

THE ANWAR IBRAHIM MAJORITY JUDGEMENT

(Delivered by Justice Dato' Abdul Hamid bin Haji Mohamad)

IN this judgment, Dato' Seri Anwar bin Ibrahim will be referred to as “the first appellant” and Sukma Darmawan Sasmitaat Madja will be referred to as “the second appellant”.

The first appellant was charged with an offence punishable under section 377B of the Penal Code.

The second appellant was charged with two offences. The first charge is for abetting the first appellant in the commission of the offence with which the first appellant was charged. The second charge is similar to the charge against the first appellant i.e. under section 377B of the Penal Code.

Both the appellants were tried jointly. The first appellant was convicted and sentenced to nine years imprisonment commencing from the expiry of the sentence he was then serving in the first trial. High Court Kuala Lumpur Criminal Trial No. 45-48-1998 (1999) 2 M.L.J. 1 (H.C), (2002) 2 M.L.J. 486 (C.A.) and (2002) 3 M.L.J. 193 (F.C.).

The second appellant was convicted on both charges and sentenced to six years imprisonment and two strokes for each charge with the sentences of imprisonment to run concurrently. For the judgment of the High Court in the present case, see (2001) 3 M.L.J. 193.

They appealed to the Court of Appeal. Their appeals were dismissed – see (2004) 1 M.L.J. 177.

They appealed to this court and this is the majority judgment of this court.

Section 87(3) of the Courts of Judicature Act 1964 (“CJA 1964”) provides that a criminal appeal to this court “may lie on a question of fact or a question of law or on a question of mixed fact and law.” The position is the same as in the case of the Court of Appeal hearing an appeal from a trial in the High Court as in this case – see section 50(3) CJA 1964.

In this judgment, we shall first consider whether the trial judge had correctly, in law and on the facts, called for the defence. If he had not, it would not be necessary for us to consider the defence: the appellants are entitled to an acquittal. Only, if we find that the learned trial judge had correctly called for the defence that we will have to consider whether he had correctly convicted the appellants at the close of the case for the defence.

In so doing, this court (and the trial court too), as a court of law, is only concerned with the narrow legal issue i.e. whether, at the end of the prosecution’s case, the prosecution had proved beyond reasonable doubt that, in respect of both appellants, the appellants had sodomised Azizan bin Abu Bakar (“Azizan”) at Tivoli Villa one night between the month

of January until March 1993 and, in respect of the second appellant only, whether he had abetted the offence committed by the first appellant.

In considering whether the defence was correctly called, this court, being an appellate court not only will consider whether all the ingredients of the offences have been proved beyond reasonable doubt, but will also consider whether there have been misdirections or non-directions amounting to misdirections that have caused a substantive miscarriage of justice.

It must be borne in mind that the duty on the part of the prosecution at the close of the case for the prosecution is to prove beyond reasonable doubt, not only, that the offence was committed one night at Tivoli Villa, but also that that “one night” was in the month of January until and including the month of March 1993. Even if it is proved that the incident did happen but if it is not proved “when”, in law, that is not sufficient. This is because the period during which the offence is alleged to have been committed is an essential part of the charge. It becomes even more important when the defence, as in this case, is that of alibi.

The appellants must know when (usually it means the day or date, but in this case the period from and including the month of January until and including the month of March 1993) they are alleged to have committed the offence to enable them to put up the defence of alibi.

In this respect we propose to take the bull by the horns. We shall consider, first, whether the prosecution had proved beyond reasonable doubt not only that the offence was committed, but whether it was committed one night during the three months’ period. That would call for the evaluation of Azizan’s evidence, and determining whether the second appellant’s confession is admissible. There will be sub-issues that will have to be determined e.g. the impeachment proceeding against Azizan, whether Azizan is an accomplice and the issue of voluntariness of the second appellant’s confession.

After deciding on those issues, we shall consider whether, in view of our findings on them, the decision of the learned trial judge to call for defence can stand. If it cannot stand, the matter ends there. If it can still stand, then only we shall consider the other issues raised at the close of the case for the prosecution. Only if after considering all the issues raised in respect of the case for the prosecution we are satisfied that the learned trial judge had correctly called for the defence that we shall consider the defence. Otherwise we do not have to as the appellants would also be entitled to an acquittal at the close of the case for the prosecution.

Credibility of Azizan: general observation

For reasons best known to the defence which is also not difficult for us to understand, learned counsel for the appellants, especially Mr Christopher Fernando, kept stressing that Azizan was an outright liar. Actually, in doing so, he had placed a very high burden on the appellants. For the purpose of the case, in a criminal trial, it is not necessary for

the defence to show or for the court to arrive at a conclusion that Azizan is a liar before his evidence may be regarded as unreliable. Azizan may not be a liar but his evidence may or may not be reliable. Further, some parts on his evidence may be reliable and some may not be.

Before considering Azizan's credibility as a witness, one point must be made so that whatever conclusion we arrive at will not be an issue vis-a-vis the earlier finding of the High Court in the first trial which had been confirmed by the Court of Appeal and this court.

It is to be noted that Azizan's credibility had been considered in the earlier case. All the three courts, including this court, had found that he was a credible witness.

We must point out that that is a separate matter. His credibility as found by the courts in that case was in respect of that case, based on the evidence he gave in that case. In that case the main issue was whether the first appellant directed Dato' Mohd. Said bin Awang, Director of the Special Branch and Amir Junus, Deputy Director II of the Special Branch to obtain a written statement from Azizan denying and withdrawing his (Azizan's) allegation of sodomy against the first appellant as contained in his (Azizan's) statutory declaration dated 5 August 1997 (Exh. P14C in the first trial and Exh. P5 in this trial which will be referred to as Exh. P14C/P5) which they (Mohd. Said and Amir Junus) obtained in the form of a written statement dated 18 August 1997 (Exh. P17 in the first trial). That was the substance of the offence in the first trial. The substance of the main offence in the instant appeal is whether the appellants sodomised Azizan at Tivoli Villa one night in January until and including March 1993.

Secondly, is it true that Azizan's statutory declaration dated 5 August 1997 (Exh. P14C/P5) and Azizan's statement dated 18 August 1997 (Exh. P17 in the earlier trial) featured strongly in this trial and appeal. But, as pointed out by this court, in the judgment of Haidar FCJ (as he then was) in the earlier appeal:

“In respect of (1) (i.e. allegation of sodomy by the first appellant in Exh. P14C/P5 – added), after the evaluation of the evidence, the learned judge ruled there is evidence to show that Umami and Azizan had made the allegations. In fact, in our view, the defence did not seriously dispute that the allegations were made but contended that they were false and fabricated.

However, in view of the amendment to the charges, the truth or falsity of the allegation was no longer in issue. There are no reasons for us to disagree with the learned judge when he said that:

“... there is evidence to show that Umami and Azizan had made the allegations against the accused.”

The principles adopted by the appellate courts not only in this country but also in other common law jurisdictions have been reproduced at length by the Court of Appeal. The

Court of Appeal reproduced dicta made in the following cases: Clarke Edinburgh Tramways (1919) SC (HL) 35 @ 36 (per Lord Shaw of Dunfermline), Powell and Wife v Streatham Manor Nursing Home (1935) AC 243 (per Viscount Sankey L.C.), Herchun Singh & Ors. v Public Prosecutor (1969) 2 MLJ 209 (per H.T. Ong C.J. (Malaya), Lai Kim Hon & Ors v. Public Prosecutor (1981) 1 MLJ 84 (per Abdul Hamid F.J. (as he then was), Kandasamy v. Mohamed Mustafa (1983) 2 MLJ 85 (P.C.) (per Lord Brightman) and Goh Leng Kwang v. Teng Swee Lin & Ors (1994) 2 MLJ 5 (Singapore). Even learned counsel for the appellants did not disagree with the principles stated in those cases. We shall not repeat them except to quote a few short passages from the judgments and point out the contexts in which they were made.

In Herchun Singh & Ors v. Public Prosecutor (1969) 2 MLJ 209, H.T. Ong (C.J. (Malaya) said:

“This view of the trial judge as to the credibility of a witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the judges, 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.”

It must be noted that, in Herchun Singh’s case (supra), the police report made shortly after the robbery by the complainant, not only failed to identify the appellants but contained a further statement “I do not know them (saya tidak kenal)”. This was contradicted by the complainant who denied those words, in fact, he remembered telling the police about Adaikan, the third appellant, as well as giving a description of the first appellant. He remembered telling the policeman who wrote the complainant’s police report that there were Sikhs among the robbers and that one of them was a brother of the estate watchman but whose name he could not recollect at the time he made the report. Ong Hock Thye (C.J. (Malaya)) then said:

“The learned trial judge, having heard the complainant’s explanation, was satisfied that the latter was still very much shaken by the alarming experience he had undergone when he made his report but that, despite his agitation, he did mention the names to the police. This was a finding of fact that the report which was taken down contain errors and omissions for which the constable was responsible.”

This passage is then followed by the passage quoted earlier. So, that passage must be read and understood in the light of that finding of fact i.e. that the police report contain errors and omissions. Indeed, in Herchun Singh’s case (supra) the learned Chief Justice (Malaya) distinguished Ah Mee v. Public Prosecutor (1967) MLJ 220 (F.C.) In that case, a rape case, the Federal Court held that in view of the inconsistencies in the evidence of the complainant it was unsafe to rely on her uncorroborated evidence and therefore the conviction must be set aside. This is in spite of the fact that the trial judge considered that the complainant’s credibility was unimpeached and had stated that he was personally impressed by his demeanor.

Ah Mee (supra) is a case where the complainant's own evidence is inconsistent, not a case in which the evidence of one witness on a particular point is contradictory to that of another witness, and the judge believes one witness and not the other.

We shall only refer to another Federal Court judgment in *Lai Kin Hon & Ors v. Public Prosecutor* (1981) 1 MLJ 84. In that case, in a passage quoted by the Court of Appeal in the instant appeal, Abdul Hamid F.J. (as he then was) said:

“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.”

In that case the Federal Court did not interfere with the finding of the trial judge because the court was of the view that the trial judge had enough evidence before him which, if believed, would justify his finding the appellant guilty.

Of course, the general principle is not in dispute. However, it is the application of the principle to a particular situation that is difficult and, more often than not, in dispute.

Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of H.T. Ong (C.J. Malaya) in *Herchun Singh's* case (supra) “there are substantial and compelling reasons for disagreeing with the finding.” Otherwise, no judgment would ever be reversed on question of fact and the provision of section 87 CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

Azizan's credibility was attacked, first, through the impeachment proceeding and, having failed in the impeachment proceeding, on ground of contradictions in his evidence made in the earlier trial and in this trial. The learned trial judge correctly stated in his judgment that the “defence is entitled to embark on the assault of the credibility of Azizan based on the facts of the case even after a ruling has been made by the court that his credit is saved.” The Court of Appeal, after citing the learned trial judge at length and stating the law, agreed with the decision of the learned trial judge on the impeachment proceeding and the learned trial judge's finding that “Azizan was a reliable, credible and truthful

witness notwithstanding some of the discrepancies and contradictions that were highlighted by the defence.”

