As to the observation of the learned trial judge on D35 as being new we say that he is entitled to make it but we do not think such observation should be a basis for the rejection of its evidential value. On our part we pause to note that D35 itself may not be the best proof on the purchase of those mattresses and divans. Other than the evidence of the shop that claimed to have sold them there was nothing to link it to those items. It would not have been simple as mattresses do not have serial or model numbers identification.

On the assertion that there was a failure on the part of the prosecution to cross-examine the second appellant pertaining to the bed, with respect we are inclined to agree with the contention of the learned public prosecutor that it was not fatal and necessary since it was already in the evidence of Azizan adduced during his cross-examination that the act was committed on a queen-sized bed. It should also be noted that it was the defence that wanted the learned trial judge to accept the fact that the defence of alibi prevailed. Hence it should therefore be for the defence to establish it so as to cast reasonable doubt on the prosecution's case and not for the prosecution to disprove once a mere assertion has been made. Section 103 of the EA 1950 is relevant.

Accordingly we find no reason to interfere with the conclusion of the learned trial judge that in respect of the first appellant his denial of being in the second appellant's apartment at Tivoli Villa as alleged in the charge should be rejected 'in the face of overwhelming and convincing evidence of Azizan'. As noted earlier for the period between January 1993 and 3 February 1993 no evidence as to his whereabouts was tendered for the first appellant. The defence was contented to rely on the assertion that during that period the apartment at the Tivoli Villa was under extensive renovation. But the finding of the learned trial judge had stated otherwise and which we have no reason to differ. Thus we accept as the correct position that for the period from January 1993 to 3rd February 1993 the first appellant failed to establish his whereabouts so as to cast a reasonable doubt to the prosecution's case that he was there. We will deal with the position of the alibi defence and the nature of the evidence tendered for that purpose by the second appellant later on in this judgment.

(b) The defence of fabrication and conspiracy

The issue of fabrication as alleged by the defence is partly connected to the allegation of bad faith in the prosecution of the first appellant. And we have already dealt with this issue hereinabove. But the allegation of fabrication by the defence went further to include an existence of conspiracy to fabricate evidence by a group of persons with vested interest to ensure the downfall of the first appellant. Witnesses were called for that purpose.

In his grounds of judgment the learned trial judge concluded that from the evidence adduced he was not satisfied that such defence had been substantiated.

Before us learned counsel for the first appellant submitted that the learned trial judge erred in his conclusion in that, *inter alia*:

(i) he considered the evidence adduced in isolation and glossed over them instead of adopting a holistic approach with the result that the first appellant received an unfair trial;

(ii) that the learned trial judge was already prejudiced when he said that the issue of fabrication was irrelevant;

(iii) that adverse inference should have been made for the failure by the prosecution to call those mentioned by the witnesses called by the defence in connection with the defence of fabrication and conspiracy instead of merely offering them to the defence;

(iv) that the learned trial judge was too eager to rule as being hearsay, irrelevant or given with motives the testimonies of the witnesses called by the defence;

(v) that the learned trial judge should have taken judicial notice of the Special Branch report that was sent to the Prime Minister in connection with the allegation of sexual misconduct of the first appellant;

(vi) that the statutory declaration of one Umi Halfida (D37) should have been read by the learned trial judge in the light of the other evidence adduced instead of summarily dismissing it;

(vii) that the evidence of the first appellant should have been considered as it detailed the reasons for those involved in the conspiracy to act as they did;

(viii) that the learned trial judge did not give any latitude to the discrepancies in the testimonies of the witnesses called by the defence while he gave so much to the witnesses called by the prosecution; and

(ix) that the learned trial judge should have given the benefit of doubt to the defence where it was due but failed to do so contrary to established legal principles.

In reply the learned public prosecutor submitted, *inter alia*:

(a) that before any evidence can be admitted it should be relevant to the issue at hand. Sections 11 and 15 of the EA 1950 were referred;

(b) that the learned trial judge was justified in either ruling the evidence of the witnesses called by the defence as hearsay or unbelievable due to the nature of the evidence and its quality; and

(c) that there were glaring contradictions in the evidence of some the witnesses called by the defence.

