Re Section 22 of the Mutual Assistance in Criminal Matters Act
[2008] SGCA 41

Case Number : CA 77/2008

Decision Date : 23 October 2008

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : David Chong, Francis Ng and Janice Wong (Attorney-General's Chambers) for the appellant

Parties : —

Criminal Procedure and Sentencing – Mutual legal assistance – Whether application for bank to produce material relating to account of client should be granted – Whether request had to be exhibited with application – Whether proper request by prescribed foreign country essential part of application – Section 22 Mutual Assistance in Criminal Matters Act (Cap 190A, 2001 Rev Ed)

23 October 2008

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This is an appeal by the Attorney-General against the decision of the High Court judge ("the Judge") dismissing his *ex parte* application ("the AG's application") under s 22 of the Mutual Assistance in Criminal Matters Act (Cap 190A, 2001 Rev Ed) ("MACMA"). The AG's application, made pursuant to s 22 of MACMA, was for an order that the bank named in the application ("the Bank") produce to an authorised officer the complete bank records of the account of one of the Bank's customers, including but not limited to the items specified in the application, and for the authorised officer to take them away for a specified period.

MACMA and production orders for criminal matters

2 The preamble to MACMA states that it is an Act "to facilitate the provision and obtaining of international assistance in criminal matters". It applies to both requests by Singapore to foreign countries for assistance and by foreign countries to Singapore for assistance. The types of assistance which may be given under MACMA are set out in s 3 and include:

(*a*) the provision and obtaining of evidence and things;

(*b*) the making of arrangements for persons to give evidence or assist in criminal investigations;

(*c*) the recovery, forfeiture or confiscation of property in respect of offences;

(*d*) the restraining of dealings in property, or the freezing of assets, that may be recovered, forfeited or confiscated in respect of offences;

(*e*) the execution of requests for search and seizure;

(*f*) the location and identification of witnesses and suspects; and

(*g*) the service of documents.

The AG's application concerned a request by a foreign state ("the Requesting State") to Singapore for assistance with respect to the provision and obtaining of material relating to a bank account.

3 After hearing the Senior State Counsel, we allowed the appeal and now give our reasons.

4 The relevant provisions of MACMA relating to production orders in criminal matters are set out in ss 22 to 27 as follows:

> **22.**—(1) Where a request is made by the appropriate authority of a prescribed foreign country that any particular thing or description of thing in Singapore be produced for the purposes of any criminal matter in that country, the Attorney-General or a person duly appointed by him may apply to the court for an order under subsection (3).
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> (2) An application for an order under subsection (3) in relation to any thing in the possession of a financial institution shall be made only to the High Court.
>
> (3) If, on such an application, the court is satisfied that the conditions referred to in subsection (4) are fulfilled, it may make an order that the person who appears to the court to be in possession of the thing to which the application relates shall —
>
> (*a*) produce the thing to an authorised officer for him to take away; or
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> (*b*) give an authorised officer access to the thing,
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> within 7 days of the date of the order or such other period as the court considers appropriate.
>
> (4) The conditions referred to in subsection (3) are —
>
> (*a*) that there are reasonable grounds for suspecting that a specified person has carried on or benefited from a foreign offence;
>
> (*b*) that there are reasonable grounds for believing that the thing to which the application relates —
>
> (i) is likely to be of substantial value (whether by itself or together with another thing) to the criminal matter in respect of which the application was made; and
>
> (ii) does not consist of or include items subject to legal privilege; and
>
> (*c*) that the court is satisfied that it is not contrary to the public interest for the thing to be produced or that access to it be given.
>
> (5) The proceedings referred to in subsection (3) may be conducted in the presence or absence of the person to whom the criminal proceedings in the foreign country relates or of his legal representative (if any).
>
> (6) No person who is required by an order under this section to produce or make available any thing for the purposes of any criminal proceedings in a foreign country shall be required to produce any thing that the person could not be compelled to produce in the proceedings in that

country.

(7) A duly certified foreign law immunity certificate is admissible in proceedings under this section as prima facie evidence of the matters stated in the certificate.

(8) Proceedings under subsection (3) shall be heard in camera.

Supplementary provisions regarding production orders

23.—(1) Where a court orders a person under section 22 to give an authorised officer access to any thing on any premises, it may, on the same or a subsequent application of an authorised officer, order any person who appears to him to be entitled to grant entry to the premises to allow an authorised officer to enter the premises to obtain access to the thing.

(2) Where any material to which an order under section 22 relates consists of information contained in or accessible by means of any data equipment —

(*a*) an order under section 22(3)(*a*) shall have effect as an order to produce the material in a form which can be taken away and which is visible and legible; and

(*b*) an order under section 22(3)(*b*) shall have effect as an order to give access to the material in a form which is visible and legible.

