



10 FEBRUARY 2015

PRESS SUMMARY

**DATO' SERI ANWAR IBRAHIM V PUBLIC PROSECUTOR
(CRIMINAL APPEAL NO.: 05-47-03/2014(W))**

CORAM:

**YAA TUN ARIFIN ZAKARIA (CJ),
YAA TAN SRI RAUS SHARIF (PCA),
YA TAN SRI ABDULL HAMID EMBONG (FCJ)
YA TAN SRI SURIYADI HALIM OMAR (FCJ)
YA DATUK RAMLY ALI (FCJ)**

BACKGROUND TO THE APPEAL

This is an appeal by the appellant against the decision of the Court of Appeal dated 7.3.2014 which allowed the prosecution's appeal against the decision of the High Court. The appellant was convicted of the offence as charged and sentenced to a term of five years imprisonment. The charge preferred against the appellant reads *"That you, on 26 June 2008 between 3.01 p.m. to 4.30 p.m. at Unit 11-5-1, Desa Damansara Condominium, No. 99, Jalan Setiakasih, Bukit Damansara, Kuala Lumpur in the Federal Territory of Kuala Lumpur, did intentionally commit carnal intercourse against the order of nature with Mohd Saiful Bukhari bin Azlan by inserting your penis into his anus; and thereby have committed an offence punishable under section 377B of the Penal Code."* [1] – [2]

The facts relevant to this appeal as narrated by the trial judge are briefly as follows: Mohd Saiful Bukhari bin Azlan, the complainant (PW1), testified that he started working as a volunteer with the appellant in early March of 2008. From the end of April 2008 PW1 then worked as the personal assistant to the appellant. His duties, amongst others were to arrange for meetings, to communicate with agents and Members of Parliament from the appellant's party, to file confidential documents and to oversee the appellant's personal handphone. He also assisted the appellant's Chief of Staff, Ibrahim bin Yaacob (PW24) to prepare work schedules as instructed by the appellant. On 26.6.2008, on the appellant's instruction PW1 went to Unit 11-5-1, Desa Damansara Condominium, No.99, Jalan Setiakasih, Bukit Damansara, Kuala Lumpur (Unit 11-5-1). PW1 took with him some documents given to him by PW24 to be delivered to the appellant. [5] – [6]

PW1 left the office at about 1.45 p.m., and drove to Desa Damansara Condominium in a Fiat van bearing registration number WPK 5925. He arrived at Unit 11-5-1 at approximately 2.45 p.m. and upon arrival PW1 found the door not locked. He then entered the unit. He saw the appellant seated at the dining table. PW1 then sat at the table facing the appellant and placed the documents on the table. They discussed work schedule and not long after that the appellant asked PW1, “*Can I fuck you today?*”. PW1 said initially he refused and when the appellant asked him why, PW1 answered that he did not wish to do it that day. The appellant then instructed him in an angry tone to go into the master bedroom. PW1 followed the appellant’s instruction. In the bedroom, the appellant closed the curtain and switched off the light. He then directed PW1 to clean himself in the bathroom. PW1 then went into the bathroom and came out covered only with a towel. The appellant was then standing at the lower right end corner of the bed, clad only in a white towel. PW1 went to the appellant when he was told to do so and the appellant hugged him.

[7] – [9]

Further evidence was given in camera where PW1 described the carnal intercourse by describing how his anus was penetrated by the appellant's penis with the aid of a lubricant known as 'KY Jelly'. PW1 also testified that the appellant ejaculated in his anus. After the carnal intercourse PW1 went into the bathroom and wiped himself with water. The appellant then invited PW1 to have some refreshments with him. 20 minutes later, PW1 left the condominium. **[10]**

On 27.6.2008, PW1 sent an e-mail to the appellant conveying his wish to resign. The reasons he gave were that he was undisciplined, always late to the office and also felt the pressure as he was given a room in the new office over those who were more qualified. However, in his testimony PW1 said that the real reason for his resignation was that he did not wish to be sodomised by the appellant again. **[11]**

On 28.6.2008 at 1 p.m., PW1, accompanied by his uncle Tuah bin Mohd Ali, went to Tawakal Hospital at Jalan Pahang but failed to see any doctor as it was a half working day. PW1 then proceeded to PUSRAWI (a private hospital) at Jalan Tun Razak where he met Dr. Than Aung @ Muhamed Osman bin Abdul Hamid (DW1). PW1 informed DW1 that he had stomach ache and felt pain in his anus. DW1 examined PW1 and while DW1 was inserting something into PW1's anus, PW1 told him that he had been sodomised and needed an examination. Upon hearing this, DW1 immediately stopped the examination and told PW1 that PUSRAWI did not have the facility for forensic examination. PW1 was also informed by DW1 that any medical report from a private hospital could not be used as evidence in court. PW1 was then directed by DW1 to go to a government hospital and suggested Hospital Kuala Lumpur. **[12]**

PW1 went to Hospital Kuala Lumpur and registered himself as an outpatient. That was around 3.00 p.m. He was then referred to one Dr. Daniel. PW1 informed Dr. Daniel that he wanted to be examined because he was sodomised by Dato' Seri Anwar Ibrahim. Upon hearing this, Dr. Daniel issued a referral letter and directed PW1 to go to the One Stop Crisis Centre (OSCC) at the emergency department. He

arrived at the OSCC at about 3.30 p.m. After about 30 minutes at the OSCC, a doctor came and took PW1's blood pressure. PW1 informed the doctor the reason for seeking examination was that he had been sodomised. At about 4.30 p.m., the doctor came again and advised PW1 to lodge a police report without which a forensic examination could not be performed on him. After waiting for about an hour, two policemen came with a form for PW1 to lodge his report. PW1 then made his report (P3). **[13] – [15]**

After lodging the police report, PW1 was examined by three doctors, namely, Dr. Mohd Razali Ibrahim (PW2), Dr. Siew Sheue Feng (PW3) and Dr. Khairul Nizam bin Hassan (PW4). Also present was Dr. Razuin binti Rahimi (PW23), who filled up the pro forma form. PW2 took swabs from the perianal region, low rectal and high rectal from PW1, while PW4 took swabs from the oral cavity at the left peritonsillar recess, below the tongue, the left nipple and areola, the right nipple and areola, body swab from the mid chest to epigastrium and one penile swab from the hiatus and coronal area. While PW1 was being examined, the investigating officer Supt. Judy Balcious Pereira (PW25) was present to observe the whole examination on PW1. PW1 further testified that since the date he was sodomised until he was examined by PW2, PW3 and PW4, he had not passed motion. **[16] – [18]**

The samples collected from PW1 at the hospital were then placed into individual containers, labelled and sealed by PW3. The samples were then placed inside a sample bag (P27) which was then sealed and handed over to PW25 at 12.35 a.m. on 29.6.2008. PW25 then placed P27 in a steel cabinet in his air-conditioned office.

On the same day, PW1 handed over to PW25 the KY Jelly (P4), a long sleeve Ralph Lauren brand shirt (P11), a pair of black trousers (P12), a green shirt (P13), a grey underwear (P14) and a dark blue underwear (P15). **[19] – [20]**

On 30.6.2008, at about 9 a.m., PW25 cut the bottom of P27 and put each container containing the swabs into individual envelopes which he marked as 'B' to 'B10'. On the same day at about 7.55 p.m., PW25 handed over the envelopes together with a handing over form, 'Pol.31' (P24), to the chemist (PW5) who acknowledged receipt (P30). In her testimony, Dr. Seah Lay Hong (PW5) confirmed that she found no evidence of any tampering to the seals on the various individual containers which contained the swabs. According to her, had she found any evidence of tampering she would have stated it in her report. **[21]**

In the chemist report (P25) prepared by PW5, she recorded the results of her analysis of the samples. From the examination, PW5 was able to detect semen on swabs B5, B7, B8 and B9. Using the sperm isolation test, she found sperm cells in those samples and from a microscopic examination, PW5 found sperm heads. On 11.7.2008, the Clinical Forensic Department of Hospital Kuala Lumpur received the chemist report (P25) regarding the result of the analysis conducted on the samples collected. PW2, PW3 and PW4 together prepared the Report of Clinical Forensic Case (P22) dated 13.7.2008, which they jointly signed. **[22] – [23]**

PW2, PW3 and PW4 were subjected to lengthy cross-examinations which centred over their findings that PW1's anus showed no scarring, fissure or any sign of recent

injuries, in particular at the external area. When clarifying P22, which stated that “*No conclusive clinical findings suggestive of penetration to the anus/rectum and no significant defensive wound on the body of the patient*”, PW2, PW3 and PW4 explained that it did not mean that there was no penetration. Upon receiving the report from the chemist, (PW5) confirming the presence of spermatozoa in the rectum of PW1, and also the exact sites from which the samples (B5, B7, B8 and B9) were taken, PW2, PW3 and PW4 explained that penetration could take place without any injury to the rectum. They gave three possible grounds to explain why there was no injury, namely the lapse of time prior to seeing the doctors, no undue force having been used and the use of lubricant during the sexual act. **[24] – [25]**

