IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 244

Magistrate's Appeal No 9043 of 2017/01

Between

Pua Hung Jaan Jeffrey Nguyen

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Appeals]

Pua Hung Jaan Jeffrey Nguyen
v
Public Prosecutor

[2017] SGHC 244

High Court — Magistrate's Appeal No 9043 of 2017/01
Sundaresh Menon CJ
20 July 2017

4 October 2017 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 The appellant, Pua Hung Jaan Jeffrey Nguyen (the "Appellant"), pleaded guilty to a single charge of driving while having excessive alcohol in his breath or blood under s 67(1)(*b*) of the Road Traffic Act (Cap 276, 2004 Rev Ed) (the "RTA", which expression also refers, where applicable, to the corresponding predecessor version). The district judge (the "District Judge") sentenced him to one week's imprisonment and disqualified him from holding or obtaining all classes of driving licences for a period of 30 months with effect from the date of release.

2 Magistrate's Appeal No 9043 of 2017/01 is the Appellant's appeal against the sentence imposed on him by the District Judge. It is opposed by the respondent, the Public Prosecutor (the "Respondent"). What stands out on the

facts is the Appellant's previous conviction, in 2012, for an offence of being in charge of a motor vehicle while under the influence of drink under s 68(1)(*b*) of the RTA. After hearing parties on 20 July 2017, I reserved judgment. I now render my decision.

Facts

3 The facts giving rise to the offence are unremarkable. The Appellant, an American citizen and Singapore permanent resident, was 34 years old at the time of the offence. At about 4.50am on 29 October 2016, the Appellant was driving his car along Whitley Road when he was stopped at a police road block. The Appellant smelt strongly of alcohol. A breathalyser test was administered and the Appellant's alcohol level was found to be excessive. He was placed under arrest and escorted to the Traffic Police department for a Breath Evidential Analyser ("BEA") test. The BEA test revealed that the proportion of alcohol in the Appellant's breath was 70μg of alcohol per 100ml of breath. This far exceeded the prescribed limit of 35μg of alcohol per 100ml of breath set out in s 72(1) of the RTA. Investigations revealed that the Appellant had been at the Pan Pacific Hotel at about 11.00pm on 28 October 2016, where he had consumed about three glasses of champagne.

Proceedings below

4 On 26 January 2017, the Appellant pleaded guilty before the District Judge to a single charge of driving while having excessive alcohol in his breath or blood under s 67(1)(*b*) of the RTA. Section 67 of the RTA provides as follows:

> **Driving while under influence of drink or drugs**
>
> **67.**—(1) Any person who, when driving or attempting to drive a motor vehicle on a road or other public place —

> (*a*) is unfit to drive in that he is under the influence of drink or of a drug or an intoxicating substance to such an extent as to be incapable of having proper control of such vehicle; or
>
> (*b*) has so much alcohol in his body that the proportion of it in his breath or blood exceeds the prescribed limit,
>
> shall be guilty of an offence and shall be liable on conviction to a fine of not less than $1,000 and not more than $5,000 or to imprisonment for a term not exceeding 6 months and, in the case of a second or subsequent conviction, to a fine of not less than $3,000 and not more than $10,000 and to imprisonment for a term not exceeding 12 months.
>
> (2) A person convicted of an offence under this section shall, unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified from holding or obtaining a driving licence for a period of not less than 12 months from the date of his conviction or, where he is sentenced to imprisonment, from the date of his release from prison.
>
> (3) Any police officer may arrest without warrant any person committing an offence under this section.

5 Following the Appellant's plea of guilt and the parties' submissions on sentence, the matter was adjourned for sentencing. On 13 February 2017, the District Judge sentenced the Appellant to one week's imprisonment and disqualified him from holding or obtaining all classes of driving licences for a period of 30 months with effect from the date of release. On the same day, the District Judge granted bail pending appeal and stayed the execution of the imprisonment term as well as the disqualification order.

6 The District Judge subsequently issued the full grounds for her decision on 10 March 2017 (see *Public Prosecutor v Pua Hung Jaan Jeffrey Nguyen* [2017] SGDC 63 (the "GD")). She considered that the key point in this case was that the Appellant had previously been convicted on 17 May 2012 for an offence of being in charge of a motor vehicle while under the influence of drink under

s 68(1)(*b*) of the RTA. She noted that the Appellant had been fined $1,000 in respect of that offence. An offence under s 68(1) of the RTA arises when the offender is not driving the vehicle but is in charge of it. In this regard, s 68 of the RTA provides as follows:

> **Being in charge of motor vehicle when under influence of drink or drugs**
>
> **68.**—(1) Any person who when in charge of a motor vehicle which is on a road or other public place but not driving the vehicle —
>
> (*a*) is unfit to drive in that he is under the influence of drink or of a drug or an intoxicating substance to such an extent as to be incapable of having proper control of a vehicle; or
>
> (*b*) has so much alcohol in his body that the proportion of it in his breath or blood exceeds the prescribed limit,
>
> shall be guilty of an offence and shall be liable on conviction to a fine of not less than $500 and not more than $2,000 or to imprisonment for a term not exceeding 3 months and, in the case of a second or subsequent conviction, to a fine of not less than $1,000 and not more than $5,000 and to imprisonment for a term not exceeding 6 months.
>
> (2) For the purpose of subsection (1), a person shall be deemed not to have been in charge of a motor vehicle if he proves —
>
> (*a*) that at the material time the circumstances were such that there was no likelihood of his driving the vehicle so long as he remained so unfit to drive or so long as the proportion of alcohol in his breath or blood remained in excess of the prescribed limit; and
>
> (*b*) that between his becoming so unfit to drive and the material time, or between the time when the proportion of alcohol in his breath or blood first exceeded the prescribed limit and the material time, he had not driven the vehicle on a road or other public place.
>
> (3) On a second or subsequent conviction for an offence under this section, the offender shall, unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified from holding or obtaining a

