MUTUAL LEGAL ASSISTANCE AND RECOVERY OF PROCEEDS OF CORRUPTION

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I. MLA IN ACTION: PROSECUTION'S CHALLENGES—THE "PERWAJA CASE": THEN & NOW

Crimes today are transnational in nature. Criminals now are not limited by geographical or distance factors. Criminals also use time and space to cover their tracks, and to hide or move their ill-gotten gains to another jurisdiction. It is becoming more difficult for the authorities to find admissible evidence and witnesses obtained from foreign jurisdictions, or to trace the proceeds and the instruments used during the commission of those crimes. Thus, mutual legal assistance ("MLA") is an important tool or mechanism to obtain evidence from foreign jurisdictions. However, having a law in place to cater for MLA alone is not sufficient to ensure success in getting foreign evidence to be used in Malaysian courts, as will be demonstrated below in the case of *Public Prosecutor v. Tan Sri Eric Chia Eng Hock*, commonly known as the Perwaja case.

The Perwaja case bears a huge significance in the context of MLA in Malaysia as it is the best case to showcase the use of MACMA extensively and the challenges faced by the prosecution during the trial to admit the evidence obtained from the relevant countries.

A. Brief Facts of the Perwaja Case

On 4 November 1993, a Technical Assistance Agreement ("TAA") was entered into between NKK Corporation, Japan and Perwaja Rolling Mill and Development Sdn. Bhd., Malaysia ("Perwaja"). The assistance was to be provided free of charge. On 18 February 1994, Tan Sri Eric Chia Eng Hock ("Eric Chia"), the Managing Director of Perwaja authorized the payment of 2,891,580,000 Yen (approximately RM76,433,134.14) by Perwaja to NKK, purportedly for the assistance to be provided under the TAA. Payments were made as follows:

(i) Firstly, the above payment was made into the account of Frilsham Enterprise Incorporated ("Frilsham") with the American Express Bank Ltd. ("Amex") in Hong Kong;

(ii) On 25 February 1994, the money was transferred into the account of Waterfront International Ltd ("Waterfront") at the same bank;

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(iii) On 1 March 1994, a sum of 2,486,260,000 Yen (about RM65,700,000) was transferred into the account of Borneo Enterprises Inc. ("Borneo") at Banque Indosuez (now Calyon Corporate and Investment Bank) in Geneva, Switzerland;

(iv) Subsequently, a sum of 2,294,600,000 Yen (about RM60,650,000) was transferred to the account of Sitar Investment Ltd. with the Union Bank of Switzerland, Zurich;

(v) The said amount was then transferred to the account of Lotus Development Inc. at the same bank;

(vi) Both the accounts of Sitar Investment Ltd. and Lotus Development Inc. at the Union Bank of Switzerland, Zurich belonged to an immediate member of Eric Chia's family.

The Executive Director of NKK Japan denied receiving any payment for the technical assistance provided and stated that the technical assistance provided by NKK to Perwaja was free of charge. On 10 February 2004, about 10 years after the incident, Eric Chia was charged under section 409 of the Penal Code[1] for the offence of criminal breach of trust.[2]

B. The Perwaja Case at the Sessions Court

During the trial, the prosecution sought to adduce evidence recorded earlier by a Magistrate in Hong Kong between June and July 2005 pursuant to a request made by the Attorney-General of Malaysia under subsection 8(1) of the Mutual Assistance in Criminal Matters Act 2002 ("MACMA").[3] The evidence consisted essentially of the transcripts of the evidence of six witnesses and of documents produced by one of the witnesses. In the taking of the evidence, the Attorney-General himself conducted the examination-in-chief of the witnesses and the defence counsel from Malaysia was present to conduct cross-examination of the witnesses. At that point in time (2005), which was before the insertion of the new Chapter VA into the Evidence Act 1950 (via Act A1424 w.e.f. 1.6.2012), the admissibility of that evidence was governed solely by subsection 8(3) of MACMA,[4] which provided that the evidence may be

[1] Act 574.