On 16.7.2008, DSP Yahya bin Abdul Rahman (PW17), L/Kpl. Nik Rosmady bin Nik Ismail (PW18) and L/Kpl. Mohd Azry bin Mohd Toyeb (PW19) confirmed that the appellant was brought to and detained in the lock-up at the Kuala Lumpur Police Contingent Headquarters (IPK Kuala Lumpur). According to PW17, the appellant brought with him a bottle of mineral water and two towels. At the lock-up, PW17 gave the appellant a package containing a 'Good Morning' towel , a tooth brush, a tube of toothpaste and a bar of soap. On 17.7.2008 after the appellant was taken out of the lock-up, PW17 saw a 'Good Morning' towel and a tooth brush on the lock-up floor and a mineral water bottle on the toilet half wall. PW17 was instructed to keep the lock-up under lock. On the same day, Supt. Amidon bin Anan (PW15) head of the Crime Scene Investigation, went to the lock-up which had been occupied solely by the appellant. He was assisted by Insp. Nur Ayuni Dayana binti Mohd Fuad (PW16). On the floor of the lock-up, PW15 found the following items: (i) a strand of hair

(P57A); (ii) a tooth brush (P58A); (iii) a 'Good Morning' towel (P59A); and (iv) a mineral water bottle (P61A). **[26] – [27]**

PW15 instructed L/Kpl Mohd Hazri bin Hassan (PW14) to take photographs of those items. He also instructed PW16 to prepare four envelopes (P57, P58, P59 and P61). Each of the above items was placed inside individual envelopes. The envelopes were marked with numbers 4, 5, 6 and 7. PW15 signed on the back of each envelope and sealed them. On the same day, PW15 handed over the envelopes to PW25 at the IPK Kuala Lumpur. Both PW15 and PW25 signed a handing over form (P80). PW25 took the envelopes back to his office at about 3.35 p.m. and kept them in a steel cabinet in his office. PW25 marked each envelope as 'D', 'D1', 'D2' and 'D3' (P57, P58, P59 and P61) respectively and sealed the envelopes with a 'PDRM' seal. At about 6.50 p.m., PW25 took the items and handed them over to Nor Aidora binti Saedon (PW6), a chemist at the Chemistry Department. **[28] – [29]**

PW6 successfully developed Deoxyribonucleic Acid (DNA) profiles from the swabs of the tooth brush, the 'Good Morning' towel and the mineral water bottle, but not from the hair. These DNA profiles matched each other, indicating that the DNA identified originated from the same source. PW6 then compared the DNA profiles she obtained with that obtained by PW5. PW6 found the DNA profiles developed from the swabs from the tooth brush, the 'Good Morning' towel and the mineral water bottle matched the DNA profile of 'Male Y', thus indicating that the DNA identified originated from a common source. PW6 then prepared a report (P62). **[30]**

At the end of the prosecution's case, upon a maximum evaluation of the prosecution's case, the trial judge held that the prosecution had established a prima facie case against the appellant. Accordingly, the appellant was called upon to enter his defence. The appellant in his unsworn statement from the dock advanced the theory of a political conspiracy by the Prime Minister, Dato' Seri Mohd Najib bin Abdul Razak, with the purpose of ending his political career by putting him behind bars. **[31] – [32]**

The appellant's statement may be summarized as follows: (a) PW1 had all the opportunity to flee; (b) PW1 did not seek immediate medical attention; (c) the medical evidence did not support PW1's complaint; (d) PW1 did not lodge a police report immediately after the incident; (e) PW1's conduct did not support his claim of being sodomised as he had a drink and a friendly conversation with the appellant immediately after the incident and attended PKR's function and a meeting of Anwar Ibrahim's club the next day; (f) PW1 has connection with the Prime Minister and the Inspector General of Police; (g) PW1 could have resisted the appellant as he is younger and physically bigger than the appellant; (h) the appellant is old and weak with a history of back injury and had undergone a major surgery; and (i) the appellant does not hold any position of power. **[33]**

In respect of the scientific evidence, which we shall deal with in detail later in this judgment, the appellant called a number of expert witnesses. Professor David Lawrence Wells (DW2) commented that there were serious shortcomings in the filing of D28 (pro forma form) by PW23. PW1's history and essential information, as

required in D28, was incomplete and tardy in its preparation. It was bad practice not to complete D28 in full and it was riddled with ambiguity. DW2 further testified that it was wrong for PW2, PW3 and PW4 to have come to the conclusion in court that there was “*anal penile penetration*” based on another person’s opinion i.e., PW5, who testified that she found semen in the PW1’s rectal swabs as there were many other ways by which semen could have found its way into PW1’s anus. **[34] – [36]**

On the issue of semen found on PW1’s rectal swabs as evidenced from PW5’s findings, both DW2 and Dr. Brian Leslie McDonald (DW4) testified that there was no photographic evidence presented by PW5, to positively indicate that the sperms were actually seen in the swabs. According to DW2 and DW4, one could hardly succeed in collecting any sample of value from which DNA could be extracted beyond 36 hours after a sexual assault. This is based on the Australian experience or practice. When confronted with an article by JE Allard – reported in Forensic Science International, 19 (1982) pp 135-154, that sperms could be found even after 65 hours in the rectum, DW2 answered that the scientific community has some reservation about that single case in 30 years. 36 to 48 hours might be the limit in which good DNA profile could be obtained. In this case, it was already past the time span. Furthermore, the samples here were not only not dry or frozen but also kept at room temperature. According to DW2, from his experience it was unlikely that anything of value could be retrieved. **[37] – [38]**

Dr. Thomas Hoogland (DW7) testified that, due to the back injury suffered by the appellant, he was of the opinion that it would be very unlikely for the appellant to be

able to commit the sodomy in the way described by PW1. Dr. Osman bin Abdul Hamid (DW1) was offered to the defence by the prosecution and was the first witness called by the defence to support the appellant's case. According to DW1, on 28.6.2008, PW1 turned up at PUSRAWI for treatment complaining of pain in the anus when passing motion. DW1 examined PW1 using a proctoscope for suspected piles but found no injury. As PW1 was putting on his trousers and DW1 was washing his hands, PW1 told DW1 that he had been sodomised by a VIP and was scared to go to the police. According to DW1, had he been informed earlier, he would not have carried out the examination of PW1. DW1 alleged that PW1 also told him that he had been assaulted by the insertion of a plastic object into his anus. **[39] – [40]**

At the close of the defence case, the trial judge held that the appellant had succeeded in creating a reasonable doubt in the prosecution's case and acquitted and discharged the appellant of the charge. He came to his finding premised essentially on the evidence of DW2 and DW4 that it was unlikely any trace of semen could be retrieved 36 hours after the sexual assault. In this case, since PW1 was examined some 56 hours after the alleged incident, and relying on DW2's and DW4's evidence, it was very unlikely any sperm cell could have been retrieved from PW1's rectum. This he said was further compounded by the manner the samples were kept by PW25 which was contrary to the instruction of PW3. However, the EPG (electropherogram) tendered by the prosecution according to DW2 and DW4 showed that the DNA was in pristine condition. Furthermore, PW25 had cut open the sample bag (P27). Having considered the defence evidence, the trial judge held that the possibility of the integrity of the samples taken from PW1 had been compromised before reaching PW5 for analysis could not be excluded. For that reason he held that

it was not safe to rely on the DNA result obtained by PW5. In the result, he held that there was no evidence to corroborate PW1's evidence on the factum of penile penetration, an ingredient of the offence, and on that premise the appellant was acquitted and discharged of the charge. [41] – [42]

The Court of Appeal disagreed with the finding of the trial judge that the defence had through their witnesses, in particular DW2 and DW4, succeeded in casting a reasonable doubt in the prosecution's case. The Court of Appeal held that DW2 and DW4 were mere armchair experts who had not done the analysis on the samples as opposed to PW5 and PW6 who had conducted the analysis on the samples. On this issue, the Court of Appeal preferred the evidence of PW5 and PW6 to that of DW2 and DW4. The Court of Appeal accordingly set aside the order of the High Court and the appellant was convicted and sentenced to a term of five years imprisonment. [43]

PROCEEDINGS IN THIS COURT

Several issues were raised by the appellant contending that the Court of Appeal had erred in their decision. We will now deal with these issues. [44]

Credibility Of PW1

The appellant's appeal began by attacking the credibility of PW1. PW1's failure to run away from the place of incident, to ask for help from the occupier of Unit 11-5-2, to report to the security guard, and to make a police report immediately, ran counter

to his testimony that he did not consent to being sodomised. The alleged vigorous act by the appellant on PW1 was not consistent with the medical report prepared by PW2, PW3 and PW4 which recorded no trace of violence or resistance. The medical report (P22) also stated that no tear was detected in his anus thus indicative of no penile penetration. PW1's conduct of bringing the KY Jelly, the inconsistency in the duration of the sexual act i.e. whether it was five minutes or thirty minutes, his delay in filing a police report, his attendance at a meeting with the appellant on 27.6.2008, DW1's annotation on the medical report of PW1 (IDD16) stating that PW1 had complained of a plastic object having been inserted into his anus, amongst others, were all brought to our attention. **[45] – [46]**

