Microsoft Corp and Others v SM Summit Holdings Ltd and Another (No 2) [2000] SGCA 12

Case Number : Cr App 25 /1999, 26/1999

Decision Date : 09 March 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; L P Thean JA

Counsel Name(s) : VK Rajah SC and Lionel Tan (Rajah & Tann) for the appellants in Crim App 25/99; Harry Elias SC and Tan Chee Meng (Harry Elias Partnership) for the appellants in Crim App 26/99; Engelin Teh SC and Thomas Sim (Engelin Teh & Partners) with Manjit Singh and Govin Menon (Manjit Samuel & Partners) for the respondents

Parties : Microsoft Corp — SM Summit Holdings Ltd and Another (No 2)

Courts and Jurisdiction – Court of appeal – Criminal jurisdiction – Whether court has jurisdiction to hear appeals against orders by High Court in exercise of revisionary jurisdiction – Whether orders by High Court made in exercise of original criminal jurisdiction – Whether court has jurisdiction to hear appeals from such orders – ss 185, 241, 354, 376 Criminal Procedure Code (Cap 68)

Words and Phrases – "Original Criminal Jurisdiction" – ss 29A, 44, 59, 60 Supreme Court of Judicature Act (Cap 322, 1999 Ed)

(delivering the judgment of the court): These two appeals arose from the decision of the High Court in CM 6 and 7/99 which were heard together. Criminal Motion 6 was taken out by Microsoft Corporation (`Microsoft`), Adobe Systems Inc (`Adobe`), Autodesk Inc (`Autodesk`) and Ronald Eckstrom (`Eckstrom`), and CM 7/99 by Business Software Alliance (`BSA`), Stuart Ong, and Lee Cross. The two criminal motions were identical in all material respects and sought the same orders. Both motions were heard before the learned Chief Justice and were dismissed, and against his decision these two appeals were filed respectively. Criminal Appeal 25/99 was filed by Microsoft, Adobe, Autodesk and Eckstrom and is against the dismissal of CM 6/99, and Crim App 26/99 was filed by BSA, Stuart Ong and Lee Cross and is against the dismissal of CM 7/99. The respondents in these two appeals are SM Summit Holdings (`Summit Holdings`) and Summit CD Manufacture Pte Ltd (`Summit CD`).

Background

Microsoft, Adobe and Autodesk are companies incorporated in the United States of America and are engaged in the business of, inter alia, publishing and distributing computer software. BSA is a software anti-piracy watchdog organization of which Microsoft, Adobe and Autodesk are members. Stuart Ong is the legal counsel of Autodesk in the Asia Pacific region and vice-president of BSA. Lee Cross is a vice-president and managing director of the Asia Pacific region and regional counsel of BSA. Eckstrom is a corporate attorney of Microsoft and vice president of BSA. We shall refer to these parties collectively as the appellants.

Summit Holdings is a public company and was, at the material time, listed on the SESDAQ Board of the then Stock Exchange of Singapore Ltd. It is currently listed on the Main Board of the Singapore Exchange. Summit CD is a wholly owned subsidiary of Summit Holdings and is engaged in the business of, inter alia, manufacture of CDs and CD-ROMs. We shall refer to both of them jointly as the respondents.

The matter in dispute before us had its origin in 1997 and arose in the following manner. On 8 August 1997, BSA applied for and were granted two search warrants before a magistrate to search the

premises of Summit Holdings for alleged copyright and trademark offences. Armed with the search warrants, the representatives of BSA, police officers and also lawyers from the law firm representing BSA, on 12 August 1997, carried out a raid on the premises. As the first two search warrants did not permit a seizure of documents, BSA applied for and were granted, on the same night, a third search warrant by GP Selvam J. Pursuant to these warrants, the raiding party seized and took away various documents from the premises of the respondents and five CD-ROMs alleged to contain copyright infringing programmes, stamper and two glass masters alleged to be used for the purposes of replicating CD-ROMs. The documents included internal memoranda of the staff, minutes and notes of meetings, invoices, sale orders and a log book. A list recording some of the customers of the respondents was allegedly downloaded from the computer system of the respondents and was seized and taken away also.