It is said that these are concurrent finding of facts of the two courts but, again, that does not mean that this court should shy away from analysing the evidence to see whether there are “substantial and compelling reasons for disagreeing with the finding”, again borrowing the words of H.T. Ong (C.J. (Malaya) in Harchun Singh (supra).

Impeachment proceeding

The impeachment proceeding was in respect of Azizan’s inconsistent statements in his testimony in the previous trial and in this trial. The inconsistent statements are, in brief, in the first trial he said he was not sodomised by the first appellant after May 1992. But in this trial, he said that he continued to be sodomised after that. This becomes of utmost importance because the charge, as finally amended, gives the date of the offence as from January until March 1993. His explanation was that what he meant by the earlier statement was that he was not sodomised in the first appellant’s house after May 1992.

The learned trial judge accepted Azizan’s explanation that what he meant by the statement that he was not sodomised by the first appellant after September (later, May) 1992 was that he was not sodomised in the first appellant’s house. His reason was that the questions were asked in relation to his visits to the first appellant’s house after May 1992. The Court of Appeal found that there was nothing wrong with the conclusion of the learned trial judge. Even though we are not absolutely satisfied with the explanation, we are not inclined to disturb that finding for the following reasons. First, unlike the learned trial judge, we do not have the advantage of seeing and hearing the witness.

Secondly, in an impeachment proceeding, Azizan was placed in the position of an accused. Therefore, if there is any doubt, the benefit of the doubt should be given to him.

Thirdly, the effect of impeachment seems to be very harsh. Not only his whole evidence will be disregarded, he is also liable to prosecution for perjury. On the question whether, where a witness is impeached, his whole evidence is to be disregarded, there appears to be conflicting decisions in our courts. Earlier cases seem to take the rigid view that once a witness is impeached, his whole evidence becomes worthless (see *Koay Chooi v. R.* (1955) MLJ 209, *Mathew Lim v. Game Warden, Pahang* (1960) MLJ 89 and *Public Prosecutor v. Munusamy* (1980) 2 MLJ 133 (F.C.). On the other hand, in *Public Prosecutor v. Mohd. Ali bin Abang & Ors.* (1994) 2 MLJ 12, *Chong Siew Fai J* (as he then was) took the view that the fact that the credibility of a witness is impeached does not mean that all his evidence must be disregarded.

It is still incumbent upon the court to carefully scrutinize the whole of the evidence to determine which parts of her evidence are the truth and which should be disregarded. The learned Judge followed the Singapore case of *Public Prosecutor v Somwang Phattana Saeng* (1992) 1 SLR 138. Indeed there is also another Singapore High Court case to the same effect: *Public Prosecutor v Mohammed Faizal Shah* (1998) 1 SLR

333. However, no reference was made to the earlier Malaysian cases, including the judgment of this court in Munusamy (supra).

As the point was not argued before us, and also since it is not necessary for this court to decide on the issue in this appeal, we would leave it to another occasion and in a proper case for it to be decided upon by this court, if it need be.

The point is, if we accept the view prior to Mohd. Ali bin Abang (supra), which we should, in view of Munusamy (supra), a Federal Court judgment, then the effect of an impeachment order, if made against Azizan would be very drastic. Not only that, he may even be subject to prosecution.

But, the fact that he was not impeached does not mean that his whole evidence must be believed. His evidence will have to be scrutinised with care, bearing in mind the dent in his credibility caused by his contradicting statements. At the end of the day, his evidence may be found to be reliable in some parts and not in others. And, at that stage, if there is any doubt, the benefit of the doubt must be given to the appellants because they are the accused.

Azizan's evidence regarding the date of offence

The only person who was present during the alleged incident, other than the appellants, was Azizan. The person who was alleged to have been sodomised was Azizan. So, he should be the only person, other than the appellants, who should know when he was sodomised.

Is he really consistent in his evidence about the "date" of the offence?

The first time he mentioned about the date of sodomy (at luxurious hotels), was in Exh. P14C/P5 dated 5 August 1997. The period given was around 1992 ("sekitar tahun 1992"). But, in P14C/P5 he did not mention Tivoli Villa. So we do not know whether he meant to include it or not. In any event, in the charge dated 5 October 1998 against the first appellant regarding Tivoli Villa incident, the date of the commission of the offence was stated as "May 1994" (Jilid 1, page 239).

Who gave the "May 1994" date to the police? Logically, the date of the commission of the offence could only come from Azizan as he was the "victim", the only person present other than the appellants.

In this trial, on 3 August 1999, Azizan was cross-examined by Mr. Christopher Fernando:

"S: Adakah kamu beritahu pihak polis kamu diliwat pada bulan Mei 1994?"

J: Saya tak ingat."

S: Adakah kamu tahu tuduhan asal terhadap Dato' Seri Anwar adalah pada Mei 1994?"

J: Ya, saya tahu.

S: Adakah kamu diberitahu polis kamu diliwat pada bulan Mei 1994?

J: Saya tak ingat.”

(Jilid 2, page 992 to 993)

On 4 August 1999, still under cross-examination:

“S: Adakah awak berithau polis bahawa awak diliwat oleh Dato’ Seri Anwar dan Sukma pada bulan Mei 1994?

J: Tidak.”

Still under cross-examination on 9 August 1999:

“S: Adakah tidak sebelum hari ini awak ada memberitahu mahkamah ini bahawa awak tidak ada memberitahu polis bahawa awak diliwat oleh Dato’ Seri Anwar dan Sukma pada tahun 1994?

J: Ada.

S: Jikalau awak tidak beritahu tarikh iaitu tahun 1994 siapakah beritahu polis ianya berlaku dalam bulan Mei 1994? (Tidak ada jawapan).”

On 16 August 1999, now under re-examination by the Attorney General:

“S: Adakah awak katakan apa-apa kepada polis mengenai apa-apa kejadian dalam tahun 1994.

J: Saya beritahu polis yang saya ada diliwat pada tahun 1994.”

So, having denied that he informed the police that he was sodomised by the appellants in 1994, he finally admitted that he did tell the police that he was sodomised in 1994. That answers the question that he earlier on did not answer when asked: if he did not tell the police the 1994 date who informed the police that the incident happened in May 1994?

On 23 April 1999, the second appellant was charged. The date of the offence was given as “May 1992”. Three days later, on 27 April 1999, the charge against the first appellant was also amended from “May 1994” to “May 1992”. How did this date come about? SAC 1 Musa provides the answer: it was based on “other statements” made by Azizan. (Jilid 2. Page 1101). After the amendment, notices of alibi were served on the prosecution. Then, it was found that the construction of Tivoli Villa had not been completed yet!

On this point, the evidence of Azizan given on 4 August 1999 reads:

“S: Setuju atau tidak pada bulan Mei 1992, Tivoli Villa (belum siap dibina)?

J: Setuju.”

On 7 June 1999 the charges were amended from “May 1992” to “between the month of January until March 1993”.

On 3 August 1999 under cross-examination, Azizan said that he gave that “date” to the police on 1 June 1999.

Towards the end of his evidence, when re-examined by the then Attorney General, another point cropped up. Azizan said:

“J: SAC1 Musa telah meminta saya untuk mengingati dengan jelas tentang kejadian pertama kali saya diliwat di Tivoli Villa.” (emphasis added)

Note that he now talked about SAC1 Musa asking him to remember the incident that he was sodomised by the appellants for the first time at Tivoli Villa. SAC1 Musa (SP9) also said the same thing:

“J: Saya minta Azizan mengingatkan tarikh pertama kali dia di liwat oleh Dato’ Seri Anwar dan Sukma di Tivoli Villa.”(emphasis added).

So, even at the end of his evidence, while he was certain about the January until March 1993 date, he came up with another poser: Was there a second or third incident that he was sodomised by both the appellants at Tivoli Villa?

To sum up, he gave three different dates in three different years, the first two covering a period of one month each and the third covering a period of three months as the date of the alleged incident.

Regarding his finding on Azizan’s credibility, the learned trial judge said:

“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. I had dealt with the amendment of these charges earlier in this judgment and had ruled that the amendment was lawfully made in the proper exercise of the discretion by the Attorney General. 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.

It was also argued that the evidence of Azizan cannot be accepted in the light of the evidence of SAC-1 Musa. It was pointed out that SAC-1 Musa in his evidence said five statements were recorded from Azizan and that all these statements were in relation to sodomy. The allegations are consistent and true. He also testified that there was a necessity to amend the charges because there were contradictions in the date. It was submitted that there were two versions of the prosecution case on a fundamental ingredient i.e the dates. In this respect, it is necessary to recapitulate what Azizan had said about the dates. In his evidence which I had referred to earlier he was confused about the dates as he was asked repeatedly the same questions on the dates May 1994 and May 1992. In substance what he said on this issue was that he could not remember whether he told the police he was sodomized in May 1994 although he did say that he did not inform the police that he was sodomized in 1992.

Be that as it may, the evidence of SAC1 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 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. I see no merits on this contention and the credit of Azizan is not affected on this ground."

It is true that May 1994 and May 1992 are not the dates that we are concerned with in the instant charges. But, in determining whether Azizan's evidence regarding the date in the present charges is reliable or not we do not think that they are not relevant. All the dates must have been given by Azizan as he was the "victim" and the only person present during the incident other than the appellants. Indeed evidence shows that he did give those dates to the police. We accept that he may not be lying. He may be confused. May be he cannot remember because the incident happened many years earlier and unlike in most sexual cases, he did not lodge a police report immediately. In fact he did not lodge a police report at all. But, the fact that he may be confused or he cannot remember is the point. You do not prove a thing by forgetting or by being confused about it. That is why the charge against the first appellant had to be amended twice. The fact that the amendments were lawfully made is of no consequence. We accept that the amendments were lawfully made. But, we are talking about the consistency of Azizan's evidence regarding the date of the commission of the offence.

And, it is not a matter of one or two days, one or two weeks or even one or two months. It covers a period of three years (1992, 1993 and 1994) and, even the last date given was one night in a period of three months!

Furthermore, we note that on the issue whether he informed the police that he was sodomised in 1994, having said he could not remember twice, Azizan denied informing the police, but under re-examination he admitted that he did inform the police of the fact. We also note that the learned trial judge had recorded his observation of Azizan when giving evidence, e.g. "tidak ada jawapan", "witness is very evasive and appears to me not to answer simple question put to him."