The appellant submitted that had IDD 16 been introduced at the prosecution's stage, the court would have been confronted with two versions. First, of PW1 being sexually assaulted by the appellant and second of a plastic object having been inserted into his anus. The appellant suggested that, as it was incumbent upon the prosecution to call DW1 as a witness, its failure to do so had triggered s.114(g) of the Evidence Act 1950 (the Evidence Act). With DW1's evidence left unimpeached, there were therefore doubts in the prosecution's case and the appellant was entitled to the benefit of the doubt. **[47]**

The prosecution on the other hand argued that PW1's evidence was credible. The comprehensive details narrated by PW1, especially of those before entering the condominium, and the graphic description of the sexual act, merely strengthened his credibility. He could not have described those material particulars unless he was

there and had gone through the ordeal. The prosecution also argued that the previous encounters with the appellant were admissible in order to show PW1's state of mind and why he behaved the way he did. The word 'every time' in his testimony was indicative of the previous encounters. As he was reminded of the memory of the sensation of pain he came prepared with the KY Jelly. The prosecution suggested that the availability of the KY Jelly and the lapse of time explained why there was no injury on PW1's anus. The prosecution added that the previous sexual encounters would help the court appreciate the type of relationship PW1 had with the appellant, explain why PW1 did not resist or run away, why he remained in Unit 11-5-1 after the sexual encounter, and why he attended the meeting together with the appellant the next day. **[48]**

So, was PW1 credible? In this case it takes a lot of courage for a young man, like PW1, to make such a disparaging complaint against a well-known politician like the appellant. Knowing that such an allegation might taint him (PW1), we cannot ignore the life-long negative effect such a serious allegation would have on PW1 and his family even if the allegation were proven to be true. The minute details testified by PW1 gave his testimony the ring of truth, as, unless he had personally experienced the incident, he would not be able to relate the antecedent facts and the sexual act in such minute details. It must be borne in mind too that despite the lengthy cross-examination, PW1 had withstood that grueling session which the trial judge described as "*sometimes bordering on harassment*". PW1 spoke of the previous encounters he had with the appellant, the unpleasant sensation of pain and the reason for bringing the KY Jelly. He hid nothing. The trial judge found PW1 to be

completely open and honest. The Court of Appeal agreed with this finding. **[50] – [51]**

Specifically on the issue of delay in lodging the police report by PW1 and his failure to complain to the occupier of Unit 11-5-2 and the security guard, the issue of delay was never put to PW1 in the cross-examination and he found that such failure should not be taken against PW1. **[52] – [54]**

In the present case, considering the age of PW1 and his connection with the appellant, it was therefore reasonable for PW1 to take some time before lodging a police report, what more to complain to the occupier of Unit 11-5-2 whom he knew to be a friend of the appellant or to the security guard, who is a complete stranger. It is a settled principle of law that credibility of a witness is the domain of the trial judge and an appellate court should be slow in interfering with the findings of the trial judge who has the audio visual advantage. Having heard and observed the demeanour of the witness, the trial judge found PW1 to be a credible witness. His finding was upheld by the Court of Appeal. **[55] – [56]**

Before us it was also submitted by appellant's counsel that PW1's credibility is questionable for a number of reasons. First, it was alleged by PW1 that he was given an expensive gift (a Brioni suit) by the appellant and the trousers (P12) which was tendered in evidence came from that suit. However, counsel contended that P12 carried no label at all. Thus it was submitted that PW1 could not be telling the truth because such an expensive suit must carry a label; even an ordinary brand would

carry a label, what more such an expensive suit. However, there was no cross-examination of PW1 by the defence on the absence of the label on the P12. As such, PW1 was not given any opportunity to explain the absence of that label. In the circumstances, we hold that it is not proper for counsel to raise this issue at this stage. **[57] – [58]**

Secondly, it was the prosecution's case that the act of sodomy took place in Unit 11-5-1 on the carpet (P49A). P49A was however recovered from Unit 11-5-2. The prosecution had not explained how P49A came to be in Unit 11-5-2. There was therefore a gap in the prosecution's case which was not explained as the owner of Unit 11-5-2 was not called. Counsel for the appellant remarked, "*I don't believe in flying carpet.*" It was then submitted that with this gap PW1 could not have been telling the truth in that the act took place in Unit 11-5-1 and on P49A. We agree with counsel for the appellant that there was no evidence led as to how P49A "moved" from Unit 11-5-1 to Unit 11-5-2. From the evidence, it is not in dispute that Unit 11-5-1 and 11-5-2 are adjacent to each other, and belonged to the same owner, Hassanuddin Abdul Hamid. P49A was sent to the chemist for analysis but no trace of KY Jelly was found on it. There was also no conclusive evidence that the KY Jelly had in fact spilled onto P49A. What PW1 said in his testimony was that the KY Jelly could have spilled on either P49A or the towel. In any event, we are of the view that P49A was not a critical piece of evidence to the prosecution's case in light of other compelling evidence. Having gone through PW1's evidence and how he stood the vigorous cross-examination, we agree with the trial judge that there is nothing inherently improbable about his story. We too find him to be a credible witness. **[59] – [61]**

Impeachment of PW1

The issue of impeachment of PW1's evidence was also raised by the appellant. The complaint was over the dismissal by the trial judge of his application to impeach the evidence of PW1. Impeachment generally means to call into question the veracity of a witness by means of evidence adduced for such purpose or the adducing of proof that a witness is unworthy of belief. **[62] – [63]**

S. 155(c) must however be read together with s. 145(1) of the Evidence Act. S. 145(1) sets out the procedure for impeachment. Taylor J. in *Muthusamy v Public Prosecutor* [1948] 1 MLJ 57 laid down in great detail the procedure for impeachment proceeding, with which we agree. From the above, it is clear that there must be some material and real contradictions or circumstances unexplained by the witness before one can seek to impeach his credit. **[64] – [66]**

In the present case, in making his application before the trial judge, the appellant's counsel stated, "*... we have a hunch here that the statements produced in court, and even if they are privileged, we have the right to have them produced for our inspection and thereafter. Proceed to impeachment of the witness.*" In dealing with the application, the trial judge had asked the appellant's counsel repeatedly the nature of his application. However counsel failed to give any specific answer as to the exact nature of his application except to say that he had a hunch. The basis for his hunch was that the charge is punishable under s.377B i.e. consensual intercourse but PW1 comes to court alleging non-consensual intercourse which is punishable under s.377C. **[67] – [68]**

In the present case, we find that counsel for the appellant had failed to comply with the correct procedure in applying for an impeachment proceeding against PW1's evidence. After being repeatedly asked by the trial judge, counsel for the appellant vaguely indicated, "*Pohon untuk semua statement yang direkodkan dari saksi ini (PW1) dalam penyiasatan kes ini, which include 112 statement.*" Clearly, counsel was asking for all of PW1's statements recorded by the police during its investigation, including statements recorded under s. 112 of the Criminal Procedure Code without specifying or identifying the relevant part of the statement. Based on the above, we hold that the trial judge had correctly exercised his discretion in dismissing the application of counsel to impeach PW1. [70] – [71]

Corroboration

We now turn to the issue of corroboration of PW1's evidence. The law on corroboration of the evidence of a victim in a sexual offence is settled in our jurisdiction. In this regard, the Court of Appeal had correctly addressed the law by referring to various authorities both here and in other Commonwealth jurisdictions. As a matter of practice and prudence, not of law, corroboration is normally required in a sexual offence. Where corroboration is dispensed with, and the complainant's evidence is accepted as having established the case against an accused, the judge as a matter of law is required to warn himself of the danger of convicting on the uncorroborated evidence of the complainant. [72] – [73]

It was submitted by the prosecution that the evidence of PW1, even without any corroboration is credible and probable, and on its own was sufficient to prove the charge against the appellant. His evidence, it was argued, is akin to that of a female rape victim who will not ordinarily “*stake her reputation by levelling a false charge concerning her chastity*” (a phrase taken from *State of Maharashtra v Chandraprakash Kewalchand Jain*, AIR [1990] 1 SCC 550). Similarly, for PW1 to come out publicly to testify that he had been sodomised would obviously subject him and his family to ridicule. There was therefore no reason for him to level a false accusation against the appellant as the stigma will remain for his lifetime. **[74]**

