Lim Hsien Hwei *v* Public Prosecutor
[2014] SGHC 63

Case Number : Magistrate's Appeal No 175 of 2013

Decision Date : 07 April 2014

Tribunal/Court : High Court

Coram : Chao Hick Tin JA

Counsel Name(s) : Au-Yong Kok Keong Kenneth and Lim Yue Chuan (Ramdas & Wong) for the appellant; Sharmila Sripathy-Shanaz (Attorney-General's Chambers) for the respondent.

Parties : Lim Hsien Hwei — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Forms of Punishment

Criminal Procedure and Sentencing – Sentencing – Benchmark sentences

7 April 2014

Chao Hick Tin JA:

Introduction

1 This was an appeal against the sentence imposed by the district judge ("the DJ") in *Public Prosecutor v Lim Hsien Hwei* [2013] SGDC 238 ("the GD") in respect of a charge under s 67(1)(*b*) of the Road Traffic Act (Cap 276, 2004 Rev Ed) ("the Act") of driving while under the influence of drink. The DJ sentenced the appellant to a fine of $3,000, in default 15 days' imprisonment, and a period of disqualification from holding or obtaining a driving licence for all classes of vehicles ("disqualification period") of three years from the date of conviction (*viz*, 31 July 2013). In the appeal, the appellant sought to have the disqualification period reduced from three years to two years. I allowed the appeal and now give my reasons.

Background facts

2 At about 5.01am on 6 May 2012, the appellant was driving her car along Keppel Road when she was stopped by police officers patrolling the area. The police officer who approached the appellant noticed that she smelled strongly of alcohol and had bloodshot eyes and a flushed face. He administered a breathalyser test on her. However, the appellant was unable to complete the test due to shortness of breath. She was thereupon arrested and brought to Changi General Hospital, where a blood test was conducted to ascertain the level of alcohol in her body.

3 A Health Sciences Authority report dated 14 May 2012 issued by one Dr Low Xuankai Alex revealed that the level of alcohol in the appellant's blood sample was 150 mg of ethanol in every 100 ml of blood. This is 1.875 times the prescribed limit of 80 mg of alcohol in every 100 ml of blood under s 72 of the Act.

4 As a result, the appellant was charged with an offence under s 67(1)(*b*) of the Act ("the Drink-driving Offence"), which criminalises driving while under the influence of drink, and is punishable by:

(a) in the case of a first-time offender, a fine of not less than $1,000 and not more than $5,000, or imprisonment for a term not exceeding six months; and

(b) unless the court thinks fit to order otherwise for special reasons, a mandatory disqualification period of not less than 12 months from the date of conviction or, in cases where the offender is sentenced to imprisonment, from the date of the offender's release from prison.

The appellant subsequently pleaded guilty to the Drink-driving Offence.

5 The appellant was also charged with an offence under s 120(4) of the Act ("the Directional Offence"), which criminalises the failure to comply with traffic directions and traffic signs, and is, for first-time offenders, punishable by a fine not exceeding $1,000 or imprisonment for a term not exceeding three months. A disqualification order is not a type of sentence prescribed for this offence. The Directional Offence was not proceeded with by the Prosecution, but the court was asked to take it into consideration for the purposes of sentencing for the Drink-driving Offence. It was not disputed that the appellant admitted to the Directional Offence and, therefore, also to the particulars of the charge for that offence ("the s 120(4) charge"). That charge reads:

You,

…

are charged that you, on the 6th day of May 2012, at about 5.01am, along Keppel Road, Singapore, when driving motor car SJX9064L, did fail to obey [the] traffic indicating sign and dr[o]ve against the flow of traffic and you have thereby committed an offence under Section 120(4) of the Road Traffic Act, Chapter 276, and punishable under Section 131(2) of the same Act.

The decision below

6 The DJ's decision on sentence was made prior to this court's decision in *Edwin s/o Suse Nathen v Public Prosecutor* [2013] 4 SLR 1139 ("*Edwin s/o Suse Nathen*"), where Sundaresh Menon CJ, after examining the relevant precedents, laid down certain sentencing guidelines for first-time offenders under s 67(1)(*b*) of the Act. The DJ, in sentencing the appellant, did not have the benefit of those sentencing guidelines.

7 In respect of the Drink-driving Offence, the DJ considered that as the level of alcohol in the appellant's blood was 1.875 times the prescribed limit, the case was "clearly … not a case that would fall within the minimum end of the spectrum either in terms of a fine or the period of disqualification" (at [11] of the GD). He also relied on various authorities for the general principle that the higher the level of alcohol in the offender's body, the harsher the sentence should be (at [10] of the GD). In particular, the DJ considered the case of *Public Prosecutor v Ong Yeng Fong* [2012] SGDC 339, where a fine of $3,000 and a disqualification period of two years were imposed on a drink-driving offender whose alcohol level was 1.66 times the prescribed limit, and used that as a guide.