In the circumstances, even though, for the reasons that we have given, we do not interfere with the finding of the trial judge in the impeachment proceeding, when we consider Azizan's evidence as a whole, we are unable to agree with the "firm finding" of the learned trial judge and the Court of Appeal that Azizan "is a wholly reliable, credible and truthful witness". Evidence does not support such a finding. He was most uncertain, in particular about the "date" of the offence, not just the day or the week or even the months but the year. We do not say he is an "outright liar" as Mr. Christopher Fernando was trying to convince us. But, considering the whole of his evidence, he is certainly not the kind of witness described by the learned trial judge.

Is Azizan an accomplice?

Both the High Court and the Court of Appeal found that Azizan was not an accomplice. On this point too we are not going to repeat the law which has been stated by both the High Court and the Court of Appeal. Instead, we will focus on the facts.

The reason for his finding that Azizan was not an accomplice is to be found in this paragraph.

“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 reasons I therefore find that Azizan is not an accomplice.”

The Court of Appeal added nothing to it in agreeing with the finding of the learned trial judge.

In our view, if the learned trial judge was looking for mens rea he should look at the surrounding circumstances. This is where evidence of similar facts becomes relevant. This is not a case of a person who was merely present at the time of the commission of the offence or participated in it only once. By his own evidence, he was sodomised 10 to 15 times at various places, including in the house of the first appellant over a number of years. He never lodged any police report. He never complained about it until he met Ummy in 1997. He did not leave the job immediately after he was sodomised the first time, we do not know when. Even after he left the job, he went back again to work for the first appellant’s wife. Even after he left the second time, he continued to visit the appellant’s house. He even went to the first appellant’s office. When invited by the second appellant to go to Tivoli Villa, he went. He said he was surprised to see the first appellant there. Yet he stayed on. Signalled to go into the bedroom, he went in. There is no evidence of any protest. He followed whatever “instructions” given to him.

He said he submitted under fear and was scared of both the appellants. A person may allow himself to be sodomised under fear once or twice but certainly not 10 to 15 times over a number of years. He is not a child nor an infirm. Even on this occasion, when he saw the first appellant there, he would have known of the possibility of the first appellant wanting to sodomise him again. Why did he not just go away? Instead, by a mere signal, he went into the bedroom, as if he knew what was expected of him. He did nothing to resist, in fact co-operated in the act. And, after the first appellant had finished and went to the bathroom, he remained in that “menungging” position. What was he waiting for in that position? Indeed the whole episode, by his own account, appears like a repetition of a familiar act in which each actor knows his part. And, after that he went back to the place again, twice and talked about the incident as “the first time” he was sodomised there, giving the impression that there was a second or third time. Are all these consistent with a person who had submitted under fear? We do not think so. Therefore, in our judgment Azizan is an accomplice, though he may be a reluctant one.

Second Appellant’s Confession

The prosecution sought to introduce the confession of the second appellant recorded by Encik Abdul Karim bin Abdul Jalil, a Session's Court Judge acting as a Magistrate ("the magistrate") on 17 September 1998.

A trial within a trial was held. At the end of it the learned trial judge held that the confession was properly recorded and voluntarily made and admitted it as evidence. The Court of Appeal agreed with him.

The attack on the confession can be divided into two parts. The first was on what the magistrate did or did not do in recording the confession. This has been enumerated by the learned trial judge as points (a) to (g). We have no reason to differ from the findings of the learned trial judge on those points.

The second part is on the issue of voluntariness of the confession. In this regard, the fact the magistrate who recorded the confession said that he was satisfied that the confession was made voluntarily, does not mean that the trial court must accept that the confession was voluntarily made. The magistrate formed his opinion from his examination, oral and physical, and his observation of the confessor. He formed his opinion from what he saw of the confessor and what was told to him by the confessor, in answer to his questions or otherwise. A confessor may, at the time of making the confession, tell a magistrate that he is making the confession voluntarily and the magistrate may believe him. But, that does not mean that the trial court must automatically accept that the confession was voluntarily made and therefore admissible. If that is the law, then the trial within a trial would not be necessary at all because every confession that is recorded by a magistrate is recorded after the magistrate is satisfied of its voluntariness. But, though the magistrate may be justified based on his examination and observation of the confessor that the confessor was making the confession voluntarily, the trial court, after holding a trial within a trial and hearing other witnesses as well, may find otherwise. That is what a trial within a trial is for.

We do not question the opinion of the learned magistrate that he was satisfied that the second appellant was making his confession voluntarily. Neither do we find that the other grounds forwarded in respect of the recording of the confession have any merit.

What is more important is for this court to examine whether the finding of the learned trial judge that the confession was voluntarily made after the trial within a trial is correct.

In this regard too, the learned trial judge had stated the law correctly which was amplified by the Court of Appeal. We agree with them. However, we would like to add that, of late, this court, in considering the voluntariness of cautioned statement made under section 37A of the Dangerous Drugs Act 1952 has accepted that if there appears to be "suspicious circumstances surrounding the making of, or recording of, the cautioned statement" it is incumbent on the trial judge to hold it inadmissible: *Tan Ewe Huat v. Public Prosecutor* (2004) 1 MLJ 559 F.C. In so doing, this court followed the judgment of the Court of Appeal in *Chan Ming Cheng v. Public Prosecutor* (2002) 3 MLJ 741 in which Gopal Sri Ram JCA, delivering the judgment of the court said:

“There is no burden on an accused person to prove that the statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also no burden on an accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on an accused is to show suspicious cir

cumstances surrounding the making of or recording of the cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible.”

It must be pointed out that the provision of section 37A (1)(a) of the Dangerous Drugs Act 1952 is similar to the provision of section 24 of the Evidence Act 1950.

In dealing with this issue, it appears to us that the learned trial judge considered each allegation by the second appellant and denial by the police officers in question and concluded that he believed the police officers and held that the confession was voluntarily made.

In the circumstances of this case which, we must say, is different from any other case that we know of, we think we have to consider the whole circumstances surrounding the arrest of the second appellant and the related investigations.

As we are considering the question of voluntariness of the confession which is a question of fact, we have no choice but to reproduce the evidence, even though it is quite long.

We shall summarise the evidence of the second appellant first. The second appellant was arrested by ASP Rodwan (TPW3) and three other police officers at about 1.00 p.m. on 6 September 1998 at Societe Cafe, Lot 10 Shopping Complex, Bukit Bintang. He was then having lunch with his sister Komalawati (TDW2). He was taken to the lower ground of Lot 10 and pushed into a Proton Saga car and his hands were handcuffed. He was then taken to his car. ASP Rodwan and the other police officers ransacked (“membongkar”) his car in the presence of the public. From there he was taken to Bukit Aman. During the journey, ASP Rodwan played the speech of the first appellant condemning (“memaki dan mencaci”) the former Prime Minister.

They stopped at Bukit Aman only to park the second appellant’s car and then proceeded to his apartment at Tivoli Villa. In the car he was verbally abused (“memakihamun”). At the apartment they ransacked the whole place but did not find anything that they were looking for. They broke the door of the room of the second appellant’s sister in spite of the fact that he told them that the key was with her. Between 3.00 p.m. to 4.00 p.m. he was taken to Bukit Aman. At ASP Rodwan’s office he was asked to sit at one corner with his hands handcuffed. At that time, they were jumping merrily (“bersuka-suka dan meloncat-loncat”). ASP Rodwan was filling a form. At that time the second appellant heard Zaini, one of the officers, asking ASP Rodwan: “Boss, borang nak tahan dia ni atas dasar apa? Rodwan jawab “entah.” He was taken to the lock up. Before entering he was asked to remove all his clothes except for his under pants. He was not given food that

evening/night as he was told by the officer in charge of the lock-up that meal time was over. In fact he had not eaten the whole day.

On the second day, in the morning, 7 September 1998, he was taken to ASP Rodwan's office. There he met a person by the name of "Zul" (ASP Zulkifly bin Mohamed, TPW4). After ascertaining his identity, according to the second appellant, ASP Zulkifli lifted his shirt and pinched his nipple while making fun of him using shameful words ("memulas-mulas buah dada (nipple) saya dengan sekuat-kuatnya dengan mempersendakan diri saya dengan kata-kata yang memalukan"). At the office, ASP Rodwan asked him to make a statement regarding his homosexual relationship with the first appellant. When he denied, ASP Rodwan challenged him to take an oath with the Quran in the presence of a religious teacher ("Ustaz"). He accepted the challenge but no "Ustaz" came.

Later in the same day, 7 September 1998, he was taken to see a magistrate. The magistrate made a remand order of two weeks straight away.

In the afternoon, he was taken back to Bukit Aman. There ASP Rodwan told him that he was under his (ASP Rodwan's) detention ("di bawah tahanan saya") and it was better for him to tell about his (the second appellant's) homosexual relationship with the first appellant. When he denied, ASP Rodwan told him if he was prepared to talk he could go home faster. If not he would be handed over to the Special Investigation Unit which officers were very rough and he would regret later.

He also said he was suffering from asthma and at night it became worse and he asked to be allowed to wear his T-shirt to cover his chest.

At about 7.00 a.m. on the third day, 8 September 1998, two officers took him to a meeting room at the third floor. There were six officers in the room. In the room he was asked to strip naked, while still being handcuffed and he was asked to turn around so that they could see his whole body. When he sat down on a chair, all the officers simultaneously scolded him: "Who ask you to sit down?" They removed his spectacles and knocked it ("mengetuk-ngetuk") as if to break it. After he sat down an officer stood up, kicked his chair and he fell down. They did not question him then. They merely scolded him simultaneously and continuously very close to his ears in a very high and rough tone. This went on until about 1.30 pm. Hewas in that room from about 8.00 am or 8.30 am to about 1.30 p.m.

After lunch, at about 2.00 p.m. or 2.30 p.m. he was taken to the same room again. The same thing happened again, until about 4.30 p.m. or 5.00 p.m.

On the fourth day, 9 September 1998, he was taken to a room. There were a few people there including one Dr. Zahari (Dr. Zahari Noor (TDW5)). Dr. Zahari examined his whole body paying particular attention to his private part and his anus. He also inserted his finger into his (the second appellants') anus. He was naked during the examination. ASP Rodwan directed the cameraman to take photographs of the second appellant while naked but Dr. Zahari stopped it as he did not require the photographs. But ASP Rodwan said it

was necessary for the purpose of the investigation. Photographs of him, naked and in various positions and close ups of his private part, were taken (and in fact tendered in the main trial as P7 A – G.)

After that he was taken to the same room on the third floor again. There were six people there. The second appellant identified C/I Sampornak bin Ismail (TRW2), D/Kpl Ahmad Bustami bin Ayob (TRW3), D/Kpl Mokhtaruddin bin Suki (TRW5), D/Kpl Hamdani bin Othman (TRW4). They told him that the photographs would be used as evidence, but not for what.

As had happened on the previous day, he was roughly scolded until about 4.30 p.m. or 5.00 p.m.