A judge is entitled in law to convict even without corroboration if convinced of the truth of a complainant’s evidence (*Chiu Nang Hong v Public Prosecutor* [1965] 1 MLJ 40 P.C.). If the evidence of a complainant in a sexual offence inspires confidence then it should be relied upon without the need of corroboration. It has been said that a refusal by the courts to convict based on the testimony of a victim of a sexual offence alone in the absence of corroboration, amounts to “*adding insult to injury*” (*Bharwada Bhoginbhai Hirjibhai Air* [1983] SC 753). Corroboration is independent evidence which implicates the accused by connecting or tending to connect him with the crime (*The King v Baskerville* [1916] 2 KB 658). This may be in the form of independent witnesses or medical evidence (*Syed Abdul Tahir v Public Prosecutor* [1988] 3 MLJ 485) or other scientific evidence such as DNA profiling. **[81] – [82]**

In the present case, the trial judge had considered the following independent evidence and concluded that they were corroborative of PW1’s testimony of having

been sodomised by the appellant: (i) the evidence of the appellant's Chief of Staff, Ibrahim bin Yaacob (PW24) who testified that the appellant called him at about 12.15 p.m. on 26.6.2008 and told him (PW24) that the appellant had left the envelope on the table and would like to have it delivered to him. PW24 then instructed PW1 to deliver the envelope to the appellant, which was duly complied with. This piece of evidence, according to the trial judge, corroborated PW1's evidence of his and the appellant's presence at Unit 11-5-1, thereby affording not only an opportunity for the appellant to commit the offence, but also confirming proximity of time; (ii) the CCTV recordings which is the primary evidence of the arrival and departure of PW1 and the appellant at the said condominium on that day, corroborating PW1's story that they met there; (iii) the medical history of PW1 as narrated by Dr. Siew Sheue Feng (PW3) and Dr. Razuin binti Rahimi (PW23) both of whom had interviewed PW1 in their preparations of PW1's medical history. Both PW3 and PW23 confirmed in their evidence that PW1 had informed them that he had been sodomised, that lubricant was used, and that there was penetration and ejaculation; (iv) the medical history of PW1 as reflected in the medical report (P22) jointly prepared by three doctors (PW2, PW3 and PW4) alleging that he had been sodomised by a well-known public figure for the past two months with the last incident taking place on 26.6.2008; (v) the evidence of PW2, PW3 and PW4 relating to the taking of swabs from PW1. The evidence of PW5 confirmed, from the analysis on four of the swabs taken from the perianal region, high rectal region and low rectal region of PW1, the presence of semen; (vi) the positive conclusion made by PW2, PW3 and PW4 that there was penile penetration of PW1's anus based on the medical history of PW1 and the sites from which the swabs were taken; (vii) the findings made by PW2, PW3 and PW4 that there was no scarring, fissure or any sign

of recent injuries to the external areas of PW1's anus were consistent with PW1's evidence that lubricant was used; and (viii) the evidence of Dr. Seah Lay Hong (PW5) and Nor Aidora binti Saedon (PW6) that the DNA profile of Male Y developed from the seminal extract from PW1's rectum matched the profile developed from the lock-up items (tooth brush P58A, a Good Morning towel P59A and a mineral water bottle P61A) collected from the lock-up occupied by the appellant. **[83]**

The trial judge found that there was ample corroboration of PW1's evidence that he had been sodomised by the appellant. He took into account those facts enumerated above and tested them against the probabilities of PW1's evidence and concluded that his story was adequately corroborated. The Court of Appeal agreed with the findings of the trial judge. We have no reason to disagree with that finding. **[84] – [85]**

In this appeal, it was also submitted by counsel for the appellant that PW1 was an accomplice and as such his evidence requires corroboration. However, on the facts of this case, we find that PW1 is not an accomplice; we find him not a willing participant in the offence but in fact a victim. In any event, even if we were to agree with that submission of the counsel, we find there is ample corroborative evidence to support PW1's testimony. **[86]**

No direct evidence to link the DNA profile of Male Y to the appellant

Lengthy submissions were made on whether the prosecution had succeeded in proving that the DNA profile of 'Male Y' extracted from the three exhibits (P58A, P59A and P61A) obtained from the lock-up was that of the appellant's. It will be recalled that the appellant was arrested and detained for police investigations on 16.7.2008. He was placed in a police lock-up at IPK Kuala Lumpur from 11.30 p.m. till his release at 8.00 a.m. the following day. The appellant brought with him a bottle of mineral water (P61A) when he went into the lock-up. At 12.10 a.m. L/Kpl. Nik Rosmady bin Ismail (PW18) handed to the appellant for his use, a plastic package containing a Good Morning towel (P59A), a toothbrush (P58A), a tube of toothpaste and a bar of soap. It was from the three exhibits (P58A, P59A and P61A) that the matching DNA profile of 'Male Y' was extracted and analysed by the chemist Nor Aidora binti Saedon (PW6). **[87]**

It is in evidence that the appellant was the sole occupant of the lock-up on the night of 16.7.2008. According to PW18, one of the lock-up sentries, the lock-up was clear and empty prior to the appellant occupying it. The lock-up was locked after the appellant left, and those items remained untouched and unmoved until the police forensic team seized them later for investigations. L/Kpl. Mohd Jasni bin Jaafar (PW20), another sentry at the lock-up said he heard the appellant brushing his teeth although he did not actually see this happening. It was submitted for the appellant that there was no direct evidence of anybody actually seeing the appellant using those exhibits recovered from the lock-up. **[88] - [90]**

It is our finding that there was direct and strong circumstantial evidence pointing to the appellant using those exhibits. The lock-up was solely occupied by the appellant, and there was no dispute on this. Those exhibits except for the mineral water bottle (P61A) were neatly packed in a plastic package when they were handed over to him. When the forensic team recovered them later, they were found scattered on the floor of the lock-up, except for P61A which was placed on a half-wall in the lock-up. The lock-up remained locked until the arrival of the forensic team. Supt. Amidon bin Anan (PW15), who headed the forensic team testified that he picked up those exhibits from the lock-up, carefully placed them into separate envelopes, sealed and signed the envelopes before handing them over to PW25. The evidence of PW15 and the lock-up sentries was not challenged by the appellant and was accepted by the trial judge. In the circumstances, the only inference that can be made is that the appellant had used those exhibits. [91] - [92]

Whether the exhibits P58A, P59A and P61A are admissible as evidence

The next submission was whether exhibits P58A, P59A and P61A were illegally obtained by means of trickery and deception and as such should not be admitted as exhibits. Earlier, the appellant had declined for his blood sample to be taken for the purpose of DNA profiling. At the trial, the appellant then objected to the admission of those exhibits seized from the lock-up which led to the trial judge holding a trial within a trial to decide on their admissibility. At the end of that mini-trial the trial judge made a ruling excluding those exhibits as well as the analysis made by PW6 on them, reasoning that “*they were obtained by unfair means against the wishes of the accused*”. Immediately prior to the close of the prosecution’s case an application

was made by the prosecution to have that ruling reviewed in the light of later evidence of Supt. Judy Balcious Pereira (PW25) and Supt. Ahmad Taufek bin Abdullah (PW26). The trial judge upon that consideration reversed his earlier ruling giving the following reasons: *“Now, in light of the evidence adduced from the investigating officer and the arresting officer during the main trial, it is clear that the arrest of the accused was in fact lawful. His subsequent detention in the cell was indeed lawful and for a lawful purpose. Thus, the detention of the accused in the cell could no longer be said to have been for the sole purpose of obtaining DNA evidence from him by trick as alleged by the defence. In those circumstances, the court has no discretion but to allow those items collected from the cell and all evidence related to those items to be tendered as evidence. Therefore I now rule that those items and all evidence related to those items are admissible and could be tendered as evidence. My early ruling on this matter is accordingly reversed.”* [93]

Counsel for the appellant conceded that a trial judge may review his earlier ruling citing this passage in **R v Watson [1980] 2 All ER 293**: *“It is the duty of the judge to exclude from the jury’s consideration evidence which is inadmissible. In the case of a written statement, made or signed by the accused, the judge must be satisfied that the prosecution have proved that the contested statement was voluntary, before allowing the jury to decide whether to act on it. Experience has shown that where the question of the voluntary character of a statement has been investigated and decided at a trial within a trial it is only in very rare and unusual cases that further evidence later emerges which may cause the judge to reconsider the question whether he is still satisfied that the statement was voluntary and admissible. But*

where there is such further evidence the judge has power to consider the relevance of the admissibility of evidence on which he has already ruled.” [94]

Counsel thus submitted that only in rare and unusual cases may a judge review his earlier ruling, which is not the case here. It was further submitted that the evidence of PW25 and PW26 given in the main trial should not be considered as they were not called as witnesses during the trial within a trial. The prosecution on the other hand, submitted that after hearing the evidence of PW25 and PW26 the trial judge was satisfied that the detention of the appellant in the lock-up was not for the sole purpose of obtaining DNA evidence from him using trickery or deception, and as such, the trial judge had full discretion to relook and review his earlier ruling. [95] – [96]

We are of the view that on the question of admissibility of an exhibit, a trial judge may review any previous ruling he made and if need be, reverse the earlier ruling. Now, even if those exhibits recovered from the lock-up were indeed illegally obtained, which we say were not, in law they remain admissible if found to be relevant to the case (S.5 of the Evidence Act). [97] - [98]

We are of the view that the conducting of a trial within a trial by the trial judge to determine whether the DNA samples from exhibits P58A, P59A, P61A recovered from the lock-up were obtained by unfair means or otherwise was a superfluous and an unnecessary exercise. It is our finding that the recovery of those exhibits used by the appellant while he was in the lock-up was not a transgression of any rule, nor

was it an infringement of the appellant's constitutional right to a fair trial. The appellant was lawfully detained at the lock-up and the gathering of evidence there by the forensic team was a legal and fair method of police investigation. The trial judge was thus entirely right in admitting those exhibits and reversing his earlier ruling.