8 Turning to the Directional Offence, the DJ emphasised (at [13] of the GD) that it was not "a minor infringement", but was instead "pregnant with danger". This was because the appellant (see likewise [13] of the GD):

… had driven her motor vehicle against the flow of traffic and there is no doubt in my mind that her failure to obey the traffic sign indicating the proper direction of travel was a result of her

inebriated state.

9 However, the DJ also took into account the fact that the appellant was a first-time offender in so far as the Drink-driving Offence was concerned and had shown remorse by a timely plea of guilt to the charge. He then concluded that a fine of $3,000 and a disqualification period of three years were an appropriate sentence for the Drink-driving Offence (at [14] of the GD).

The issues before this court

10 During the appeal, both parties relied on the sentencing guidelines laid down in *Edwin s/o Suse Nathen*. Counsel for the appellant, Mr Au-Yong Kok Keong Kenneth ("Mr Au-Yong"), while recognising the trite principles of appellate intervention on sentencing (see *Public Prosecutor v Cheong Hock Lai and other appeals* [2004] 3 SLR(R) 203 at [26]), submitted that the appeal should be allowed as far as the disqualification period was concerned because:

(a) the DJ had erred in appreciating the proper factual basis for the sentence imposed;

(b) the sentence imposed was wrong in principle; and

(c) the disqualification period was manifestly excessive.

I will first consider the application of *Edwin s/o Suse Nathen* to the present case before dealing with each of Mr Au-Yong's submissions in turn.

The application of Edwin s/o Suse Nathen

11 In *Edwin s/o Suse Nathen*, Menon CJ (at [22]) held that sentencing for offences under s 67(1)(*b*) of the Act should typically begin from "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". The neutral starting points for first-time offenders were categorised (likewise at [22]) into the following broad bands according to the level of alcohol in the offender's *breath*:

Level of alcohol (µg per 100 ml of breath)	**Range of fines**	**Range of disqualification**
35 – 54 (1–1.54 times the prescribed limit)	$1,000 – $2,000	12 – 18 months
55 – 69 (1.57–1.97 times the prescribed limit)	$2,000 – $3,000	18 – 24 months
70 – 89 (2–2.54 times the prescribed limit)	$3,000 – $4,000	24 – 36 months
≥ 90 (≥ 2.57 times the prescribed limit)	> $4,000	36 – 48 months (or longer)

12 The figures set out in the above table were based on the use of a breathalyser test, as opposed to a blood test, to determine the level of alcohol in the offender's body. As a matter of logic

and common sense, those ratios should similarly apply where the level of alcohol in the offender's body is determined by a blood test. The level of alcohol in the body which is shown to be 35 µg of alcohol per 100 ml of breath is the same as that which is shown to be 80 mg of alcohol per 100 ml of blood, these being the prescribed limits apropos, respectively, a breathalyser test and a blood test.

13 In the present case, the alcohol level in the appellant's body was 1.875 times the prescribed limit, placing her in the second category set out at [11] above, with a fine of $2,000 to $3,000 and a disqualification period of 18–24 months being the neutral starting point. In *Edwin s/o Suse Nathen*, where the offender had an alcohol level 1.82 times the prescribed limit, a fine of $2,500 and a disqualification period of 21 months were imposed. All other considerations aside, the application of the aforementioned sentencing benchmarks to the appellant's higher alcohol level would entail a fine of around $2,700 and a disqualification period of around 22–24 months as the neutral starting point.

14 In the present case, the sentence imposed by the DJ – *viz*, a fine of $3,000 and a disqualification period of three years – was much higher (especially in relation to the disqualification period) than the neutral starting point. In my view, the only possible justification for this differential was the appellant's commission of the Directional Offence, which was taken into consideration for sentencing by the DJ (see [2] and [13] of the GD).

Did the DJ err in appreciating the proper factual basis for the sentence imposed?

15 Mr Au-Yong submitted that the DJ, in sentencing the appellant, misunderstood the actual position in relation to the Directional Offence. The s 120(4) charge stated that the appellant "fail[ed] to obey [the] traffic indicating sign and dr[o]ve against the flow of traffic". Mr Au-Yong submitted that the DJ took this to mean (as most people probably would) that the appellant had driven against oncoming traffic while on the wrong side of the road. However, the appellant had not in fact driven against the flow of traffic in that sense, but had merely made a left turn from a lane which permitted only a right turn. Mr Au-Yong submitted that while the appellant in making such a turn had committed a traffic offence, she had not driven against the flow of traffic and had, instead, carried out a relatively less dangerous act as compared to driving against oncoming traffic. Mr Au-Yong further explained that at the hearing below, the appellant was unrepresented and did not have the presence of mind to have this factual position clarified.