> driving licence for a period of 12 months from the date of his release from prison.
>
> (4) Where a person convicted of an offence under this section has been previously convicted of an offence under section 67, he shall be treated for the purpose of this section as having been previously convicted under this section.
>
> (5) Any police officer may arrest without warrant any person committing an offence under this section.

7 I pause here to note that under s 67(1) of the RTA, an offender who commits a second or subsequent offence "shall be liable … to imprisonment". Similarly, under s 68(1) of the RTA, an offender who commits a second or subsequent offence "shall be liable … to imprisonment", but for a shorter maximum period (six months) than the second or subsequent offender under s 67(1) of the RTA (12 months). Further, under s 68(4) of the RTA, an offender under s 68 of the RTA who has been previously convicted of an offence under s 67 of the RTA shall be treated for the purpose of s 68 of the RTA as having been previously convicted under s 68 of the RTA. No equivalent provision exists in s 67 of the RTA.

8 The District Judge accordingly considered the four scenarios that could present themselves in relation to the interplay between ss 67(1) and 68(1) of the RTA. These were previously set out in *Public Prosecutor v Ow Weng Hong* [2010] SGDC 284 ("*Ow Weng Hong*") (at [7]):

Scenario	**Antecedent**	**Current conviction**	**Punishment**
1	Section 67(1), RTA	Section 67(1), RTA	Mandatory imprisonment and fine and disqualification
2	Section 68(1), RTA	Section 68(1), RTA	Mandatory imprisonment and fine and disqualification
3	Section 67(1), RTA	Section 68(1), RTA	Mandatory imprisonment and fine and disqualification

4	Section 68(1), RTA	Section 67(1), RTA	Fine and disqualification; **or** imprisonment and disqualification

9 For convenience, I shall refer to these four scenarios as "Scenario 1", "Scenario 2", "Scenario 3" and "Scenario 4", respectively.

10 The District Judge agreed with the Respondent that it seemed anomalous that an offender in Scenario 4 ("Scenario 4 Offender") might be sentenced to only a fine and disqualification, as compared with an offender in Scenario 2 ("Scenario 2 Offender"), for whom a term of imprisonment would be mandatory. She thought, in relation to most drunk driving cases, that a Scenario 4 Offender might generally be considered more culpable than a Scenario 2 Offender. Moreover, she highlighted the observation in *Ow Weng Hong* (at [29]) that even if a Scenario 4 Offender were sentenced to imprisonment, this sentence might be described as "less harsh" than the sentence for which a Scenario 2 Offender would be liable, which would comprise both imprisonment *and* a fine. Notwithstanding this, the District Judge found it clear that: (a) an antecedent under s 68(1) of the RTA did not constitute a prior conviction for the purposes of s 67(1) of the RTA so as to attract a mandatory imprisonment term; and (b) there was no basis to adopt the position that an imprisonment term should be the starting point when sentencing the Appellant, who fell within Scenario 4. However, while the District Judge was unable to agree that an imprisonment term was the default position for Scenario 4 Offenders, she also rejected the Appellant's contention that Parliament's intention was to treat such offenders as being *less* culpable.

11 The District Judge took the view that the dominant consideration with respect to sentencing in drunk driving cases was that of deterrence, although she also accepted that deterrence did not *necessitate* that a sentence of imprisonment

be imposed, since a high fine might equally achieve that objective. The District Judge also considered the decision of the High Court in *Chong Pit Khai v Public Prosecutor* [2009] 3 SLR(R) 423 ("*Chong Pit Khai*"), where a fine had been imposed, but she thought that it was distinguishable. In calibrating the appropriate sentence in the present case, the District Judge had regard to the following factors:

(a) the Appellant's high alcohol level, which was two times the prescribed limit of 35μg of alcohol per 100ml of breath;

(b) the Appellant's antecedent under s 68(1) of the RTA, which she considered as "highly relevant" and not dated; and

(c) the absence of mitigating factors.

12 In all the circumstances, the District Judge was satisfied that the custodial threshold had been crossed, and that a "firm, deterrent sentence in the form of a short imprisonment term of [one] week" was called for. The District Judge also found this to be a "fair sentence" which sat well with the "general tenor" of the provisions in the RTA relating to drunk driving.