[102] – [103]

DNA evidence as corroboration

We now deal specifically on how scientific evidence had proven that the DNA profile of Male Y can be linked to the appellant, thus corroborating PW1's allegation that he was sodomised by the appellant. In the present case, PW2, PW3 and PW4 took swabs from the rectal region of PW1, and, as confirmed by PW5's DNA analysis, sperm was found in PW1's rectum. PW5 stated that by logical deduction, if sperm was detected in PW1's rectum, then there must have been penile penetration. This piece of evidence corroborates the allegation of PW1 that he was sodomised by the appellant. **[104] – [105]**

Whether the anus was torn or bruised is not, in our view, an issue which could refute the fact that PW1 had been sodomised. According to PW2, PW3 and PW4, the absence of such injury could have been due to the lapse of time prior to seeing the doctors, no undue force having been applied and the use of lubricant. This explanation in our view is plausible and we accept it. **[106]**

DNA EVIDENCE

What is critical in the present case is the DNA evidence adduced by the prosecution to corroborate PW1's evidence on the factum of penile penetration, an ingredient of the offence. In view of that, we will now embark on a detailed examination of the DNA evidence. The chemists (PW5 and PW6) carried out the Polymerase Chain Reaction (PCR) test in conducting the DNA examination and analysis. By this method, when any cell divides, enzymes called polymerase make a copy of the entire DNA in each chromosome. The first step in this process is to "unzip" the two DNA chains of the double helix. As the two strands separate, DNA polymerase makes a copy using each strand as a template. [107] – [109]

Challenges on DNA

Against that background, we now consider the issues raised by counsel for the appellant challenging the reliability of the DNA analysis. [111]

Degradation of sample

It is the appellant's contention that as the samples were taken some 56 hours after the alleged incident, and it took another 40 hours before the samples reached the chemist (PW5), it is therefore impossible for the samples to be in pristine condition. It was further submitted that the surprisingly fresh condition of the samples, was inconsistent with their history thereby pointing to the possibility of the samples being compromised on their way to PW5. This is premised on the opinion of DW4 from his reading of the analysis by PW5. [112]

However, it was never the prosecution's case that the samples were in pristine condition. This is clear from the evidence of PW5. She conceded under cross-examination that the samples had undergone some degradation but maintained that what is important is to see whether the DNA is readable despite the degradation. If the DNA is readable, findings can be made. The appellant also criticised the manner PW25 kept the samples i.e. instead of keeping in chillers or refrigerator he had kept them in a drawer in his air-conditioned room. This the appellant said could lead to further degradation of the samples. **[113]**

One crucial point to note is that from the evidence of PW5 and PW6, if the DNA is completely degraded it means that no DNA profile could be obtained or developed. But it does not mean that when a DNA profile was obtained, no degradation had taken place. They emphasized that there might be some slight degradation, but the damage is not substantial enough to destroy the DNA entirely. **[114]**

On a related issue, PW5 under cross-examination explained that the decline on one of the peaks was an indication that there could be degradation of the samples. But she further affirmed that despite the possibilities of contamination and degradation, it did not affect her reading of the samples obtained from swabs taken from the high rectal and the low rectal. She testified that the DNA profile obtained from swabs B7, B8 and B9 was clear and unambiguous. It was obviously readable. The degradation has no effect on the DNA profile obtained from those samples. PW6 also explained that degradation will always occur in any biological samples. But when DNA analysis

is conducted and good perfect profiles are obtained, it means that even if degradation had occurred, it is not sufficient to affect the quality of the DNA. [116] – [117]

In our case, PW6 when asked whether she took into consideration the occurrence of contamination on all the exhibits she received, PW6 testified that there was no contamination, as all the profiles were readable. All the quality assurances were in place. The reagent blank stayed blank. If any of the peaks was contaminated by e.g. the 18 allele or contaminated by the people in her laboratory (or for that matter by PW25 as suggested by the defence), then the other Short Tandem Repeat (STR) locus will also be contaminated, which was not the case here. Even her negative control in her Electropherogram was blank as well. If there was contamination, then one would be able to see the 18 allele in all the loci D3S1358 across all the samples that she had analysed. [121]

Premised on the above we agree with the prosecution that it is incorrect and misleading to conclude that because of the degradation the DNA profiling is rendered unreliable. It is thus our finding that the degradation has no effect whatsoever on the DNA profiling in this case. [112]

Break in the chain of custody of the exhibits

The appellant's counsel submitted that the samples had been compromised as there was a break in the chain of custody of the exhibits. It was also his submission that

the DNA evidence had been planted. Let us now consider the evidence before us. The evidence shows that PW25, after receiving the sample bag (P27) had cut it open to add his own markings to the samples inside. He was merely adhering to departmental guidelines the Inspector-General Standing Orders (IGSO) which required him as an investigating officer to put proper markings and labelling to exhibits for the purpose of identification in courts. Having seen the physical evidence, especially the bottom part of P27 that was snipped by PW25, we observed that he was extremely careful in handling it. PW25 even left the snipped portion of P27 attached to it to show transparency in his action. PW25 then sent the samples to PW5 who thereafter developed the Male Y DNA profile. **[123] – [124]**

PW5 in her testimony confirmed that she did not detect any tampering of the seals of the exhibits marked B to B10. We therefore find that there was no break in the chain of custody of those exhibits. As such, we agree with the Court of Appeal that the integrity of the samples was not compromised. In view of our finding that there was no break in the chain of custody of evidence, the fanciful suggestion of the appellant's counsel that the DNA evidence had been planted is therefore unsustainable. **[125] – [126]**

Presence of Allele 18

The next issue is the presence of allele 18. It was contended that the presence of allele 18 proves the existence of a third party contributor on B9 (low rectal swab) and P59A ('Good Morning' towel). **[127]**

According to PW5 the existence of DNA in 6 loci is the minimum threshold requirement before one can imply or conclude the presence of a third party contributor. Therefore, the presence of one “foreign” allele (of which PW5 considered it not reportable) cannot be taken to mean there exists a third party contributor. This explains why on B5 (perianal region) one other contributor was reported as the 18 allele was found on 6 loci. This is one of the reasons why the unaccounted alleles pointed out by the appellant was not reported by PW5 and PW6 in the summary of their STR results, as they did not meet the minimum threshold. The existence of allele 18 found on B9 (low rectal swab) and the P59A (‘Good Morning’ towel), however, does not affect the finding by PW6 that the DNA found on the P58A, P59A and P61A matched the DNA found by PW5 on swabs B5 (perianal region), B7 (high rectal) and B8 (high rectal). The DNA profile matched each other indicating that the DNA identified originated from the same source i.e. Male Y. From the evidence, it is established that Male Y is the appellant. **[128] – [129]**

Reading and Interpretation of Data

According to the chemists (PW5 and PW6) DNA profile is unique in that no two individuals would have the same DNA. Even siblings and twins have different DNA unless they are identical twins. In the case of twins, the profiles are different because there would be two separate ovum fertilized by two separate spermatozoa. **[130]**

Since specific locations are used for DNA profiling (Short Tandem Repeats profiling) which has a high degree of discrimination, the profile can safely be used to discriminate between two individuals. Because of the uniqueness of DNA profile of

each individual, it is used to identify people or individuals. In forensic context, it is used to compare the origin of certain biological evidence. **[131]**

PW5 received the samples collected by the doctors from PW1 through the investigating officer (PW25). Out of the twelve samples collected, PW5 conducted tests and examinations on eleven of them. They are swabs B to B10 (P6A to P6K). On swabs B to B10 she carried out both confirmatory and non-confirmatory tests to detect and confirm the presence of semen. The tests she carried out were: (a) acid phosphate test – non confirmatory; (b) PSA (phosphate specific antigen) test – confirmatory; and (c) sperm isolation test – confirmatory. From these tests, PW5 was able to detect semen and using the sperm isolation test she found sperm cells in those samples. From the microscopic examination, she found sperm heads. This finding of sperm heads, after more than two days is not unusual as according to PW5, even though sperm cells are prone to microbial attack, but because of the membrane structure of the sperm heads, they are better preserved. **[132] – [133]**