[2] S.409: Criminal breach of trust by public servant or agent: "Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping, and shall also be liable to fine." Under s.402A Act 574, an "agent" includes a company director. A criminal breach of trust offence is also a "prescribed offence" under section 3 of the Malaysian Anti-Corruption Commission Act 2009 [*Act 694*], which means it is an offence that can be investigated by MACC and charged if necessary, despite it not being a corruption offence. Act 694 took effect on 1.1.2009. Previously, corruption matters were governed by the Anti-Corruption Act 1997 [Act 575]. Subsection 7(3) of Act 575 provided that an officer of the Anti-Corruption Agency may get an appropriate direction from the Public Prosecutor to investigate etc. if a non-corruption offence is disclosed while an investigation is made on a corruption case.

[3] Act 621.

[4] Subsections 8(1) and (2) of MACMA provide, *inter alia*, that the Attorney General may request for evidence or thing in a foreign State to be taken and sent to him if he is satisfied that there are reasonable grounds for believing such evidence or thing are relevant to a criminal proceedings or criminal matter in Malaysia. Subsection 8(3)

admitted subject to the provisions of the Evidence Act 1950 ("EA") and the Criminal Procedure Code ("CPC").[5] There was no specific reference to evidence by way of MLA in EA and CPC.

After a trial that took about three years, on 26 June 2007 the Sessions Court held that the prosecution had failed to prove a *prima facie* case and accordingly acquitted Eric Chia on the grounds that the transcripts of the evidence of witnesses obtained by way of MLA from Hong Kong (including Japan and Switzerland) were inadmissible due to authentication issues under MACMA, and because of non-compliance with section 33 of the EA.[6] The prosecution appealed against the acquittal to the High Court.

C. The Perwaja Case at the High Court

At the High Court, the defence counsel argued that the qualification "subject to the provisions of the Evidence Act 1950" as appears in subsection 8(3) of MACMA 2002 must mean that the admissibility of the Hong Kong evidence must be subject to the provisions of section 33 of the EA.[7] The defence counsel thus argued that the situation in this case was actually reversed in that in obtaining the Hong Kong evidence, much money and time was unnecessarily spent and that the prosecution had not even attempted to procure those witnesses in Hong Kong to testify in Malaysia, which the Attorney General could request under section 9 of MACMA.[8] Justice Abdull Hamid Embong, however, disagreed with this line of argument and ruled that the evidence obtained pursuant to a request made under subsection 8(1) of MACMA is not subject to section 33 of the EA and thus it is not required to pass the test and qualifications laid down in section 33 of the EA.

The Judge further stated that MACMA is a specific piece of legislation to facilitate mutual assistance in criminal matters and thus should not be hampered by the requirements of the EA, notwithstanding its mention in sub-section 8(3). He went further by adding that to subject its operation to the technical requirements as found under section 33 of the Evidence Act would render nugatory or redundant Parliament's intention of a speedy and convenient method of evidence taken overseas. Thus, the High Court found the Hong Kong evidence to be admissible. Further, the High Court said it is unfortunate that the Malaysian EA was not consequently amended to cater for evidence taken under MACMA as was done to section 77F of the Hong Kong Evidence Ordinance, which provides that evidence obtained pursuant to a similar request in respect of any criminal proceedings, shall on its production without further proof be admitted

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provides that any evidence or thing received by the Attorney General pursuant to an MLA request may be admitted in such proceedings subject to the provisions of EA and CPC.

[5] Act 56 & Act 593, respectively.

[6] S.33 EA provides, among others, that evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable.

[7] Subsection 8(3) MACMA: "Any evidence or thing, or photograph or copy of a thing, received by the Attorney General pursuant to a request under subsection (1) or (2) may, subject to the provisions of the Evidence Act 1950 [Act 56] and the Criminal Procedure Code [Act 593], be admitted as evidence at any criminal proceedings to which the request relates."

