Public Prosecutor *v* Ng Jui Chuan
[2011] SGHC 90

Case Number : Magistrate's Appeal No 406 of 2010 (DAC No 17852-17853 of 2010)

Decision Date : 11 April 2011

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Amarjit Singh and Geraldine Kang (Deputy Public Prosecutors) for the appellant; Raymond Lye (Citilegal LLC) for the respondent.

Parties : Public Prosecutor — Ng Jui Chuan

Road Traffic

11 April 2011 Judgment reserved.

Choo Han Teck J:

1 On 8 November 2009 the respondent was driving along Upper Thomson Road at about 6.48am when he fell asleep at the wheel. His car veered to the side of the road and hit a pedestrian, Mok Sow Loon, killing her. The respondent was charged under s 304A(a) of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") for "doing a rash act not amounting to culpable homicide ... and thereby causing death". He was also charged under s 337(a) of the Penal Code for causing hurt by doing a rash act that endangered the life of Wee Song Mong, the husband of Mok Sow Loon who was walking beside her at the time of the accident. At the end of the trial, the trial judge amended the charge from s 304A(a) to s 304A(b), namely from causing death by a "rash" act to causing death by a "negligent" act and convicted the respondent on the amended charge. The second charge was similarly amended from s 337(a) to s 337(b) from causing hurt by a "rash" act to causing hurt by a "negligent" act. The punishment under s 304A(a) was "imprisonment for a term which may extend to five years, or with fine, or with both". The punishment for a s 304A(b) offence was "imprisonment for a term which may extend to two years, or with fine, or with both". The punishment for an offence under s 337(a) was "imprisonment for a term which may extend to one year, or with fine which may extend to $5,000, or with both". The punishment for an offence under s 337(b) was "imprisonment for a term which may extend to six months, or with fine which may extend to $2,500, or with both".

2 The trial judge fined the respondent $7,000 and disqualified him from driving all classes of vehicles (the "disqualification") for three years in respect of the first charge (as amended); and fined him $2,500 in respect of the second charge (as amended). The total fine was thus $9,500 and the period of disqualification was for three years with effect from 28 October 2010. The prosecution appealed against the amendment of the charges and the sentences imposed. Although a trial was conducted, the facts relied upon by the prosecution were based on the Statement of Agreed Facts, which were in turn based on the statement that the respondent had given to the police on the morning of the accident.

3 The respondent was at the time, a 34-year old manager in a company dealing in milk products. Mok Sow Loon and her husband were both 76 years old. The couple were walking along the road on the extreme left lane towards a church. There was a pedestrian walkway but cars that were parked in front of the terraced houses along the road had partially blocked the walkway. According to the Statement of Agreed Facts, the respondent rose from bed at 8am the previous day, 7 November

2009, and went to work. He left his office sometime in the evening and went for dinner. He was back home at about 10pm and continued to work at home till midnight. He then chatted with a friend over the Internet. He left his flat at 2am to meet the said friend at the friend's flat at Block 760 Yishun Street 72. The respondent lived at Block 318 Shunfu Road. He told the police that he had drunk two small glasses of wine before 5am, when he was at the friend's flat. The alcohol content in his blood was 0.07mg per 100ml of blood, an amount conceded by the Deputy Public Prosecutor to be "negligible". The respondent felt tired at about 6am and decided to return home. He left Yishun, and the route home took him along Sembawang Road to Upper Thomson Road.

4 An important part of the Statement of Facts (at [6.4] to [6.6] of the judgment below) read as follows:

> 6.4 … At the signali[s]ed junction of Upper Thomson Road and Sin Min[g] Avenue, he was already feeling sleepy and was dozing off. He had actually slapped himself behind the neck a few times to keep himself awake.
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> 6.5 As the traffic light turned green, the [respondent] moved off. After the junction of Upper Thomson Road and Sin Min[g] Avenue, the [respondent] had filtered to the left lane as it was his habit to travel on the extreme left lane to make a left turn into Jalan Todak to go home. Subsequently, the [respondent] was uncertain of the speed of his vehicle or the lane in which he was travel[l]ing as he [had] dozed off while he was driving. The [respondent] was unaware of what had occurred and was awoken only by a sudden "bang" on the front left of his motor car.
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> 6.6 When the [respondent] opened his eyes, he noticed that the left side of his windscreen was cracked and that his vehicle was still in motion. The [respondent] applied the brakes and the vehicle came to a stop somewhere before the church. The [respondent] then saw [Mok Sow Loon] lying on the road and Mr Wee sitting on the road.

The Statement of Facts also stated that at the time of the accident, the respondent was only five minutes away from his home. The trial judge also accepted the following as facts, namely, that the respondent was not speeding and that his vehicle had not gone off the road. He also accepted that the impact of the accident was low, although death had resulted from the collision.

