Public Prosecutor *v* Wong Yew Foo
[2013] SGHC 129

Case Number : Magistrate's Appeal No 310 of 2012

Decision Date : 10 July 2013

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Mark Tay and Yvonne Poon (Deputy Public Prosecutors) for the Appellant; Raj Singh Shergill (Lee Shergill LLP) for the Respondent.

Parties : Public Prosecutor — Wong Yew Foo

CRIMINAL PROCEDURE AND SENTENCING – sentencing – appeals

10 July 2013

Chan Seng Onn J:

1 This was an appeal by the Prosecution against the sentences meted out on the accused ("the Respondent") by the District Judge ("DJ") in respect of two charges — 1 charge under s 304A(b) Penal Code (Cap 224, 2008 Rev Ed) ("PC") and 1 charge under s 67(1)(b) Road Traffic Act (Cap 276, 2004 Rev Ed) ("RTA").

2 At the conclusion of the appeal, I allowed the Prosecution's appeal. I now set out my reasons.

The Background

3 According to the Statement of Facts ("SOF"), on 4 April 2012, at about 7.00pm, the Respondent drove his motor car to Lorong 15 Geylang to meet up with three of his friends at a coffee shop for dinner and drinks. They ordered a total of 6 bottles of beer, of which the Respondent consumed 2 bottles. At about 8.45pm, the Respondent left the coffee shop and drove his motor car to send a friend home before heading home himself.

4 At about 9.29pm, the Respondent was driving along Lower Delta Road after dropping his friend off. The Respondent entered a slip road leading to Jalan Bukit Merah. Without stopping his motor car at the give way line, the Respondent proceeded to exit the slip road and turn left into Jalan Bukit Merah in the direction of Queensway.

5 In doing so, however, the Respondent failed to keep a proper lookout and thus did not see one Sin San Wah ("the deceased") cycling along the extreme left lane of Jalan Bukit Merah. The front right of the Respondent's motor car thus collided with the deceased's bicycle. Upon impact, the deceased was run over by the motor car and was pinned under it. The deceased suffered multiple injuries and was pronounced dead at the scene by a paramedic at 9.55pm.

6 At the time of the accident, the weather was fine, road surface was dry and the visibility was fair. The traffic flow along Jalan Bukit Merah towards the direction of Queensway was light.

7 The police officers who arrived at the scene to investigate the collision observed that the Respondent smelled strongly of alcohol. The Respondent was then placed under arrest and escorted

to Traffic Police Headquarters for investigations. At about 11.45 pm, a Breath Evidential Analyser test which was conducted revealed that the proportion of alcohol in the Respondent's breath was 42 microgrammes of alcohol in every 100 millilitres of breath. This exceeded the prescribed limit by 7 microgrammes.

The Charges

8 The Respondent pleaded guilty before the district judge, admitted to the facts in the SOF and was convicted on two charges:

> MAC 7965-2012:
>
> You, Wong Yew Foo … are charged that you, on the 4th day of April 2012, at about 9.29pm, along Jalan Bukit Merah towards the direction of Queensway near lamp post 74 A, Singapore, being the driver of a motor car bearing registration number SGS 2868 S, did cause the death of a pedal cyclist, Sin San Wah (m/67), by doing a negligent act not amounting to culpable homicide, to wit by failing to keep a proper look out for the said pedal cyclist while entering Jalan Bukit Merah from the slip road of Lower Delta Road resulting in a collision between your motor car and the deceased's bicycle which was travelling along Jalan Bukit Merah in the direction of Queensway, hence causing his death, and you have thereby committed an offence punishable under section 304A(b) of the Penal Code (Cap 224, 2008 Rev Ed).
>
> And MAC 7966-2012:
>
> You, Wong Yew Foo … are charged that you, on the 4th day of April 2012, at about 9.29pm, along Jalan Bukit Merah towards the direction of Queensway near lamp post 74A, Singapore, when driving motor car bearing registration number SGS 2868 S, did have so much alcohol in your body that the proportion of it in your breath exceeds the prescribed limit of 35 microgrammes of alcohol in 100 [millilitres] of breath, to wit, not less than 42 microgrammes of alcohol in 100 [millilitres] of breath, and you have thereby committed an offence punishable under section 67(1)(b) of the Road Traffic Act, Chapter 276.

