Public Prosecutor *v* Soh Chee Wen and another
[2019] SGHC 235

Case Number : Criminal Case No 9 of 2019

Decision Date : 30 September 2019

Tribunal/Court : High Court

Coram : Hoo Sheau Peng J

Counsel Name(s) : Deputy Attorney-General Hri Kumar Nair SC, Peter Koy, Teo Guan Siew, Nicholas Tan, Randeep Singh, Tan Ben Mathias, Loh Hui-Min, Ng Jean Ting and David Koh (Attorney-General's Chambers) for the Public Prosecutor; Narayanan Sreenivasan SC, Lim Wei Liang Jason and Tan Zhen Wei, Victoria (K&L Gates Straits Law LLC) for the first accused; Philip Fong Yeng Fatt, Sui Yi Siong and Lau Jia Min, Jaime (Eversheds Harry Elias LLP) for the second accused.

Parties : Public Prosecutor — Soh Chee Wen — Quah Su-Ling

Evidence – Witnesses – Privilege

30 September 2019 Judgment reserved.

Hoo Sheau Peng J:

Introduction

1 On 15 July 2019, pursuant to the Prosecution's application for further arguments, I heard the parties on two evidential issues. The first is whether generally, the Prosecution is entitled to assert litigation privilege. The second is whether specifically, litigation privilege protects communications between prosecutors/investigators and witnesses in two scenarios: first, in the preparation of conditioned statements; and second, in the preparation of the witnesses for giving evidence in court.

2 By way of background, in the previous tranche of the trial, the Prosecution objected to the cross-examination of a number of witnesses concerning such communications on the ground of litigation privilege. On 23 May 2019 (the last hearing day in the previous tranche), I heard the parties on this objection, and ruled against the Prosecution. I then agreed to hear further arguments because of the importance of these issues to the ongoing case, as well as beyond the present case. Having considered the further arguments of the parties, I now provide my decision, with brief reasons, before we resume with the trial.

The Prosecution's further arguments

3 On the first issue, the Prosecution submitted that in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 ("*Skandinaviska*") at [23], the Court of Appeal had clearly recognised that legal advice privilege and litigation privilege are conceptually distinct. Different rationales underpinned each doctrine. In this connection, the Court of Appeal had endorsed the exposition of the rationales of the two forms of privilege by the Supreme Court of Canada in *Minister of Justice v Sheldon Blank (Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada (Interveners))* [2006] 2 SCR 319 ("*Blank*") at [26]–[27].

4 Effectively, as the Prosecution put it, the Court of Appeal accepted that litigation privilege "seeks to promote the effective functioning of the adversarial system by creating *a zone of privacy for all litigants*, *whether represented or not*, to prepare their contending positions in" [emphasis added]. Nonetheless, there is an overlap between the two doctrines. On the facts of *Skandinaviska*, the respondent asserted litigation privilege in relation to a draft report prepared jointly by the respondent's solicitors and accountants (which incorporated legal advice by the respondent's solicitors). In that context, certain passages of *Skandinaviska* discussing litigation privilege, including [70]–[74] relied on by this court previously, referred to the solicitor-client relationship, as well as the legal advice of the respondent's solicitors. However, these were not prerequisites to a claim of litigation privilege. In criminal litigation, the Prosecution is a *party*. While there is no local case authority on this point, based on the rationale of litigation privilege as endorsed by the Court of Appeal, the Prosecution argued that it should be entitled to claim litigation privilege.

5 In a comparative review of the positions in other common law jurisdictions, the Prosecution highlighted that in Canada, Australia and New Zealand, the prosecution is able to claim litigation privilege. The Prosecution submitted that all three jurisdictions recognise the same rationale for litigation privilege as set out in *Skandinaviska*. In Canada, the prosecution is entitled to rely on litigation privilege purely based on the underlying rationale. Australia and New Zealand appeared to have further grounded the prosecution's claim to litigation privilege by regarding the relationship between the Crown (or the Director of Public Prosecutions) and the solicitors/prosecutors acting on his behalf as being in the nature of a solicitor-client relationship. Further, it should be noted that in Australia and New Zealand, there has been codification of the law on litigation privilege. Turning to England, the Prosecution acknowledged that the position is less clear, with some uncertainty as to whether litigation privilege is a "distinct privilege", or "an extension of legal advice privilege, and intertwined with it". Be that as it may, the Prosecution submitted that it would be in accord with the weight of the common law jurisprudence to recognise that the Prosecution is able to assert litigation privilege.