5 In his submissions on appeal, the DPP stated the issue as "was a driver who dozed off at the wheel, negligent or rash?" That was also the way the trial judge below saw it. However, the DPP thought that the answer should be "rash" but the trial judge found it to be "negligent". Various cases were cited by both the DPP and defence counsel. It will never be easy to draw a clear line between rashness and negligence, other than the fact that the former indicates conduct that is more serious and culpable than the latter. When a driver drives through a red light at a pedestrian crossing in the clear light of day it is not difficult for a court to find his act rash. When a driver drives through a red light in traffic conditions that made her unaware that the light was red, the degree of culpability is lesser than the previous example and we could give her the benefit of the doubt and accept that she had carelessly assumed the light was green. If the prosecution fails to prove that the driver knew that the light was red, and the court accepts that the driver was unaware of the red light, she would not need to prove that she had believed the light to be green. See *Lim Hong Eng v Public Prosecutor* [2009] 3 SLR(R) 682. In road accident cases, the facts that affect culpability can vary immensely. Not all road accidents are caused by criminal conduct. Often, they are caused by conduct we accept as "non-criminal" negligence. Cases that involve speeding and drink driving obviously increase the criminal culpability of the act. What distinguishes a criminal act and a non-criminal act in road traffic cases are mostly questions of fact which concern the conduct, the mental state of the actor, and

the consequences of the act. It will always be difficult for courts to lay down as a matter of law when an act is rash or when it is negligent, given the scope of the Penal Code provisions which apply not only to road traffic cases but also to other categories of cases such as *Balakrishnan S and another v Public Prosecutor* [2005] 4 SLR(R) 249 which involved the training of military commandos under the supervision of their commanding officers.

6 The issue in question is thus not a question of law, in terms of a determination, *ipso facto*, whether a person who falls asleep at the wheel would have committed a rash or negligent act and thus be guilty of an offence under either s 304A(a) or (b). It would be closer, but also not entirely accurate to say that the question is a question of fact. Whether an act falls within the definition of rashness or that of negligence is largely a question of fact because the factual circumstances can differ vastly from case to case just as they can be differentiated by the faintest element. Cases such as *Balakrishnan* have tried to formulate reasonable criteria for the application of s 304A. Yong CJ stated in *Balakrishnan* at [121]:

> As I stated in *Ng Keng Yong v PP* ([76] *supra* at [88]), s 304A merely requires the court to consider whether "a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others resulting from [his] conduct".

Yong CJ concluded that a reasonable man in the same circumstances would have known that the acts of the commanding officers in question in *Balakrishnan* were rash. The guiding factors thus include the test of the reasonable man. However, since circumstances differ, what a reasonable man might think would also differ. It is therefore helpful to take into account the mental state of the actor, the nature of the act in question, the likelihood of harm, and the extent of the harm foreseeable, as well as the actual harm or damage that resulted. It must be obvious that these are matters that a reasonable man would take into account. They are not elements of law.

7 Thus, the trial judge was not wrong to have expressed his opinion in an exchange with the DPP at trial (in page 98 of the Record of Appeal) that "tiredness" alone would not be sufficient to infer rashness. Other factors should also have been taken into account, and he named drinking, speeding, and beating traffic lights as some of those factors. The trial judge also did not discount falling asleep as a factor. He noted that bus drivers, taxi drivers and others fall asleep at the wheel. The point of this observation was that many drivers suffer from varying degrees of exhaustion. Driving when one is tired or sleepy is not an offence, let alone an offence of rashness. It may become so if it had been proved that the tired driver knew that he was in all likelihood to fall asleep at the wheel and yet he drove. In this case, the facts did not show that that was the case. It was open, on the specific facts, to conclude that the respondent, though tired, genuinely believed he could continue for at least five more minutes. The trial judge also considered the fact that the respondent had not been speeding, had not committed any other traffic violation, and had no significant alcohol level in his blood. The only factor against the respondent was simply that he had fallen asleep at the wheel. I am thus of the view that the judge had taken the totality of the respondent's actions into account. The DPP submitted that the respondent had been devoid of sleep for 22 hours and on the strength of that fact, he ought to have told himself that he was in no position to drive and should not have driven. The DPP further submitted that the fact that the respondent did continue to drive was a strong factor indicating the rashness of his conduct. What was overlooked in this argument was that the length of time without sleep is a subjective factor. Some people will fall asleep at the wheel if they are devoid of only 10 hours of sleep, some can drive with no danger even after 24 hours without sleep. In this case, when the respondent started off from Yishun he was only feeling tired but there was nothing to indicate that he clearly ought not to drive. The point of importance therefore occurred at the junction between Upper Thomson Road and Sin Ming Avenue, where the respondent felt sleepy at the wheel and slapped himself on the neck in order to stay awake. However, it must be

remembered that he was, at that time, only five minutes away from home and he thought he would be able to make it back home without incident. The point at which a person falls asleep is, ironically, a point which he will never be aware of. The mental state in the circumstances of the respondent may indicate an element of negligence, but I agree with the trial judge that in the totality of the circumstances of the case, they fall short of rashness. The findings of fact and the application of the law by the trial judge in this case were not unreasonable and I therefore do not think that his decision to amend the charges ought to be reversed.

8 The DPP submitted that in any event, even if the charges were rightly reduced, the trial judge ought to have imposed a custodial sentence. In my view, on the facts of the case, that would amount to saying that that there was no distinction between a rash act and a negligent one. The trial judge already noted that there may be cases in which rash acts might not necessarily require a custodial sentence and, vice versa, the fact that an act was negligent did not necessarily mean that no custodial sentence would be imposed. On the facts in the present case, the culpability of the respondent had already been shown to be attributable to his falling asleep at the wheel at the unfortunate time. I agree with the trial judge that a custodial sentence was not warranted in the circumstances. The respondent not only had not acted in any other way in a rash manner, but had also shown exemplary honesty in his account to the police, as the trial judge noted. The only evidence against him came entirely and exactly from what he told the police, and was corroborated by the two independent witnesses who were in a car behind his.

9 For the reasons above, the appeals against the amendment of the charges as well as the sentences are dismissed.