Thrumoorthy s/o Ganapathi Pillai *v* Public Prosecutor
[2010] SGHC 223

Case Number : Magistrate's Appeal No 346 of 2009 (DAC No 33896 of 2008)

Decision Date : 05 August 2010

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Ramesh Tiwary (M/s Ramesh Tiwary) for the Appellant; Christopher Ong Siu Jin (Attorney-General's Chambers) for the Respondent.

Parties : Thrumoorthy s/o Ganapathi Pillai — Public Prosecutor

Criminal Law

5 August 2010

Choo Han Teck J:

1 This was an appeal by Thrumoorthy s/o Ganapathi Pillai (the "Appellant") against a two year disqualification sentence ("DQ") imposed on him after being convicted for drink driving pursuant to s 67(1)(b) of the Road Traffic Act (Cap 376, 2004 Rev Ed) ("RTA"). At the conclusion of the first hearing on 16 July 2010, I directed the Prosecution to make further submissions on whether the fact that an accused chose to stop by the road after finding himself intoxicated could be considered a mitigating factor.

2 In *PP v Rangasamy Subramaniam* Criminal Reference No 3 of 2010 ("*Rangasamy*"), the Court of Appeal dealt with a similar case. Although the court there was dealing with the issue of whether the presumption provision of s 71A(1) applied to an accused charged pursuant to s 67(1)(b), the practical effect of that case is that an accused person could be liable to a charge of drink driving even though he was sleeping inside the vehicle at the side of the road. The court's grounds of decision have yet to be released.

3 If a driver knows that he is intoxicated and voluntarily stops by the road shoulder to either (a) prevent an accident from occurring for his continued driving, or (b) to avoid a greater contravention of the law, it seems to me that this voluntary arrest of risk deserves some form of credit. Even though these intoxicated sleeping drivers have, as a result of the *Rangasamy* case, been determined to be liable for the same s 67(1)(b) offence, the court ought to distinguish such accused persons from those offenders who are caught in the actual act of driving in so far as sentencing is concerned. Other than the *Rangasamy* case, there are no written decisions on similar cases canvassing the applicable sentencing considerations. In principle however, there are two main reasons why such a fact should be considered a mitigating circumstance.

4 Firstly, in the case of the intoxicated sleeping driver, his culpability has been mitigated by his voluntary act of averting harm. Naturally, a driver who had continued driving would logically have been an active risk to fellow road users who come into contact with that errant driver. Conversely, the potential harm of the crime would have decreased if the offender voluntarily arrests the risk at hand. See *Thorneloe v Filipowski* [2001] NSWCCA 213 as per Speigelman CJ at [130]. It would thus be unfair to say that the two types of drivers above are equally culpable. Secondly, it seems sensible to encourage drunk motorists to stop driving in mitigation of having started off in the first place. The

motives behind the voluntary stop could either lie in his/her intention to prevent any accident from his continued driving, or a selfish reason of avoiding a harsher punishment if he were to be caught for drink driving. Whatever the motives, it would be in the public interest to encourage intoxicated drivers to stop and refrain from driving until they become sober. There are therefore two facets of public interest that the court has to consider; the first aims at discouraging drivers from driving in the first place when they have chosen to drink (thus the liability of the charge applies to the intoxicated sleeping driver) and the second aims to encourage drivers to remind themselves of their intoxication and stop driving.

5 From the record of appeal, it appears that the Appellant did not stop on his own volition. The District Judge (the "DJ") found that:

> 29 ... This was not a case where the Accused had felt sleepy while driving, pulled over at the road shoulder and had stopped his vehicle like the factual situation in *Rangasamy*'s case.
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> 30 In my view, it is evident that the Accused in the present was clearly so highly intoxicated when he took to the wheels of the van on his way home ..., he was unable to recall how he ended up at Lornie Road. It was undisputed that he had driven the van until Lornie Road and in my view he was *so inebriated that he had passed out while his van was in the first lane of Lornie Road with the engine still running*...
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> [emphasis added]

In the circumstances, it was far from the hypothetical scenario where an intoxicated driver voluntarily chooses to stop by the road shoulder. In my view, the Appellant was just as culpable as those intoxicated drivers stopped at a road block. On the contrary, the Appellant seemed more culpable as he had lost total control of his vehicle when he passed out while driving. He was fortunate to have avoided an accident. Accordingly, his actions (or inactions for that matter) did not mitigate his offence. In determining the appropriate length of disqualification, the court will have regard to the level of blood alcohol concentration and whether there had been an actual loss of control of the vehicle (*Ong Beng Soon v PP* [1992] 1 SLR(R) 453. The accused there was disqualified for three years after being convicted for drink driving, and the accused was also recorded to have 164.5 microgrammes of alcohol in 100 millilitres. The accused lost control of his car in a residential area, injuring himself and damaging the car). In the Appellant's case, I did not think that the two years was manifestly excessive since his alcohol content was more than two times over the limit and he had lost total control of his vehicle. In addition to the above, the Appellant contended (both on appeal and below) that (a) his employment opportunities have been limited to driving and the disqualification would bring inordinate hardship to his family and (b) there was a delay in his prosecution for five years. In her grounds of decision, the DJ had already taken the above considerations into account. In my view, those mitigating circumstances probably explained why the Appellant received a relatively lower sentence (both in terms of the financial penalty and the length of disqualification) than other similar cases where accused persons registered more than 70 microgrammes of alcohol in 100 millilitres of breath:

(a) *Public Prosecutor v Magenderan s/o Marimuthu* [2005] SGDC 61, 72 microgrammes of alcohol in 100 millilitres. Sentence: $3,300 fine, 26 months' disqualification

(b) *Public Prosecutor v Wang Loke Shen* [2002] SGDC 164, 75 microgrammes of alcohol in 100 millilitres. Sentence: $2,500 fine and 25 months' disqualification

(c) *Public Prosecutor v Tan Peng Yew Melvin* [2005] SGDC 24, 84 microgrammes of alcohol in 100 millilitres. Sentence: $3,800 fine and 30 months' disqualification.

6 Accordingly in my view, the Appellant's sentence was not manifestly excessive and the appeal against sentence was therefore dismissed.