PW5's discovery of the sperm heads is not only consistent with the above literature but also consistent with the evidence of PW1 of being sodomised on 26.6.2008 between 3.01 p.m. to 4.30 p.m. His rectum was swabbed on 28.6.2008 between 10.30 p.m. to 11 p.m. approximately 56 hours after the act. The discovery of the sperm heads is thus consistent with current scientific knowledge. PW5 further explained that the seminal stains were subjected to an extraction process known as the differential extraction process to separate the sperm cells. By this process, the

sperm cells would appear in sperm extract and non-sperm cells in non-sperm extract. **[135] – [136]**

Apart from the differential extraction process and the microscopic test, PW 5 also conducted DNA test, which according to her was the ultimate test, in determining the sperm cells. The DNA profiles obtained in the present case were very clean and clear and she was thus able to interpret them without any difficulty. With regard to the mixed profile in this case, she subtracted the known contributor in order to deduce who the other contributor was. In this case she could easily do it since she had the known sample of PW1. **[137] – [138]**

PW5 and PW6 had carried out the PCR technique in conducting the DNA examination and analysis. Using this technique, the DNA extract is examined at 15 STR loci and one sex determining locus called amelogenin. It is significant as it increases the discrimination power and sensitivity to differentiate between individuals. As stated earlier, the PCR technique increases the sensitivity of detecting the DNA because of the amplification which can be done from a minute amount of DNA. In addition, it is able to analyse the smaller fragment of DNA or DNA of poor quality. **[139] – [140]**

PW5 also testified that PCR technique involved the re-amplification of DNA as not all the PCR will be successful at the first instance. If there are problems seen after amplification, then re-amplification is carried out to rectify those problems. This usually will result in the most successful DNA profile. Both chemists testified that

their reports P25 and P26 were made based on their interpretation of the DNA profile from the PCR technique that they had adopted. Both chemists interpreted their data based on the entire 16 loci. According to PW5, interpretation could not be made by discriminating and isolating the locus and it must be based on the entire 16 loci. The mathematical approach relied by the defence in raising the possibilities of having some other contributors by referring to one or two loci was not the correct approach to interpretation. **[141] – [143]**

PW5 further testified that even if the erroneous mathematical approach were used, the possibility of other contributors from the unaccounted alleles at some of the STR loci (and not reported in the appendix in P25), does not disprove the existence and presence of Male Y, whose profile was obtained from the interpretation of the entire 16 STR loci. PW5 also testified that apart from interpreting the entire 16 STR loci, she also interpreted the DNA profiles from all the samples. When asked about the possibility of the combination of certain alleles which by mathematical permutation could result in ten contributors, PW5 explained that the mathematical permutation is not the approach to interpretation. If this approach is adopted some of these combinations become impossible when further loci are examined. This is just a mathematical exercise and not interpretation. During cross-examination, the defence did not dispute that the forensic community had recommended that the minimum number to make an association is 6 loci despite the appellant having his experts with him throughout the cross-examination. This piece of evidence given and explained by PW5 was not challenged. The defence merely put to PW5 the possibility of other unaccounted alleles at one or two loci. PW5 explained that that was not how the interpretation of data/profile should be done. **[144] – [146]**

PW5 was also asked about allele drop-out, a phenomenon where the expected allele is not observed. She explained the situation in which it could occur and said that there is no other exercise in determining drop-out except by reference samples (term used by the chemist). On the omission to follow recommendations 7 and 8 of the “*Recommendations on the Treatment of Dropout*” found in the publication of the International Society of the Forensic Genetic, of which she is a member, PW5 said that these are merely recommendations and not standards. They cannot be applied rigidly to each and every case. She said that all interpretations of the mixture are based on their validation studies and experience. **[147] – [148]**

With regard to T-value (threshold value), which she did not adopt when drop-out was considered to have occurred, she said it was of no significance in this case. To adopt a standard T-value would mean adopting a mathematical approach and not interpretation. She explained that the Chemistry Department adopted the threshold of 50 RFU that is equated to T-value. PW 5 also dealt at length on the implication of drop-out. Both chemists also touched on the issue of stutter. From their evidence, it could be gleaned that the Chemistry Department has its own guidelines for the identification of stutter and the range of stutter established through validation studies is 10% to 20% of the real peak or parent allele. The threshold for considering a peak as stutter is 50 RFU and a stutter would not be reported in the STR summary. On statistical evaluation, PW5 testified that the calculation of the matching probability of DNA samples will be conducted only when there is a sample or a known contributor. **[149] – [151]**

In our case the sample is B10 (the blood-stained sample) taken from PW1. PW5 explained during cross-examination that she only did the statistical evaluation on samples A3 (P12A and P12B) with the known sample B10 to make association of the crime stain profile and the known contributor (PW1). PW5 further testified in re-examination that she will make a statistical evaluation to make a match that this profile comes from the same origin of the known sample. PW5 concluded that from the DNA examination using the PCR technique, the result was that DNA profiles derived from the seminal stain spots P12A, and P12B of trousers P12, distinguished one common male contributor having a DNA profile matching the profile of blood-stained sample B10. The probability of a coincidental match from a randomly selected unrelated individual, as calculated based on the population database of Malaysian Malays is 1 in 570 quadrillion (570×10^{15}). **[152] – [154]**

PW5 further explained how the calculation was made. According to her, the result was calculated from a population database of samples of Malaysian Malays and the frequency of each allele is then computed. Using the law of genetics with the correction of sub-population and sub-culture the figure of 1 in 570 quadrillion was obtained. She further testified that this was a very high figure, indicative of the high certainty that these two DNA profiles originated from the same individual. PW5 in cross examination affirmed that the purpose of the statistical report is to give weight to the evidence. **[155] – [156]**

PW5 also testified that as part of the quality assurance, the statistical data kept by the Chemistry Department is regularly audited. PW6 also explained as to the

population database kept by the Chemistry Department. The DNA profile of population database kept by the Chemistry Department consists of the DNA profile of the major ethnic groups in Peninsular Malaysia namely Malay, Chinese and Indian based on the STR 16 loci. This population database is kept in the DNA view software. PW6 also testified on the match probability that she had conducted on the DNA profile of Male Y in her report as well as Male Y in PW5's report. According to PW6, the match probability of a randomly selected unrelated individual to have a matching profile at the STR loci is approximately 1 in 470 quintillion (470×10^{18}) as calculated based on the Malaysian population database of the Malay race, 1 in 52 quintillion (52×10^{18}) as calculated based on the Malaysian population database of the Chinese race and 1 in 210 quintillion (210×10^{18}) as calculated based on the Malaysian population database of the Indian race. **[157] – [159]**

PW6 testified further that the document she referred to in court was the DNA view statistical calculation. It consisted of the DNA profile that she had obtained namely the locus, the alleles, the frequencies and the probabilities. This document referred to by PW6 is the same document as reflected in the DNA view software. PW6 had compared the DNA profile obtained from the swabs of P58A, P59A and P61A with the report of PW5. She concluded that the common DNA profile that she obtained from those swabs matched the DNA profile of Male Y, indicating that the DNA identified originated from the same source. **[160]**

In our case, the PCR technique was employed using the 16 STR loci which gives a higher discriminatory profile. It would appear that after Doheny and Adams the

significance of DNA test will depend greatly upon what else is known about the suspect and how these pieces of evidence are sufficient to connect the suspect with the crime. **[163] – [164]**

In our case, PW6 carried out the match probability of Male Y profile based on PW5's STR summary. It is indeed a very high probability based on the DNA of the Malaysian population database that Male Y belongs to the same person. Considering the other evidence, there is no dispute that the samples which PW6 had examined came from the items that were used solely by the appellant. It is thus indisputable that the profile of Male Y developed and analysed by both the chemists belongs to none other than the appellant. **[165] – [166]**

Hence, the DNA evidence of Male Y in the present case is the key corroborative evidence to the element of penile penetration by the appellant. It was the contention of the appellant that the statistical data must be produced before the court, failing which, no weight could be attached to such findings. In reply, the prosecution submitted that both chemists, PW5 and PW6, had explained at great length of the matching probability by using the DNA view software. **[168] – [170]**

Premised on the above, we agree with the prosecution that it is not the statistical data that has to be produced but for the experts to explain in detail how the results tabulated in their reports were obtained and how the calculation was made, as demonstrated by PW5 and PW6. **[171]**

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

Based on the above, we agree with the Court of Appeal that the trial judge had sufficiently evaluated the evidence before him in arriving at his finding that a prima facie case had been made out against the appellant, at the close of the prosecution's case. **[174]**

The Defence

The appellant's initial defence was one of alibi. A notice under s. 402A of the Criminal Procedure Code was earlier filed and served on the prosecution on 19.6.2009, stating that the appellant was not at the place and time where the alleged offence had taken place. In the notice of alibi, the appellant listed 13 witnesses in support of his alibi. However, when the defence was called, the appellant chose not to call any of his alibi witnesses. The alibi defence was thus abandoned. **[175]**

The prosecution submitted that the failure by the appellant to provide the explanation for the abandonment of his alibi defence warranted an adverse inference under s.114 (g) of the Evidence Act to be invoked. **[176]**