Some observations

13 I pause at this juncture to make two observations on the District Judge's decision.

14 First, the Appellant had sought to persuade the District Judge to consider imposing a short detention order. However, the District Judge did not consider this to be an available option in the light of s 337(1)(*b*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), which provides as follows:

> **Community orders**
>
> **337.**—(1) Subject to subsections (2) and (3), a court shall not exercise any of its powers under this Part to make any community order in respect of —
>
> …
>
> (*b*) an offence for which a specified minimum sentence or mandatory minimum sentence of imprisonment or fine or caning is prescribed by law;
>
> …
>
> …

15 The District Judge held that an offence under s 67(1) of the RTA fell within the ambit of s 337(1)(*b*) of the CPC because the prescribed "mandatory minimum fine" for this offence was $1,000. With respect, this is not entirely correct. In *Mohamad Fairuuz bin Saleh v Public Prosecutor* [2015] 1 SLR 1145, the three-judge panel of the High Court clarified (at [17]) that:

> (a) a "mandatory minimum sentence" means a sentence where a minimum quantum for a particular type of sentence is prescribed, and the imposition of that type of sentence is mandatory; and
>
> (b) a "specified minimum sentence" means a sentence where a minimum quantum for a particular type of sentence is prescribed, but the imposition of that type of sentence is not mandatory.

16 In the present case, the fine component of the prescribed punishment under s 67(1) of the RTA is a *specified* (rather than a *mandatory*) minimum sentence since its imposition is not mandatory (because a term of imprisonment can be imposed instead). However, nothing in the present case turns on this distinction. In any event, the Appellant has expressly accepted on appeal that he does not qualify for a community sentence.

17 Second, the District Judge proceeded on the assumption that imprisonment was mandatory in Scenarios 1, 2 and 3. I note that some doubt was cast on this assumption in *Chong Pit Khai* (at [20] and [24]). On the other hand, the High Court in *Choo Kok Hwee v Public Prosecutor* [2014] 3 SLR 1154 declined (at [11]) to follow *Chong Pit Khai* on this point. It is not necessary for me to come to a view on this issue in the present case because it is does not appear to be either party's suggestion that imprisonment is not mandatory in Scenarios 1, 2 and 3.

Submissions on appeal

Appellant's submissions

18 The Appellant submits that the maximum fine and a lengthy period of disqualification would be an effective deterrent commensurate with his culpability. To this end, the Appellant contends that:

(a) the District Judge failed to accord adequate weight to the fact that, as she accepted, imprisonment is not the starting point for a Scenario 4 Offender;

(b) the District Judge erred in not finding that an offence for which a sentence of imprisonment is discretionary (namely, Scenario 4) is one that should be viewed as less serious than an offence which carries a mandatory sentence of imprisonment (namely, Scenario 2);

(c) the District Judge failed to adequately consider the need for consistency and proportionality between Scenarios 1 and 4;

(d) the District Judge erred in the way she sought to distinguish *Chong Pit Khai*;

(e) the District Judge erred in finding that the custodial threshold had been crossed; and

(f) the District Judge failed to adequately consider the possibly crushing and disproportionate consequences of imprisonment and, in the circumstances, imposed a sentence on the Appellant that was (and is) manifestly excessive.

Respondent's submissions

19 The Respondent submits that the District Judge did not err in law in imposing a custodial sentence. It is said that in the present case, the custodial threshold has been crossed due to a combination of factors, namely: (a) the Appellant's directly relevant antecedent; (b) the Appellant's pattern of offending behaviour in committing a more serious drunk driving offence; (c) the lack of any emergency or other *need* to drive after drinking; and (d) the high level of alcohol in the Appellant's body. The Respondent also submits that *Chong Pit Khai* is distinguishable. Moreover, the fact that the Appellant might lose his job following a custodial term is not a mitigating factor. Nor is the fact that the Appellant did not lose control of his vehicle or cause an accident.

Relevant considerations

20 It is evident from the Appellant's submissions that his appeal is primarily directed at the one-week imprisonment term that was imposed on him, rather than the disqualification order. The central question that is raised is whether the custodial threshold has been crossed.

21 In my judgment, that question is best answered having regard to a number of considerations. These considerations are as follows:

(a) the two decisions of the High Court setting out the benchmark sentences for offences under s 67(1)(*b*) of the RTA, namely, *Edwin s/o Suse Nathen v Public Prosecutor* [2013] 4 SLR 1139 ("*Edwin Suse*") and *Stansilas Fabian Kester v Public Prosecutor* [2017] SGHC 185 ("*Stansilas*");

(b) the Scenario 4 precedents;

(c) a comparison with Scenario 2;

(d) the precedents cited by the Appellant involving two charges under s 67(1)(*b*) of the RTA being prosecuted at the same hearing; and

(e) the degree of harm caused and the Appellant's culpability.

22 At the outset, I should also deal very briefly with the Appellant's submission that a custodial term would have a crushing effect on him as it might result in the revocation of his representative licence with the Monetary Authority of Singapore and consequently destroy his career. In *Stansilas*, I held (at [111]) that such considerations are irrelevant to sentencing and I accordingly place no weight on this submission in the present case.