(3) A person is not excused from producing or making available any thing by an order under section 22 on the ground that —

(*a*) the production or making available of the thing might tend to incriminate the person or make the person liable to a penalty; or

(*b*) the production or making available of the thing would be in breach of an obligation (whether imposed by law or otherwise) of the person not to disclose the existence of the contents of the thing.

(4) An order under section 22 —

(*a*) shall not confer any right to the production of, or of access to, items subject to legal privilege; and

(*b*) shall have effect notwithstanding any obligations as to secrecy or other restrictions upon the disclosure of information imposed by statute or otherwise.

(5) An authorised officer may photograph or make copies of any thing produced or to which access is granted pursuant to an order made under section 22.

(6) Where an authorised officer takes possession of any thing under an order made under section 22 or takes any photograph or makes any copy of the thing under subsection (5), he may retain the thing, photograph or copy for a period of up to one month pending a written direction from the Attorney-General as to the manner in which the thing, photograph or copy is to be dealt with (which may include a direction that the thing, photograph or copy be sent to the appropriate authority of the foreign country concerned).

(7) Rules of Court may provide for —

(*a*) the discharge and variation of orders under section 22; and

(*b*) proceedings relating to such orders.

(8) In this section, "data equipment" means any equipment which —

(*a*) automatically processes information;

(*b*) automatically records or stores information;

(*c*) can be used to cause information to be automatically recorded, stored or otherwise processed on other equipment (wherever situated);

(*d*) can be used to retrieve information whether the information is recorded or stored in the equipment itself or in other equipment (wherever situated).

Immunities

24.—(1) No civil or criminal action, other than a criminal action for an offence under section 25, shall lie against any person for —

(*a*) producing or giving access to any thing if he had produced or given access to the thing in good faith in compliance with an order made against him under section 22; or

(*b*) doing or omitting to do any act if he had done or omitted to do the act in good faith and as a result of complying with such an order.

(2) Any person who complies with an order made under section 22 shall not be treated as being in breach of any restriction upon the disclosure of information or thing imposed by law, contract or rules of professional conduct.

Failure to comply with production order

25. Any person who —

(*a*) without reasonable excuse contravenes or fails to comply with an order under section 22; or

(*b*) in purported compliance with such an order, produces or makes available to an authorised officer any material known to the person to be false or misleading in a material particular without —

(i) indicating to the authorised officer that the material is false or misleading and the part that is false or misleading; or

(ii) providing correct information to the authorised officer if the person is in possession of, or can reasonably acquire, the correct information,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both.

5 The relevant provisions from the Rules of Court (Cap 322, R 5, 2006 Rev Ed) are set out in O 89B rr 2 and 3 as follows:

Production orders (O. 89B, r. 2)

2.—(1) An application for an order under section 22 [of MACMA] must be supported by affidavit and may be made ex parte.

(2) Where an order under section 22 has been made, the person required to comply with the order may apply to the Court for the order to be discharged or varied, and on hearing such an application, the Court may discharge the order or make such variations to it as the Court thinks fit.

(3) Subject to paragraph (4), where a person proposes to file an application under paragraph (2) for the discharge or variation of an order, he shall serve a copy of the application, not later than 2 clear days before the filing of the application, on the Attorney-General or the person who made the application for the order.

(4) The Court may direct that paragraph (3) need not be complied with if the Court is satisfied that the person making the application has good reason to seek a discharge or variation of the order as soon as possible and it is not practicable to comply with that paragraph.

Confidentiality of documents relating to production orders(O. 89B, r. 3)

3. Notwithstanding Order 60, Rule 4, no person may inspect or take a copy of any document relating to —

(*a*) an application for an order under section 22; or

(*b*) an application to discharge or vary such an order,

without the leave of Court.

6 The following points should be noted concerning the scope of s 22 of MACMA, read with the Rules of Court:

(a) *Firstly,* the application for a production order may be made by the Attorney-General after receiving a request from the requesting country. As a matter of state policy pursuant to Singapore's treaty with the requesting country, he is under a duty to make the application if the request satisfies all the requirements of MACMA, as otherwise he would cause Singapore to be in breach of its international obligations to the requesting country. It should be noted that assistance under MACMA is provided only to a country that has given an undertaking to provide similar assistance to Singapore (see s 16(2)) or to a prescribed country that has entered into an agreement or a treaty with Singapore (see s 17(1)).

(b) *Secondly*, the application is supported by affidavit but O 89B r 2 of the Rules of Court does not require that the request of the requesting country be disclosed as an exhibit.

(c) *Thirdly*, the application may be (and is invariably) made *ex parte* and the proceedings are heard *in camera*.