The Decision Below

9 The DJ sentenced the Respondent to the following:

> (a) For MAC 7965-2012 under s 304A(b) PC: a fine of $10,000 (in default 2 months' imprisonment) and disqualification from driving all classes of vehicles for a period of 4 years with effect from the date of conviction;
>
> (b) For MAC 7966-2012 under s 67(1)(b) RTA: a fine of $2500 (in default 2 weeks' imprisonment) and disqualification from driving all classes of vehicles for a period of 2 years with effect from the date of conviction.

The total sentence was hence a fine of $12,500 and disqualification from driving all classes of vehicles for a period of 4 years with effect from the date of conviction. At the time of the appeal, the fine had already been paid.

10 It was noted from the outset that the DJ incorrectly concluded that Prosecution was appealing only against the sentence imposed for the s 304A(b) PC charge and not the s 67(1)(b) RTA charge. Therefore, the key thrust of her grounds of decision ("GD") centred on the sentencing considerations

in relation to the former. They were as follows:

(a) The proper punishment for causing death by a negligent act is the imposition of a fine unless aggravating factors render it a "most unusual case" to warrant a custodial sentence. A "most unusual case" is one where the level of negligence is towards the higher end of the objective range of seriousness and bordering on recklessness.

(b) The Court could not reject the Respondent's claim that he had taken some care, albeit insufficient, before executing the turn from the slip road. The Prosecution did not object to the Respondent's mitigation that he had indeed slowed down to check for the oncoming traffic. Further, the Respondent's view might have been compromised by the big tree at the scene and the shadows that it cast at the said location.

(c) The Respondent's negligence fell short of the level of negligence demonstrated by the accused persons in previous s 304A(b) PC cases where custodial terms had been imposed. Those cases were more serious in nature as the accused persons took the risk when they did not have a complete view of the path that they were taking or failed to notice a pedestrian or cyclist who was directly ahead of them for a period of time.

(d) Moreover, the facts of the present case were not more serious than in cases where fines had been imposed even though the accused persons in those cases had deliberately and intentionally chosen to act in a certain way which resulted in an accident.

(e) In determining whether the Respondent's drink driving seriously aggravated the act of negligence in this case, other factors like the amount of alcohol consumed by the Respondent as well as whether his state of intoxication had contributed to the cause of the collision would have to be taken into account. As regards the former, she noted that the alcohol level in this case was lower than the precedents cited by the Prosecution. As regards the latter, there was no direct evidence to support a conclusion that his state of intoxication was a causal factor in that it had caused or had contributed to his failure to keep a proper look out.

(f) The Respondent was a first time offender and his early plea of guilt was indicative of his remorse.

11 In the light of the above, the DJ was of the view that the negligence of the Respondent was not of such an aggravated degree as to warrant a custodial sentence.

Principles governing appellate intervention

12 It bears emphasising from the outset that it is settled law that an appellate court only has a limited scope to intervene when reappraising sentences imposed by a court at first instance: see *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 ("*Angliss*") at [13]; affirmed by the Court of Appeal in *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [81].

13 In *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 ("*Kwong Kok Hing*") at [14], it was held that an appellate court would interfere with the sentence imposed if it was satisfied that:

(a) the trial judge had made the wrong decision as to the proper factual basis for sentence;

(b) there had been an error on the part of the trial judge in appreciating the material placed

before him;

(c) the sentence was wrong in principle; or

(d) the sentence imposed was manifestly excessive or manifestly inadequate.

The threshold for determining whether a sentence is manifestly inadequate or excessive is whether it "requires substantial alterations rather than minute corrections to remedy the injustice": see *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [13].

The Prosecution's case

14 In respect of the s 304A(b) PC charge, the Prosecution submitted that having regard to all the facts and circumstances of the case, the custodial threshold had been crossed. It argued that:

(a) The DJ failed to give sufficient weight to the aggravating factor of the Respondent being intoxicated above the prescribed legal limit when he caused the deceased's death.

(b) The DJ failed to identify the Respondent's degree of negligence as being high, and in particular erred in failing to appreciate the material before her by:

(i) failing to give adequate consideration to the Respondent's act of filtering onto Jalan Bukit Merah without first making a proper check of the oncoming traffic;

(ii) failing to give adequate consideration to the Respondent's failure to stop his motor car at the slip road and give way to the deceased who had the right of way;

(iii) failing to give adequate consideration to the fact that there were no vehicles ahead of the Respondent and his view was unobstructed;

(iv) accepting the Respondent's claims that his view was compromised by the shadows cast from a big tree when the photographs showed it was not possible for the tree to cast shadows on the road;

(v) construing that the Respondent had failed to notice the deceased due to a "momentary lapse in concentration";

(vi) finding that there was no evidence that the Respondent had driven with reckless disregard for the safety of other road users; and

(vii) assessing that there was no causal relationship between the Respondent's intoxication and his failure to keep a proper look-out.