Immediately following the raid, on 13 August 1997, the appellants held a press conference at the premises of Summit Holdings and published or caused to be published to persons present thereat a press release. This press release later became the subject of proceedings in Suit 1323/98, to which we shall return in a moment.

The respondents being aggrieved by the raid carried out by the appellants instituted proceedings in CR 15/97 seeking an order to quash all the search warrants. BSA, for their part, applied by way of CM 17/97 for permission to make copies of documents and for an order that the respondents deliver up (i) copies of certain invoices issued to Category `C` customers who, the appellants alleged, were well known pirates, (ii) copies of warranties, indemnities signed by such customers, and (iii) a copy of each CD-ROM produced for such customers. Both the criminal revision and the criminal motion came on for hearing before the learned Chief Justice. On 29 September 1997, the learned Chief Justice made the following orders in respect of the criminal revision. He directed that the two warrants issued by the magistrate should stand but he quashed the third warrant issued by GP Selvam J on the ground, inter alia, that a High Court judge has no jurisdiction to sit as a magistrate or to make any order as a magistrate. Further, he ordered that all the documents and items seized pursuant to the third warrant and the documents and items seized outside the scope of the first two warrants be returned. The CM 17/97 taken out by BSA was dismissed. The grounds of his judgment were handed down on 13 October 1997: **SM Summit Holdings Ltd & Anor v PP and another action** [1997] 3 SLR 922 .

We now return to the Suit 1323/98. It was commenced by the respondents on 5 August 1998, which was about a year after the publication of the press release. In this suit, the respondents claim that certain words of the press release published or caused to be published at the press conference on 13 August 1997 defamed them, and attributed to the words complained of the meaning that the respondents were guilty of criminal conduct, namely, the systematic manufacturing of, and trading in, counterfeit CD-ROMs on such an extensive scale that they were responsible for the pirate CD-ROM trade in Southeast Asia. Soon after the commencement of the action, the respondents applied, inter alia, for (a) an order under O 14 r 12 of the Rules of Court determining the meaning of the words complained of as pleaded in the statement of claim, and (b) summary judgment under O 14 r 3. Prior to the hearing of the application, the appellants filed their joint defence in which they denied that the press release bore the meaning which the respondents had pleaded. More importantly, they pleaded justification and/or fair comment of the meaning which they said the passages complained of bore.

The application came on for hearing before an assistant registrar. At that hearing, a preliminary objection was raised by counsel for the respondents as to the references, in the joint defence and in the affidavits filed in opposition to the application, to documents and information obtained by the appellants pursuant to the search warrants, on the following grounds:

(a) that there was an implied undertaking on the part of the appellants not to use such documents or information obtained in criminal proceedings in unconnected civil proceedings, as the information was confidential information on which the appellants could not rely without leave of court; and

(b) even if there was no implied undertaking, it followed from the order made on 29 September 1997 directing that all documents and copies seized in the raid be returned to the respondents that the use of such documents and copies and information derived therefrom was impermissible.

The assistant registrar overruled the preliminary objection and held that the information obtained as a result of the raid and referred to in the joint defence and affidavits was admissible and should be allowed to stand. She then proceeded to consider the natural and ordinary meaning of the words complained of and came to the conclusion that the natural and ordinary meaning of the words was that the respondents were guilty of criminal conduct, namely, the systematic manufacture of and trading in counterfeit CD-ROMs on such an extensive scale that they were responsible for the pirate trade in Southeast Asia. Having dealt with these two issues, the assistant registrar granted leave to the appellants to amend the defence and adjourned the hearing to a later date. At the subsequent hearing the appellants tendered a proposed amended defence. At the end of the hearing, the assistant registrar granted the appellants unconditional leave to defend the action.