Edwin Suse *and* Stansilas

23 I first consider the decision of the High Court in *Edwin Suse*. There, I set out (at [22]) the appropriate range of sentences for first-time offenders under s 67(1)(*b*) of the RTA. This is categorised within broad bands according to the level of alcohol as follows:

Level of alcohol (µg per 100ml of breath)	**Range of fines**	**Range of disqualification**
35 – 54	$1,000 – $2,000	12 – 18 months
55 – 69	$2,000 – $3,000	18 – 24 months
70 – 89	$3,000 – $4,000	24 – 36 months
≥ 90	> $4,000	36 – 48 months (or longer)

24 These benchmarks are neutral starting points based on the relative seriousness of the offence considering only the level of alcohol in the offender's blood or breath and not yet having regard to any aggravating or mitigating circumstances (at [22]). I further identified four factors that might aggravate or mitigate the gravity of an offence under s 67(1)(*b*) of the RTA: (a) the actual or potential danger posed by the offender's conduct in committing the offence (at [27]–[28]); (b) the real or actual consequences of the offender's conduct (at [29]–[31]); (c) the offender's conduct upon apprehension (at [32]); and (d) the offender's reason or motivation for driving (at [33]).

25 In the present case, the Appellant is a first-time offender under s 67(1)(*b*) of the RTA. Applying the framework in *Edwin Suse*, he would fall at the lowest end of the third band, and an appropriate neutral starting point would be a fine of $3,000 and a period of disqualification of 24 months. The present case does not attract any of the aggravating or mitigating factors identified in *Edwin Suse*. Yet, it is also clear that an upward adjustment to this neutral starting point is warranted in the light of the Appellant's antecedent. The Appellant accepts as much, but submits that such an upward adjustment "need not warrant imprisonment".

26 In my judgment, *Edwin Suse* provides a helpful analytical starting point to the extent that it suggests that the sentence in the present case should be *more onerous* than a fine of $3,000 and a period of disqualification of 24 months. However, it is silent as to *how much* more onerous the sentence should be. More

importantly, it does not answer the central question raised by the present case, which is whether the custodial threshold has been crossed.

27 The framework laid down in *Edwin Suse* was very recently modified in *Stansilas* in respect of cases of drunk driving involving first offenders *where physical injury and/or property damage has been caused* ("Injury and/or Damage Cases"). The present case is not such a case and *Stansilas* is therefore not directly applicable. However, I make reference to *Stansilas* simply to highlight that it should now be read alongside *Edwin Suse* in determining the appropriate sentence to be imposed in Injury and/or Damage Cases. In brief, I held in *Stansilas* (at [74]) that in assessing the overall gravity of the offence, it is relevant to consider: (a) the degree of harm caused; and (b) the culpability of the offender (which entails consideration of the extent to which the offender's alcohol level exceeds the prescribed limit as well as the manner of the offender's driving). I further held (at [77]) that aside from cases involving slight harm and low culpability, the custodial threshold would, in general, be crossed in Injury and/or Damage Cases. The indicative sentencing ranges, calibrated according to the degree of harm caused and the offender's culpability, are set out at [78] of *Stansilas*.

Scenario 4 precedents

28 I next turn to consider the Scenario 4 precedents. These can be separated into two categories: (a) *Chong Pit Khai*; and (b) four District Court decisions.

Chong Pit Khai

29 In *Chong Pit Khai*, the offender was stopped at a random police road block. A strong smell of alcohol was detected and a breath analyser test conducted on the offender indicated the presence of 56μg of alcohol per 100ml

of breath. The offender was arrested and subsequently charged for drunk driving under s 67(1)(*b*) of the RTA, to which he pleaded guilty. The district judge sentenced the offender to two weeks' imprisonment and also disqualified him from holding or obtaining a driving licence for a period of two years. In imposing the sentence, the district judge took into consideration as an antecedent the offender's previous conviction under s 68(1)(*b*) of the RTA.

30 On appeal, the High Court held (at [29]) that using an imprisonment term as a starting point for each and every Scenario 4 case is "not necessarily desirable as a sentencing precedent". The court went on to express considerable doubt over the offender's previous conviction under s 68(1)(*b*) of the RTA (at [33]), although it ultimately acknowledged that this could not be ignored. The court reasoned (at [34]) that:

> Nonetheless, as the appellant had pleaded guilty to the s 68 charge voluntarily after he had ample time to think about whether he should defend the charge, *I am unable to hold that the District Judge was wrong to treat the appellant's conviction for the s 68 offence as an antecedent (but not as a first offence) for the purpose of sentencing him for the s 67 offence*. However, for the reasons I have given above, *I gave the appellant the benefit of the doubt and* ***treated his s 68 conviction as a very weak antecedent in the present case***. [emphasis in italics and bold italics]

31 In these circumstances, the court allowed the appeal, set aside the custodial sentence and imposed the maximum fine of $5,000.

32 I make two observations concerning *Chong Pit Khai*. First, the facts presented in *Chong Pit Khai* were unique. What troubled the court was that, *factually*, it appeared to be the case that there was no basis for the offender's previous conviction under s 68(1)(*b*) of the RTA although, *legally*, the previous conviction could not be ignored. The court addressed this predicament by regarding the offender's previous conviction as a "very weak antecedent" (at

[34]). Before me, the Appellant sought to suggest that the purported "weakness" of the offender's previous conviction in *Chong Pit Khai* was not the central aspect of the reasoning in the case. I disagree. It is plain, on any reasonable reading of *Chong Pit Khai*, that this was in fact key to the decision in that case.