(c) The DJ placed undue weight on the purported mitigating factors in the case, in particular the Respondent's assertion that he had checked for both oncoming traffic and there was a blind spot.

(d) The DJ also gave undue weight to sentencing precedents which could be distinguished, for instance, sentencing precedents for the s 304A(b) PC charge in which the accused persons were not intoxicated beyond the prescribed legal limit.

15 In respect of the s 67(1)(b) RTA charge, the Prosecution argued that the DJ failed to:

(a) give sufficient weight to the aggravating factor of the Respondent causing the death of the deceased due to his drink-driving;

(b) appreciate the material before her in assessing the Respondent's culpability; and

(c) give adequate consideration to the sentencing precedents where imprisonment was imposed when death was caused by the Respondent's drink-driving.

It submitted that having regard to all the facts and circumstances of the case, a custodial sentence should also have been imposed for the s 67(1)(b) RTA charge.

16 Further in respect of both charges, the Prosecution argued that the DJ failed to:

(a) sufficiently consider the principles of deterrence and protection involving such offences; and

(b) give adequate consideration to the sentencing precedents for the length of disqualification normally imposed in cases under s 304A(b) PC and s 67(1)(b) RTA.

17 The Prosecution thus urged me to substitute the fine imposed in respect of the s 304A(b) PC charge with a sentence of 6 months' imprisonment and to enhance the period of disqualification to 8 years. In respect of the s 67(1)(b) RTA charge, the Prosecution submitted that a custodial sentence and disqualification period commensurate with the gravity of the Respondent's wrongdoing be imposed.

The Respondent's case

18 The Respondent contended that the DJ was correct in finding that the degree of intoxication in this case was marginal and did not play any significant causative role in his momentary lapse of judgment. In addition to the low breath alcohol level, his ability to stop almost immediately upon impact indicated that the Respondent was not so intoxicated as to lose control of his vehicle.

19 Moreover, in view of the mitigating factors, the Respondent argued that the DJ was correct in finding that the degree of negligence displayed in the circumstances on that night in question was not unusual or sufficiently severe to merit a custodial sentence. Factors looked at would include the fact that:

(a) the Respondent was travelling at a relatively slow speed;

(b) the road was dimly lit;

(c) shadows cast by trees might have obstructed the Respondent's view;

(d) the deceased was dressed in dark clothing; and

(e) the deceased's bicycle was poorly lit and lacked reflectors.

20 The Respondent thus submitted that the sentence was not delivered against the weight of evidence nor was it manifestly inadequate in view of the sentencing precedents and circumstances.

My decision

21 Where the accused faces a number of separate charges, the correct approach to determine the appropriate sentence to be imposed is to first determine the sentences for the individual offences before deciding whether the overall sentence is globally fair in view of the totality of the criminal behaviour by selecting the appropriate sentences to run consecutively or concurrently and if need be, by appropriately adjusting the individual sentences, in order to achieve the overall objective of a globally fair sentence: see *Public Prosecutor v Syamsul Hilal bin Ismail* [2012] 1 SLR 973. With this in mind, I turn to the appeal proper.

Section 304A(b) PC

The 2008 amendments to the Penal Code

22 Section 304A PC reads:

> **Causing death by rash or negligent act**
>
> **304A.** Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished —
>
> (a) in the case of a rash act, with imprisonment for a term which may extend to 5 years, or with fine, or with both; or
>
> (b) *in the case of a negligent act, with imprisonment for a term which may extend to 2 years, or with fine, or with both.* [emphasis added]

23 As mentioned above at [10(a)], the DJ found that the proper starting point as regards sentencing for this offence is the imposition of a fine unless aggravating factors render it a "most unusual case" rising to the level of culpability as that of a reckless and rash act to warrant a custodial sentence. This sentencing principle was set out in *Public Prosecutor v Gan Lim Soon* [1993] 2 SLR(R) 67 ("*Gan Lim Soon*") at [10] (and applied in *Mohamad Iskandar bin Basri v Public Prosecutor* [2006] 4 SLR(R) 440):

> Under s 304A, the act can be due to either rashness or negligence. If death has been caused by a rash act the proper punishment would be imprisonment for a term not exceeding two years. *If death has been caused instead by a negligent act, it would be sufficient in most cases to inflict a fine on the accused.* [emphasis added]

The dictum in *Gan Lim Soon* thus appears to evince a sentencing dichotomy between the offences of causing death by rashness and causing death by negligence.