The respondents appealed to a judge-in-chambers against that part of the decision which allowed the appellants to use the documents and information obtained as a result of the raid. The appellants, for their part, appealed against the other part of the decision of the assistant registrar which determined the meaning of the words complained of. Both appeals were heard by Amarjeet Singh JC who upheld all the orders made by the assistant registrar. The parties then further appealed to the Court of Appeal. The respondents appealed in CA 39/99 against that part of the decision overruling the preliminary objection as to the use of the documents and information. The appellants, for their part, appealed against the other part of the decision which determined the natural and ordinary meaning of the words complained of. In that respect, two appeals were filed: CA 37/99 was taken out by Microsoft, Adobe and Autodesk and Eckstrom, and CA 38/99 was taken out by BSA, Stuart Ong and Lee Cross. Both these appeals raised the same arguments, and all the three appeals were consolidated and heard together.

In the meantime, there was another important development that took place. The respondents complained that BSA had failed to return to them certain documents pursuant to the order made by the learned Chief Justice on 29 September 1999. They applied by way of CM 21/98 to commit BSA for contempt. The motion was heard before the learned Chief Justice, and at the conclusion of the hearing on 11 May 1999 he found that BSA was guilty of contempt in failing to comply fully with the orders made on 29 September 1997 and fined BSA for $5,000. The decision was given after the date on which Amarjeet Singh JC dismissed the appeals from the assistant registrar. In his grounds of judgment handed down on 31 May 1999, the learned Chief Justice further clarified the order he made on 29 September 1997: **Summit Holdings Ltd & Anor v Business Software Alliance** [1999] 3 SLR 197 .

After this decision of the learned Chief Justice, the three CA 37, 38 and 39/99 came on for hearing before the Court of Appeal. The court dismissed CA 37 and 38/99 (filed by the appellants) but allowed CA 39/99 (filed by the respondents): **Microsoft Corporation & Ors v SM Summit Holdings Ltd & Anor and other appeals** [1999] 4 SLR 529 . The court held, inter alia, that:

(1) the order made on 29 September 1997 in CR 15/97 and CM 17/97 prohibited the use of all documents and copies thereof obtained pursuant to the search warrants and information extracted from such documents or copies: [para] 18-20 of the judgment;

(2) aside from the order, there was an implied undertaking in criminal proceedings analogous to that arising on discovery in civil proceedings, which precluded the use of documents seized in the criminal proceedings for a collateral purpose, which includes unrelated civil proceedings; however, the implied undertaking was not absolute and could be varied in an appropriate case: [para] 34-36 of the judgment.

Soon after the decision of the Court of Appeal, the appellants took out the present applications by way of CM 6 and 7/99 for the following orders:

(1) that the order made on 29 September 1997 in CR 15/97 be varied to the extent and effect that the appellants be allowed to refer to and to rely on the documents and information referred to therein solely for the purposes of defending Suit 1323/98;

(2) that the applicants be granted a release from or variation of the implied undertaking in respect of documents and information obtained pursuant to the execution of the search warrants solely for the purposes of defending Suit 1323/98;

(3) that the applicants be permitted to retain, refer to and rely on the documents and information referred to and/or contained in all pleadings and affidavits filed and submissions made in the proceedings in Suit 1323/98; and

(4) any consequential order that the court may think fit.

Decision of the High Court

The applications were heard before the learned Chief Justice on 27 October 1999 and at the conclusion of the hearing he dismissed them. He held that it is only in exceptional circumstances that the court would exercise its discretion to grant such applications and that the appellants had not shown any cogent and persuasive reasons as to why the applications should be allowed: see **Microsoft Corporation & Ors v SM Summit Holdings Ltd & Anor** [2000] 1 SLR 343 . It is against this decision that the present two appeals are brought.

Jurisdiction

Before us the respondents raise a preliminary objection. It is submitted by counsel for the respondents that the appellants have no right of appeal against the order under appeal. Her grounds for saying so are briefly these. First, under s 241 of the Criminal Procedure Code (Cap 68) (`CPC`), there is no right of appeal from a judgment or order on a criminal matter, except as provided in the CPC or any other written law. The CPC itself gives no right of appeal from such order. The other written relevant law is the Supreme Court of Judicature Act (Cap 322, 1999 Ed) (`SCJA`), and SCJA itself also does not give any right of appeal from such order. Hence, the order under appeal is not appealable and the Court of Appeal has no jurisdiction to hear and determine these appeals.