6 Turning to the communications that fall to be protected, the Prosecution contended that litigation privilege protects from disclosure all communications, both written and oral. For a claim to litigation privilege to be made, the Prosecution submitted that the conditions are (a) that the communication must have been made at a time when there was a reasonable prospect of litigation; and (b) the communication must have been made for the dominant purpose of litigation. Should any communication by the prosecutors/investigators with witnesses in the two scenarios satisfy these conditions, the Prosecution would be entitled to rely on litigation privilege to protect such communication.

7 That said, the Prosecution submitted that litigation privilege is not *absolute* in nature, unlike legal advice privilege (which is subject to only limited exceptions). Indeed, the Prosecution accepted that the scope of litigation privilege is *narrower* when claimed by the Prosecution in criminal proceedings. Any claim to litigation privilege is circumscribed by the Prosecution's duty of disclosure, including its duty of disclosure as set out in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 and *Muhammad bin Kadar and another v Public Prosecutor* [2011] 4 SLR 791. More importantly, the Prosecution submitted that "the law in Singapore should be further developed to recognise that litigation privilege should not apply where a party can show that it is *necessary* that he be allowed to adduce otherwise privileged evidence, because the probative value of the evidence outweighs the interest of the other party in preserving the confidentiality of the information" [emphasis added]. I shall refer to this as "the necessity exception".

8 Departing from its earlier position on 23 May 2019, in relation to any privileged communication between prosecutor/investigators with witnesses in the two scenarios, the Prosecution submitted

that it falls on Defence Counsel to demonstrate why it is *necessary* that he be permitted to adduce evidence which is otherwise protected by litigation privilege, and the extent to which he should be permitted to do so. To this end, the Prosecution broadly agreed with the part of the earlier ruling which observed that Defence Counsel should question witnesses so as establish some basis for exploring the circumstances of the interview/preparation sessions. This should follow, however, as a consequence of the necessity exception to litigation privilege, and Defence Counsel should establish a *clear* (and not some) basis for doing so.

Further arguments by Defence counsel

9 In response, on the first issue, Mr N Sreenivasan SC and Mr Sui Yi Siong, counsel for the first and second accused persons respectively, relied on the earlier cases they put forth on 23 May 2019. They informed the court that they would not address the court in detail on the further arguments by the Prosecution (especially with regards the review of the positions in the other common law jurisdictions). On the second issue, on the premise that the Prosecution is entitled to claim litigation privilege, Defence Counsel argued that thus far, the questions asked of the witnesses did not seek disclosure of privileged communications. The lines of cross-examination were meant to probe the witnesses' evidence in court, *ie*, *how and why the witnesses came to give such evidence in their conditioned statements and in their oral evidence*. In any event, given the Prosecution's acknowledgement that any claim to litigation privilege is subject to the necessity exception, Defence Counsel submitted that the practical outcome would broadly be in accord with the earlier ruling on how to proceed with the cross-examination of the witnesses, and they would accept this approach.

My decision

10 I turn to my decision. Having considered the Prosecution's detailed analysis of *Skandinaviska* and the subsequent local cases, as well as the discussion in *Blank* cited in *Scandinaviska*, I accept the Prosecution's submission that litigation privilege should be viewed to be a form of privilege distinct from legal advice privilege. As encapsulated at [27] of *Blank*, which was cited at [23] of *Scandinaviska*, its underlying rationale is as follows:

> Litigation privilege … is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. *Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship.* And to achieve this purpose, *parties to litigation, represented or not*, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure. [emphasis added]

11 Nonetheless, in Singapore, it has not been clearly determined whether the Prosecution has the right to claim litigation privilege. In this regard, I note that the approaches in the other common law jurisdictions are not entirely consistent. It is only in Canada that the courts have reasoned from first principles, and held that based on the rationale of litigation privilege, such privilege should extend to the prosecution (see *Blank* at [27], [32] and [43]). The English position appears to be uncertain, and no English authority has been cited to me as to whether the prosecution is entitled to litigation privilege there. The approach in Australia is to recognise a solicitor-client relationship between the Crown (or the Director of Public Prosecutions) and the solicitors/prosecutors acting on its behalf (see *R v Bunting and Others* (2002) 84 SASR 378 at [44]–[45]). In New Zealand, the courts appear to have taken the position that litigation privilege for the prosecution follows from the general availability of litigation privilege in criminal proceedings (see *R v King* [2007] 2 NZLR 137 at [25], [27]). While the Prosecution submitted that in Singapore, the relationship between the Public Prosecutor and the