[8] Section 9 MACMA provides that the Attorney General may request a foreign country to assist in arranging a person in that foreign country to testify in Malaysia.

in those criminal proceedings as *prima facie* evidence of any fact stated in the evidence. The appeal by the prosecution was thus allowed. Eric Chia appealed to the Court of Appeal.

D. The Perwaja Case at the Court of Appeal

The Court of Appeal, in a 2 – 1 majority decision, agreed with the prosecution and dismissed Eric Chia's appeal, holding that section 8 of MACMA provides a scheme for the deliberate gathering of testimonies of witnesses in a foreign country to be used specifically in a particular criminal proceeding in Malaysia. Thus, section 8 is not within the contemplation of section 33 of the EA and the Hong Kong evidence was admissible. Dissatisfied, Eric Chia appealed further to the Federal Court, the highest court in Malaysia.[9]

E. The Perwaja Case at the Federal Court

The appeal initially began with a preliminary objection by the prosecution that the appeal was incompetent, as an appeal from a decision of a Sessions Court, the trial court in the Perwaja case could only go so far as the Court of Appeal. However, the Federal Court overruled this objection on the grounds that the inherent powers of the Federal Court under Rule 137 of the Federal Court Rules 1995[10] can be invoked to prevent an injustice or to prevent an abuse of the process of any court where there is no other available remedy.

Having dismissed this preliminary objection, on 31 January 2007, the Federal Court, by a unanimous decision, went on to affirm the decision of the trial court, i.e. the Sessions Court, and held that the evidence from Hong Kong was inadmissible.[11]

F. Amendment to the Evidence Act 1950

After the Perwaja case, the EA was amended to include a new Chapter VA (effective date 1.6.2012 via Act A1424), containing sections 90D, 90E and 90F. This amendment caters specifically for evidence obtained by way of MLA.

The provisions of sections 90D, 90E and 90F are reproduced below as follows:

> "CHAPTER VA
> ADMISSIBILITY OF EVIDENCE OBTAINED UNDER MUTUAL ASSISTANCE IN CRIMINAL MATTERS REQUESTS
> *Application of Chapter VA*
> 90D. Notwithstanding any other provision in this Act, this Chapter shall apply for the purpose of determining the admissibility of evidence obtained pursuant to a request made under the Mutual Assistance in Criminal Matters Act 2002 [*Act 621*].
> *Admissibility in criminal matter of evidence obtained pursuant to requests for mutual assistance in criminal matters*

[9] Reported in Malaysian Current Law Journal (2006) 2 CLJ 544.
[10] Rule 137: "For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court."
[11] Reported in Malaysian Current Law Journal (2007) 1 CLJ 565.

90E. (1) Subject to subsections (2) to (9), any testimony, statement or deposition, together with any document or thing exhibited or annexed to such statement or deposition, that is received by the Attorney General pursuant to a request made under the Mutual Assistance in Criminal Matters Act 2002 in respect of the criminal matter, shall on its production be admitted in those criminal proceedings as evidence without further proof of any fact stated in the testimony, statement or deposition and in the document, if any, exhibited or annexed to such statement or deposition.

(2) The testimony, statement or deposition shall be taken —

(a) on oath or affirmation;

(b) under an obligation to tell the truth imposed, whether expressly or by implication, by or under a law of the foreign country concerned; or

(c) under such caution or admonition as would be accepted, by courts in the foreign country concerned, for the purposes of giving testimony in proceedings before those courts.

(3) The testimony, statement or deposition shall—

(a) be signed or certified by a judge, magistrate or officer in or of the foreign country to which the request was made; and

(b) bear an official or public seal of—

(i) the foreign country; or

(ii) a Minister of State, or a department or officer of the government of the foreign country.

(4) A certificate by the judge, magistrate or officer referred to in subsection (3) shall, without further proof, be admitted in the proceedings as conclusive evidence of the facts contained in the certificate.