33 Second, if anything, *Chong Pit Khai* in fact points *towards* the imposition of a custodial sentence in the present case. Despite regarding the offender's previous conviction under s 68(1)(*b*) of the RTA as a "very weak antecedent", the court saw it fit to impose the *maximum* fine of $5,000. On that basis, had the previous conviction not rested on a doubtful factual foundation, it would seem to follow that a higher sentence (which would necessarily have been custodial) would have been imposed. In this sense, *Chong Pit Khai* can be said to represent the high watermark of cases where a non-custodial sentence is appropriate in the context of a Scenario 4 Offender. In the present case, there is nothing to suggest that the Appellant's previous conviction under s 68(1)(*b*) of the RTA was anything but regular. Moreover, the Appellant's alcohol level (70μg of alcohol per 100ml of breath) was higher than that of the offender in *Chong Pit Khai* (56μg of alcohol per 100ml of breath). *Chong Pit Khai* therefore points *towards* the imposition of a custodial sentence in the present case.

Four District Court decisions

34 My attention was also drawn to three District Court decisions dealing with Scenario 4 Offenders: *Public Prosecutor v Lechimanan s/o G Sangaran* [2007] SGDC 229 (upheld on appeal in *Lechimanan s/o G Sangaran v Public Prosecutor* Magistrate's Appeal No 136 of 2007/01); *Public Prosecutor v Benedict Goh Whei-Cheh* [2007] SGDC 304; and *Ow Weng Hong*. I do not propose to discuss these cases in detail because they all appear (although not always entirely clearly) to have involved some degree of physical injury and/or

property damage. In this regard, the different frameworks in *Edwin Suse*, on the one hand, and *Stansilas*, on the other, make it abundantly clear that Injury and/or Damage Cases are to be treated differently from cases where no physical injury or property damage has been caused. It suffices to note that the sentence imposed in all of these cases in respect of the offence under s 67(1)(*b*) of the RTA was the same: three weeks' imprisonment and four years' disqualification. Leaving aside the lower alcohol levels in these cases, this suggests that the sentence in the present case (which does not involve physical injury or property damage) should be *lower*, but there is nothing to indicate the *extent* to which this should be so. Crucially, the central question raised by the present case, namely, whether the custodial threshold is crossed, is left unanswered.

35 In this connection, I do not accept the Appellant's submission, on the basis of these three cases, that it is the materialisation of the risk of drunk driving that is the "determinative factor" as to whether the custodial threshold has been crossed. While these cases do appear to involve situations where the risk of drunk driving did materialise, it simply does not follow that the custodial threshold is *only* crossed in such a circumstance.

36 There is also a further District Court decision dealing with Scenario 4 but the parties have not referred to it. In *Public Prosecutor v Ng Chun Beng* [2008] SGDC 113, a sentence of two weeks' imprisonment and two years' disqualification was imposed even though there was no physical injury or property damage. The alcohol level was 52μg of alcohol per 100ml of breath. I do not intend to say much about this decision because the parties have not addressed me on it. It is sufficient for me to note that one consideration the court had in mind (at [17] and [20]) was that the offence under s 67(1)(*b*) of the RTA was committed within eight months of the offender's previous conviction under

s 68(1)(*b*) of the RTA. In contrast, the corresponding period in the present case is about four and a half years.

Comparison with Scenario 2

37 Next, I compare the present case (which falls under Scenario 4) with Scenario 2. The latter provides a helpful comparator because in both Scenarios 2 and 4, the previous conviction is one under s 68(1) of the RTA. The difference is that in Scenario 2, the second offence (which is the offence under consideration for sentencing) is also under s 68(1) of the RTA, whereas in Scenario 4, it is under s 67(1) of the RTA.

38 Leaving aside the issue of disqualification, a Scenario 2 Offender would face both imprisonment *and* a fine, whereas a Scenario 4 Offender would face either imprisonment *or* a fine. However, all other things being equal, a Scenario 4 Offender would generally be more culpable than a Scenario 2 Offender. This is because the second offence in Scenario 4 (which is an offence under s 67(1) of the RTA) is a more serious offence than the second offence in Scenario 2 (which is an offence under s 68(1) of the RTA). This much is evident from the stiffer penalties prescribed in respect of s 67(1) of the RTA as opposed to s 68(1) of the RTA, and also from the fact that an offence under s 67(1) of the RTA entails actually driving (or attempting to drive) the vehicle. It is therefore somewhat anomalous that imprisonment is mandatory in Scenario 2 but not in Scenario 4. In these circumstances, the argument can be made that the need for sentencing consistency between Scenarios 2 and 4 demands that a custodial sentence be the starting point in Scenario 4, since this might go some way towards alleviating this anomaly. In turn, this would point *towards* the imposition of a custodial sentence in the present case.

39 In her decision, the District Judge highlighted the following hypothetical scenario which was raised before her by the Respondent (see [30] of the GD):

> … An interesting hypothetical situation was highlighted by Prosecution of how offenders with a section 68(1) RTA antecedent may be "*incentivised*" to drive the vehicle after drinking, as opposed to simply sitting in the vehicle (and waiting for a driver to come by) – since the former course of action may only attract a fine and a disqualification (or a jail and a disqualification in certain circumstances) whereas the latter would carry a mandatory imprisonment term, a mandatory fine and a disqualification in all circumstances. … [emphasis in original]

40 This hypothetical scenario is really an extension of the anomaly highlighted at [38] above. Of course, a rational person with an antecedent under s 68(1) of the RTA would avoid the vehicle altogether. But it seems untenable that as between two irrational choices (namely, driving the vehicle, on the one hand, and sitting in the vehicle and waiting for a driver to come by, on the other), a person with an antecedent under s 68(1) of the RTA should have a greater incentive to drive the vehicle. This simply cannot be right and, in my judgment, the anomaly highlighted at [38] above is *likely* to have been the result of legislative oversight. *If* that is the case, legislative reform would be desirable. But in the meantime, the anomaly remains and, as suggested at [38] above, the imposition of a custodial sentence as the starting point in Scenario 4 might go some way towards alleviating it. However, for reasons which are dealt with at [54] below, I do not ultimately think this is the appropriate course in the circumstances.