prosecutors who conduct prosecutions on his behalf should be similarly viewed as a solicitor-client relationship, I do not express any views on this. Instead, I am inclined to agree with the Canadian approach. Based on the underlying rationale of litigation privilege, and the fact that the Prosecution is a party to criminal proceedings, I am persuaded that the Prosecution has the right to assert litigation privilege.

12 For completeness, there were two other points which I considered (which were not addressed on 23 May 2019). It is of note that the Prosecution has assured the court that "the [Prosecution's] duty of disclosure prevails over any claim to litigation privilege". Further, when queried, the Prosecution submitted that while prosecutors are entitled to claim public interest immunity in relation to certain communications (which is not available to the defence), that is a distinct concept and operates in different circumstances. Therefore, it seems to me that any right of the Prosecution to claim litigation privilege is not inconsistent with the duty of disclosure, and public interest immunity would not often arise in a typical case where litigation privilege may be invoked.

13 Turning to the question of whether oral communications fall to be protected by litigation privilege, Mr Sui pointed out that most of the foreign cases cited by the Prosecution concerned objections to applications for disclosure of *documents/materials* of the prosecution, created or generated in the course of litigation. Thus far, Defence Counsel have not sought to obtain any notes, memoranda, minutes or record, *etc*, of the Prosecution. Essentially, the Prosecution's invocation of litigation privilege has been in response to lines of questioning by Defence Counsel intended to elicit details of what was *said* or *shown* to the witnesses in the course of witness interview/preparation sessions.

14 It seems to me that there is no reason to exclude oral communications from the scope of litigation privilege, as the very same information may be conveyed in oral or written form. In *Scandinaviska* at [44], the Court of Appeal held that "litigation privilege applies to *every* communication, whether confidential or otherwise so long as it is for the purpose of litigation" [emphasis added]. This is also the position taken in *The Law of Privilege* (Bankim Thanki QC ed) (Oxford University Press, 3rd Ed, 2018) ("*The Law of Privilege*") at para 3.12, where it is noted that "oral communications are … just as capable of attracting privilege as written communications". What is outside the scope of litigation privilege, however, are facts in issue: see *The Law of Privilege*, at para 3.13. As the Prosecution conceded, litigation privilege does not attach to facts in issue observed by witnesses.

15 I see no reason to depart from the principles established in *Skandinaviska* that the two conditions to be met for a claim to litigation privilege are (a) that the communications must have been made at a time when there was a reasonable prospect of litigation; and (b) the communications must have been made for the dominant purpose of litigation. Therefore, in respect of any specific communication that the Prosecution wishes to claim litigation privilege, it must show it falls to be protected by litigation privilege. In relation to any communication during a witness interview/preparation session, it seems to me that the first condition would be met. Instead, the contention would be whether the communication was made or created for the dominant purpose of litigation.

16 I note that on 23 May 2019, while not clearly articulated, the Prosecution's position was to the effect that a successful claim to litigation privilege is *absolute.* Indeed, the Prosecution ran the alternative argument that any line of questioning in relation to the communications in the two scenarios would not be *relevant.* In its further arguments, as stated above, the Prosecution accepted that there are *limits* to the claim to litigation privilege. More significantly, the Prosecution put forth the necessity exception for the court's consideration.

17 Indeed, the ambit of litigation privilege (including its duration and limitations) gives rise to difficult questions for consideration on future occasions. In the context of criminal proceedings, a review of the positions in the other jurisdictions shows inconsistent approaches and outcomes. Nonetheless, the Prosecution accepted that certain established exceptions are applicable. Litigation privilege, the Prosecution accepted, would fall away if it has been waived (which would include implied waiver), as well as if the communications were made in furtherance of an illegal purpose (which I shall refer to as "the fraud exception").

18 In this regard the Court of Appeal discussed the relevant principles of implied waiver at length in *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 ("*ARX*"), a case concerning legal advice privilege, at [65]–[71]. There is no reason to think that these principles do not apply in the same way to the implied waiver of litigation privilege. In my view, implied waiver could potentially be applicable to the present circumstances – a matter I will elaborate on at [25] below.