(d) *Fourthly*, the financial institution served with a production order has seven days to comply with the order and it may apply to vary or set aside the order.

(e) *Fifthly*, s 22(3) provides that the court may make a production order in terms of the application if it is satisfied that the conditions referred to in s 22(4) are fulfilled. However, neither s 22(3) nor s 22(4) makes it a requirement that the request must be disclosed to the court as a condition to the exercise of its power to grant the production order.

(f) *Sixthly*, if the s 22(4) conditions are satisfied, the court *may* make a production order. The word "may" in s 22(3) is an enabling word that confers power on the court to make the production order if it is satisfied that the s 22(4) conditions have been fulfilled. However, if the court is so satisfied, then it *must* make the order; otherwise it would cause Singapore to be in breach of its obligations to the requesting country.

7 The AG's application was supported by the affidavit of Station Inspector Lim Keng Poh Alan ("SI Lim") of the Commercial Affairs Department ("CAD") of the Singapore Police Force dated 9 April 2008 ("SI Lim's Affidavit"). SI Lim's Affidavit read:

1. I am an authorised officer within the meaning of section 2(1) of [MACMA].

2. It has been brought to my attention that the Ministry of Home Affairs of the Government of [the Requesting State] has, on [date], submitted a request for mutual legal assistance to the Attorney-General of the Republic of Singapore …

3. I hereby make this Affidavit in support of the application by the Attorney-General for a production order against [the Bank] …

4. Insofar as the matters deposed to herein are within my personal knowledge they are true. Insofar as they are based on documents or information received by or in the possession of the CAD, including information provided by the [magistrate of the Requesting State], pertaining to a criminal investigation against [the parties under investigation] for criminal conspiracy to commit offences of cheating, forgery of a valuable security, forgery for the purpose of cheating and using forged documents as genuine, under [law of the Requesting State], they are true to the best of my knowledge, information and belief.

5. According to information provided by the [magistrate of the Requesting State], investigations conducted by the [investigating authority of the Requesting State] have revealed the following:

[particulars of transactions relating to the fraud alleged to have been committed by the parties under investigation]

6. The production order sought in the present application is for the production by [the Bank] of the complete bank records for account number xxx ("the account") for the period of 1 January 2000 to the present, including, but not limited to the following:

a. original signature cards for the account;

b. application forms and any other documentation pertaining to the opening of the account;

c. account ledger cards;

d. periodic account statements;

e. records of all items deposited into, withdrawn from, or transferred out of the account;

f. records of wire transfers to and from the account;

g. correspondence to, from, or on behalf of the account holder; and

h. memoranda related to the account.

7. Based on information received by me from [Head of Operational Risk and Compliance, the Bank], I believe that [the Bank] is in possession of the material described in paragraph 6 above.

8. I have reasonable grounds for believing that the material to which the application relates is likely to be of substantial value to the criminal matter in respect of which this application is made and does not consist of or include material subject to legal privilege.

8 In his grounds of decision ([2008] SGHC 96) ("the GD") at [8], the Judge expressed the view that para 6 of SI Lim's Affidavit was unclear as to whether the items stated therein were specifically sought in the request since the request had not been exhibited in the affidavit. The Judge stated (at [11]) that on the material before him, he was "left in doubt [as to] whether the items in the [AG's] application were spelt out in the request". The Judge did not doubt the existence of the request: what he doubted was whether the items sought in the AG's application were the same as the items sought in the request. However, as will be seen later, nowhere in the GD has the Judge given any reason or explained the basis of his doubts other than the fact that the request of the Requesting State had not been produced to the court. The notes of evidence recorded the following exchange between the Judge and the state counsel:

Court: There should be disclosure of the request and the "thing" that is requested for so that the Court and the bank can be satisfied that there is a proper basis for the application.

[State counsel]: We are not producing that.

Court: Application dismissed.

The exchange as recorded above has been elaborated upon at [10] of the GD where the Judge explained:

When the application came on for hearing before me, I informed counsel that the request from the foreign country should be exhibited in [SI Lim's] [A]ffidavit. I told him that if there was any apprehension that any part of the request may contain confidential information which should not be disclosed, that can be redacted so long [as] it can be ascertained that there is a request coming within s 22(1) [of MACMA] from a prescribed foreign country for the production of the particular material specified in the application.

9 The Judge observed (at [9]) that it was unclear if para 2 of the AG's application (which sought an order that, where the material listed in para 6 of SI Lim's Affidavit consisted of information contained in data equipment, the said material "shall be produced in a form in which it can be taken away and in which it is visible and legible") formed part of the actual request from the Requesting State. It is not clear whether this observation was meant as a criticism of the form of the application or a reinforcement of the Judge's doubt as to whether the application was seeking more material than was requested by the Requesting State. In any event, we can say immediately that this observation was misplaced because para 2 of the AG's application merely restated the requirements of s 23(2) of MACMA (see [4] above).