24 The Prosecution queried if the sentencing norm set out in *Gan Lim Soon* still applies. In this regard, they pointed out that the present form of s 304A PC came in the wake of the 2008 amendments to the Penal Code. Pre-2008 amendments, s 304A PC read as follows:

> **Causing death by rash or negligent act**
>
> **304A.** Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

The Prosecution contended that in the light of the pre-2008 amendment provision, there was a need

for the court to differentiate between the culpability of an offender who was negligent versus one who was rash when sentencing. This was the basis of the sentencing dichotomy in *Gan Lim Soon*.

25 However, in the wake of the 2008 amendments, s 304A PC has been clearly bifurcated into rashness and negligence limbs with each limb attracting a different statutorily prescribed maximum sentence. The rationale for the sentencing dichotomy expounded in *Gan Lim Soon* has thus been considerably weakened.

26 Also significant was the increase of the prescribed statutory maximum sentence for the rashness limb (*ie* s 304A (a) PC) to five years whilst the statutory maximum sentence prescribed for the negligence limb is now two years. It bears reiterating that the court must take the statutory maximum sentence into account when determining the sentence to be imposed. As was emphasised by the Court of Appeal in *Kwong Kok Hing* at [44], citing *Angliss*:

> … when Parliament sets a statutory maximum, it signals the gravity with which the public, through Parliament, views that particular offence … Therefore, it stands to reason that the sentencing judges must take note of the maximum penalty and then apply their minds to determine precisely where the offender's conduct falls within the spectrum of punishment devised by Parliament.

27 Therefore, I agreed with the Prosecution's contention that it is highly questionable if the starting point as regards sentencing for the s 304A(b) offence remains a fine and that only a "most unusual case" would warrant the imposition of a custodial sentence. That said, it is clear that the sentence to be imposed will depend on the nature and extent of the culpability — the more serious the negligence, the more justification there is for the imposition of a custodial sentence: see *Public Prosecutor v Lee Kao Chong Sylvester* [2012] SGHC 96 ("*Lee Kao Chong* Sylvester") at [18].

Drink driving as an aggravating factor

28 The Prosecution's key contention was that the DJ failed to place sufficient weight on the Respondent's drink driving as a serious aggravating factor warranting the imposition of a custodial sentence for the s 304A(b) PC offence.

29 The DJ's decision was premised on the dictum in *Gan Lim Soon* that an offence under the negligence limb would only attract a fine unless it was a "most unusual case" rising to a similar level of culpability as that of a reckless or rash act. However, as explained in the section above, the applicability of this dictum is questionable in the light of the 2008 amendments to the Penal Code. Instead, I found that the preferable approach is to determine the seriousness of the Respondent's negligence against the standard of care that a prudent and reasonable man would exercise: see *Public Prosecutor v Teo Poh Leng* [1991] 2 SLR(R) 541.

30 In coming to her decision that this case did not warrant the imposition of a custodial sentence, the DJ placed some emphasis on her finding that there was no evidence or statement in the SOF that the alcohol had contributed causally to the Respondent's negligence in failing to keep a proper lookout. She thus took the view that the Respondent's intoxicated state could not on its own raise the objective seriousness of the s 304A(b) PC negligence.

31 On appeal, the Prosecution submitted that the presence of alcohol in the body was always a factor affecting an individual's perception, reaction and reflexes. It cited an excerpt from the 1985 Parliamentary Debates on the Road Traffic Act where impairment of driving skill was observed at levels as low as 30 to 50 milligrammes of alcohol per 100 millilitres of blood (approximately 13 to 21.7

microgrammes per 100 millilitres of breath) and a rapid deterioration of driving skill thereafter. I found the Prosecution's submissions on this point in relation to causation highly persuasive.