Now, further to what we have stated earlier on we note that the charge against the first appellant is for sodomizing Azizan. Yet no where in the testimony and the statutory declaration of DW31 was it ever revealed that it was for that offence that the two learned Deputies Public Prosecutor were referring to when they were alleged to have asked him to get his client to fabricate evidence. Indeed the impression that was given by DW31 was that short of fabricating evidence his client had nothing at all to say.

However, it was not disputed that the client of DW31 gave his police statement subsequently. Again nowhere it was alleged by DW31 that the contents of such statement were fabricated or they were remotely connected to the nature of the offence for which the first appellant was charged.

We are therefore inclined to agree with the conclusion of the learned trial judge and as submitted by the learned public prosecutor before us that such matters alleged and the statutory declaration of DW31 were irrelevant to the issue at hand. Accordingly we find no merit in the complaint of the first appellant in relation to this issue.

It was also the complaint of learned counsel for the first appellant that the learned trial judge failed to mention, let alone consider the affidavits of Dr. Munawar Ahmad Anees (D53) and Dato' Nallakaruppan (D54).

With respect the learned trial judge did consider them and came to his finding that they were irrelevant as they did not make any reference to what was being alleged in the charge preferred against the first appellant. At any rate we would say that such affidavits provided little or no evidential value at all when compared to the gravity of the allegation hurled against the two learned deputies who are also officers of the court. It would be a tragedy if such allegation could be lightly established by a mere affidavit, shielded from any cross-examination by the affected party.

As regards the other witnesses including the first appellant called by the defence purportedly to show the existence of a conspiracy to fabricate evidence against the first appellant, we note that the learned trial judge analyzed their testimonies carefully and gave his reasons for being unable to accept their evidence as credible. Such assessments and findings should be given due respect and weight unless they are so incredible that no reasonable trier of facts or tribunal would have made them. (See: *Herchun Singh & Ors v. Public Prosecutor (supra)*; *Lai Kim Hon & Ors v. Public Prosecutor (supra)*). We heard no assertion that such was the case here. The closest to that was the submission by learned counsel for the first appellant that the learned trial judge was not being fair in that he was lenient in his reception to the evidence of the witnesses for the prosecution while the slightest mistake as to the date made by DW15-DSP Zull Aznam resulted in the rejection of his evidence.

With respect we are unable to agree with the contention of learned counsel for the first appellant that the learned trial judge was not being fair in the disposal of the evidence of the witnesses called by the defence. As to the testimony of DW15 we note that the learned trial judge examined his evidence in detail and gave his reasons one of which was the discrepancy in the date before refusing to believe him. We find nothing wrong in that exercise.

We are also unable to find any gross error in the finding of the learned trial judge when he refused to believe the allegations and assertions of DW6 – Raja Kamaruddin bin Raja Abdul Wahid and DW19 – Jamal Abdur Rahman. For instance DW6 in his evidence not only contradicted himself but also made his version so inherently improbable for a reasonable tribunal to accept. At one point he said that he was told by none other than one Dato' Aziz Shamsuddin himself that he was about to fabricate evidence of sexual misconduct against the first appellant. Yet when he confronted the first appellant he posed a question to him, that is, whether it was true that he was involved in sexual misconduct, instead of telling him what he was told. Common sense dictates that DW6, who must have been intelligent enough to be taken by the said Dato' Aziz in confidence, could not have made such move if there was any truth in what he alleged. And the reported reaction of the first appellant when asked indicated the improbability, unless of course the first appellant did not want to rebut the allegation, of the tale promoted by DW6. Any sensible person, more so in the position of the first appellant at that time, would have immediately alerted the authorities of what was going on. There was no explanation for not asking DW6 to lodge a police report immediately or soon after. DW6 said that he did not trust the police. But surely the first appellant could not be heard to say at that time that he too did not have any confidence in the police force.