10 At the hearing, the Judge informed the state counsel that in another application before the court, the hearing was adjourned for the request to be produced, and that when the request was produced, a production order was made. However, as the state counsel was not receptive to the suggestion, the Judge dismissed the AG's application. The Judge elaborated on his reasons for dismissing the AG's application at [13]–[17] and [21]–[22] of the GD. They are reproduced below:

> 13 I have noted earlier that a request for assistance from a foreign country is dealt with in two stages. First, the Attorney-General has to decide whether to accede to or to refuse the request. If the Attorney-General accedes to the request, an application is made in court, and the court must be satisfied with the application before an order for production is made. It is clear that the starting point to an application to the court is a request from a foreign country which identifies the material for which an order for production is sought.
>
> 14 It may be argued that the Court's role in deciding whether to grant an application for production is governed by s 22(3) and (4) of [MACMA]:
>
> [sub-ss(3) and (4) of s 22 set out (see [4] above)]
>
> and if the conditions in sub-s (4) are satisfied, the Court should not concern itself with other matters falling outside sub-ss (3) and (4).
>
> 15 Such an argument does not withstand examination. In the scheme of s 22, an application is made only when a request is received. If there is no proper request, the matter should not progress to the s 22(3) stage. The existence of a proper request is at all times an essential part of an application.
>
> 16 How does a court satisfy itself that there is a proper request? Under the best evidence rule, the actual request should be produced in evidence. For the present application, the strictness of this rule is ameliorated by the combined effect of s 67(1)(e), s 76(a)(iii) and s 65(b) of the Evidence Act (Cap 97), and a certified copy or a photocopy of the request may be produced in lieu of the actual request.
>
> 17 Without sight of the request, I am not able to verify that there is a proper request received from a prescribed foreign country, and that the request is for the production of the "things" set out in the application.
>
> …
>
> 21 When the rights and interests of these parties are considered, the request for assistance from a foreign government and the "things" for which production is sought by the foreign government cannot be withheld from them. A prudent bank mindful of its dual duties to

maintain banking secrecy and to comply with court orders would want to study the request before it produces any material in good faith.

22 For the foregoing reasons, I found that the present application made without exhibiting the request does not conform with the letter and spirit of the Act as it did not enable the court to be satisfied that the conditions for an order for production have been satisfied, and it did not allow the parties under investigation or the bank involved a proper opportunity to oppose the making of an order for production, or the discharge or variation of any order made.

11 We are unable to agree with the Judge's approach as set out in the above paragraphs. With respect to [17] of the GD, that there should be a *proper* request from the Requesting State may be said to be obvious, but nowhere in the GD has the Judge explained what he meant by a *proper* request. In our view, a proper request is a request that conforms to the requirements of MACMA as set out in s 22 (see discussion at [20] below). If the request seeks the production of five items of information from a bank, and the AG's application seeks the production of eight items of information, there is nothing wrong with the request, but there is something wrong with the application. The Judge has confused the scope of the request with the scope of the application. As the Judge did not doubt the existence of the request (and rightly so, since para 2 of SI Lim's Affidavit stated that such a request had been submitted by the Requesting State under MACMA, and also in view of the screening role of the Attorney-General and the supervisory role of the Minister for Law under MACMA), the only conceivable reason why the Judge did not consider the request in the AG's application to be a proper request was because it was not disclosed to him. This conclusion is confirmed by [17] of the GD where the Judge stated that, without sight of the request, he was not able to say that there was a proper request for the production of the "things" set out in the application.

12 With respect to [21] of the GD, the Judge appeared to have suggested that, not only should the request be disclosed to the court, it should also be disclosed to the Bank and the account holder as their interests would be affected, and that the Bank would want time to study the request before it produced any material. In our view, the Judge has failed to appreciate the statutory scheme of MACMA. Leaving aside the issue of disclosure (which is addressed at [21] below), the substantive provisions and the Rules of Court provide that an application for a production order may be made *ex parte*, and any bank served with an order has seven days to comply with it (which would give it sufficient time to study its propriety or validity) and to apply to vary or discharge it. Similarly, the Judge's statement at [22] of the GD – that, as a result of the non-disclosure of the request, the AG's application did not allow parties under investigation nor the Bank a proper opportunity to oppose the making of the production order or the discharge or variation of any order made – was also wrong for the reasons we have given with respect to his observations at [21] of the GD.