41 The Appellant does not dispute that the court is entitled to draw a comparison with Scenario 2. However, he suggests that another way of looking at Scenario 2 is that because imprisonment is mandatory in Scenario 2, it should presumptively be treated by the court as more aggravated. Hence, a Scenario 2 Offender should be deemed more culpable than a Scenario 4 Offender, for

whom imprisonment is discretionary. This submission appears to be based on the observation in *Chong Pit Khai* (at [26], albeit in the context of a comparison between Scenarios 3 and 4) that "if there was a need for parity in the prescribed punishment, Parliament would have said so". In essence, the Appellant's submission invites me to conclude that Parliament had acted irrationally by choosing to deem the less serious situation as the more serious one. I am unwilling to reach that conclusion. As I have already explained at [38] above, all other things being equal, a Scenario 4 Offender would generally be more culpable than a Scenario 2 Offender. And as I have noted at [40] above, the anomaly that imprisonment is mandatory in Scenario 2 but not in Scenario 4 is likely to have been the result of legislative oversight. It is unlikely to have been a deliberate and seemingly irrational choice.

Precedents cited by Appellant involving two charges under s 67(1)(b) of the RTA being prosecuted at same hearing

42 I turn to consider the precedents cited by the Appellant involving two charges under s 67(1)(*b*) of the RTA being prosecuted at the same hearing. In this regard, two unreported District Court cases were highlighted by the Appellant.

43 In *Public Prosecutor v Tan Wei Jin Alvin* District Arrest Case No 046037 of 2011 and others ("*Alvin Tan*"), the offender pleaded guilty to two charges under s 67(1)(*b*) of the RTA. A further charge under s 65(*a*) of the RTA was taken into consideration for the purpose of sentencing. For the earlier offence under s 67(1)(*b*) of the RTA (which was committed on 29 April 2010, and which involved the offender travelling at 81km/h on a 50km/h road), he was sentenced to a fine of $2,000 and two years' disqualification. For the later offence under s 67(1)(*b*) of the RTA (which was committed on 11 December 2010, and which involved an accident in which the offender sustained injuries

and his car was overturned and damaged), he was sentenced to a fine of $4,000 and three years' disqualification.

44 In *Public Prosecutor v Woo Chun Sum, Sam* District Arrest Case No 020338 of 2013 and others ("*Sam Woo*"), the offender pleaded guilty to two charges under s 67(1)(*b*) of the RTA, one charge under s 65(*a*) of the RTA and one charge under s 84(1) read with s 84(7) and punishable under s 131(2) of the RTA. A further charge under s 65(*a*) of the RTA was taken into consideration for the purpose of sentencing. For the earlier offence under s 67(1)(*b*) of the RTA (which was committed on 21 October 2010, and which involved the offender colliding into a taxi (even though there was no damage to both vehicles and their drivers were not injured)), he was sentenced to a fine of $2,500 and 18 months' disqualification. For the later offence under s 67(1)(*b*) of the RTA (which was committed on 25 May 2013, and which involved the offender being stopped at a road block), he was sentenced to a fine of $4,500 and three years' disqualification.

45 In both *Alvin Tan* and *Sam Woo*, the two charges under s 67(1)(*b*) of the RTA were *prosecuted at the same hearing*, such that the earlier offence was not treated as an antecedent and a custodial sentence in respect of the later offence was therefore not mandatory. These were therefore not Scenario 1 cases. The Appellant's point is that in each of these cases, while a higher fine and a longer disqualification period were imposed for the later offence in recognition of the fact that it was aggravated by the earlier offence, this was still not thought to be sufficient to warrant crossing the custodial threshold in respect of the later offence.

46 In my judgment, there is force in this argument. The cases of *Alvin Tan* and *Sam Woo* were clearly more aggravated than the present case. First, the

offenders were persons who, after having been apprehended for a first offence under s 67(1)(*b*) of the RTA, *proceeded to commit a second, identical offence even before they had been dealt with for the first offence*. The blatant recalcitrance evinced by the conduct of the offenders in both these cases is less evident in respect of the Appellant, whose previous offence under s 68(1)(*b*) of the RTA was dealt with some four and a half years prior to the commission of the present offence. Second, the circumstances of the offences in both these cases were far more serious than those that avail in the present case. There was evidence of dangerous driving in some of the offences and, in the case of the later offence in *Alvin Tan*, even injury and damage. Third, the earlier offence in both these cases was a *more serious* one as it was an offence under s 67(1)(*b*) of the RTA. Yet, despite both these cases being more aggravated than the present case, a non-custodial sentence was imposed in respect of the later offence. Additionally, the Respondent informed me at the hearing that it had not argued for a custodial sentence in either of these cases, and that neither of these cases were appealed. It therefore seems that the Respondent was entirely content with the non-custodial sentence imposed in respect of the later offence in both these cases. Seen in this light, it seems to me that, in the interest of fairness, the cases of *Alvin Tan* and *Sam Woo* point *against* the imposition of a custodial sentence in the present case.