In all we are in agreement with the finding of the learned trial judge that none of the witnesses called by the defence ever came near to saying that evidence was being fabricated to implicate the first appellant of having sodomized Azizan. And if indeed there was a 'mastermind' in the fabrication of evidence directed against the first appellant for the offence he was ultimately charged, there was no reason for the 'shortcomings' in the evidence as alleged by learned counsel for the appellants. Any sensible person preparing a venture to frame another of an offence would have ensured that the key issues were in place to prevent any failure.

Accordingly we have no reason to interfere with the conclusion of the learned trial judge in respect of the defence of conspiracy and fabrication raised by the first appellant.

The Defence Of The Second Appellant – Alibi

Apart from the common grievances raised particularly on the technical issues, the main defence of the second appellant was one of alibi. However in the course of his submissions learned counsel for the second appellant conceded that his client did not adduce evidence of alibi. Nevertheless that concession would be of limited effect since it was found by the learned trial judge that for the period from 4 February 1993 to 31 March 1993 the first appellant had established successfully his whereabouts. And it was not in dispute that the second appellant could rely on the alibi evidence of the first appellant. Hence that would leave the period from the whole of January 1993 to the 3 February 1993.

For that period the second appellant relied on the assertion that his apartment at Tivoli Villa was under extensive renovation and thus could not have been the place of incident. We have already dealt with this issue in respect of the defence of the first appellant and our view remains the same for the second appellant.

Apart from our above view there is one more issue respecting the defence of alibi of the second appellant. Admittedly we have expressed our concurrence with the learned trial judge as to the validity of the notice of alibi served by the second appellant after the May 1992 charge was preferred against him notwithstanding the subsequent amendment. It was the contention of learned counsel for the second appellant that the said notice expired upon amendment of the May 1992 charge.

In the event that we are wrong in concurring with the view of the learned trial judge and that the contention of the learned counsel for the second appellant prevails, we agree with the submission of the learned public prosecutor before us that the second appellant suffered no prejudice by the refusal of the learned

trial judge to adjourn the hearing. Indeed it is material to consider the actual nature of the purported evidence of alibi that was finally adduced. It is only if 'a trial court having considered the evidence put forward by the defence holds that such evidence amounts to evidence in support of an alibi for which no notice under s. 402A Criminal Procedure Code has been given, then he has no discretion in the matter but to exclude such evidence' and it is evidence of alibi if it 'shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence is committed. … that "a true alibi defence consists of a affirmative proof of the defendant's presence somewhere other than at the time and place alleged.")' per Abdul Hamid FJ (as he then was) in *Public Prosecutor v. Ku Lip See (supra)* at p. 196. Otherwise evidence adduced by an accused in defence may be 'in essence a complete denial of the prosecution case' wherein a trial judge may treat it as purely a question of fact thereby making the issue of notice of alibi quite irrelevant.

Thus in the present case with the concession by the learned counsel for the second appellant as stated hereinabove the issue of notice of alibi becomes plainly academic. In any event the learned trial judge allowed the second appellant to adduce all the evidence which was probably thought at that point in time to be evidence of alibi when it was not. Notwithstanding, the nett effect of such acquiescence was that the second appellant suffered no prejudice even with the refusal of the adjournment applied for. It is therefore our considered opinion that the contention of the learned counsel respecting the refusal by the learned trial judge to grant the adjournment applied for with the view to serve a fresh notice of alibi is without merit. And even if indeed an adjournment should have been granted at that point in time as it was not known then the nature of the alibi evidence to be adduced, in view of what subsequently transpired we are of the view that in the circumstances of this present case the invocation of the proviso to s. 60(1) of the CJA would be appropriate.

Learned counsel for the second appellant also touched on P4 as having been retracted and thus of no evidential value.

We have already dealt with this matter hereinabove and say no more.

Abetment Charge Against The Second Appellant

On the charge of abetment learned counsel for the second appellant submitted that the learned trial judge erred in convicting his client since there was no evidence to support such charge. It was contended that if the second appellant had intended to lure Azizan to the apartment he would have informed him of the address. Further, it was argued that the mere presence of the second appellant did not make him an aider and abettor.