13 We should emphasise that the propriety of the request for a production order by a foreign country and its conformity with the requirements of MACMA are determined initially by the Attorney-General and his determination is subject to confirmation by the competent Minister. This screening process is a useful means to balance the competing public interests of financial confidentiality and privacy, on the one hand, and on the other hand of ensuring that Singapore is not a haven for money laundering and a heaven for those wishing to enjoy or protect ill-gotten gains by parking them here. Sections 19 and 20 of MACMA provide as follows:

19.—(1) Every request by a foreign country to Singapore for assistance under this Part shall be made to the Attorney-General.

(2) Every request shall —

(*a*) specify the purpose of the request and the nature of the assistance being sought;

(*b*) identify the person or authority that initiated the request; and

(*c*) be accompanied by —

(i) a certificate from the appropriate authority of that country that the request is made in respect of a criminal matter within the meaning of this Act;

(ii) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;

(iii) where the request relates to —

(A) the location of a person who is suspected to be involved in or to have benefited from the commission of an offence; or

(B) the tracing of property that is suspected to be connected with an offence,

the name, identity, nationality, location or description of that person, or the location and description of the property, if known, and a statement setting forth the basis for suspecting the matter referred to in sub-paragraph (A) or (B);

(iv) a description of the offence to which the criminal matter relates, including its maximum penalty;

(v) details of the procedure that that country wishes to be followed by Singapore in giving effect to the request, including details of the manner and form in which any information or thing is to be supplied to that country pursuant to the request;

(vi) where the request is for assistance relating to an ancillary criminal matter and judicial proceedings to obtain a foreign confiscation order have not been instituted in that country, a statement indicating when they are likely to be instituted;

(vii) a statement setting out the wishes of that country concerning the confidentiality of the request and the reason for those wishes;

(viii) details of the period within which that country wishes the request to be met;

(ix) if the request involves a person travelling from Singapore to that country, details of allowances to which the person will be entitled, and of the arrangements for accommodation for the person while he is in that country pursuant to the request;

(x) any other information required to be included with the request under any treaty, memorandum of understanding or other agreement between Singapore and that country; and

(xi) any other information that may assist in giving effect to the request or which is required under the provisions of this Act.

Refusal of assistance

20.—(1) A request by a foreign country for assistance under this Part shall be refused if, in the opinion of the Attorney-General —

(*a*) the appropriate authority of that country has, in respect of that request, failed to comply with the terms of any treaty, memorandum of understanding or other agreement between Singapore and that country;

(*b*) the request relates to the investigation, prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character;

(*c*) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Singapore, would have constituted an offence under the military law applicable in Singapore but not also under the ordinary criminal law of Singapore;

(*d*) there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, religion, sex, ethnic origin, nationality or political opinions;

(*e*) the request relates to the investigation, prosecution or punishment of a person for an offence in a case where the person —

(i) has been convicted, acquitted or pardoned by a competent court or other authority in that country; or

(ii) has undergone the punishment provided by the law of that country,

in respect of that offence or of another offence constituted by the same act or omission as the first-mentioned offence;

(*f*) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Singapore, would not have constituted a Singapore offence;

(*g*) the offence to which the request relates is not an offence of sufficient gravity;

(*h*) the thing requested for is of insufficient importance to the investigation or could reasonably be obtained by other means;

(*i*) it is contrary to public interest to provide the assistance;

(*j*) the appropriate authority fails to undertake that the thing requested for will not be used for a matter other than the criminal matter in respect of which the request was made, except with the consent of the Attorney-General;

(*k*) in the case of a request for assistance under Division 2 or 6, the appropriate authority fails to undertake to return to the Attorney-General, upon his request, any thing obtained pursuant to the request upon completion of the criminal matter in respect of which

the request was made; or

(*l*) the provision of the assistance could prejudice a criminal matter in Singapore.

(2) A request by a foreign country for assistance under this Part may be refused by the Attorney-General —

(*a*) pursuant to the terms of any treaty, memorandum of understanding or other agreement between Singapore and that country;

(*b*) if, in the opinion of the Attorney-General, the provision of the assistance would, or would be likely to, prejudice the safety of any person (whether in Singapore or elsewhere);

(*c*) if, in the opinion of the Attorney-General, the provision of the assistance would impose an excessive burden on the resources of Singapore; or

(*d*) if, in the case of any assistance under sections 21 and 27(1) and Divisions 7 and 8, that country is not declared as a prescribed foreign country under section 17 and the appropriate authority of that country fails to give an undertaking to the Attorney-General that that country will comply with a future request by Singapore to that country for similar assistance in a criminal matter involving an offence that corresponds to the foreign offence for which assistance is sought.

14 Further, s 41 of MACMA provides as follows:

Attorney-General to give notice to Minister

41.—(1) Unless the Minister otherwise directs, the Attorney-General shall cause a notice to be given to the Minister of every Singapore request and foreign request.