47 Taking the analysis one step further, both *Alvin Tan* and *Sam Woo*, for the first of the reasons noted at [46] above, can be said to be more aggravated than even a Scenario 1 case, where imprisonment is mandatory. Yet, a custodial sentence in respect of the later offence was not mandatory simply because the two charges under s 67(1)(*b*) of the RTA happened to be prosecuted at the same hearing, such that the earlier offence was not treated as an antecedent. In my judgment, this fact provides neither a sufficient nor principled basis for distinguishing between both these cases, on the one hand, and a Scenario 1 case,

on the other. In principle, there is really no reason why a custodial sentence should not be sought by the Prosecution or imposed by the court in respect of the later offence in such cases (that is, cases involving two charges under s 67(1)(*b*) of the RTA being prosecuted at the same hearing) whenever this is considered appropriate. In such cases, the sentencing court and the Respondent should be mindful of the anomalous sentencing position that might ensue if regard were not had to the sentencing regime that applies in the context of cases falling within Scenario 1 and, to some extent, Scenarios 2 and 3 (where imprisonment is also mandatory) as well.

Degree of harm caused and Appellant's culpability

48 Finally, I turn to consider the degree of harm caused and the Appellant's culpability. I noted in *Stansilas* that these twin factors are relevant in assessing the overall gravity of the offence (see [27] above), and the same applies in the present case.

49 There was no actual damage or injury caused in the present case. As for the Appellant's culpability, this is to be measured by considering: (a) the extent to which the Appellant's alcohol level exceeded the prescribed limit; and (b) the manner of the Appellant's driving (see [27] above). In the present case, the Appellant's alcohol level was certainly on the high side, being twice the prescribed limit. However, there is no evidence that the manner of the Appellant's driving was particularly dangerous. Considering matters in the round, I do not think that the facts and circumstances of the offence are so egregious as to warrant a custodial sentence in and of themselves. The degree of harm caused and the Appellant's culpability therefore point *against* the imposition of a custodial sentence in the present case.

My decision

50 Drawing the various threads together, the decision in *Chong Pit Khai* (see [29]–[33] above) and a comparison with Scenario 2 (see [37]–[41] above) point *towards* the imposition of a custodial sentence in the present case though, for completeness, I should add that I do not consider the decision in *Chong Pit Khai* to be a particularly strong point in the Respondent's favour given the unique facts of that case (see [32] above). As against this, the precedents cited by the Appellant involving two charges under s 67(1)(*b*) of the RTA being prosecuted at the same hearing (see [42]–[47] above) and the degree of harm caused and the Appellant's culpability (see [48]–[49] above) point *against* the same. As for the decisions in *Edwin Suse* and *Stansilas* (see [23]–[27] above), as well as the four District Court decisions dealing with Scenario 4 (see [34]–[36] above), these do not point clearly in either direction.

51 All things considered, I am not prepared to find that the custodial threshold has been crossed in the present case.

52 In my judgment, the starting point of the analysis is the fact that imprisonment is not mandatory in Scenario 4. On the contrary, a sentencing court faced with a Scenario 4 Offender has a choice whether to impose a fine and a period of disqualification or a term of imprisonment and a period of disqualification. In this regard, and as a matter of statutory interpretation, the District Judge was quite right to approach the case on the footing that an imprisonment term was not the default position for Scenario 4 Offenders. In these circumstances, it might be said that the correct approach is simply to apply the framework laid down in *Edwin Suse* and then enhance the sentence derived from that framework to take account of the Appellant's antecedent.

53 The difficulty with that and, in a sense, the strongest point in the Respondent's favour, is the comparison which Scenario 4 invites with Scenario 2. There is attraction in the notion that the statutory framework in respect of offences under ss 67(1) and 68(1) of the RTA cannot be ignored and should be taken into account. In this context, a comparison with Scenario 2 points strongly towards the imposition of a custodial sentence in the present case for the reasons set out at [38]–[40] above. In particular, it is somewhat anomalous that imprisonment is mandatory in Scenario 2 but not in Scenario 4, even though, all other things being equal, a Scenario 4 Offender would generally be more culpable than a Scenario 2 Offender. If a custodial sentence were the starting point in Scenario 4, this might go some way towards alleviating this anomaly.

54 However, the fact remains that imprisonment is not mandatory in Scenario 4. Whether intentionally or otherwise, the current statutory framework leaves room for inconsistency between Scenarios 2 and 4. In my judgment, it would not be correct for the courts to regard a custodial sentence as the starting point in Scenario 4. To do so would come dangerously close to regarding imprisonment as mandatory in Scenario 4 when the current statutory framework does not require this. Although I have noted at [40] above that this anomaly is *likely* to have been the result of legislative oversight, I do not think that it would be appropriate to adopt a rectifying construction against the Appellant when what is in question is a *penal* provision, and when there is an absence of clear evidence of Parliament's intent.