There is some merit in this contention, and as we see it, this is a fundamental difficulty which the appellants have to overcome. In Singapore, there is no general right of appeal from a judgment or order of a criminal court except such as provided by law: **Mohamed Razip & Ors v PP** [1987] 2 SLR 142 , 143. The authority for this proposition is s 241 of the CPC which provides:

> *No appeal shall lie from a judgment, sentence or order of a criminal court*

> *except as provided for by this Code or by any other law for the time being in force.*

Next, it is important to bear in mind that the Court of Appeal is a creature of legislation and its jurisdiction must necessarily be defined solely by and limited to the provisions of the legislation creating it: **Abdullah bin A Rahman v PP** [1994] 3 SLR 129 , 132. The relevant legislation is the SCJA, and the criminal jurisdiction of the Court of Appeal is set out in ss 29A(2), 44, 59 and 60 of the Act. Section 29A(2) provides:

> *The criminal jurisdiction of the Court of Appeal shall consist of appeals against any decision made by the High Court in the exercise of its original criminal jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.*

Section 44, in so far as relevant, provides as follows:

> *(1) An appeal by a person convicted shall be either against the conviction or against the sentence or against both.*
>
> *(2) Where an accused person has pleaded guilty and been convicted on such plea, there shall be no appeal except as to the extent or legality of the sentence.*
>
> *(3) ...*
>
> *(4) An appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.*
>
> *(5) ...*

Sections 59 and 60 of SCJA confer on the Court of Appeal the jurisdiction to determine any question of law referred to it by the High Court or the public prosecutor. Under s 59 the court has jurisdiction to determine any question of law referred to it by the High Court or the public prosecutor in a situation where a person has been convicted by the High Court in exercise of its original jurisdiction. Section 60 provides that where a criminal matter has been determined by the High Court in exercise of its appellate or revisionary jurisdiction, the judge may on application of any party and shall on application by the public prosecutor, reserve for the decision of the Court of Appeal any question of law of public interest which has arisen in the matter and the determination of which by the judge has affected the case. These two sections, strictly speaking, do not confer any right of appeal from any order of the High Court.

In considering the above statutory provisions two questions arise: first, whether the matters determined by the learned Chief Justice in CM 6 and 7/99 were criminal matters; and second if they were, whether the order which he made was one made by him in exercise of the original criminal jurisdiction of the High Court.

In the two criminal motions, the appellants essentially made two applications: (i) an application for a variation of the order made by the learned Chief Justice on 29 September 1997 in CR 15/97, and (ii) an application for a release or variation of the implied undertaking given to court. The nature of the first application turns on the order that was made by the learned Chief Justice on 29 September 1997. That order was made in a criminal revision under s 268 of the CPC and concerned the validity of three search warrants issued in criminal proceedings. The order was clearly one made in a criminal matter. Under the CPC there is no appeal against an order made by the High Court in exercise of such revisionary jurisdiction. Nor does the SCJA give any right of appeal against such an order. It therefore follows that when the application was made to the High Court to vary that order, the Chief Justice in refusing to vary it was similarly exercising the revisionary jurisdiction of the High Court. For the same reason, there is no appeal from such refusal and the Court of Appeal has no jurisdiction to hear an appeal from that decision.

We now turn to the second application which was for a release from or variation of the implied undertaking in respect of documents and information obtained pursuant to the execution of the search warrants. These documents and information were disclosed under compulsion in criminal proceedings and the implied undertaking not to use these documents and information for a collateral purpose was given in those proceedings. In view of this, the subject matter of the application, which was for a release or variation of the undertaking, was a criminal matter, and the learned Chief Justice in dismissing the application for a release or variation of the undertaking was exercising the criminal jurisdiction of the High Court.