(2) A notice under subsection (1) shall —

(*a*) in the case of a Singapore request, be given before the request is made;

(*b*) in the case of a foreign request, be given as soon as reasonably practicable after receipt of the request and before the request is processed; and

(*c*) be accompanied by —

(i) a copy of the request;

(ii) copies of all relevant documents;

(iii) a summary of the material facts supporting the request; and

(iv) such other matters and information as may be required by the Minister.

(3) Upon receipt of a notice under subsection (1), the Minister may, if he thinks that —

(*a*) the taking of any action in relation to a Singapore request or foreign request is in the interests of the sovereignty, security or public order of Singapore, instruct the Attorney-General to take such action, and the Attorney-General shall comply with such instruction;

(*b*) the taking of any action in relation to a Singapore request or foreign request is against the interests of the sovereignty, security or public order of Singapore, instruct the Attorney-General not to take such action, and the Attorney-General shall, notwithstanding the provisions of this Act, comply with such instruction.

(4) Where a foreign request has been complied with, the Attorney-General shall, if the Minister so requires, provide the Minister with particulars of any evidence, documents or other assistance provided pursuant to the request.

(5) In this section —

"foreign request" means a request from a foreign country to Singapore under Part III for assistance in a criminal matter;

"Singapore request" means a request by Singapore to a foreign country under Part II for assistance in a criminal matter.

15 As can be seen, MACMA has provided a very elaborate structure for the provision of assistance to foreign countries. It also sets out in detail the conditions which the foreign country must satisfy before such assistance can be given. Under MACMA, there are two levels of checks by the Executive on any request by a foreign country, first by the Attorney-General and second by the competent Minister, as both are also charged with statutory duties to ensure that any such request must satisfy the statutory requirements before assistance can be given. Given this statutory framework, when the Attorney-General makes an application under MACMA for a production order, or, for that matter, any other order under MACMA, there should be no reason for the court to ask for disclosure of the request in the absence of *prima facie* evidence that both the Attorney-General and the competent Minister have not discharged their statutory duties in determining whether the request is a proper request. Acceding to such a request by a foreign country is a serious decision for the Executive as it involves agreeing to disclose what would otherwise be non-disclosable material under the law. There should be no reason to believe (again in the absence of *prima facie* evidence to the contrary) that the Attorney-General would seek to disclose more information than that requested by the foreign country. The fact that a request is not produced to the court is not a red flag that something might have gone wrong with the screening process.

16 At [11] of the GD, the Judge, in support of his reasoning that the request of the Requesting State must be disclosed in the AG's application, quoted the following statement by the Minister for Law during the debate in Parliament on the Mutual Assistance in Criminal Matters (Amendment) Bill (Bill 2 of 2006) (see *Singapore Parliamentary Debates, Official Report* (13 February 2006) vol 80 at cols 2312–2313 (Prof S Jayakumar, Minister for Law):

> Assistance will also be declined if a foreign authority is merely "fishing" for information that might be of use against a person or a corporation. The Act has many safeguards against such "fishing expeditions". For example, section 22 of the Act, on production orders, requires that a foreign request must be made for a particular item or document.

In our view, having regard to the legal framework in MACMA, the Minister's statement was directed primarily to the Attorney-General, as the central authority to receive foreign requests, and also the competent Minister. It was not directed to the court.

17 The Judge referred to and rejected (at [15] and [16] of the GD) (see [10] above) the argument (which was made by the state counsel) that it was not necessary for the Attorney-General

to produce the request so long as the application satisfied the conditions set out in s 22(4) of MACMA (see [4] above).

18 The state counsel's argument was that the AG's application, as supported bySI Lim's Affidavit, met all the conditions in sub-s (4) and that the court should not have to concern itself with other matters falling outside ss 22(3) and 22(4), such as the disclosure of the request to the court. The Judge held that the argument did not withstand examination on the ground that, in the scheme of s 22, an application was to be made only when a request was received and, if there was no proper request, the matter should not progress to the s 22(3) stage. According to the Judge, the existence of a proper request was at all times an essential part of a MACMA application.

19 As we have earlier stated (at [11]–[12] above), the Judge's reasoning is flawed because the disclosure of the request to the court is not relevant to the issue of whether the Attorney-General has received any request from the foreign country. Nor is it relevant to the issue of whether the request is a proper request in the context of satisfying the requirements of MACMA or the terms of the treaty between Singapore and that country. So long as there is placed before the court an application by the Attorney-General for a production order, which satisfies the requirements of s 22 of MACMA and O 89B of the Rules of Court, the court should proceed on the basis (unless there is *prima facie* evidence to the contrary) that there exists a request from the foreign country that complies with MACMA and the relevant treaty. The court should accord due deference to the decision of the Attorney-General, a decision he would not have lightly made. There is no reason for the court not to proceed on the basis that the Attorney-General and the competent Minister would have applied their minds to the propriety of every foreign request for disclosure of financial information under MACMA. In our view, the maxim, *omnia praesumuntur rite esse acta*, applies to an executive decision made by the Attorney-General in the discharge of his statutory duties in order to carry out Singapore's obligations to the requesting country under the relevant treaty.