55 This approach is broadly consistent with the decision of the three-judge panel of the High Court in *Amin bin Abdullah v Public Prosecutor* [2017] SGHC 215. One of the questions that arose in that case was whether the court should proceed on the presumptive basis that once an offender is exempted from caning, his sentence of imprisonment should be enhanced. The court answered

this question in the negative. In so concluding, the court noted (at [54]) that the relevant provisions in the CPC are all worded in terms that confer a *discretion* rather than impose an *obligation*. The court further observed (at [58]) that the courts should not, in general, exercise punitive powers absent sufficient justification. Not dissimilarly, a sentence of imprisonment is discretionary rather than mandatory in the context of Scenario 4. In my judgment, there is insufficient justification for a sentencing court to proceed on the presumptive basis that a custodial sentence is the starting point in Scenario 4.

56 In addition, the precedents cited by the Appellant involving two charges under s 67(1)(*b*) of the RTA being prosecuted at the same hearing also point strongly against the imposition of a custodial sentence. I see neither reason nor basis for imposing a custodial sentence in the present case when a non-custodial sentence was imposed in respect of the later offence in *Alvin Tan* and *Sam Woo*, even though both these cases were more aggravated for the reasons set out at [46] above. Moreover, as I have noted, this has not only been the sentencing practice of the courts; it also appears to have been the practice of the Respondent to not seek a custodial sentence in such cases. To sentence the Appellant to a custodial sentence in these circumstances would be grossly unfair and could only be justified if sentencing consistency were sought as a matter of *formalism* rather than of *substantive fairness*. I say this because if one approaches it as a matter of substantive fairness, it is plain to me that the cases of *Alvin Tan* and *Sam Woo* were more aggravated than the present case. Yet, the only reason sentencing was approached differently in both these cases by the courts and by the Respondent is that the earlier offence in both these cases was not an antecedent in the strict, formal sense. While true, that completely overlooks the real quality of the relevant conduct in both these cases. Furthermore, this has a very real consequence because, as was observed by the three-judge panel of the High Court in *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 (at [59]), "a

fine and a term of imprisonment are, for most intents and purposes, *incommensurate*" [emphasis added].

57 In these circumstances, I return to the point outlined at the outset at [52] above, namely, that imprisonment is not mandatory in Scenario 4. Given this, I take the view that to determine whether the custodial threshold has been crossed, I must consider the facts and circumstances of the present Scenario 4 case rather than the sentence prescribed for some other combination of offences. In the present case, the degree of harm caused and the Appellant's culpability point against the imposition of a custodial sentence for the reasons set out at [49] above. In my judgment, this ultimately tilts the balance in favour of the Appellant.

58 I must stress, however, that this decision must not be construed as suggesting that a custodial sentence should not be meted out in a Scenario 4 case. On the contrary, it follows from what has been said at [57] above that much will ultimately turn on the facts and circumstances of the offence. In the present case, for instance, a custodial sentence would have been entirely conceivable if harm had been caused and/or if the Appellant's culpability had been higher.

59 In the circumstances, I allow the appeal. I set aside the sentence of one week's imprisonment imposed by the District Judge and substitute this with the maximum fine of $5,000. The period of disqualification is to remain, except that it is to take effect immediately.

Concluding remarks

60 In the course of this judgment, I have noted two issues concerning the current statutory framework in respect of offences under ss 67(1) and 68(1) of

the RTA. The first is the anomaly that imprisonment is mandatory in Scenario 2 but not in Scenario 4, even though, all other things being equal, a Scenario 4 Offender would generally be more culpable than a Scenario 2 Offender (see [38]–[40] above). As I have already noted, this is *likely* to have been the result of legislative oversight and, *if* that is the case, legislative reform would be desirable. However, until such time, the anomaly remains and the role of a court is to make the best it can out of the current statutory framework. Although the imposition of a custodial sentence as the starting point in Scenario 4 might go some way towards alleviating the anomaly, I have decided against such a course for the reasons set out at [54] above.

61 The second issue, which does not directly arise in the present case, has to do with cases involving two charges under s 67(1)(*b*) of the RTA being prosecuted at the same hearing. In such cases, a custodial sentence in respect of the later offence is not mandatory because the two charges under s 67(1)(*b*) of the RTA happen to be prosecuted at the same hearing. Yet, such cases will often be more aggravated than even a Scenario 1 case, where imprisonment is mandatory (see [47] above). I have noted that in such cases, there is really no reason why a custodial sentence should not be sought by the Prosecution or imposed by the court in respect of the later offence whenever this is considered appropriate.

62 The task of ensuring a coherent statutory framework depends in part on the laws enacted by Parliament and in part on the way the courts exercise the sentencing discretion they are afforded. However, the desire for consistency and coherence in the overall sentencing regime cannot override the function of a court, in any given case, to achieve a condign sentence based on the facts and circumstances that are presented by the offence. I recognise that my decision in this matter might leave room for the anomaly highlighted at [38] above to

further present itself in a subsequent case where an offender falling within the seemingly less serious Scenario 2 is punished with a mandatory and more onerous sentence of imprisonment. Subject to any other arguments that might be raised in such a case, that anomaly cannot be a reason for not striving for what I regard to be the correct sentence in this case.

Sundaresh Menon
Chief Justice

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