On this charge it was a finding of fact by the learned trial judge that 'the prosecution has proved beyond a reasonable doubt that in fact and in law Sukma abetted Dato' Seri Anwar in the commission of the act of sodomy on Azizan as particularized in the first charge against Sukma'. And he relied on the following:

(i) the evidence of Azizan that he was invited by the second appellant to the latter's apartment without being informed that the first appellant would be present;

(ii) in P4 the second appellant admitted that at the request of the first appellant he took the latter to his apartment to meet Azizan; and

(iii) that from the evidence of Azizan and P4 the second appellant was present when the first appellant sodomized Azizan.

On the evidence before him it was the conclusions of the learned trial judge that the acts of the second appellant in inviting Azizan to the apartment and making arrangement for the first appellant to be present to sodomize him (Azizan) were:

(a) 'acts which connect Sukma (the second appellant) with the steps of the transaction which are criminal';

(b) 'acts which show that Sukma intentionally aided and abetted the commission of the offence as envisaged under the third limb of s. 107 of the Code (the Penal Code) and are also acts done by Sukma to facilitate the commission of the offence under explanation 2 of s. 107 of the Code'; and

(c) the 'evidence of active complicity on the part of Sukma and is caught by s. 109 of the Code'.

It was also the finding of the learned trial judge that by evidence it was established 'that Sukma was voluntarily and purposely present witnessing the commission of the offence by Dato' Seri Anwar and offered no opposition to it or at least to express his dissent. Thus the presence of Sukma cannot be taken to mean mere presence but more to it, it would under the circumstances afford cogent evidence which would justify this court in finding that Sukma wilfully encouraged the commission of the offence and so aided and abetted it.'

Now, in *Public Prosecutor v. Datuk Haji Harun Haji Idris* [1979] 1 MLJ 180 at p. 196 his Lordship Abdoolcader J (as he then was) opined that there are three limbs in s. 107 of the Penal Code namely, 'abetment by instigation, conspiracy and intentionally aiding'. And he went on to explain each of the limbs in this way:

Instigation consists of acts which amount to active suggestion or support or stimulation for the commission of the main act or offence. Advice can also become instigation if that advice is meant to actively suggest or stimulate the commission of an offence (*Ragunath Das v. Emperor* [1920] 21 Cr LJ 213). Abetment by conspiracy consists in the combination and agreement of persons to do some illegal act or to effect some illegal purpose by illegal means. Proof of conspiracy need not be direct proof but can be a matter of inference deducted from certain criminal acts of the accused done in pursuance of an apparent criminal purpose in common between them (*Emperor v. Abdul Hamid* [1945] 46 Cr LR 342). Abetment by aiding takes place when a person by the commission of an act intends to facilitate and does in fact facilitate the commission of an offence (*Faguna Kanta Nath v. State of Assam* AIR [1959] SC 673). Where there is shown a positive act of assistance voluntarily done by a person with a knowledge of the circumstances constituting the offence, the abettor is guilty of abetment by aiding (*National Coal Board v. Gamble* [1959] 1 QB 11).

The learned trial judge in the present case may not have clearly stated which limb or limbs the acts and omissions of the second appellant came under. However, in our view it can be discerned from his findings that the least such acts or omissions can come under should be the third limb. It was the evidence of Azizan that he was invited by the second appellant to come to his apartment without informing him that the first appellant would be there too. And in P4 the second appellant admitted to have picked up the first appellant and brought him to his apartment to meet Azizan. Further, in P4 as well the second appellant admitted to have invited Azizan to his apartment at the behest of the first appellant. These pieces of evidence all pointed to the fact that the second appellant facilitated and did facilitate in the commission of the offence of sodomy by the first appellant.