(5) All courts in Malaysia shall take judicial notice of the official or public seal referred to in subsection (3).

(6) The testimony taken under subsection (2) may be reduced to writing or be recorded on a tape, disk or other device from which sounds or images are capable of being reproduced or may be taken by means of technology that permits the virtual presence of the person in Malaysia.

(7) Where the testimony has been reduced to writing or recorded on a tape, disk or other device from which sounds or images are capable of being reproduced, the writing, tape, disk or other device shall be authenticated as provided under subsection (3).

(8) Where the testimony has been made by means of video or other means which permits the virtual presence of the person in Malaysia, that testimony shall be deemed to have been given in Malaysia.

(9) For the purposes of this Chapter, the testimony, statement or deposition need not—

(a) be in the form of an affidavit; or

(b) constitute a transcript of a proceeding in a foreign court.

(10) For the purpose of this Chapter, where the prosecutor seeks to adduce any testimony, statement, deposition, document or thing specified in subsection (1) as evidence in the criminal matter, the court shall not give any direction that such evidence or any part thereof is not to be adduced.

(11) In this Chapter, "criminal matter" has the meaning assigned to it under the Mutual Assistance in Criminal Matters Act 2002.

Certificate relating to foreign evidence

90F. A certificate by the Attorney General or by a person authorized by the Attorney General to make such a certificate certifying that any testimony, statement or deposition to which such certificate is attached, together with any document or thing exhibited or annexed thereto, if any, has been received by the Attorney General pursuant to a request made under the Mutual Assistance in Criminal Matters Act 2002 in respect of any criminal matter referred to in the certificate, shall on its production without further proof be admitted in the proceeding as conclusive evidence of the facts contained in the certificate."

G. Some Other Challenges in MLA Process

Although the issues regarding the admissibility of evidence obtained by way of MLA have been resolved with the amendments to the EA to include the new Chapter VA above mentioned, the fact remains that the new provisions have yet to be tested in courts. The above provisions were inserted into EA as a consequence of the Perwaja case. It is foreseeable that new technical legal challenges may be made in future cases where the prosecution wishes to tender foreign evidence obtained by way of MLA, which may touch upon issues or areas not catered for by the above provisions.

It is also pertinent to note that the MLA process is in itself not a simple one. The drafting of an MLA request is a process that requires meticulous drafting by the enforcement agency concerned, or in this case of the MACC, so as to ensure the final version is not only accurate but complete in material particulars. A request that contains mistakes or is incomplete will result in possibly a supplementary request to be prepared and sent, or at least may result in further

communications between the authorities of both requesting and receiving countries to clarify certain facts or issues.

An MLA request also takes time to be executed and this may not allow the prosecution in the requesting country to wait, as the court in which a trial is conducted may not wait for several months pending the execution of the request. In a few cases, the trial continued and the prosecution case was closed without waiting for the MLA evidence requested for. For MACC, there was only one case where a witness was successfully arranged to appear and testify here, which resulted in the conviction of the accused concerned. However, in the majority of cases, witnesses cannot be found, while tracing for them takes time. Furthermore, a potential witness in a foreign country is not obliged to come here to testify.[12]

H. Recovery of Assets Obtained from Corruption in Foreign Jurisdictions

This is an area which remains largely unexplored. Malaysia has not made any request to recover assets obtained by way of corruption or other crimes. We also do not have the experience of executing any request for freezing or forfeiture of assets. In the Perwaja case, the request was only limited to obtaining witnesses' statements or depositions and documentary evidence. Despite the fact that millions of ringgit were siphoned out by Eric Chia from Perwaja company to certain overseas accounts belonging to his family member, no specific request was made to recover the money.

[12] Section 9 MACMA. Conversely, a person in Malaysia is also not bound to go to a foreign country to testify there pursuant to a request under section 27 MACMA.