32 More critically, I was of the view that this was not a case where a momentary lapse of concentration arising from human frailty resulted in the unfortunate loss of life. On the contrary, not only did the Respondent fail to maintain a proper lookout and to give way to the deceased cyclist who had the right of way, he also made a *conscious* decision to drink and drive. The lattermost act was one of complete selfish disregard for the safety of other fellow road users since the Respondent could not have been ignorant of the risk that his judgment and driving skills might be impaired as a result of his inebriation. Taken as a whole, it was clear that the Respondent's conduct fell *egregiously* below the standard of what a prudent and reasonable man would do. I am even prepared to go so far to hold that by choosing to drive a car (and it was not a case that he chose to ride a bicycle) after having consumed two whole bottles of beer that had sent his level of alcohol in his body beyond the prescribed legal limit, and knowing full well (a) the very serious consequences that might follow due to any impairment of his driving skill and any slowdown in his perception, reaction and reflexes as a result of being in a relatively high state of inebriation; and (b) that a car could cause death to others in a serious accident, the Respondent could also be said to have acted with culpable rashness when he consciously took the risk to drive a car whilst in that state of inebriation. It is of course the Prosecution's prerogative to prefer a lower charge under s 304A(b) instead of s 304A(a) PC. I was thus satisfied that the Respondent's culpability for the offence here was of such seriousness that the custodial threshold had been breached.

33 In determining the gravity of the offence and hence the sentence for the Respondent, the level of alcohol and the degree of loss of control of the vehicle are highly relevant factors. In this regard, I found that the DJ was correct in distinguishing the present case from cases like *Public Prosecutor v Zaw Myint Tun* (unreported, DAC 16003/2006) and *Public Prosecutor v Tan Siam Poo* (unreported, DAC 25841/2009) where the levels of alcohol were significantly higher and the accused persons were so inebriated that they completely lost control of their vehicles. Nonetheless, the absence of these further aggravating factors (*ie* of an extremely high level of alcohol and a complete loss of control) would not detract from the seriousness of the Respondent's conduct, which on the facts of this case would in my view still attract a custodial sentence.

Mitigation

34 The Prosecution raised several contentions in relation to the facts the Respondent had relied on and which the DJ had considered as mitigating the offence. First, it contended that the DJ had erred in accepting the Respondent's claim that his view of the road had been compromised, in particular, by the shadows cast by a big tree at the scene. The Prosecution pointed out that No 5 of a series of photographs taken of the scene immediately after the accident showed that that the canopy and branches of the tree in question rose well above the street lamp and thus could not have cast shadows as alleged by the Respondent.

35 I agreed with the Prosecution and further observed from the photos that besides the presence of railings, through which the Respondent could have looked, there was no dense shrubbery which could have obscured the Respondent's view of the main road. In any case, both the tree and railings were located some distance before the give way line. Hence, I found that the DJ had erred in accepting the Respondent's claim that his view of the main road (when his car was at the give way line) had been compromised.

36 Pertinently, paragraph 72 of the Highway Code places the onus of checking for oncoming traffic squarely on the driver of the motor vehicle on the minor road. Had the Respondent's view of the main

road indeed been obstructed by the tree trunk or compromised as alleged, it was all the more incumbent on him to exercise extra prudence when checking for oncoming traffic — for instance, by bringing his vehicle to a complete stop at the give way line and checking for oncoming traffic before slowly easing out and exiting the slip road, instead of taking the risk and making a dangerous assumption that there would be no on-coming cyclist or vehicle hidden by the obstruction or the blind spot coming his way. This would be akin to the dangerous act of overtaking at a sharp bend when the driver's view of on-coming traffic on the opposite side is obstructed. In this regard, the High Court in *Lee Kao Chong Sylvester* deemed the accused's negligent act of deliberately reversing a car at high speed for an extensive distance when he could not completely see the path of his reversing vehicle "a dangerous act or recklessness" (at [19]).

37 The Prosecution also contended that the DJ had given undue importance to the Respondent's assertion that he had slowed down in order to check for oncoming traffic and his blind spot. Counsel for the Respondent submitted below and before me that the Respondent was able to stop his car immediately upon feeling the impact of the collision. He contended that this was consistent with the Respondent's account of slowing down before exiting the slip road.

38 Several facts contradicted the Respondent's account. According to the SOF, the deceased had been travelling along the left-most lane when the collision occurred. However, the colour photos taken of the accident scene and the sketch map indicated that the Respondent's motor vehicle did not come to a standstill until squarely at the middle of the centre-most lane. The deceased and his bicycle were dragged the distance of approximately a full car length. Had the Respondent been travelling at a slow speed and stopped as soon as he felt the impact, one would have expected the car to come to a complete halt earlier. Counsel for the Respondent was unable to offer a satisfactory explanation for this incongruity. I was thus inclined to agree with the Prosecution that the DJ had placed too much weight on the Respondent's assertion that he had slowed down and that he had checked for oncoming traffic and his blind spot.