20 The question that the court has to ask itself is whether, on the materials placed before it, the court is satisfied that the conditions referred to in s 22(4) of MACMA have been met. In the present case, it was our view that, having regard to the contents of SI Lim's Affidavit, there was no reason to doubt that the AG's application had met all the conditions set out in s 22(4). The affidavit set out sufficient particulars to show that there were reasonable grounds for suspecting that the specified person had carried out or benefited from a foreign offence and that there were reasonable grounds for believing that the things to which the AG's application related were of substantial value to the criminal matter in respect of which the application was made. In our view, the Judge erred in rejecting the state counsel's arguments on this point. The Judge did not decide that the s 22(4) conditions had not been met, but only that, unless the request was disclosed, he could not be sure that it was a proper request. Since the Judge did not say that he doubted the sworn statements of SI Lim, there was no basis on which he could have doubted that the request was a proper request or that the items sought for production in the AG's application were not those sought in the request.

21 We should like to emphasise that it is not our view that, in any application for assistance under MACMA, the court would never be justified in requesting the Attorney-General to disclose the request of the requesting country, in order to decide whether to grant or refuse to grant the production order, if disclosure is essential for that purpose. What the court cannot do is to compel disclosure if it is protected by public interest immunity under s 125 of the Evidence Act (Cap 97, 1997 Rev Ed). Indeed, the Attorney-General has made a claim to such immunity in his written case, but, in our view, the claim was not relevant to the disposition of this appeal as the Judge did not order the disclosure of the request. However, a successful claim for immunity only means that the court may not be able to look at the request, but it would still be entitled to dismiss a s 22(3) application in a case where the conditions under s 22(4) would not be met unless the request is

disclosed. The present case is not such a case. When a court is asked to approve an application that meets all statutory requirements, it is not asked to rubber stamp it. It is asked to determine whether there is due compliance with the law by the applicant.

22 The question here is whether it is necessary for the Judge to have sight of the request in order to determine whether the requirements of MACMA, *viz*, the s 22(4) conditions, have been met. In the present case, the Judge dismissed the AG's application, not because he was of the view that these conditions had not been met, but because he held that without sight of the request he was not able to verify that the request was for the production of the things set out in the application. In our view, having regard to SI Lim's Affidavit, there was no reason for the Judge to take upon himself the duty or task of having to verify whether the Attorney-General had sought more or less information than that requested by the Requesting State. He did not have any grounds at all to believe that the AG's application did not conform to the request.

International practice

23 As a result of an increasingly globalised world, legislation relating to mutual assistance in criminal matters is nowadays a common feature in many countries. Countries with strong trade and financial ties are anxious to combat transnational crimes by co-operating with one another to uncover the proceeds of such crimes, in order to recover the proceeds or to prevent them from being laundered as legitimate funds. As such, it may be useful to refer to the practice in some common law jurisdictions.

24 In Hong Kong, the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) (HKSAR) ("the Hong Kong Ordinance") is similar to our MACMA. Section 15(5) of the Hong Kong Ordinance lists the conditions that the court must be satisfied as having been fulfilled before it can make an order for assistance. Order 115A r 12(1) of the Rules of the High Court (Cap 4 sub leg A) (HKSAR) ("the Hong Kong Rules") simply provides that "[a]n authorized officer shall make an application for an order under section 15 [of the Hong Kong Ordinance] ex parte to a judge by laying an information on oath". The Hong Kong Rules do not provide for the disclosure of the foreign request.

25 In Canada, the Mutual Legal Assistance in Criminal Matters Act, RSC 1985 (4th Supp), c 30 (Can) ("the Canadian Act"), is similar in structure. Section 18(1) states the conditions, which a judge must have reasonable grounds to believe exist, before an order for the gathering of evidence can be made. The statute does not contain any requirement that the foreign request must be produced to the court. In *In the Matter of an Application Pursuant to s 17(2) of the Mutual Legal Assistance in Criminal Matters Act and Rafal Kurek* 2005 BCSC 516, the issue of the disclosure of the foreign country's request ("the Request") came before the court. Holmes J made the following rulings:

> **DISCLOSURE**
>
> [21] The applicants seek disclosure of the Request as necessary to permit proper adjudication of the issues. It was Corporal Stein's reading of the Request which provided the information he then deposed to in his affidavit to ground the *ex parte* application for an Examination Order.
>
> [22] The applicants also seek disclosure of the Request on the basis that the Minister's authorization approving the Request which is an Exhibit to Corporal Stein's affidavit notes the Request as being attached. It was not.
>
> [23] The applicants seek disclosure to permit general inquiry into allegations of material non-disclosure by Poland regarding the civil actions in the *ex parte* application for the Examination

Order and in respect of their allegation of an ulterior motive by Poland for seeking the Examination Order of the applicants.

