

# Behind closed doors

America is famous for its show trials, but would we have handled the DSK affair any differently? **Felicity Gerry** talks briefs, cuffs and conspiracies

When I first heard the news that Dominique Strauss-Kahn, now former head of the International Monetary Fund, had been charged with sexual offences I had the usual reaction of a barrister – to wonder who would get the brief.

Nothing other than the status of the suspect is unusual to a criminal barrister who specialises in cases involving sexual allegations, but I suppose at least this one would be a private payer.

The NYC authorities set a good example in taking the complaint seriously and acting quickly to apprehend the alleged suspect. One wonders whether they would have done so had he not been so high profile. However, the fact of arrest does not prove guilt and there was no need to parade him in handcuffs which merely risks prejudicing a future jury and affecting the fairness of a trial.

## What will happen next?

Initially, such cases depend on the quality of the investigation by the police. It is important they collect the evidence properly, make relevant disclosure to the defence and the lawyers conduct proceedings fairly. The police will need to check for CCTV footage and to some extent investigate their own witness.

In the UK, the complainant might give a video interview (if she is particularly vulnerable) and advice will be sought as to what charges her complaint discloses. Effort should then be made to seek supporting evidence. Has she made similar complaints before? With what result? Is she a witness who can be relied on to tell the truth? At the commencement of such proceedings, much depends on the presentation and history of the person complaining as she must be able to withstand cross-examination at court.

For the defence lawyer briefed to attend the police station, a suspect will need quality advice on whether to answer questions or not given that scientific evidence is outstanding at that stage. It is

impossible to give a detailed account of the flurry of paperwork that would have been going on behind the scenes but one hopes that everyone was properly briefed and that decisions were based on the evidence not the personnel involved.

Strauss-Kahn was arrested on an aeroplane about to leave the country, having contacted the hotel in an attempt to recover his telephone and freely disclosed his whereabouts. He has denied the allegations and was granted bail last Thursday (19 May). There is some suggestion that he will raise an alibi as, before his flight, he is reported to have had lunch with his daughter. Others have suggested that he may have been set up by political opponents. Sadly, false sexual complaints are not unheard of and such assertions will need to be rebutted by the evidence collected.

More recently some have said he may assert that the complainant consented. In this country, defence counsel cannot tell a defendant which is their best defence so it is left to the defendant to give a voluntary account upon which the advocate can then advise. Much will depend on the scientific testing carried out on Strauss-Kahn and the complainant whether sexual contact between the parties can be proved. Once physical contact is proved, any potential alibi can be rebutted.

In a case where the defendant asserts that the complainant consented to his advances, the complainant will be required to give evidence not merely as to her account of events but also as to what she said and did at the point of the sexual activity or whether he could have reasonably have believed in consent. For genuine victims, this requires some stoicism in court.

Many defendants can also find reasons why an accusation of rape may have been fabricated; usually said to be rejection or financial motives. Such assertions are best based on evidence rather than conjecture as an unwarranted attack on the character of a witness generally backfires.

As to bail, in this country there is a right

to bail and, despite the suggestion of flight risk, it is unlikely that a suspect of good character would be remanded in custody as surrender of his passport, surety and a tag would probably do the trick. Similar conditions have now been imposed on Strauss-Kahn.

For the advocates involved, once the trial date is fixed and directions given, it is an exercise in preparation; knowing the case for the prosecution and how to rebut it and, at trial, structuring questioning in such a way as to ensure that witnesses and the defendant are able to give their best account to the jury who make the ultimate decision. Sometimes a case is weak and can be exploited. In others there is little wriggle room.

## Media attention

The press has had a field day with revelations of DSK's reputation as a seducer of women. But such conduct is rarely, if ever, admissible. A propensity to commit sexual assault can be admissible if the evidence of past conduct (bad character) is reliable and relevant to the issues in the case. A seducer is not a rapist and vice versa. The burden is on the prosecution to make a jury sure of guilt. It always bears saying that nothing less than that will do and past consensual indiscretions do not progress the prosecution case on rape.

All or none of the above issues may arise in the proceedings against Strauss-Kahn. It is important that no one speculates as to the outcome but that the case is resolved on the evidence. It is now down to the NYC criminal justice system to give both parties a fair hearing in a reasonably short space of time.

As to who got the brief, for the viewing public one hopes they will be a formidable prosecutor with a fantastic opponent and it will be rather more exciting telly than the UK Supreme Court.

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