39 Even though the cyclist was dressed in dark clothing and his bicycle was not well lit, which might have made it more difficult to spot the deceased on the road at night, this would be more than off-set by the presence of front and side reflectors on the bicycle which were in serviceable condition as stated in the Accident Damaged Vehicle Inspection Report. I was not persuaded that the manner the deceased had dressed, the absence of a bicycle light, the Respondent's lack of antecedents and his early plea of guilt would sufficiently mitigate in favour of a non-custodial sentence in respect of the s 304A(b) PC offence.

Section 67(1)(b) RTA

40 For reasons mentioned above at [10], this part of the appeal had to proceed without the benefit of the DJ's full grounds of decision for the s 67(1)(b) RTA charge.

Aggravating factors

41 The Prosecution's primary contention was that the DJ failed to give sufficient weight to the aggravating factor of death having been caused. In *Sentencing Practice in the Subordinate Courts* (Lexis Nexis, 2nd Edition, 2003) at pp 938-939, it was observed that although a fine is the norm for a first offender, this would not be the case if there were aggravating circumstances like involvement in an accident resulting in personal injuries. It was further noted that "[i]n cases where death was caused, a term of imprisonment appears to be inevitable". Support for this proposition can be found in cases like *Public Prosecutor v Lim Eng Kiang* (MA 48/92/01-02, unreported) ("*Lim Eng Kiang*") and *Public Prosecutor v Teo Seng Hock* (MA 273/95/01, unreported) ("*Teo Seng Hock*") where the fines

originally imposed on the offenders were substituted with custodial sentences on appeal.

42 The length of the custodial sentence would in turn depend on the aggravating and mitigating circumstances of each case, in particular on the quality of the driving and the amount by which the offender was over the limit. In *Public Prosecutor v Lee Meng Soon* [2007] 4 SLR(R) 240 ("*Lee Meng Soon*"), Lee Seiu Kin J held at [22] and [29] that the principal aggravating factors were the level of alcohol and degree of control over the vehicle. As regards the latter factor, Chao Hick Tin JA observed in *Lim Kay Han Irene v Public Prosecutor* [2010] 3 SLR 240 ("*Lim Kay Han Irene*") that the mere commission of an offence under s 67(1)(b) RTA would not give rise to the presumption that the driver was also incapable of controlling the vehicle. Although involvement in an accident could be indicative of poor control of the vehicle, much would also depend on the circumstances of the accident: see *Lee Meng Soon* at [27]-[28].

43 In this regard, I observed that the breath alcohol level of the Respondent had exceeded the prescribed limit of 35 microgrammes of alcohol in 100 millilitres of breath, albeit by 20%, and that there was no other objective evidence indicating that the Respondent might have lost some degree of control of his vehicle apart from the fact of the accident and the vehicle stopping about a car length after the collision. However, it should be emphasised that the absence of other evidence indicating that he had lost control of his vehicle would not sufficiently mitigate the seriousness of the offence on the facts of his case when he failed to give way, caused the cyclist's death and his breath alcohol level at the time of causing the fatal accident had exceeded the prescribed limit.

Culpability of the offender

44 In *Lim Kay Han Irene*, the High Court observed that the sentence meted out to the offender must be calibrated according to the degree to which the offender was culpable for the offence. As Chao JA stated at [29]:

> … Deliberate, purposeful and calculated harm-causing must be differentiated from unintended or incidental peccadilloes. In assessing the degree of culpability of an offender, the court must take into account, all the circumstances, including the reason why the person drove on that occasion and only when this is done would the sentence meted out be fair and proportionate.

Such an analysis should not be undertaken from the *ex post facto* point of view but by stepping into the shoes of the offender (at [34]). In that case, the court took into account the special circumstances of the case — the offender was emotionally fragile and in a heightened state of panic, having been woken up in the wee hours of the morning by a call from the hospital that the medical condition of her aunt, with whom she shared an extremely close relationship, was rapidly deteriorating. The court was of the view that in such a context, her good judgment took leave of her and the fact that she had consumed alcohol hours before was understandably not at the forefront of her mind.

45 The circumstances of the present case were far removed from that of *Lim Kay Han Irene*. According to his own mitigation plea, the Respondent was the designated driver for the evening. Despite this, he consumed two bottles of beer in the course of the evening. The Respondent thus knowingly placed himself in a difficult position where he should have appreciated the possible consequences of his actions.