We are of the view that the principle stated in the above cases is an exception to the general principle. In *Goh Ah Yew v Public Prosecutor* [1949] MLJ 150, it was held that: “No inference can be drawn against an accused person in a criminal trial. There is no duty upon an accused person to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other.” The Supreme Court in *Ilian & Anor v Public Prosecutor* [1988] 1 MLJ 421 approved the above proposition. We hold that the above proposition is still good law, and therefore decline the invitation by the prosecution to invoke an adverse inference against the appellant for the abandonment of the alibi defence. **[177] – [178]**

The appellant in this case elected to make an unsworn statement from the dock. In his statement, the appellant denied ever sodomising PW1. The appellant contended that the incident had never happened, and that PW1 had lied. The appellant stated that PW1 had all the opportunity to flee from the room where the incident happened as it was not locked or latched. PW1 further did not seek immediate medical attention after the incident. **[179]**

The appellant further stated that PW1 did not lodge a police report immediately after the incident. Further, his subsequent conduct of having a drink, a friendly

conversation with the appellant immediately after the alleged incident, his attendance at a PKR's function, and a meeting with Anwar Ibrahim's Club the next day, were not consistent of him having been sodomised by the appellant. He also stated that PW1 could not have given in to him as PW1 is younger and physically bigger than him, whilst he is old and weak with a history of back injury and had undergone a major back surgery. **[180]**

The appellant also criticised the evidence of the chemists, PW5 and PW6, as well as the investigating officer (PW25) in that the DNA obtained by PW5 did not come from the samples taken from PW1's rectum. He further stated that the samples collected from the perianal and rectum of PW1 had degraded and had been tampered with. He further claimed that his DNA had been planted. **[181]**

The appellant also claimed that he was deprived of a fair trial in that the prosecution had failed to disclose evidence material to his defence coupled with the failure of the court to direct the prosecutor to do so. He criticised the court for failing to take contempt proceedings against the media and persons who made prejudicial statements outside the court to influence the course of the trial, and to act on the allegation that PW1 had an affair with a member of the prosecution's team. He further criticised the finding of the court that PW1 was a truthful witness, and accused the court of prejudging his case. He was also unhappy with adverse comments made by Abdul Malik Ishak JCA when delivering an earlier judgment of the Court of Appeal, which according to him had prejudiced and deprived him of a fair trial. **[182]**

His other complaints included his unlawful arrest, the illegally obtained DNA evidence, the integrity of the samples, the possibility of the samples having been tampered with, the lack of credibility and competency of the prosecution's expert witnesses and the trial judge's refusal to recuse himself. He also complained that the court had created a situation under which he could not have possibly given evidence under oath. In short, the appellant alleged that all the above infirmities revealed that the trial judge had failed to ensure a fair trial. **[183]**

Finally, the appellant alleged that the entire process against him is nothing but a conspiracy by the Prime Minister Dato' Seri Mohd Najib bin Abdul Razak to send him into political oblivion by attempting once again to put him behind bars. The existence of a political conspiracy by the Prime Minister and others was raised extensively by the appellant in his statement from the dock. **[184]**

In support of his defence, the appellant called seven witnesses, namely Dr. Than Aung@ Muhamad Osman bin Abdul Hamid (DW1), Dr. David Lawrence Wells (DW2), Yusni bin Ali (DW3), Dr. Brian Leslie McDonald (DW4), Lim Kong Boon (DW5), Mohd Najwan bin Halim (DW6) and Dr. Thomas Hoogland (DW7). **[185]**

DW1 was a doctor from PUSRAWI, who first examined PW1. DW1 was offered to the defence by the prosecution at the close of the prosecution's case. According to DW1, on 28.6.2008 PW1 had turned up at PUSRAWI for treatment complaining of

pain in the anus when passing motion. DW1 then examined PW1 using a proctoscope for suspected piles. Immediately after the examination PW1 told DW1 that he was sodomised by a VIP and was scared to go to the police. According to DW1, had he been informed of that earlier, he would not have carried out the examination of PW1 as this would be a matter for forensic medical examination. DW1 in his evidence also testified that PW1 told him that he had been assaulted by the introduction of a plastic object into his anus. **[186]**

DW2 is a professor at the Victorians Institute of Forensic Medicine Melbourne, Australia. He was called as an expert witness by the appellant to contradict and rebut the prosecution's expert witnesses. In his evidence DW2 testified that beyond 36 hours after a sexual assault one could hardly succeed in collecting any sample of value from which DNA could be extracted. DW2 also testified that in view of the manner the samples were packed, sealed and stored, it was not possible to extract DNA from the sperm cells because samples of this nature would have degraded. Therefore, he concluded that it was impossible to have positive findings on the samples taken from PW1 more than 56 hours after the alleged incident. In his evidence DW2 even suggested that the samples could be contaminated, and that the appellant's DNA was planted. DW2 also criticised the medical report on PW1 (P22) for lacking in particulars, such as the omission to state the time when the samples were collected, and the errors of dates on certain exhibits. **[187]**

DW3 is the Administrative Officer of PUSRAWI. He was called to identify IDD16; a file kept at PUSRAWI on PW1. According to DW3, he only had a copy of the report, and did not know what happened to the original. **[188]**

DW4 is the second expert witness called by the defence. He is a Consultant at Molecular Genetics, Linkfield New South Wales, Sydney, Australia. DW4 similarly testified that it was unlikely that any trace of semen could be retrieved 36 hours after a sexual assault. Commenting further on the retrieval of the samples which took place 56 hours after the alleged offence was committed, DW4 shared the same opinion as DW2 in that it would be very unlikely any sperm cell could be retrieved from PW1's rectum. According to him active bacterial action in the rectum for 54 to 58 hours would have degraded the samples. **[189]**

DW4 was also of the opinion that the action of the investigating officer (PW25) in not following the instruction given by PW3 as to the proper safekeeping of the samples had further contributed to the degradation of the samples. According to him as the samples were not stored in a freezer as instructed by PW3, any trace of DNA on the samples would be destroyed. DW4 also commented on the accreditation of the laboratory of the Chemistry Department, and added that the two chemists, Dr. Seah Lay Hong (PW5) and Nor Aidora binti Saedon (PW6), were not competent to extract DNA and interpret the DNA profiles. DW4 also attacked the differential extraction process carried out by PW5. **[190]**

DW5 is the Director of the Forensic Division at the Chemistry Department. He was called by the defence to testify on the accreditation of the Forensic Division of the Chemistry Department for various disciplines of forensic science which include control substances, toxicology, trace evidence, biology, firearms and tool marks, and question document. During cross-examination by the prosecution DW5 testified that the Chemistry Department had been accredited under the American Society Crime Lab Directors (ASCLB/LAB) Organization. **[191]**

DW6 who was 26 years old, was an officer employed at the office of “Penasihat Ekonomi Selangor”. In his evidence, he claimed to know PW1 when they were studying together at University Tenaga Nasional in Bangi. He testified of his acquaintance with PW1. He claimed that he had lunches, attended the same orientation at the university and stayed at the same hostel with PW1. DW6 gave evidence as to PW1’s activities as a student, the associations he joined and the various positions he held at the university. DW6 testified that through the social media “Friendster”, PW1 had uploaded pictures of himself with some senior ministers. DW6 also testified of the other photos which were uploaded by PW1 in the social network showing his campaigning activities for Barisan Nasional (BN) during the 2008 General Election. DW6 testified that PW1 hated the appellant. This was evident from the photograph of the appellant uploaded by PW1 in the social media, under a caption “Pemimpin Munafik” (hypocrite leader). DW6 also testified that he was surprised when he discovered at the end of February 2008 that PW1 worked for the appellant. According to DW6, this went against PW1’s stand when he was a student. **[192]**

DW7 was the last witness called by the defence. DW7 is the Orthopaedic Surgeon from Munich Germany. He informed the court that he examined the appellant on 5.9.2004. He found the appellant suffering from slip disc at levels L4 and L5 on the left and lateral stenosis with facet joint arthritis. He carried out an operation on the appellant on 6.9.2004, and the appellant was hospitalised from 6.9.2004 to 27.9.2004. After the appellant was discharged and about 4 ½ months later, DW7 examined the appellant again. He found a significant improvement of the appellant's condition in comparison to the condition before the operation. DW7 did not see the appellant for the next six years until 8.9.2011, which was about a month before he testified at the trial. From his examination and the history of the appellant's illness, DW7 claimed that the appellant could not possibly perform the act as described by PW1 as the appellant was labouring under intense back pain resulting from degeneration in the facet joint. **[193]**

At the end of the defence's case the trial judge acquitted and discharged the appellant of the charge. He was of the view that the result of the analysis done by PW5 could not be reconciled with the expert evidence of DW2 and DW4. The trial judge was of the view that the evidence of DW2 and DW4 had cast a reasonable doubt on the guilt of the appellant. **[194]**

The Court of Appeal disagreed with the decision of the trial judge. In allowing the appeal, the Court of Appeal was of the view that the trial judge had failed to carry out a critical examination of the evidence when preferring DW2 and DW4's evidence

over that of PW5 and PW6. The Court of Appeal also held that the evidence of DW2 and DW4 had not raised a reasonable doubt on the prosecution's case. **[195]**