The question therefore is whether there is any appeal from such an order. The CPC does not provide any right of appeal from such an order; and that much is clear. The next question is whether the order was one falling within s 29A(2) or s 44 of the SCJA. Considering first s 44, we do not think that section has any application here. It is s 29A(2) which is relevant. It raises a difficult point for consideration, and it is this: whether the refusal by the learned Chief Justice in giving the release or variation of the implied undertaking was an order made by him in exercise of the original jurisdiction of the High Court. This is purely a matter of construction of s 29A(2). There are three decisions bearing on the point which we find of great assistance.

The first is the case of **Wong Hong Toy & Anor v PP** [1984-1985] SLR 298 . That was a case of an appeal against the refusal of the learned Chief Justice to reserve for the Court of Criminal Appeal some nine questions of law said to be of public interest which arose in the course of appeals from the magistrates` court which were determined by the learned Chief Justice. The Court of Criminal Appeal held that the learned Chief Justice`s decision in refusing to reserve the questions of law was not a `decision of the High Court in exercise of its original criminal jurisdiction`. At that time, the relevant provision of the SCJA pertaining to this issue was s 44 which was as follows:

> *(1) The Court of Criminal Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the* ***High Court in the exercise of its original criminal jurisdiction*** *, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.*
>
> *(2) An appeal by a person convicted shall be either against the conviction or against the sentence or against both: Provided that where an accused person has pleaded guilty and been convicted on such plea there shall be no appeal except as to the extent or legality of the sentence.*
>
> *(3) An appeal by the Public Prosecutor shall be either against the acquittal of an*

accused person or against the sentence imposed upon an accused person by the High Court.

(4) An appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

(5) The Court of Criminal Appeal shall also have jurisdiction to hear and determine matters brought before it in accordance with section 59 or 66. [Emphasis is added.]

Lai Kew Chai J in delivering the judgment of the court, after referring to s 44, said at p 304:

In our view, the decision of the learned Chief Justice in refusing to reserve the questions of law was not a `decision made by the High Court in the exercise of its original criminal jurisdiction` within the meaning of that expression in s 44(1) of the Act. We are of the view that the Court of Criminal Appeal is a creature of the Act and it has no powers other than those conferred upon it by the Act. The decision was made after the conclusion of an appeal to the High Court in exercise of its appellate criminal jurisdiction and on the application of the appellants. To say that the learned Chief Justice was exercising the original criminal jurisdiction of the High Court when he refused to reserve the questions of law is to extend the meaning and scope of the `original criminal jurisdiction` of the High Court to an extent quite out of line with the statutory framework for the administration of appellate criminal justice in Singapore.

The next case is **Mohamed Razip & Ors v PP** [1987] SLR 142 . There, three accused were charged with the offence of rape under s 376 of the Penal Code and they applied to the High Court under s 354 of the CPC for bail pending trial, but their applications were dismissed. They appealed. In dismissing the appeal the Court of Criminal Appeal held that the jurisdiction of the court to hear appeals is limited to hearing appeals against orders of finality, ie those resulting in conviction and sentence or acquittal. An order on bail is not such a decision and does not fall within the purview of s 44 of the SCJA. Wee Chong Jin CJ in delivering the judgment of the court said that the `key words` in s 44(1) were `any decision made by the High Court in exercise of its original criminal jurisdiction`. He compared s 44 then in force with its predecessor, prior to the amendments made in 1973 and said at p 144:

It is plain from the legislative history of all these sections that the words `any decision made by the High Court` in s 44(1) of the Supreme Court of Judicature Act were inserted to accommodate appeals by the Public Prosecutor, thereby enlarging the jurisdiction of the Court of Criminal Appeal in that respect. The words were, in our opinion, not inserted as a `catch-all` phrase. They must be read in the context of the other provisions. In s 44(2), the appellant is the `person convicted` and the appeal is against conviction, or sentence, or both. In s 44(3), the appellant is the Public Prosecutor and the appeal is against acquittal, or sentence. Even when questions of law are referred to the Court of Criminal Appeal under s 59 or 60 of the Supreme Court of Judicature Act, they are done only at the conclusion of the trial or the appeal, as the case may be. The only logical conclusion, therefore, is that the jurisdiction of the Court of Criminal Appeal is to hear appeals against orders of finality, ie those resulting in conviction and sentence, or acquittal.