46 The Respondent further pleaded in mitigation that he had genuinely believed that he was fit to drive as he had not drunk much and allowed himself 45 minutes prior to taking the wheel. In this regard, the observations of Lee J in *Lee Meng Soon* at [30] are pertinent:

> … Such precautions arguably reflect a lesser degree of wilful disregard for the law. However the amount of weight to give to this factor is quite another issue as it is far too easy for an offender to undertake precautions, but thereafter underestimate the level of alcohol remaining in his system …

It is further noted that the precautionary period allegedly taken by the Respondent in our present case was shorter than that in *Lee Meng Soon*. I was thus not inclined to place much weight on it.

General deterrence

47 In *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814, the court held at [24] that:

> General deterrence aims to educate and deter other like-minded members of the general public by making an example of a particular offender: *Meeran bin Mydin v PP* [1998] 1 SLR(R) 522 at [9] ("*Meeran bin Mydin*"). Premeditated offences aside, there are many other situations where general deterrence assumes significance and relevance. These may relate to the type and/or circumstances of a particular offence. Some examples of the types of offences, which warrant general deterrence are:
>
> > ...
> >
> > (d) Offences affecting public safety, public health, public services, public or widely used facilities or public security...

48 By now, the opprobrium evoked by drink driving needs no repetition. As Professor S. Jayakumar stated in the 1990 Parliamentary Debates (*Singapore Parliamentary Debates, Official Report* (28 March 1990) vol 55 at col 960):

> …we must get every driver in Singapore to note that when he is issued a licence, it is in fact a very special privilege and it is granted on condition that he drives in a responsible manner bearing in mind the interests of others. And certainly no driver in Singapore who drinks can claim or should be able to claim that he was unaware of the serious consequences of driving under the influence of alcohol.

The strict legislation put in place for drink driving has been accompanied by rigorous enforcement efforts by the Traffic Police and constant public education efforts to curb drink driving. There is little doubt that a deterrent sentence is warranted here.

Sentencing Precedents

49 Numerous sentencing precedents involving a vast array of factual matrices were presented by the Prosecution and Respondent's counsel. For purposes of this appeal, I think it appropriate to highlight precedents which involve factual matrices very similar to our own, *ie*, the offenders were charged with both drink driving and causing death by negligent act.

50 These sentencing precedents could further be classified into those prior to the 2008 amendments to the PC and those after it. This classification is significant. For the reasons given above at [23]-[27], the precedential value of the former cases have been somewhat diminished.

51 Both *Lim Eng Kiang* and *Teo Seng Hock* were pre-2008 amendments cases. In *Lim Eng Kiang*, the offender whilst making a right turn at a junction, cut into the path of an oncoming motorcyclist

which resulted in the latter colliding head on into the front left side of the lorry. The offender's blood specimen contained 132 milligrammes of ethanol per 100 millilitres of blood. The High Court rejected the Prosecution's appeal on the s 304A charge and upheld the fine of $7,000 and a disqualification period of 10 years imposed for the charge. The appeal on the drink driving charge succeeded and the court imposed a sentence of one week's imprisonment and a disqualification period of 10 years.

52 In *Teo Seng Hock*, the offender failed to keep a proper lookout for vehicles in front of him and collided with the rear of a trishaw. The offender was also convicted of drink driving under s 67(1) and s 84(1) read with s 84(3) RTA for failing to stop and render assistance. The offender's blood alcohol level was 208 milligrammes of ethanol per 100 millilitres of blood. Following the appeal, the $10,000 fine imposed for the s 304A charge was upheld, but the fine for the offence under s 67 RTA was set aside and substituted with a sentence of 4 weeks' imprisonment and a disqualification period of five years for all classes of vehicle. The disqualification period for the offence under s 304A PC was similarly reduced to five years.

53 The Prosecution also brought to the court's attention another pre-2008 PC amendments case. In *Public Prosecutor v Su Hong* (DACs 17678, 17679 and 17680 of 2007, unreported) the accused failed to keep a proper lookout when travelling along the 2nd lane from the right of a 5-lane carriageway and collided with the deceased who was crossing from the left to the right of the accused. The collision had taken place more than 50 m away from the nearest pedestrian crossing. The accused did not stop after the accident and fled the scene. Tested three hours after the accident, the accused's breath alcohol level was found to contain 39 microgrammes of alcohol per 100 millilitres of breath. There was some contributory negligence on the part of the deceased who was also drunk. As regards the s 304A PC offence, the accused was sentenced to 3 weeks' imprisonment and 5 years' disqualification for all classes of vehicle. As regards the s 67(1)(b) RTA offence, the accused was sentenced to 2 weeks' imprisonment and 3 years' disqualification. The accused was also sentenced to 9 weeks' imprisonment and 3 years' disqualification for the s 84(1) read with s 84(7) RTA charge. Two additional charges were taken into consideration.