On the fifth day, 10 September 1999, the interrogation continued. On that day they were rougher. They threatened that if he did not follow their instructions he would be detained under the Internal Security Act for two years and then for a further two years. They also told him that he could be charged like Dato' Nalla. They could place bullets in his car which was then at Bukit Aman. They also threatened him that they could pay someone to shoot him and no one would suspect the police for it.

On 11 September 1998, the sixth day, his stand was not strong anymore (“saya tidak lagi teguh dengan pendirian saya”) because he could no longer bear what was being done to him and he followed their instructions. After that they became nice to him. They removed the handcuff, lowered their voices, allowed him to wear shirt and trousers, give him drink, cigarette and cakes in the morning. Asked by learned counsel, what they wanted from him, the second appellant said that they wanted him to admit that he had sexual relationship with the first appellant.

The interrogation continued on the following days, in a more friendly manner.

On 16 September 1998, the eleventh day of his detention, at about 7.30 a.m. or 8.30 a.m. ASP Rodwan came to see him at the lock-up. He informed the second appellant that he should make a statement before a magistrate. He agreed after ASP Rodwan told him that he would be released after making a confession before a magistrate. On the following day, 17 September 1998, the twelfth day, he was taken to see the magistrate (TPW1) who recorded his confession. Asked by his counsel how he could make such a long confession, about 10 or 12 pages, he said he was guided by ASP Rodwan repeatedly. ASP Rodwan also told him it was all right if he were to make mistakes but what was more important was to give a clear and detailed evidence (“keterangan”) about his homosexual relationship with the first appellant and Azizan.

Cross-examined by Mr. Karpal Singh he said that from 6 September 1998 to 16 September 1998 he was taken to the interrogation room every day including Sunday. Each day he was interrogated from about 8.30 a.m. to 1.00 p.m. and from about 2.00 p.m. or 2.15 p.m. until 4.30 p.m., though at times until 5.30 p.m. or even 6.30. It was about 8 hours a day for 10 days.

Still under cross-examination by Mr. Karpal Singh, on 18 September 1998 (one day after the confession was recorded) SAC1Musa told him that if he engages his own lawyer he would be charged under section 377B of the Penal Code but if he uses the lawyer appointed by him (“jika saya gunakan yang dia lantik”) he would only be charged under section 377D and would be sentenced to three months only. The lawyer in question is Encik Mohd. Noor Don who went to see him at about 4.30 p.m. on the same day, 18 September 1998. He said Mohd. Noor Don told him if he pleaded guilty and said he had repented (“bertaubat”) he would only be sentenced to one day imprisonment.

Under cross-examination by Dato’ Gani, he admitted that he had filed an affidavit in Criminal Case No.44-166-1998 that the name of the lawyer mentioned by SAC1 Musa was Zulkifli Nordin instead of Mohd. Noor Don. He also admitted that on 30 September 1998 (note that this is 11 days after he was charged in the sessions court in which he was represented by Mohd. Noor Don) he signed a letter confirming that Mohd. Noor Don had acted for him on 19 September 1998 on his instructions. However, he said he was forced to sign the letter by SAC1 Musa. Then he was referred to Tun H.S. Lee Police Report No.25536/98 (Exh. T.P.1) lodged by the second appellant.

Under re-examination he explained the inconsistency between his affidavit dated 10 December 1998 while he was under detention at Bukit Aman and his evidence in court thus: Mohd. Noor Don told him that SAC1 Musa told him (Mohd. Noor Don) that he (the second appellant) would be sentenced to one day imprisonment but the second appellant told Mohd. Noor Don that SAC1 Musa had told him (the second appellant) that the sentence would be three months. Mohd. Noor Don then went to see SAC1 Musa and came back and told him (second appellant) that he (Mohd. Noor Don) had confirmed with SAC1 Musa that the sentence would be one-day imprisonment.

He also confirmed that the letter dated 30 September 1998, signed by the second appellant confirming the appointment of Mohd. Noor Don as his (the second appellant’s) counsel was prepared by SAC1 Musa.

An important witness for the second appellant in the trial within a trial is Mr. Ganesan a/l Karupanan, an advocate and solicitor (TDW4). He said that he was appointed to act for the second appellant on 6 September 1998. On the next day, he came to know that the second appellant was at Bukit Aman. He wrote a letter to the Inspector General of Police. On 8 September 1998 in an attempt to meet the second appellant, he went to see ASP Rodwan at Bukit Aman. He was told that he had to get the permission of SAC1 Musa.

On the following day, 9 September 1998 he wrote to SAC1 Musa informing him that the second appellant’s sister would like to see him. He tried to see the second appellant on 7, 8, 9 and 11 September 1998 but was not successful. He even wrote to the Attorney General seeking his assistance. On 14 September 1998 ASP Rodwan called him and told him to go to his office because he wanted to record a statement from him. He also contacted SAC1 Musa who told him the same. Neither SAC1 Musa nor ASP Rodwan contacted him before the second appellant was charged in the Session’s Court on 19 September 1998. Under cross-examination by Mr. Christopher Fernando he said he made

six attempts altogether, three were purely to see the second appellant and the other three were in respect of the recording of his statement.

Under cross-examination by Mr. Karpal Singh he said that between 7 September 1998 until 18 September 1998 he was not told by the police or the Attorney General's Chambers that some other lawyer had taken over as counsel for the second appellant. However, on 19 September 1998 the day the second appellant was charged in the Session's Court, at 9.00 a.m. he received a telephone call from Mohd. Noor Don who told him that the second appellant had appointed him as his counsel. Mohd. Noor Don also told him that he received a telephone call from the second appellant the previous night who wanted him (Mohd. Noor Don) to act for him.

Regarding Zulkifli Nordin, Ganesan said he told Zulkifli to check what was happening in Court on 19 September 1998.

Under cross-examination by Datuk Gani he said he was appointed to act for the second appellant by the second appellant's sister, Komalawati.

At the beginning of the trial within a trial the prosecution called 4 witnesses. I shall skip the evidence of Encik Abdul Karim, the recording magistrate. The second witness, Mr. Kathi Velayudhan a/l Palaniappan (TPW2) merely produced the records of proceedings in Criminal Case No.62-135-98, which also includes the confession that was tendered in mitigation.

The third witness was ASP Mohd. Rodwan bin Hj. Mohd. Yunus (TPW3). He informed the court that he arrested the second appellant on 6 September 1998 at about 1.00 p.m. at Lot 10, Bukit Bintang. On the following day, 7 September 1998, at about 12.45 p.m. he took the second appellant to see a magistrate who made a remand order effective from 7 September 1998 to 20 September 1998 (a period of 14 days).

According to him, on 16 September 1998 at about 3.00 p.m., the second appellant was brought to his office. After the second appellant told him something he took the second appellant to see SAC1 Musa. SAC1 Musa asked him to tape the second appellant's confession. The reason was because the case was a sensitive case and it was to avoid accusations ("tohmahan") that it was a police invention being made later. The recording was done from 4.30p.m. to 5.05 p.m.

On 17 September 1998, ASP Rodwan took the second appellant to see a magistrate because the second appellant "wanted to make a confession on his own will".

Cross-examined by Mr. Govind Singh Deo, ASP Rodwan admitted that the second appellant was investigated in relation to Police Report No.14140/98 lodged by Mohd. Azmin Ali mentioned earlier. Asked whether the second appellant was investigated as a witness, ASP Rodwan replied that he recorded the second appellant's statement as a witness. He admitted that he did not contact the second appellant before he was arrested. He admitted that at Tivoli Villa he was told by the second appellant that the key to his sister's room was with her and agreed that they (the police party) broke the door to the room. He admitted, at Tivoli Villa, the second appellant was handcuffed. He denied that

the second appellant was made to remove all his clothes except for the under pants while at the lock-up. Asked about his duties in the investigation of the case, he said it was to assist in the investigation regarding the book "50 Dalil". The interrogation was done by "pihak Bantuan Teknik" from the Interrogation and Photography Division of the Criminal Division (my translation). He admitted that when he took the second appellant to see the magistrate on 7 September 1998, it was he who asked for a 14-day remand straight away. He also admitted it was not a normal practice for a magistrate to make a 14-day remand order. When asked, he answered that he took the second appellant to see the magistrate who gave the 14-day remand order at the High Court, not at the magistrate's court, as usual. Asked why, he said it was because he was instructed (by SAC1 Musa) to take the second appellant to see Tuat Mat Zaraai ("kerana saya diarah untuk membawa Sukma untuk berjumpa dengan Tuan Mat Zaraai"). Asked whether it was fixed, he said he did not know. He said that after that he met the second appellant on 9, 10, 16 and 17 September 1998 but he was not present during all the interrogations. He admitted that on 9 September 1998 the second appellant was examined by Dr. Zahari Noor (TDW5) who also examined the second appellant's anus and that he (ASP Rodwan) instructed that photographs be taken. He denied that when he took the second appellant to see the magistrate to have his confession recorded he told the second appellant that he would be released the following day if he made the confession.

Cross-examined by Mr. Karpal Singh why the second appellant was remanded for 14 days he said it was to investigate further regarding the second appellant's homosexual involvement and to look for witnesses.

Coming to the day the second appellant was charged in court in respect of Criminal Case No.62-135-98, i.e. on 19 September 1998, ASP Rodwan admitted meeting Zulkifli Nordin, an advocate and solicitor who wanted to meet the second appellant. He also admitted that Ganesan (TDW4) had also tried to meet the second appellant during the latter's detention but was not successful. He admitted that Ganesan had written to him, telephoned him and even saw him on 10 September 1998 for that purpose but he did not allow Ganesan to meet the second appellant.

Re-examined by the Deputy Public Prosecutor, he said that on 19 September 1998, the second appellant's counsel was Mohd. Noor Don.

The next witness called by the prosecution was ASP Zulkifli Mohamed (TRW4). He accompanied ASP Rodwan to get the remand order on 7 September 1998. He denied all the allegations made by the second appellant against him, mentioned earlier.

We now go to the rebuttal witness

es called by the prosecution. The first rebuttal witness was SAC1 Musa bin Hassan (TRW1). He said that at about 9.30 a.m. on 18 September 1998 he met the second appellant. He told the second appellant that he would be charged under section 377D of the Penal Code. He showed two letters from Ganeson (TDW4) and asked him whether he would like to appoint the solicitor who wrote those letters. He also showed the second appellant call cards of lawyers for him to choose. On the same day at about 4.30 p.m. he

arranged for the second appellant to contact Encik Mohd. NoorDon, by telephone. Mohd. Nor Don came to see the second appellant twice. He denied all the allegations made by the second appellant regarding the appointment of Mohd. Noor Don and regarding the charge to be preferred against him and the sentence he would receive.

On 30 September 1998 Mohd. Noor Don telephoned him. He said he wanted to see the second appellant which he did at 3.40 p.m. Shown the letter dated 30 September 1998 he denied forcing the second appellant to sign it.