The SCJA was subsequently amended by the Supreme Court of Judicature (Amendment) Act 1993. By the amendments, among other things, s 44 has been recast in that sub-s (1) thereof, with necessary modifications, is now found in s 29A(2), and the remaining sub-ss (2) to (5) are now sub-ss (1) to (4) of s 44. No material changes have been made to s 44.

Since the amendments, there was decided by the Court of Appeal the case of **Ang Cheng Hai & Ors v PP and another appeal** [1995] SLR 201 . It was there held that the decision of the High Court in refusing an application under s 185 of the CPC to transfer certain proceedings from the District Court to the High Court is not an order falling within s 29A(2) of the SCJA. Karthigesu JA in delivering the judgment of the court said at p 205:

> *The concept of `original jurisdiction` has been defined to mean `jurisdiction to consider a case in the first instance ... to take cognizance of a cause at its inception, try it and pass judgment upon the law and facts`: **Black`s Law Dictionary** (6th Ed). In **Wong Hong Toy & Anor v PP**, the Court of Criminal Appeal observed (at p 457):*
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> *`The all-embracing original criminal jurisdiction of the High Court under s 15 of the [Supreme Court of Judicature] Act is not in all cases exercised by the High Court but the administration of criminal justice in respect of what we may call the less serious criminal cases, generally those cases not involving the sentence of death or life imprisonment, is entrusted to the subordinate courts. The exercise of the original criminal jurisdiction of the High Court involves generally the more serious criminal cases or such less serious criminal cases as may be transferred from the subordinate courts to the High Court.`*
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> *It is implicit from the above dicta that `original jurisdiction` refers to original trial jurisdiction. In respect of the High Court, its original criminal jurisdiction is enumerated under s 15 SCJA, which denotes its trial jurisdiction. For this reason, the dictum of Coomaraswamy J did not assist the appellants. In the present cases, as the prosecution rightly pointed out, there was no trial which had commenced in the High Court. The High Court had not yet taken cognizance of the offences in question. The only matters before the High Court were the applications under s 185 CPC. We recognized that both the magistrate`s court and the High Court may have been jurisdictionally competent to try the offences in question. Nevertheless, the proceedings had been validly commenced in a magistrate`s court, which had properly taken cognizance of the offences and had proceeded to exercise original criminal jurisdiction.*

The learned judge next referred to ***Mohamed Razip*** (supra) and said:

> *We turned to consider the prosecution`s submissions. Sections 29A(2) and 44 SCJA are the key provisions relating to the criminal jurisdiction of the Court of Appeal. While s 44(1) of the pre-existing SCJA may have been deleted and recast as s 29A(2) SCJA, the remaining sub-ss (2) to (5) in s 44 have been retained without any amendment. This clearly indicates that the reasoning and conclusion of the Court of Appeal in **Mohamed Razip** [supra] remain applicable. Accordingly, we agreed with the prosecution`s submission that the Court of Appeal is generally empowered only to entertain appeals which are concerned with orders of finality, ie those resulting in conviction and sentence or acquittal. On this premise, Rubin J`s decision did not give rise to a right of appeal.*

Following these decisions, we are of the opinion, the words `original criminal jurisdiction` in s 29A(2) of the SCJA, on the true construction, refer to `trial jurisdiction` and the decision of the learned Chief Justice in refusing to release or vary the implied undertaking was not an order made in exercise of the original criminal jurisdiction of the High Court within the meaning of s 29A(2) of the SCJA. Therefore, no appeal lies from that order and this court has no jurisdiction to hear these appeals. In the event, we do not find it necessary to consider the merits of the appeals. Accordingly the appeals are dismissed with costs. The deposits in court as security are to be paid to the respondents or their solicitors to account of costs.

Outcome:

Appeals dismissed.