54 It would appear therefore that the courts had imposed relatively short custodial sentences, if any, in circumstances highly similar to our own. Without the benefit of written decisions however, it was not possible to discern the judges' reasoning for imposing such sentences. Moreover, as had been emphasised, it was questionable if these pre-2008 amendment cases were of precedential value, particularly in respect of the s 304A(b) charge.

55 The Prosecution sought to bring to my attention two recent decisions:

(a) *Public Prosecutor v Mohamed Zairi Bin Ahmad* (MAC 11783/2011, DAC 39997-39999 of 2011, unreported) — the accused failed to keep a proper lookout for the deceased's bicycle which was travelling in front of him. The right view mirror and right rear portion of the accused's motor van hit the deceased. The accused did not stop and drove off at high speed, returning to the scene only later when told to do so by a witness. His breath alcohol level was 44 microgrammes per 100 millilitres of breath.

The accused was sentenced to 6 months' imprisonment and 10 years' disqualification for the s 304A(b) PC Charge, 2 months' imprisonment and 5 years' disqualification for the s 67(1)(b) RTA charge and 2 months' imprisonment and 2 years' disqualification for the s 84(1) charge. The last charge was to run concurrently with the rest.

(b) *Public Prosecutor v Goh Teck Guan* (MAC 2209 and 2210 of 2013, unreported) — the accused was turning right at a signalised traffic junction in his motor lorry on a green light

(without the green arrow). He failed to keep a proper lookout for the deceased who was a pedestrian crossing from the accused's left to right and collided into him. The accused's alcohol level was 48 microgrammes of alcohol per 100 millilitres of breath.

This was the accused's second conviction for drink driving. He was sentenced to 6 months' imprisonment and 8 years' disqualification for the s 304A(b) PC offence, and 4 months' imprisonment, $3000 fine and 5 years' disqualification for the RTA offence. Both sentences were to run concurrently.

56 The Respondent cited the case of *Public Prosecutor v Tan Chean Wei* [2010] SGDC 240 ("*Tan Chean Wei*"). There the accused was charged under s 304A(b) PC and s 67(1)(a) RTA for driving under the influence of a drug, Nimetazepam. He was driving along a 3-lane, 2-way road when he lost control of his motor van and collided into the deceased's bicycle. The accused was fined $6,000 and a disqualification period of 3 years was imposed for the s 304A(b) PC offence and a fine of $2,000 and 3 years' disqualification was imposed for the s 67(1)(a) RTA offence.

57 The Prosecution sought to distinguish *Tan Chean Wei* from our present case. They pointed out that the accused in that case was under the medication Erimin which had been *legally* prescribed to the accused for his insomnia and that it was not shown that the level of medication present in his system exceeded the dosage to such a degree as to constitute abuse. Moreover, the accused had taken the medication some *18 hours* prior to the accident. I accepted the Prosecution's submissions in respect of *Tan Chean Wei*; the level of culpability on the part of the Respondent clearly exceeded that of the accused in that case in the light of his conscious decision to drink two whole bottles of beer and then drive soon thereafter.

58 The recent unreported precedents also evince the imposition of a custodial sentence of more than a few weeks even in cases where the accused's alcohol level was low. The DJ's imposition of fines for both the s 304A(b) PC and s 67(1)(b) RTA charges on the facts of this case were therefore manifestly inadequate.

59 I also found that the period of disqualification of 4 years imposed in respect of the s 304A(b) PC charge was manifestly inadequate in the light of the above precedents. I declined however to disturb the disqualification period imposed in respect of the s 67(1)(b) RTA charge.

Conclusion

60 For the above reasons, I allowed the Prosecution's appeal against the sentences for both charges and ordered the following:

(a) For the charge MAC 7965-2012 under s 304A(b) PC: the fine imposed by the DJ to be substituted with a sentence of 4 months' imprisonment and the disqualification period enhanced from 4 years to 6 years.

(b) For the charge MAC 7966-2012 under s 67(1)(b) RTA: the fine imposed by the DJ to be substituted with a sentence of 2 months' imprisonment and the disqualification period of 2 years to remain.

Both sentences were to run concurrently. I also ordered that the fine already paid by the Respondent to be refunded to him.