Otherwise generally speaking the acts and omissions of the second appellant can come under all the limbs in s. 107 of the Penal Code. In any event, by the mere failure of the learned trial judge to clearly indicate the limb or limbs we do not think the second appellant has been prejudiced in anyway. More so when the findings of the learned trial judge are findings of facts in which an appellate court and we are, has limited reasons to interfere. (See: *Public Prosecutor v. Wan Razali Kassim (supra).*

In fact in criticizing the findings of the learned trial judge respecting the evidence against the second appellant for the first charge, it was also a criticism on the learned trial judge, albeit indirectly, on his assessment of Azizan as a witness and the nature of his testimony and the admission of P4 and the truth therein. We have already expressed our views on these crucial points and we say no more. Suffice it for us to state here that we find no serious errors in the approach and assessment by the learned trial Judge of the evidence adduced

by both sides in respect of the first charge preferred against the second appellant. We also find no flaw in his application of the evidence to the ingredients of the offence with reference to decided cases such as *Ferguson v. Weaving* [1951] 1 KB 814; *The Queen v. Coney & Ors* [1882] 8 QBD 534 and *Public Prosecutor v. Tee Tean Siong & Ors* [1963] MLJ 201. (See also: *Public Prosecutor v. Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166).

Accordingly we find no merit in the ground of appeal and submissions of learned counsel for the second appellant against the conviction of the second appellant on the charge for abetment.

Other Points Considered

We are conscious that there are other points raised in respect of all the convictions by the learned counsel for the appellants and the learned public prosecutor which we have not specifically dealt with in this judgment. However we state here that we have in fact considered them before coming to our decision. And even if some of our views on those points might be in tandem with the contentions of learned counsel for the appellants, we say that those points in our views are not of material nature as to have any effect to our decision as a whole in these appeals. In any event, we would say that generally we agree with the findings and conclusions of the learned trial judge on those points.

The Application Of The Proviso To Section 60(1) Of The CJA

In respect of the application of the proviso to s. 60(1) of the CJA it was the submission of learned counsel for the first appellant that it should only be applied in exceptional cases. He cited the case of *Abdillah bin Lobo Khan v. Public Prosecutor* [2002] 3 CLJ 521. It was also his plea that to apply the proviso would cause substantial miscarriage of justice in view of the evidence of Azizan.

We do not think there is any dispute as to the application of the said proviso. That has been made clear in a series of cases by this court. Our Federal Court has a similar proviso applicable thereto. Thus, very well aware of such principle of law we have deliberated carefully on the overall nature of the evidence in these appeals and the approach adopted by the learned trial judge. Admittedly there may be some mis-directions on his part, for instance his reliance on P4 as against the first appellant. We have addressed that issue. There is also the issue of s. 402A of the CPC that became one of the main planks to the contentions of the appellants in these appeals. Nevertheless, having considered the totality of the evidence adduced, the submissions of learned counsel for the appellants and the learned public prosecutor and having read and re-read the grounds of judgment of the learned trial judge and on the facts and in the

circumstances of these appeals heard jointly, it is our considered opinion that no substantial miscarriage of justice has occurred and based on our views given above we consider it an exceptional case, hence it is a fit and proper case to apply the proviso to s. 60(1) of the CJA. (See: *Basil bin Omar v. Public Prosecutor* [2003] 4 CLJ 418; *Tunde Apatira & Ors v. Public Prosecutor* [2001] 1 CLJ 381; *K Saravanan a/l S Karuppiah v. Public Prosecutor* [2002] 4 CLJ 144).

Overall Conclusion

For the above reasons we dismissed the appeals by both the appellants against their convictions on the charges preferred against them respectively.

On Sentence

In submitting for the first appellant learned counsel referred to s. 25 of the Akta Jenayah Syariah wherein for an offence of sodomy the maximum punishment is three years imprisonment, a fine of RM5,000 and strokes. And it was his contention that indeed there is a great disparity in term of sentence with s. 377B of the Penal Code. It was also submitted that the sentence of nine years imprisonment is manifestly excessive. And it was also contended that the previous conviction of the first appellant should not be taken into account as there is still a pending application for its review.