Under cross-examination by Mr. Jagdeep Singh Deo, he admitted that he met the second appellant twice i.e. on 16 September 1998 and 18 September 1998. He admitted that it was he who instructed that the second appellant's confession be recorded, after 10 days detention. He agreed that according to Ganeson's letter dated 10 September 1998, Ganeson was still acting for the second appellant. However, until 18 September 1998 he did not get a confirmation about Ganeson's appointment. Neither did he contact Ganeson. Asked whether it was usual for him to recommend a lawyer to detainees, his reply was "Not necessarily". He denied that when he saw the second appellant on 18 September 1998, he told the second appellant not to use the services of Ganeson and that if the second appellant were to plead guilty he would only be sentenced to three month's imprisonment. He admitted that the second appellant's sister met him when the second appellant was under remand. Asked why he did not ask the second appellant to get his sister to engage a lawyer for him, he replied that the second appellant was under investigation. Asked whether the second appellant was still under investigation on 18 September 1998, he said "No". He also did not provide the second appellant the facility to contact his sister for the purpose of engaging a lawyer. He admitted he was in court throughout the proceeding on 19 September 1998 and he met Zulkifli Nordin who informed the court that he was acting for the second appellant. Asked whether he knew that the appointment of Mohd. Noor Don was disputed ("dipertikaikan"), he replied that the appointment of Mohd. Noor Don was not disputed. He was then shown the notes of evidence of the Criminal Case No.62-11-35-98. The record reads:

"En. Zulkifli

Keluarga OKT melantik saya untuk mewakili OKT. Keluarga OKT X kenal P/OKT. Keluarga OKT mempertikai perlantikan Encik Mohd. Nor Don. Minta izin bercakap."

(My translation)

"The accused's family has appointed me to represent the accused. The accused's family does not know the accused's lawyer. The accused's family disputes the appointment of Encik Mohd. Noor Don. I ask for permission to speak.")

SAC1 Musa was then asked whether the record was wrong. He said "I don't know." Put to him that Mohamed Nor Don's appointment was disputed. He replied "No". He admitted that according to the record Mohamed Nor Don asked for one day's imprisonment but denied that it was the same as ("selaras dengan") what he had informed Mohamed Nor Don.

Shown the letter dated 30 September 1998, he said he did not know who typed the letter, but on that day Mohd. Nor Don did meet the second appellant at Bukit Aman. He denied it was typed on his instruction.

He was further cross-examined by Mr. Karpal Singh. He admitted that in 1997 he investigated the allegations (“tohmahan-tohmahan”) against the first appellant. He did not carry out a full investigation in 1997. However he admitted that he recommended that no further action be taken on the file and that a full investigation be carried out first before such recommendation be made. He also admitted that he made similar recommendation to the Attorney General who agreed with him. The file was however re-opened in June 1998 based on the police report by Mohd. Azmin Ali concerning the book “50 Dalil”. The following question and answers read:

“S: You arranged for a meeting in your office between Mohamed Nor Don and Sukma?

J: Benar, pada 30.9.98.

S: Sebelum tarikh ini, Mohamed Nor Don belum dilantik.

J: Saya setuju.

S: You allowed the use of your office by Mohamed Nor Don to see Sukma.

J: Yes.”

He admitted that the second appellant was a timid person and “most probably” was prone to be more susceptible to breaking down. He was aware of the beating of the first appellant by the Inspector General of Police. He was aware that the second appellant was not questioned within the first 24 hours. He agreed that a statement from the second appellant was video-taped and it was something new. He admitted that he was given a copy of the second appellant’s confession on 17 September 1998 by ASP Rodwan (at 6.00 p.m).

Under re-examination by the Deputy Public Prosecutor, he explained that he recommended the investigation against the first appellant to be closed in 1997 because the first appellant called him to his office and handed to him letters purportedly signed by Umami Hafilda and Azizan to the effect that they had withdrawn the allegations (“tohmahan”) against the first appellant and directed him to close the investigation as the allegations were unfounded. Regarding the meeting with Mohamed Nor Don he said it was the latter who contacted him. He said the investigation was completed on 17 September 1998 after he received the confession. He denied it was he who appointed Mohamed Nor Don to act for the second appellant.

The second rebuttal witness was K/Insp. Sampornak Ismail (TRW2). He said that on 7 September 1998 at about 3.00 p.m. he was told by ASP Rodwan to interrogate the second appellant. He carried out the interrogation with five other officers (D/Kpl. Ahmad Bustami (TRW3), D/Kpl. Mokhtaruddin (TRW5), D/Kpl. Hamdani (TRW4), Lee Tuck Seng (TRW7) and Tan Hwa Cheng (TRW6). He was the leader of the team. The

interrogation started on 8 September 1998 and completed on 15 September 1998 onwards, he was assisted by three detectives. The interrogations were conducted from 9.00 a.m. to 12.30 p.m. and then from 2.00 p.m. to 4.45 p.m. He admitted that at the beginning of the interrogation on 8 September 1998 he asked the second appellant to remove his shirt and trousers to examine whether he had any injury which was a normal procedure. He denied all the specific allegations made by the second appellant which I need not repeat e.g. the kicking of the chair, the knocking of his spectacles, the scolding, the threat etc.

Cross-examined by Mr. Govind Singh Deo, he agreed that the interrogation was in respect of the book "50 Dalil" which he had not seen but was given pages 63 and 64 by ASP Rodwan. Asked who else was mentioned in the book, he replied if he was not mistaken another person by the name of Azizan was also mentioned. Asked whether any other name was mentioned he said he could not remember. Asked whether it was a high profile case, he said he did not understand the meaning of high profile. When explained to him he said "Now I understand". Pressed further whether he now knew the name of a "famous person" ("orang yang terkenal") mentioned in the said pages given to him, he replied: "Now I know – Dato' Seri Anwar Ibrahim. Before the interrogation, I did not know." Asked for how long the second appellant was completely undressed on 8 September 1999, he said about four minutes. He admitted that he and four other officers repeatedly questioned the second appellant, but not simultaneously. He denied all the specific allegations made by the second appellant. He repeated that the purpose of the interrogation was to obtain "intelligence statement" which means "risikan keselamatan negara" as instructed by ASP Rodwan.

Asked whether the second appellant was a timid person he said he was not clear what "timid" means. After it was explained to him, he replied: "He was a normal person ("Diaseorang yang biasa"). He said that the interrogation was about 5 to 6 hours a day.

Under re-examination by the learned Deputy Public Prosecutor, K/Insp. Sampornak said he started recording intelligence statement from the second appellant from 13 September 1998 until 15 September 1998. Of course he denied the specific allegations made by the second appellant.

Another rebuttal witness called by the prosecution was Det. Kpl. Ahmad Bustami bin Ayob (TRW3). Basically his evidence was similar to that of K/Insp. Sampornak (TRW2). He said that interrogation ("soal siasat") started on 8 September 1998 until 15 September 1998. Out of that, from 8 September 1998 to 12 September 1998 were question and answer sessions. From 13 September 1998 to 15 September 1998 K/Insp. Sampornak (TRW2) recorded intelligence statement from the second appellant. He said that they treated him as a usual offender ("sebagai pesalah biasa"). Allegations made by the second appellant were put to him by the learned Deputy Public Prosecutor and he too denied them all.

Kpl. Hamdani bin Othman (TRW4) was another rebuttal witness called by the prosecution. He too denied all the allegations made by the second appellant.

The evidence of Det./Kpl. Mokhtaruddin bin Suki (TRW5) is similar to that of the other rebuttal witness. He too denied all the allegations made by the second appellant. Under cross-examination he denied that the purpose of the interrogation was to obtain a confession from the second appellant. It was to obtain “risikan” (intelligence statement). He stated that the second appellant was not interrogated as a witness, but as an offender (sebagai seorang yang salah”). Asked what was the offence, he said he did not know.

In the earlier part of the cross-examination he admitted that no confession (“pengakuan”) was obtained from the second appellant. But, just before the court adjourned for lunch, the record reads as follows:

S: Adakah kamu dan ahli-ahli yang menjalankan soal siasat puas hati atas jawapan Sukma?

J: Puas hati.

S: Bilakah kamu puas hati dengan jawapannya – hari pertama, hari kedua, hari ketiga?

J: Pada hari yang akhir.”

He said that the interrogation started on 8 September until 15 September 1998.

Of course, under re-examination, after the lunch break, he explained it thus:

“S: Awak ada mengatakan di dalam soal balas awak berpuashati di hari terakhir. Apa yang kamu puas hati?

J: Saya berpuas hati Sukma telah memberi kerjasama dengan baik dan memastikan segala cerita-cerita telah dijelaskan tidak diada-adakan dan saya tidak mahu ada unsur-unsur penganiayaan.”

[We think we should point out that there appears to be mistake in the notes of evidence where it was recorded that it was TRW4 (Del/Kpl. Hamdani Othman) who was giving evidence. If the sequence of the notes of evidence is followed, it should be TRW 5 (Mokhtaruddin Suki)].

We do not think we have to summarise the evidence of the other rebuttal witness.

Our first comment is that there seems to be so many unusual things that happened regarding the arrest and the confession of the second appellant.

First, the second appellant was not arrested pursuant to a report by a victim that he was sodomised as in a normal case. He was arrested pursuant to a report made by Mohd. Azmin Ali who complained that the book “50 Dalil” contained blasphemous and shameful allegations (“tohmahan”) against him, his wife and his family. The report has nothing to do with the second appellant. But the book contained allegations of homosexual relationship between the first appellant and the second appellant, that too as can be understood, he was the passive participant or the recipient. Had the dominant

partner been a “Mr. Nobody”, no one would have raised an eyelid. But the “dominant partner” being the first appellant who was what he was then at the point of time that was then he became important as a source of obtaining evidence against the first appellant. So, he was arrested. What was he arrested for? The second appellant’s evidence, though denied, that Zaini asked ASP Rodwan “Boss, borang nak tahan dia ni atas alasan apa?” and ASP Rodwan’s answer “Entah” seems to offer the answer: They were not sure themselves. However, ASP Rodwan’s evidence offers the answer. First, when asked whether the second appellant was investigated as a witness, he answered that the second appellant’s statement was recorded as a witness. Later, when asked why he requested for a 14-day remand, he replied: “Untuk menyiasat lanjut tentang penglibatan OKT dalam homosexual, dan untuk mencari saksi-saksi.” So, that was the reason: to look for evidence and witnesses regarding the second appellant’s involvement in homosexual activities, with whom? Clearly with the first appellant.

But, if that was the reason, why arrest the second appellant and subject him to the kind of interrogation done even if the version of the prosecution witnesses were to be accepted. You call him and record his statement, first, at least.