Political conspiracy

One of the complaints raised by the appellant in this appeal was the failure of both the High Court and the Court of Appeal to consider or evaluate the appellant's defence of a political conspiracy. It was submitted that the political conspiracy defence was not "plucked from the air", but supported with the names, dates and events. **[196]- [197]**

It was argued that prior and subsequent to the alleged incident of sodomy but before lodging the police report, PW1 had met with prominent persons, including the adversaries of the appellant. This was not dealt with by the High Court and the Court of Appeal. Thus, it was submitted that there existed a political conspiracy which rendered it improbable that the alleged incident ever happened. Instead, it was more probable that the alleged incident was concocted by PW1 and the persons he met between 24.6.2008 and 27.6.2008. **[198]**

It was also submitted that the existence of a political conspiracy involving the then DPM and others was raised extensively by the appellant in his statement. However, the Court of Appeal dismissed the appellant's statement and instead made adverse comments on it. This had occasioned a miscarriage of justice. **[199]**

It is a well-established principle of criminal law that the burden of proof lies on the prosecution to prove its case beyond reasonable doubt. There is no similar burden placed on the accused to prove his innocence. The accused is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution's case. **[200]**

The complaint by the appellant was that both the High Court and the Court of Appeal did not consider the political conspiracy defence which if accepted or believed would entitle the appellant to an acquittal. **[201]**

We accept that the courts below did not explicitly consider the political conspiracy defence which was raised by the appellant in his unsworn statement from the dock. In law, a trial judge will not give much weight to what an accused has said in his unsworn statement as he is not subject to cross-examination by the prosecution nor can he be questioned by the trial judge. **[202]**

The issue is did the trial judge and the Court of Appeal adopt the correct principle in assessing the appellant's statement? The trial judge in assessing the appellant's statement observed as follows: *"[196] The accused in this case had denied sodomising the complainant. Although this denial was made from the dock, it was still a denial. He believed the charges against him was made not because the sodomy took place, but to send him into political oblivion by attempting to put him behind bars."* **[203]**

The Court of Appeal after discussing the law on a statement from the dock, agreed with the trial judge that the appellant's statement from the dock was a mere denial.

[204]

We hold that the Court of Appeal had adopted the right principle in assessing the appellant's statement from the dock. As such we find no merit on the appellant's complaint that the Court of Appeal had seriously misdirected itself in making adverse comments on the appellant's decision to give his statement from the dock. While it is true that it is within the appellant's right to give a statement from the dock, that statement must however amount to a credible defence. A mere denial does not amount to a credible defence. We hold that the defence of political conspiracy remains a mere allegation unsubstantiated by any credible evidence. **[205]**

We will now consider the evidence of other defence witnesses. As stated earlier, the trial judge had found that the defence through the evidence of DW2 and DW4 had cast a reasonable doubt as to the guilt of the appellant. The Court of Appeal disagreed. It was of the view that the trial judge had erred in his finding that the evidence of DW2 and DW4 had created a reasonable doubt on the prosecution's case. **[206] - [208]**

The question now is whether the Court of Appeal came to the right conclusion. Based on what we discussed earlier, we agree with the conclusion of the Court of

Appeal that the trial judge had indeed erred in accepting the evidence of DW2 and DW4 that the samples taken from PW1 had been compromised and unsafe to be relied upon resulting in an absence of corroborative evidence on the factum of penetration. **[209]**

Further, we are of the view that the trial judge was in error in imposing the “100% certainty” standard of proof on the prosecution to refute the possibility of the samples taken from PW1 being compromised. The trial judge had imposed too high a burden on the prosecution. The correct standard of proof to constitute proof beyond reasonable doubt need not reach certainty but carry a high degree of probability. **[210]**

On the facts of this case, we find that the possibility of the integrity of the samples taken from PW1 having been compromised before reaching PW5 is remote. Such a suggestion can be dismissed with this one sentence, “of course it is possible, but not in the least probable”. **[211]**

Having considered the evidence of DW2 and DW4, we agree with the findings of the Court of Appeal in rejecting their evidence for the following reasons: (a) Both DW2 and DW4 had not done any tests on the samples but merely interpreted and made observations of the findings of PW5 and PW6. Whereas, PW5 and PW6 had personally carried out the DNA analysis on the samples. (b) As regards his proficiency, DW4 had his last proficiency test in 2004, seven years prior to the trial.

On the other hand, PW5 and PW6 had undergone proficiency tests once every six months. **[213]**

For the above reasons, we hold that the evidence of DW2 and DW4 has not raised any reasonable doubt on the prosecution's case. **[214]**

We now touch on the evidence of DW1. It will be recalled that DW1 is the doctor from PUSRAWI who first examined PW1. It was the appellant's contention that DW1 should have been called by the prosecution as a witness in order to unfold the narrative of its case. This is especially so when DW1 in his evidence said that PW1 had told him that he had been assaulted by the insertion of a plastic object into his anus. **[215]**

It was submitted that had DW1 been called as a prosecution witness, there would have been two versions in the prosecution's case. One version would be that PW1 was sodomised by the appellant and the other, that PW1 had been assaulted by the insertion of a plastic object into his anus. This by itself would have created a doubt in the prosecution's case. Therefore, an adverse inference ought to have been drawn against the prosecution under s.114 (g) of the Evidence Act. **[216]**

Let us now consider the evidence of DW1 which may be summarized as follows: (a) PW1 came to see him complaining of pain in his anus when passing motion; (b) after the examination, PW1 told him that he had been sodomised by a VIP; (c) DW1

alleged that PW1 told him that he had been assaulted by the insertion of a plastic object in his anus; (d) in his initial medical report, he made no mention of the assault on PW1 by the insertion of a plastic object. He admitted adding to his medical report that PW1 had told him of the assault; (e) he advised PW1 to go the government hospital for forensic examination since PUSRAWI is a private hospital and as such could not undertake such an examination; and (f) with regard to the insertion of a plastic object in PW1's anus, he admitted that he never asked PW1 on the nature of the plastic object that was inserted or made other inquiries regarding the insertion. Neither did he ask PW1 whether it was an act of self-insertion or by someone else.

[217]

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

In the circumstances, we agree with the prosecution that DW1 is an unreliable and untruthful person. That explains why the prosecution had chosen not to call him as its witness. It is trite that the discretion to call any witness lies with the prosecution and the court will not interfere with the exercise of that discretion. The non-calling of DW1 by the prosecution, in our view, does not create any gap in its case as it had

been fully narrated through the evidence of PW1, and corroborated by the three doctors (PW2, PW3 and PW4) and the chemists (PW5 and PW6). As such the question of drawing an adverse inference against the prosecution under s.114 (g) of the Evidence Act does not arise. **[219]**

DW6 was called to discredit PW1. However, no evidence was adduced to support his testimony. For that reason, we find that his evidence has no evidential value and does nothing to discredit PW1. It was also the contention of the defence that the appellant was labouring under intense back pain and he could not have performed the alleged act of sodomy as described by PW1. DW7 was called to support his claimed. We say that this defence is an afterthought. The appellant never put to PW1 that he could not have possibly performed the act because of his back pain. **[220] - [221]**

Further, it is in evidence that DW7 did not examine the appellant in 2008. He only examined the appellant on 8.9.2011, a month before he testified at the trial. As opposed to this, Dr. Jeyaindran a/l C. Sinnadurai (PRW4) a rebuttal witness, called by the prosecution examined the appellant just three weeks after the incident. According to PRW4, the appellant informed him that he (the appellant) had coitus with his wife one week after the incident. PRW4 also said that the appellant did not complain that he (the appellant) was having back pain and from his observation during that medical examination. The appellant's movement was not restricted by any back pain whatsoever. **[222]**

Premised on the above, we are of the view that DW7's opinion that the appellant was unable to perform the act was wholly without basis. In the result we hold that there is over whelming evidence to support PW1's allegation that he had been sodomised by the appellant. The scientific evidence (medical and DNA evidence) adduced by the prosecution clearly established that sperm cells belonging to the appellant were found in the lower and upper rectum of PW1. The only logical explanation for this is that PW1 must have been sodomised by the appellant. The unsworn statement of the appellant, which evidentially carries little weight, and the evidence adduce through his witnesses failed to cast any reasonable doubt on the prosecution case. We are thus convinced beyond reasonable doubt that PW1 had been sodomised by the appellant as charged. [223]- [224]

CONCLUSION

For the above reasons, we agree with the Court of Appeal that the appellant has not created any reasonable doubt on the prosecution's case. The prosecution therefore has established its case beyond reasonable doubt. The appeal against the conviction is dismissed. Accordingly, we affirm the decision of the Court of Appeal in convicting the appellant. [225]- [226]

References in square brackets are to paragraphs in the judgment

NOTE

This summary is merely to assist in understanding the Court's judgment. The full judgment of the Court is the only authoritative document.