For the second appellant it was submitted that the sentences imposed are manifestly excessive. It was also contended that the imposition of the strokes was unnecessary since such punishment should only be meted out where violence was involved in the commission of the crime which was absent in this case.

It is settled law that an appellate court should not interfere in a sentence imposed by a trial court unless it is satisfied that such sentence is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts and circumstances disclosed or that the court below has clearly erred in applying the correct principles when assessing the sentence to be imposed. (See: *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256). In these appeals the only complaint is that the sentences of imprisonment or the length thereof are manifestly excessive. And for the second appellant it was highlighted that there was no violence involved. But it is not for an appellate court to interfere a sentence imposed merely because it would have passed a different sentence. (See: *Public Prosecutor v. Fam Kim Hock* [1954] 23 MLJ 20).

As to whether or not a sentence imposed is excessive, such issue has to be premised on the fact that in imposing sentence a trial judge is exercising his discretion. And we can do no better than to echo the view of Raja Azlan Shah (Ag LP) (as His Royal Highness then was) in the case of *Bhandulananda Jayatilake v. Public Prosecutor* [1982] 1 MLJ 83 where his Lordship said at p. 84:

> As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v. Jamieson* [[1952] AC 525). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others, equally conscientious, have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient *per se* to warrant this court's interference.

In the present case we note that before imposing the sentences on the appellants the learned trial judge considered several matters. In respect of the first appellant the learned trial judge took into account the following:

(i) that the first appellant did not show at all any sign of remorse, instead displayed an attitude of arrogance and attack on the Bench and his purported political rivals;

(ii) the seriousness of the offence as reflected by the penalty provided;

(iii) the lofty status and the position of responsibility of the first appellant at the material time and the need to exemplify high moral standard;

(iv) the fact that due to the age of the first appellant no whipping is allowed but the alternative is for a longer term of imprisonment that may be imposed;

(v) that the first appellant has a previous conviction;

(vi) that the sentence has to be made consecutive to the then sentence being served by the first appellant since the offence of sodomy is quite distinct from the offence in his previous conviction;

(vii) that the service of the first appellant to the nation has been taken into account although there was hardly any mitigating factors submitted on his behalf; and

(viii) that the length of sentence of imprisonment is reflective of the seriousness of the offence for which the first appellant has been convicted.

From the foregoing and in respect of the first appellant we are of the view that the learned trial judge has taken all the relevant factors into consideration in the process of sentencing. Public interest demands such considerations. There is no denial that the first appellant had engaged to defend him no less than a team of senior counsel with vast knowledge and experience in criminal work. All conceivable arguments were taken up. All grievances, both justified and unjustified, against anyone that could be remembered, were allowed. We agree with the approach adopted by the learned trial judge.

As to the argument that the previous conviction of the first appellant should not be taken into account for the moment since there is a pending review, with respect that is not for us to judge at this stage. In so far as this court is concerned that conviction has been upheld by the highest court of the country and that is the position until it is reversed. There is therefore no merit in that contention and we reject it.

Accordingly we find no reason to interfere with the sentence passed by the learned trial judge on the first appellant and hereby affirm it. His appeal against sentence is therefore dismissed.

As for the second appellant the learned trial judge considered these:

(a) the fact that a sentence of whipping can be imposed, hence that attracts lesser term of imprisonment;

(b) that the health reason of the second appellant is a matter for the medical authority to consider in respect of the execution of the sentence of whipping;

(c) that the learned trial judge found no compelling reason for a lighter sentence for the second appellant; and

(d) that for the two convictions the learned trial judge imposed concurrent sentences of imprisonment.

We note that the learned trial judge did not take into account the fact that the second appellant has one previous conviction related to the offence of sodomy as well. Be that as it may we are not convinced that the learned trial judge erred in any way in his process of sentencing the second appellant. And for the same reason we stated in respect of the first appellant we find no ground to interfere with the sentences imposed on the second appellant by the learned trial judge in the exercise of his discretion. Accordingly we also dismiss his appeal against sentence and affirm the sentences passed by the learned trial judge.