Secondly, the remand order of 14 days one stretch and the circumstances under which it was obtained is unusual. No questioning was done during the first 24 hours. Then he was taken to see a magistrate to get a remand order, not to the magistrate’s court where magistrates are but to see a particular officer at the High Court. We take judicial notice that there are no magistrates in the High Court, only officers who had served as magistrates and who remain gazetted as magistrates. Requested by ASP Rodwan, he gave a 14-day remand order straight away, something that even ASP Rodwan admitted as unusual.

Back in Bukit Aman, intensive interrogation went on for ten days. The officers kept saying that the purpose of the interrogation was to obtain “intelligence statements” which was explained by ASP Sampornak, the leader of the interrogation team, to mean “risikan keselamatan negara”. However, the way the interrogation was done justifies Det. Kpl. Mokhtaruddin Suki (TRW5) to form an opinion that the second appellant was not interrogated as a witness, but as an offender even though he did not know what offence. Another rebuttal witness of the prosecution, Det. Kpl. Ahmad Bustami bin Ayob (TRW3) also said that the second appellant was interrogated as a “normal offender” (“pesalah biasa”).

Thirdly, within two days after the confession was recorded by the magistrate, the second appellant was charged for having allowed the first appellant to sodomise him in April 1998 at the latter’s official residence, an offence under section 377D of the Penal Code. Normally, it is the sodomiser who is charged or both are charged together. But, we must make it very clear that there is nothing wrong legally speaking with that charge. But again, we are only looking at all the surrounding circumstances relating to the confession.

Fourthly, the appointment of Mohd. Noor Don as counsel for the second appellant in that case is rather unusual too. Ganeson, purportedly appointed by the second appellant’s sister, had been trying to see the second appellant. He was not successful in all his

attempts. Instead, he was called to Bukit Aman twice to have his statements recorded. Then we have the involvement of SAC1 Musa in the appointment of Mohd. Noor Don. It is very pertinent to note that SAC 1 Musa admitted that Mohd. Noor Don was not appointed by the second appellant before 30 September 1998 which means that he was only appointed 11 days after he had appeared in court and “mitigated” for the second appellant. Even if we were to accept SAC 1 Musa’s own evidence (even though we must say, in this respect, the second appellant’s version is not improbable) does the fact that he gave Mohd. Noor Don’s card to the second appellant, arranged for the second appellant to call Mohd. Noor Don by telephone, allowed Mohd. Noor Don the use of his office to meet the second appellant, denied access by Ganeson even though at earlier stage, and also Mohd. Noor Don’s tendering of the confession in mitigation (we will say more about this later), the appearance of Zulkifli Nordin in court at the behest of Ganeson to see what was happening, the denial by SAC1 Musa that Zulkifli Nordin disputed the confession even though he was shown the notes of proceedings of the court, the belated letter dated 30 September 1998 (11 days after the second appellant was charged and convicted) confirming Mohd. Noor Don’s appointment, not raise some suspicion about the actions of the police relating to the confession?

Fifthly, the tendering of the confession by Mohd. Noor Don “in mitigation” of sentence in criminal case No.4-62-135-98. Even unrepresented accused do not do such a thing, what more an advocate and solicitor representing an accused person. Tendering a confession stating that an accused has committed other offences in mitigation of sentence is a contradiction in terms, to say the least. When you are pleading for a lenient sentence, you simply do not inform the court that you have committed other offences!

Whether it was the intention or not, the reason for the tendering of the confession in that case, is to be found in this case. The whole notes of proceedings of the case including the confession was tendered in evidence in this case and the tendering of the confession in mitigation of sentence in the Sessions Court case was used as an argument to prove its voluntariness: the second appellant had used it, therefore it has been made voluntarily. Again, we must say, there is nothing

wrong legally speaking about it all. But, again, we are looking at the circumstances surrounding the confession to determine whether it was voluntarily made.

We have covered all the “unusual” circumstances surrounding the confession. Now, a few more things.

First, even the first appellant who, until his dismissal (on 2 September 1998) was the Deputy Prime Minister of Malaysia, was deemed fit to be assaulted by no other than the then Inspector General of Police. Would it not be too much to expect that the second appellant was given a completely different kind of treatment during his detention?

Secondly, it is easier for seasoned police officers to deny specific allegations put to them either by the learned Deputy Public Prosecutor or learned counsel than for the second appellant to create the story especially when it covers a period of about 10 days. In fact, the version given by the prosecution witnesses confirms many of what the second

appellant told the court, except for the specific allegations which are denied. Indeed, on those matters, the prosecution's witnesses especially C/Insp. Sampornak, even from reading the notes of evidence, can be clearly seen to be evasive.

Thirdly, Det/Kpl. Mokhtaruddin Suki (TRW5), whose evidence we have reproduced earlier admitted that no confession ("pengakuan") was obtained from the second appellant but on the last day of the interrogation (15 September 1998) they were "satisfied with his answers." Note that on the next day, 16 September 1998 the taping of the second appellant's statement was done and on the following day, 17 September 1998, the second appellant was taken to see the magistrate who recorded his confession. Although Det/Kpl Mokhtaruddin Suki (TRW5) tried to explain it after the lunch break, he appears to say that they did not obtain the confession ("pengakuan") earlier but on the last day (15 September 1998) they were satisfied with the second appellants "answers" or as he puts it in the re-examination, he "had given good co-operation." In other words, having been satisfied on 15 September 1998, the interrogation stopped, followed by the taping on the following day and the recording of the confession by the magistrate on the next day. It also fits with the second appellant's version.

Fourthly, it was argued that the fact that the second appellant could narrate a story of that length and detail shows that he was not "programmed" and that he was making the confession voluntarily. Here too, we think, that the defence, in alleging that the confession was "programmed", was making things more difficult for themselves. Understandably, the defence was trying to clear the appellants totally from any indication of homosexual involvement. But, in so doing, the defence was placing a very heavy burden on themselves. It is not easy for any court, or indeed any reasonable man, to accept the story that the second appellant was "programmed" to make a story of that length and detail.

Be that as it may, the fact that the second appellant was not "programmed" to make the confession does not necessarily mean that the confession was voluntarily made. The fact that the confession is true, if it is true, does not make it admissible if it is not voluntarily made.

Two things should not be confused. Voluntariness and admissibility should not be confused with truth of the confession and the weight to be attached to it. A confession may be true yet if it is not voluntarily made, it is not admissible in evidence. A confession, though false, is admissible in evidence if it is voluntarily made, even though it may not be acted upon when considering the weight to be given to it at a later stage.

The learned trial judge, having stated the law correctly, which we shall not repeat, went on to consider the various allegations made by the second appellant and the evidence of the prosecution witnesses, in which they denied all the allegations made by the second appellant and concluded that he believed the prosecution witnesses. Of course, he had the advantage of seeing and hearing them. But, we do not think that it is just a matter of seeing and hearing the witness. What is more important, in the circumstances of this case, is to look at the broader picture, including all the surrounding circumstances enumerated

above. This, with respect, the learned trial judge had failed to do. In our judgment and with respect, that is a misdirection or a non-direction amounting to a misdirection.

We would pose the following questions. Applying the words of section 24 of the Evidence Act 1950, considering all the surrounding and unusual circumstances that we have enumerated, does it not appear that the making of the confession has been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person or persons in authority and sufficient in the opinion of the court to give the accused person ground which would appear to him reasonable for supposing that by making it he would gain an advantage or avoid any evil of a temporal nature in reference to the proceeding against him? Applying Dato' Mokhtar Hashim's case (supra), has the prosecution proved beyond reasonable doubt that the confession was made voluntarily? Or, to put it another way, considering all the circumstances enumerated above, are the allegations of the second appellant so improbable that it does not appear that the making of the confession was not voluntary, or that it does not raise any reasonable doubt that the confession was not made voluntarily? Or, applying the "classic test" laid down in *Director of Public Prosecutions v Ping Ling* (1975) 3 All E.R. 175, has the prosecution established "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 [which test] should be applied in a manner which is part objective, part subjective"? – per Abdolcader F.J. in Dato' Mokhtar Hashim (supra) and cited by the Court of Appeal – see page 229 of (2004) 1 MLJ. Or, applying *Tan Ewe Huat* (supra) and *Chan Ming Cheng* (supra), are there no "suspicious circumstances surrounding the making of" the confession? If we consider these questions seriously in the light of all the surrounding circumstances that we have enumerated, we do not think that we can reasonably conclude that there was no doubt as to the voluntariness of the confession or that it does not appear that it was made involuntarily.

We are asked to believe beyond any reasonable doubt as if, after the arrest and having "slept" over it, the second appellant was full of repentance and he would like to clear his chest because he had kept the secret for too long. ("Lama sangat dalam dada, saya hendak meluahkan segala-galanya.") We accept that the second appellant had said that to the recording magistrate. It may even be that he was telling the magistrate what he truly felt then. But, under what circumstances did it come about? That must be considered. It came after 10 days of intensive interrogation and 12 days of detention (up to the time he made that statement to the magistrate), when for all intents and purposes he was arrested as a witness but interrogated as an offender and ended as an accused, twice. Indeed he was charged two days later for allowing the first appellant to sodomise him the record of which was introduced as evidence in this trial.

With respect, the learned trial judge and the Court of Appeal had failed to consider all the surrounding circumstances, many of which unusual, before and after the confession was made. It may be asked: why should the surrounding circumstance after the making of the confession be relevant? It is true that what happened after the making of the confession does not affect the state of mind of the second appellant leading to the making of the confession. But, it reflects on the police officers: it shows that they wanted a confession

from the second appellant. Of course there is nothing wrong with that but we are looking at it in determining whether the confession was voluntarily made. The learned trial judge appears to have only considered the specific allegations made by the second appellant regarding the treatment given to him during his detention and during the interrogation and the denials by the police officers and he believed the police officers. The Court of Appeal, without much analysis of the facts, agreed with the learned trial judge. In our judgment there is a serious misdirection that warrants this court to intervene in the finding of the two courts on the issue.

In this respect, we are supported by the dictum of Abdolcader F.J. in Dato' Mokhtar Hashim (supra) and quoted by the Court of Appeal:

“It is open to an appellate court to interfere with the finding on a question as to the voluntariness of a confession if the impugned finding has been reached without applying the true and relevant tests and consideration of relevant matters (Sarwan Singh v. State of Punjab [A.I.R. 1957 S.C. 637, 643], Public Prosecutor v. Thum Soo Chye [(1954) MLJ 96, 99].”