[24] The [Canadian] Act does not provide a right of statutory disclosure. ... Disclosure requirements applicable to domestic criminal proceedings are not necessarily applicable to proceedings under the [Canadian] Act. …

[25] The information the court requires for issuance of an evidence gathering order will likely be less than that contained in the Request and there is no requirement for the Request itself to be placed before the court. [*U.S.A. v. Beach* (1999), 132 C.C.C. (3d) 156 (Man. C.A.) at ¶18-19 …]

[26] The Stein affidavit was the only evidence before the Associate Chief Justice on the *ex parte* application. The Request was not before the court and hence the applicants are not entitled to its disclosure on that basis.

[27] The Request, consideration leading to the grant of the Request, and Approval of the Request by the Minister are diplomatic matters between states pursuant to treaty and do not engage the Court's jurisdiction. [*U.S.A. v. Ding*, [1996] B.C.J. No. 1412 (C.A.) at ¶7]

[28] The Request for Assistance is similar to a request for extradition and for analogous reason not subject to disclosure. …

[29] The Request for Assistance is made pursuant to Article 14 of the Treaty between states. The Minister is charged with the review of the Request to ensure compliance with the Treaty pursuant to s. 8 of the [Canadian] Act and if approval is granted to provide the Attorney General of Canada ("a competent authority") with any documents or information necessary to permit an application to the Court pursuant to s. 17(2) for an information gathering order.

[30] The court is not concerned with the Request itself but only that Approval has been granted and the necessary pre-conditions in section 18(1) of the [Canadian] Act for issuance of an order are shown.

[31] Section 15(2) of the [Canadian] Act permits the content of a Request being kept confidential "... to the extent requested ..." by the requesting Party.

[32] As noted by Twaddle J.A. in *Beach*, *supra* ¶18-20:

> The Treaty certainly requires the requested State to use its best endeavours to keep the contents of the Request for Assistance confidential, but also recognizes that the Request will be executed in accordance with the law of the requested State. As the information which the court requires to make an order under s. 18 will ordinarily be much less than that contained in the Request, the rule of law requiring disclosure of the information filed in court to an interested person does not seriously compromise respect for the confidentiality of most of the contents of the Request.
>
> Whatever information may be passed between the States pursuant to the Treaty's protocol, s. 18 of the [Canadian] Act does not require disclosure of all of it to the court. All that need be disclosed to the court is sufficient information to show that there are reasonable grounds to believe that

(a) a serious crime over which the requesting State has jurisdiction has been committed; and

(b) evidence of its commission will be found in Canada.

The standard of "reasonable grounds" does not require disclosure of the requesting State's entire case. For the purpose of this proceeding, it would have been sufficient to prove that there was a death in circumstances which make foul play reasonably probable and that the respondents have a connection to the crime or the suspect which makes it reasonably probable that they have knowledge of facts which, if the subject of testimony, could aid the investigation or prosecution of the crime.

The decision of Holmes J and the reasons he gave were directly on point with respect to the AG's application in this case.

26 The Senior State Counsel has also drawn our attention to Art 16(1) of the applicable treaty between Singapore and the Requesting State which provides for the confidentiality of the request, *viz*:

The Requested State shall keep a request for assistance, the contents of the request and its supporting documentation, and the fact of the granting of such assistance, confidential. If the request cannot be executed without breaching confidentiality, the Requested State shall, before executing the request, so inform the Requesting State which shall then determine the extent to which it wishes the request to be executed.

Article 16(1) requires the Attorney-General, when applying for a production order pursuant to s 22(3), not to disclose the request of the requesting country. It also requires him not to do so, even if the court were to insist on disclosure, if he does not have the consent of the requesting country. This Article would explain why, in applications for various orders under MACMA, the request is not produced. Article 16(1) would provide the legal basis for the Attorney-General to plead public interest immunity under s 125 of the Evidence Act, but as we have stated earlier (at [21] above), it does not prevent the court from requesting the disclosure of the request if disclosure is a necessary condition under the law to grant the application. In such a situation, it is well within the powers of the court to refuse to grant the application if the request were not produced. That such a scenario could occur is implicit in the terms of Art 16(1). However, the present case is not such a situation.

27 For the above reasons, we allowed the appeal and granted the AG's application for the production order against the Bank.