19 As for the fraud exception, this was held to apply to both legal advice and litigation privilege in *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd* [2010] 1 SLR 833 at [62]–[67]. I would also think that if there is sufficient reason to think that the witness's testimony is tainted by *misconduct* or *abuse of process*, such as witness tampering or witness coaching, then the litigation privilege in the communications pursuant to which such misconduct was carried out would also fall away: see *Blank* at [44]–[45]. I consider this to be comparable to applying the fraud exception. That said, I stress that there is no suggestion of such misconduct here.

20 Further, given the serious consequences of criminal proceedings for accused persons, I find the Prosecution's proposition that the law should recognise that a claim to litigation privilege is subject to the necessity exception to be a fair one. In essence, citing Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 2017) at para 14.119, the Prosecution accepted that "litigation privilege may have to be subjected to a balancing operation where there is a competing interest of importance, such as the need of an accused person to rely on evidence for his defence". In other words, even if the communication satisfies the conditions of litigation privilege, an accused person may proceed to show that it would be necessary for him to rely on the evidence, and that his interest outweighs that of the Prosecution claiming the privilege.

21 I return to the situation at hand. To the parties' credit, they were broadly in agreement that in the course of the trial thus far, there have been occasions when the Prosecution had prematurely objected to cross-examination by Mr Sreenivasan on this ground, as well as occasions when Mr Sreenivasan had prematurely cross-examined witnesses in a manner which sought to elicit communications with the prosecutors/investigators before they had been established to be relevant. As I stated previously, Defence Counsel should first and foremost cross-examine a witness on the contents of his conditioned statement and his oral evidence in court, *ie*, *the facts in issue.*

22 To test the witness's personal knowledge of the facts in issue, questions such as *why a witness used a certain word, what he meant by the word, why and how he selected the trades from a spreadsheet to give evidence on, why and how he matched the trades to phone records, why and how he came to change any aspect of his evidence, etc*, are all proper and permissible questions. Thus, the Prosecution should not be too hasty in objecting to these questions, even if a witness in answering any of these questions may disclose the *fact* of a communication with the prosecutors/investigators. In this regard, the Court of Appeal has observed in *ARX* at [55] that "privilege only subsists in respect of the *confidential content of the communications* … [t]he *mere fact that such communications had taken place* is not in itself privileged" [emphasis in original].

23 At the same time, without testing the authenticity of the witness's evidence, Defence Counsel

should not, without more, launch into questions concerning *the nature of the communications* which gave rise to the use of the word, the selection of the trades, the matching of the trades to the phone records, the change in evidence, *etc*, *and the identities of the prosecutors/investigators involved*. Unless the witness's evidence gives rise to any concern as to his personal knowledge of the facts in issue and/or his credibility, I do not view such questions as even being relevant to his evidence (let alone sufficient to invoke the necessity exception).

24 However, where a concern arises about a witness's personal knowledge of the facts in issue, *ie*, his ability to remember those facts, the accuracy and reliability of his evidence, *etc*, and/or his credibility is at stake, the basis of the evidence he has given on the facts in issue may turn on the communications during the witness interview/preparation sessions. The *contents* of the communications with the prosecutors/investigators *may* then become relevant. Should the Prosecution wish to claim litigation privilege over any such communication, it will have to prove that the conditions are met. Thereafter, the Defence Counsel may wish to assert that litigation privilege should not apply, on the basis that the necessity exception applies. In this regard, the Prosecution accepted that in relation to factual material "such as a witness's account of what he was shown or told during a witness interview", the threshold is not high.

25 At this point, I explain why the doctrine of implied waiver *may* potentially be applicable, and how arguably, a similar result could be reached by applying the doctrine of implied waiver. As the Court of Appeal explained in *ARX* at [65]:

> The doctrine of implied waiver has always been concerned with fairness of a very particular sort. The principle of the matter, simply put, is that a party cannot have his cake and eat it. *If a party voluntarily puts privileged material before the court, he cannot rely on the advantageous aspects of it to advance his case but claim privilege in respect of the other less advantageous aspects* of the documents for fear that it might damage his case. … [emphasis added]

Although in this passage the Court of Appeal referred variously to privileged "material" and "documents", I do not think that the Court intended by doing so to exclude other privileged content, such as oral communications, from being the subject of implied waiver. Once this is recognised, the prerequisites of implied waiver may well be found in the present case. For example, if the Prosecution were to prepare a document comprising filtered data for the purpose of witness interview/preparation sessions, this document may be subject to litigation privilege. However, if information contained in this document is shown to the witness and thereafter reflected in his conditioned statement or evidence before the court, the privilege in such information would be expressly waived when that evidence is adduced. There would be no express waiver, however, of other privileged material, such as those parts of the filtered data that have not been adduced into evidence, and the communications surrounding the witness interview/preparation sessions (including, *eg*, the circumstances in which the document was shown to the witness).

