

Re Section 22 of the Mutual Assistance in Criminal Matters Act
[2008] SGHC 96

Case Number : OS 490/2008
Decision Date : 24 June 2008
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Francis Ng (Attorney-General's Chambers) for the applicant
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 must be exhibited with application – Whether proper request by prescribed foreign country an essential part of application – Section 22 Mutual Assistance in Criminal Matters Act (Cap 190A, 2001 Rev Ed)

24 June 2008

Kan Ting Chiu J:

1 An application was made by the Attorney-General under s 22 of the Mutual Assistance in Criminal Matters Act (Cap 190A) ("the Act") for a bank to produce material relating to the account of one of the bank's clients.

2 The preamble of the Act states that it is "(a)n Act to facilitate the provision and obtaining of international assistance in criminal matters." The Act deals with requests by Singapore to foreign countries for assistance, as well as requests by foreign countries to Singapore for assistance. Part II of the Act relates to the former, and is not relevant to the application in this case. Part III deals with requests from foreign countries for the taking of evidence for criminal proceedings, (s 21), and for the production of material for the purposes of criminal matters, (s 22).

3 The Act lays down a two-stage process under Part III. The first stage is that a request is made by a foreign country to Singapore for assistance. Under s 19(1) of the Act all requests from foreign countries for assistance are to be made to the Attorney-General, and s 19(2) sets out in some detail the information that has to be disclosed in a request. The Attorney-General may refuse to give assistance to the request on the grounds specified in s 20(1) (a) to (l).

4 When the Attorney-General accedes to a request for the production of material (referred to as "thing" in s 22) for use in criminal matters, an application has to be made to court under s 22(1) by the Attorney-General or a person appointed by him to make the application for an order for the production of the material.

5 Specific rules apply to these applications. Section 22(2) provides that where an application involves material in the possession of a financial institution, the application is to be made to the High Court, and s 22(8) stipulates that the application shall be heard *in camera*. Order 89B r 3 of the Rules of Court provides that no person may inspect or take a copy of any document relating to the application for an order under s 22, or for the discharge or variation of such an order without the leave of Court. These provisions are put in place to maintain the confidentiality of such applications.

6 The Act recognises that compliance with a production order may expose a party to civil and criminal liabilities. For example, a bank may have to produce customer information material falling under which a bank is prohibited from disclosing by s 47 of the Banking Act (Cap 19 Rev Ed 2003). To

protect the complying party, s 24 provides that no civil or criminal action shall lie against any person for complying with an order in good faith.

This particular application

7 This application followed a request from a prescribed foreign country for the production of material in the possession of a bank. It is not necessary for me to identify the requesting country, the bank or the parties under investigation.

8 The application was made *ex parte*, as authorised by O 89B r 2(1), and was supported by an affidavit deposed by an officer of the Commercial Affairs Department of the Singapore Police Force. In his affidavit, the deponent stated:

1. I am an authorised officer within the meaning of section 2(1) of the Mutual Assistance in Criminal Matters Act (Cap 190A) ("MACMA").

2. It has been brought to my attention that the Ministry of Home Affairs of the government of [a prescribed foreign country] 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 in the foreign country], 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 [provision of criminal law], they are true to the best of my knowledge, information and belief.

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

[particulars of transactions]

6. The production order sought in the present application is for the production by the [bank] of the complete bank records for account number ... ("the account") for the period of [date] 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.

It is unclear whether these items were specifically sought in the request, as the request was not exhibited in the affidavit.

9 The application went on to specify that:

Where the material consists 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

without stating whether this formed part of the request.

10 When the application came on for hearing before me, I informed counsel that the request from the foreign country should be exhibited in the affidavit. 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 that it can be ascertained that there is a request coming within s 22(1) from a prescribed foreign country for the production of the particular material specified in the application.

11 The need for the request to particularise the material to be produced was highlighted by the Minister of Law during the debate in Parliament on the Mutual Assistance in Criminal Matters (Amendment) Bill on 13 February 2006, when he said:

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.

As matters stood, I was left in doubt whether the items in the application were spelt out in the request.

12 I also informed counsel that in another application, [\[note: 1\]](#) the hearing was adjourned for the request to be produced, and when a copy of the request was produced, a production order was made. However, counsel was unreceptive to my suggestion to review the matter or take further instructions.

Reasons for the dismissal of the application

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 the Act:

(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

(b) give an authorised officer access to the thing,

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.

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.

18 I should add that although the power to order production is vested in the court, the party under investigation has recognised interests and rights in such an application.

19 Section 22(5) provides that:

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),

indicating that the person under investigation has the right to be heard before an order of production is made, if the application is made *inter partes*.

20 In any event, the right to be heard on the production of any material extends beyond the hearing of the application for production. Section 23(7) of the Act states that the Rules of Court may provide for the discharge and variations of orders made under s 22. Order 89B r 2(2) of the Rules of Court provide that:

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.

and r 2(3) refers to applications to discharge or vary production orders by parties other than the Attorney-General or the person appointed by him to make the application for the original order, and that must be the other parties interested, i.e. the party under investigation and the party ordered to give production of the material.

21 When the rights and interests of these parties are considered, the request for assistance from the 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.

[\[note: 1\]](#) OS No 1676 of 2007

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