Indeed, the surrounding circumstances in this case are much more serious than those in other cases in which this court and the Court of Appeal had found it fit to interfere e.g. Tan Ewe Huat (F.C) (supra), Chan Ming Cheng (C.A) (supra) Hasibullah bin Mohd. Ghazali v Public Prosecutor (1993) 3 MLJ 321 (S.C.) and Dato' Mokhtar Hashim (F.C.)(supra)

Effects of our findings

Having made our findings on Azizan's evidence, in particular regarding the “date” of the offence and on the issue whether he is an accomplice and the second appellant's confession, we think we are now in a position to consider the prosecution's case, whether, in view of the said findings, the prosecution had proved the case beyond reasonable doubt that justifies the calling for the defence and a conviction, if he chooses to remain silent. The burden of proof is the same as at the end of the case for the defence. If at the end of the case for the prosecution, the court has a reasonable doubt that any of the ingredients of the charge had been proven, the accused is entitled to an acquittal without his defence being called. This is again trite law.

The court, as a court of law, is concerned with proof in accordance with the requirement of the law, not whether, the judge reading the records is convinced that the incident did happen or not. He must be satisfied beyond reasonable doubt, that every ingredient of the charge has been proved on evidence admissible in law and in accordance with the requirement of the law.

In this respect, the dicta of Abdul Hamid C.J. (Malaya) (as he then was) in Teoh Hoe Chye v Public Prosecutor (1987) quoting Ong Hock Thye Ag. C.J. (Malaya) in Sia Soon Son v. Public Prosecutor (1966) is worth quoting:

“In this regard, it behoves us to reiterate that “the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective

of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else.” (Sia Soon Son v. Public Prosecutor (1966).”

We shall now consider whether, based on our findings on the three main points, at the end of the case for the prosecution, the prosecution had proved its case beyond reasonable doubt, that being the law applicable to this case.

The “date” of the commission of the offence

The learned trial judge, when discussing the question “whether the charges are vague or weak” concluded that the charges contain sufficient particulars as required by section 153(1) of the Criminal Procedure Code. The Court of Appeal agreed with him. We too agree with him. *Ku Lip See v. Public Prosecutor* (1982) is a case on point.

However, we think we have to say something on the oft-quoted sentence from the judgment of Atkin J in *Severo Dossi* 13Cr.App.R158:

“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.”

The learned trial judge in this case quoted it in support of his statement “In any event a date in the charge has never been material” when he was discussing whether the charges are vague and weak, not whether it is material that it must be proved. He merely quoted the sentence as quoted in *Law Kiat Lang v. Public Prosecutor* (1966) 1 M.L.J. 215 (F.C.) and *Ho Ming Siang v. Public Prosecutor* (1966).

To understand the context in which that statement was made, we should look at the facts of that case.

In that case, a 1918 judgment of the Court of Criminal Appeal in England, the appellant (accused) was charged with indecently assaulting a child “on March 19th, 1918,” and with indecently assaulting another child “between September 12th and 30th, 1917.” The jury found the appellant not guilty with regard to the March 19th charge but “If the indictment covers other dates, Guilty”. They also found him not guilty of indecently assaulting the second child. On the application of the prosecution the Deputy-Chairman amended the indictment by substituting “on some day in March” for the words “on March 19th, 1918”, and the jury then found the appellant guilty on the amended charge.

The judgment of Atkin J., inter alia, reads:

“The first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days they found him Not Guilty and that verdict must stand. It appears to us that that is not a correct contention in law. 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.” And although the day be alleged, yet if the jury finds him guilty on another day the

verdict is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the same law is in the case of an indictment," 2 Inst.318".

It is to be noted that in that case the court was concerned with the power of the court to amend the charge from 19th March 1918 to "on some day in March" of the same year as the jury had found that the charge bearing the specific date 19th March had not been proved but it was proved that the offence was committed in the month of March. That is the context in which that statement was made. Even then, the sweeping opening words were qualified by the words "unless it is actually an essential part of the alleged offence."

That passage was quoted by the Federal Court in *Law Kiat Liang v. Public Prosecutor* (supra). That case is one of the "Konfrontasi" cases. In the first charge the date of the alleged offence was given as "between 2.00 a.m. on 2nd day of September, 1964 and 12.00 noon on the 4th day of September 1964."

In the judgment of the court, Thomson L.P., after reproducing the charges, straight away went on to say:

"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 *Servo Dossi*."

The learned Lord President went on to cite the same sentence reproduced earlier. Nothing more was said on it. No reference was made to section 153(1) of the Criminal Procedure Code, our written law. However, considering his statement that "the dates are wrong", it appears to us that in that case, as in *Servo Dossi* followed by the court, it was proved that the offence was committed on another day (or period) but not the date (or period) specified in the charge. That being the case, it is understandable why having referred to that case he said no more about the appeal before him on that point. The only difference is that in the Federal Court case, the charge was not amended.

The case of *Ho Ming Siang v. Public Prosecutor* (supra) is similar to *Law Kiat Lang v. Public Prosecutor* (supra). Even the date of the alleged offence in the first charge is the same. That part of the judgment is a repetition of what was said in *Law Kiat Lang v. Public Prosecutor* (supra).

It must be noted that in all these cases, the court did find that the offences were proved to have been committed on another date, even though not on the date stated in the charges. In the circumstances, the convictions were upheld.

In the instant appeals, it is not that the offences have been proved to have been committed on another day, not being the date stated in the charge. The question of amending the charges does not arise. It is simply a question whether the alleged offences have to be proved to have been committed as per charge, including the date. As has been pointed out, the Federal Court in the two cases referred to earlier did not address its mind to the provision of section 153(1) of the Criminal Procedure Code. Perhaps that was because it was only dealing with the question whether the charges should have been amended. In

the instant appeals we are dealing with the question whether, the offences not having been proved to have been committed on another date, it must be proved to have been committed on the date stated in the charges. Section 153(1) of the Criminal Procedure Code clearly states that “The charge shall contain such particulars as to the time ...” Since it is mandatory to state the “time” (i.e. date or period) when an offence is alleged to have been committed, clearly it is a “material matter” and an “essential part of the alleged offence”, to use the words of Atkin J. in the exception stated by him, even if that case is applied. If the law clearly provides that the charge shall contain particulars as to “time”, it follows that such particulars must be proved.

In any event, reading the judgment of the High Court, even though the learned judge did not mention the date of the offence when he listed the ingredients to be proved (see (2000) 3 M.L.J. at page 276), it is clear from his judgment that when he found that the charges had been proved, he meant the date as well. So, there is really no issue whether the date of the alleged offences as stated in the charges have to be proved. The issue is whether it is proved.

The concluding paragraph of the

learned trial judge’s judgment on the inconsistencies of Azizan’s evidence regarding the date of the offence reads:

“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. I see no merits on this contention and the credit of Azizan is not affected on this ground.”

The only evidence available to prove the date of the commission of the offence is that of Azizan. The second appellant’s confession, even if admissible (but which we hold is not) does not help. It was made on 17 September 1998. He mentioned the date as “Dalam lebih kurang dua atau tiga tahun yang lalu waktu dan tahun yang tepat saya tidak ingat”. “Two or three years ago” can only mean in 1996 or 1995. The learned trial judge interpreted that phrase to include 1993. This is what he said:

“In my view, the phrase ‘dua atau tiga tahun yang lalu’ does not conclusively establish that the date of the commission of the offences could not be 1993. I do not agree with the contention of the defence that ‘dua atau tiga tahun yang lalu’ would be in 1995 or 1994 because this may also include 1993. This year cannot be excluded for the simple reason that Sukma himself was not sure of the exact date but only giving an estimated date. He could have said with precision that the year was 1994 or 1995 if he was sure that what he

meant by 'dua atau tiga tahun yang lalu' refers to these years but he said 'tahun yang tepat saya tidak ingat.' This in my view does not exclude 1993."

With respect, such an interpretation is unwarranted. The phrase "waktu dan tahun yang tepat saya tidak ingat" cannot reasonably be interpreted to expand the period of "dua atau tiga tahun yang lalu". The phrase "tahun yang tepat saya tidak ingat" follows immediately the phrase "dua atau tiga tahun yang lalu." It must therefore be read in that context." Tahun yang tepat" must necessarily refer to the "dua atau tiga tahun yang lalu". It means he could not remember the exact year but it was two or three years earlier. It cannot also mean five years earlier. Such an interpretation is not reasonable, what more in a criminal trial. In a criminal trial even if a word or phrase or statement is open to two interpretations, the one in favour of the accused should be adopted. This is not even such a case. There is no reasonable alternative interpretation that can be given. In any event, this discussion is on the basis that the confession is admissible. Since we have held that the confession is not admissible, the confession need not be considered at all. There is no other evidence, oral or documentary, to support the "date" of the offence.

So, we have to rely on Azizan's evidence alone to prove the "date" of the offence.

The learned trial judge found Azizan a truthful, credible and reliable witness. He was even prepared to convict the appellants on Azizan's evidence alone.

But, we find that Azizan's evidence, especially on the "date" of the commission of the offence doubtful. He had given three different periods, the first two covering one month each and the last covering three months, in three different years (1992, 1993 and 1994), including one ("May 1992") when the construction of Tivoli Villa was not even ready. Besides, he also contradicted himself on the issue whether he informed the police that he was sodomised in 1994. His demeanor even prompted the learned trial judge to record that he was "very evasive and appears to me not to answer simple question put to him" when he was cross-examined as to the manner the police finally obtained from him the "date" specified in the charges. On such evidence, can the court accept that the "date" of the offence has been proved beyond reasonable doubt? In considering his evidence whether it proves the offence or not, any benefit of the doubt should be given to the appellants who are the accused.

There is yet another point concerning the date of the commission of the offence. The notes of evidence on 19 August 1999 shows that when Mr. Karpal Singh requested for an adjournment to enable SAC1 Musa (SP9) to carry out an investigation in respect of alibi for the period from January 1993 to March 1993, the then Attorney General, at first had no objection. However, after the lunch break, he objected to the postponement on the ground that, at that stage, he had advised SAC 1 Musa that there was nothing more to investigate. And he said this:

"Peguam Negara: Saya telah memberi nasihat pada saksi ini (SAC1 Musa – added) siasatan lanjut berkaitan dengan alibi yang diberi oleh kedua-dua pihak pembela (tidak perlu (?)- added) kerana pihak pendakwa mempunyai rekod dan keterangan berkaitan

dengan pergerakan (movement) Dato' Seri Anwar di dalam negara dan di luar negara daritahun 1992 hingga September 1998 iaitu tarikh pemecatan.”

The point is this. If the prosecution had such a record, which should include the night(s) the first appellant went to Tivola Villa, then the prosecution should be able to know when the first appellant visited Tivoli Villa. Instead, the prosecution had given three “dates” as the date of the commission of the offence covering a period of three years (1992, 1993 and 1994) and the final date covers a period of three months. It only shows that even the prosecution was not sure.

Furthermore, as agreed by both parties before us, the prosecution did supply the diaries of the first appellant to the defence for inspection. This happened on 21 October 1999 (Jilid 2 page 1371). However, as admitted by the prosecution, only diaries for 1994 to 1999 were made available. That is because:

“2. Pihak kami hanya mengambil buku dairi milik Dato' Seri Anwar bin Ibrahim dari tahun 1994 hingga 1999. Dairi 1993 tidak ada dalam simpanan kami.”