26 The next question is whether and to what extent waiver of privilege should be implied. The Court of Appeal in *ARX* provided the following guidance at [69]:

> Given the importance of legal professional privilege, waiver is not to be easily implied … . A court tasked to determine whether there has been an implied waiver of privilege by reason of a reference made to privileged material should approach the matter by examining all the circumstances of the case including *what has been disclosed* (the materiality of the information in the context of the pending proceedings); *the circumstances under which the disclosure took place* (in particular, the position in the authorities appears to be that disclosures of privileged material during trial almost invariably results in a waiver); *whether it may be said* (albeit only as a

relevant factor as opposed to a single test) *that the party had "relied" or "deployed" the advice to advance his case*; and *whether it can be said that there is a risk that an incomplete and misleading impression had been given*. This list is not exhaustive, and no one factor is determinative of the issue. Ultimately, the court should ask itself whether, in all the circumstances of the case, it may be said that – given what has already been revealed – fairness and consistency require disclosure. **This is a fact-sensitive exercise of judgment and the inquiry is objective and not subjective** … [emphasis in bold italics in original; emphasis added in italics]

27 For present purposes, the most important factor would likely be "whether it can be said that there is a risk that an incomplete and misleading impression had been given". When data prepared by the Prosecution (via filtering) is adduced as the witness's evidence, it may well be possible that the effect is to give an incomplete and misleading picture of the witness's own knowledge of the information in question – including, for example, whether he understands how and why the data was filtered. This would have an impact on the reliability of his evidence. If so, adducing such evidence would amount to an implied waiver of privilege, to the extent necessary to correct the incomplete and misleading impression (and no further) (see *ARX* at [71]). For a start, this may mean an implied waiver over the fact that the witness's evidence derives from being shown data that was already filtered (to the extent that such a fact is protected by litigation privilege in the first place). Should Defence Counsel wish to invoke or expand the scope of implied waiver based on the evidence put forth by the Prosecution in such circumstances, it must be carefully established what incomplete and misleading impression is being given, and why the privileged communications will serve to correct this impression.

28 I would emphasise that unlike the fraud exception, the touchstone of implied waiver is fairness, and *not* misconduct. In the final analysis, exceptions to privilege such as the fraud exception, the doctrine of implied waiver and the necessity exception play complementary roles in ensuring that the proper balance is achieved between the protection of litigation privilege and fairness to the accused person in running his defence.

Conclusion

29 To conclude, on the first issue, I accept that the Prosecution is entitled to assert litigation privilege, but that litigation privilege is subject to a number of exceptions of potentially broad applicability.

30 As for the second issue, the following approach is to be adopted for the trial:

(a) First, cross-examination should focus on the facts in issue. Where there is concern about a witness's personal knowledge of the facts in issue and/or his credibility is at stake, the basis of the evidence he has given on the facts would be relevant, and if it appears that that basis is rooted in communications during the witness interview/preparation sessions, then those communications would be relevant.

(b) Second, to object to cross-examination on the basis of litigation privilege, the Prosecution must establish that the conditions for asserting litigation privilege are satisfied in respect of the communications.

(c) Third, if Defence Counsel wishes to assert that litigation privilege should not apply, Defence Counsel should show that any of the exceptions applies. For the necessity exception, Defence Counsel must show that it is necessary for the accused person to rely on the evidence for his defence, and that his interest outweighs that of the Prosecution's interest in withholding

the communications.

31 On a review of the evidence thus far based on the above, I do not think that any privileged communication has been improperly disclosed. Nor do I think that Defence Counsel have been improperly prevented from asking any questions in cross-examination.

32 Finally, it leaves me to thank the parties, especially the Deputy Attorney-General, who made the oral submissions on the Prosecution's behalf, for the further written and oral arguments on the issues.