(Letter dated June 1999 from SAC 1 Musa in reply to S.N. Nair's letter dated 18 June 1999)

It must be noted that this letter was written soon after the date in the charges was amended to read “from January until March 1993”. The statement of SAC1 Musa in his reply may be true. But, it is not free from suspicion.

In the circumstances, our conclusion is that the prosecution had not proved one of the material particulars of the charge i.e. the “date” of the commission of the offence.

The broader question:Has the prosecution proved its case beyond reasonable doubt?

Putting aside the issue about the date for a while, we shall now consider the broader question i.e. whether the prosecution has proved the charges beyond reasonable doubt that warrants the calling for the defence.

We have found Azizan to be an accomplice.

Section 133 of the Evidence Act 1950 provides:

“133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.”

The illustration (b)of section 114 of the same Act however provides:

“The court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.”

In Madam Guru & Another v. Emperor (1923) Vol.24 Cr.LJ 723, it was held that:

“Under section 133 of the Evidence Act the evidence of an accomplice by itself would be sufficient for the purpose of conviction; but it is a rule of practice founded on experience that in every case where an accomplice has given evidence the court must raise a presumption that he is unworthy of credit unless corroborated in material particulars. Failure to raise that presumption is an error of law”.

In *Yap Ee Kong & Anor v. Public Prosecutor* (1981) 1 MLJ 144 (F.C.), Raja Azlan Shah C.J. (Malaya) (as he then was) had this to say:

“It is trite law that although an accomplice is a competent witness a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. All leading authorities have stated in clear terms that it has long been a rule of practice or rule of prudence which has become virtually equivalent to a rule of law for the judge or jury to be warned of the danger of convicting on the uncorroborated testimony of an accomplice. It is a matter of prudence except where circumstances make it safe to dispense with that there must be corroboration of the evidence of an accomplice.”

Regarding the “nature and extent of corroboration”, his Lordship then said:

“The rules are lucidly expounded by Lord Reading in *Baskerville’s* case, *supra*. The rules may be formulated as follows:

(1) There should be some independent confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance;

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice; and

(3) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another.”

On the same point, the Privy Council, in *Dowse v. Attorney-General, Federation of Malaya* (1961) 27 MLJ 249 held:

“2) evidence, to be corroborative, must be truly probative of the relevant issue; that is, it must positively implicate the accused person and positively show or tend to show the truth of the accomplice’s story that the accused committed the offence. A fact which is indifferently consistent with the accomplice’s story and the accused’s denial of it is neutral and supplies no corroboration.”

On the issue whether corroboration is at all necessary where the evidence of the accomplice is itself “uninspiring and unacceptable”, the then Chief Justice (Malaya) applied the principles enunciated by Lord Morris of Borth-y-Gest in *Director of Public Prosecutions v Hester* (1973) A.C. 296, 315:

“The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said ... The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence.”

His Lordship then went on to say:

“Accordingly the court should first evaluate the evidence of an accomplice and if the same is found uninspiring and unacceptable then corroboration would be futile and unnecessary.”

The dictum of Lord Hailsham in *Director of Public Prosecutions v Kilbourne* (1973) 1 All E.R. 440 at p.452 quoted by the learned trial judge at (2001) 3 MLJ at p.268 is also to the same effect.

We do not go so far as to say that Azizan’s evidence is “uninspiring and unacceptable” or that all his evidence is not credible. All that we say is that some parts of his evidence are rather doubtful or are inconsistent. So, we would still look for corroborative evidence.

Is there such corroborative evidence? Tun Hanif Omar’s evidence, for example, regarding the conduct of the first appellant when told to stop his wayward activities i.e. he did not protest, at the most, only supports the first appellant’s homosexual activities, not the specific charge.

Likewise, Dr. Mohd. Fadzil’s (SP2’s) evidence. Even though the learned trial judge ruled that his evidence was relevant he did not find that Dr. Mohd. Fadzil’s evidence corroborated Azizan’s evidence. The Court of Appeal agreed with learned trial judge’s view. We agree with the views of both the courts.

Regarding the conduct of the first appellant, two incidents were considered by the learned trial judge. The first is where the first appellant asked Azizan to deny his statutory declaration which was sent to the then Prime Minister. Secondly, where he asked SAC1 Musa to close the investigation into the allegation made against him in police report No.2706/97.

On the first, this is what the learned trial judge said:

“In the ‘Pengakuan Bersumpah’ Azizan said that the act of sodomy took place ‘sekitar tahun 1992’. By this it is clear that it is not confined to just acts of sodomy committed in 1992. It could include acts committed in 1991 or 1993. This view is supported by what Azizan said in cross examination that he did tell Umi Hafilda who drafted P5 some of the places only and the date i.e. sekitar 1992 where the acts took place. He did not tell Umi all the places but this does not necessarily mean that the acts did not take place elsewhere. Therefore when Azizan signed P5 he also had in mind the incident at Tivoli Villa. Thus when Dato’ Seri Anwar asked Azizan to deny P5 to the police, the accused is specifically also referring to the Tivoli incident. In my view, this amounts to Dato’ Seri

Anwar asking Azizan to lie, as stated by Azizan in his evidence, about the acts of sodomy which would include the Tivoli incident. This amounts to suborning of false evidence and is evidence of conduct against the accused under s 8 of the Act. I shall deal with the application of this section later.”

We note that towards the tail-end of his evidence, in re-examination by the prosecution, Azizan had expanded the words “sekitar tahun 1992” in his statutory declaration to include “early 1993”. Now the learned trial judge has expanded it further to include both 1991 and 1993 as well. He did so to impute that Azizan, when signing Exh. P5 also had in mind the incident at Tivoli Villa despite the fact that it was not even a luxurious hotel as those named therein. With respect, in a criminal trial, such an interpretation should not be given. By doing so, the learned trial judge was not only not giving an interpretation which was more favourable to the appellant, but was actually expanding the evidence to connect Exh.P5 with the offences for which the appellants are charged and to hold that the conduct of the first appellant in asking Azizan to deny the contents of of Exh. P5 is corroborative evidence.

The second conduct is in respect of the first appellant’s request to SAC1 Musa to close the investigation into the alleged sexual misconduct against the first appellant in 1997 based on a police report lodged by ASP Zull Aznam in connection with an anonymous letter entitled “Talqin Untuk Anwar Ibrahim”. The learned trial judge held that that act amounts to asking SAC1 Musa to destroy evidence “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”. He then concluded:

“For the above reasons and in the circumstances I find that the conduct of Dato’ Seri Anwar as described referred to above is relevant and admissible and to that extend (sic) enhances the credibility of Azizan and corroborates his evidence on the allegation of sodomy committed against him”. (page 273 of (2001) 3 M.L.J.

The Court of Appeal, without saying much, agreed with him “although such evidence could not be said to be directly in relation to the offence as per charge.” So, even if we agree with the Court of Appeal, it does not help.

So, we find no corroborative evidence of the nature and extent described in the cases cited above, nor “of a convincing cogent and irresistible character” – see *Jegathesan v. Public Prosecutor* (1980) 1 MLJ 167.

In the circumstances, is it safe to convict the appellant on Azizan’s evidence alone? No doubt Azizan has been consistent in admitting the incident at Tivoli Villa despite the shame that would have been caused to him by such admission though made years later, but we are doubtful as to when it happened and his purported role as the innocent victim therein. As such we are really in no position to say that his story is unusually convincing nor can we find any reason to give it special weight that warrants a conviction to be recorded on his evidence alone. We do not think it is safe to convict on his evidence alone.

Furthermore, the offence is a sexual offence. Even though a conviction founded on the uncorroborative evidence of the complainant is not illegal provided that the presiding judge warns himself of the danger of convicting on such uncorroborated evidence (see *Chin Nam Hong v. P.P.* (1965) MLJ40, it is unsafe to convict on an uncorroborated testimony of the person on whom the offence is said to have been committed unless for any special reason that testimony is of special weight – see *Ganpart v Emperor* AIR 1918 Lab.322 and *Bal Mukundo Singh v. Emperor* 1937) 38 Cr.L.J. 70(Cal.).

In this respect, our discussion and conclusion regarding corroborative evidence in support of the evidence of an accomplice and in respect of Azizan's evidence is applicable. On this ground too it is unsafe to convict the appellants on Azizan's uncorroborated evidence alone.

To summarise our judgment, even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we are more inclined to believe that the alleged incident at Tivoli Villa did happen, sometime, this court, as a court of law, may only convict the appellants if the prosecution has successfully proved the alleged offences as stated in the charges, beyond reasonable doubt, on admissi

ble evidence and in accordance with established principles of law. We may be convinced in our minds of the guilt or innocence of the appellants but our decision must only be based on the evidence adduced and nothing else. In this case Azizan's evidence on the "date" of the incident is doubtful as he had given three different "dates" in three different years, the first two covering a period of one month each and the last covering a period of three months. He being the only source for the "date", his inconsistency, contradiction and demeanor when giving evidence on the issue does not make him a reliable source, as such, an essential part of the offence has not been proved by the prosecution. We also find the second appellant's confession not admissible as it appears not to have been made voluntarily. Even if admissible the confession would not support the "date" of the commission of the offences charged. We have also found Azizan to be an accomplice. Therefore corroborative evidence of a convincing, cogent and irresistible character is required. While the testimonies of Dr. Mohd. Fadzil and Tun Haniff and the conduct of the first appellant confirm the appellants' involvement in homosexual activities, such evidence does not corroborate Azizan's story that he was sodomised by both the appellants at the place, time and date specified in the charge. In the absence of any corroborative evidence it is unsafe to convict the appellants on the evidence of an accomplice alone unless his evidence is unusually convincing or for some reason is of special weight which we find it is not. Furthermore, the offence being a sexual offence, in the circumstances that we have mentioned, it is also unsafe to convict on the evidence of Azizan alone.

For all the above reasons, we are not prepared to uphold the conviction. Since the applicable law in this case requires that the prosecution must prove its case beyond reasonable doubt before the defence may be called, the burden being the same as is required to convict the appellants at the end of the case for the defence, we are of the

view that the High Court has misdirected itself in calling for the appellants to enter their defence. They should have been acquitted at the end of the case for the prosecution.

We therefore allow the appeals of both appellants and set aside the convictions and sentences.

We must record our appreciation for the meticulous recording of the notes of evidence by the learned trial judge, without which we would not be able to scrutinise the evidence, the submissions and the grounds for every ruling and decision that he had made in the preparation of this judgment.

2 September 2004.

DATO' ABDUL HAMID BIN HAJI MOHAMAD

Hakim Mahkamah Persekutuan Malaysia.