16 Although Mr Au-Yong's submission was based on a factual assertion made during the hearing of the appeal before me, the Deputy Public Prosecutor ("the DPP") accepted the appellant's account. The DPP also helpfully submitted a sketch-plan of the road where the appellant had made the said illegal turn, which greatly assisted my appreciation of the situation. The DJ, in contrast, did not have the benefit of this sketch-plan.

17 From the GD, it was unclear whether the DJ thought the appellant had driven against oncoming traffic while on the wrong side of the road. The GD only mentioned that the appellant had "driven her motor vehicle against the flow of traffic" (see [13] of the GD (reproduced above at [8])). This was probably because that was how the s 120(4) charge was framed, and no other evidence of what transpired at the material time was adduced by either party before the DJ. I accepted the premise of Mr Au-Yong's submission that the DJ misunderstood the s 120(4) charge to mean that the appellant had driven against oncoming traffic while on the wrong side of the road. This was consistent with the DJ imposing, for the Drink-driving Offence, a relatively high sentence of a fine of $3,000 and a disqualification period of three years. In any event, if there was any doubt as to what was in the DJ's mind at the time of sentencing, the benefit of the doubt ought to be given to the appellant.

18 I would hasten to add that if the DJ had indeed misunderstood the factual position in relation to

the Directional Offence, the fault did not lie with him. He was entitled to accept the particulars set out in the s 120(4) charge and what those particulars would convey to an ordinary and objective person. In the circumstances of the present case, making a left turn on a lane which permitted only a right turn should more accurately be characterised as a failure to obey traffic signs or traffic directions. I acknowledge that non-compliance with traffic signs could give rise to driving against the flow of traffic, but that did not arise on the facts of this case. On this point, the DPP clarified that the Attorney-General's Chambers had raised the matter with the Traffic Police Department. The latter had advised that the appellant, in making a left turn on a lane which permitted only a right turn, had technically driven against the flow of traffic, and this accounted for why the s 120(4) charge was framed in that manner. While I agree that the phrase "driving against the flow of traffic" could conceivably be broad enough to encompass making a turn on the wrong lane of a road, it may not be the most appropriate description; thus the confusion in the present case. I also note that the phrase "driving against the flow of traffic" does not appear in s 120 of the Act, which only makes reference to a "[d]uty to comply with traffic directions and traffic signs". To drive in a manner which fails to comply with a traffic sign need not necessarily lead to driving against the flow of traffic and should not invariably be described as such in a s 120(4) charge. The charge should instead reflect the actual alleged transgression of the offender in so far as it is possible to do so, for example, by stating that the offender disobeyed traffic signs by making a left turn on a lane which permitted only a right turn. Traffic signs restricting the direction in which vehicles may turn are very common in Singapore, especially at the T-junction of a minor road and a major road which is not controlled by traffic lights. At such a junction, there is often a traffic sign indicating that vehicles on the minor road are only permitted to turn left but not right (*ie*, the *converse* of the situation in the present case) so as not to hold up traffic on the minor road. If a motorist were to turn right at such a junction, he would have disobeyed a traffic sign, but he would not have driven against the flow of traffic.

19 Accordingly, I found that the DJ, in sentencing the appellant, had not accurately appreciated the factual basis relating to the Directional Offence.

Was the sentence wrong in principle?

20 Mr Au-Yong's second submission was that the sentence imposed on the appellant was wrong in principle because the DJ enhanced the disqualification period for the Drink-driving Offence by taking into consideration the Directional Offence, even though the latter offence was not punishable by a disqualification order. Although Mr Au-Yong did not support his submission with any authorities, I found that unsurprising as there is, to my knowledge, no express authority on this particular point.

21 Mr Au-Yong sought to persuade the court of the merits of his argument by raising a hypothetical situation, *viz*, if the Directional Offence had been proceeded with and if the appellant had been convicted of that offence, she would, in all probability, have been punished with only a fine. More importantly, the appellant could not have been punished with a disqualification order as that was not a prescribed punishment for the Directional Offence. If it were possible to rely on the Directional Offence, which was only to be taken into consideration for the purposes of sentencing for the Drink-driving Offence, to lengthen the disqualification period imposed for the latter offence, this would lead to an anomalous situation where the appellant would be worse off by consenting to the Directional Offence being taken into consideration *vis-à-vis* sentencing for the Drink-driving Offence.

22 This outcome would be inconsistent with the general principle expressed in ch XVIII, para 4354 of Tan Yock Lin, *Criminal Procedure* (Butterworths, 2010) ("*Criminal Procedure*") that an accused person can expect a more favourable overall sentence by admitting to an outstanding charge and consenting to it being taken into consideration for sentencing purposes, rather than contesting that charge and subsequently being convicted of it:

> … Where the accused admits that other outstanding offences have been committed, he saves the court time and trouble in determining his complicity in these offences. He saves the Public Prosecutor time and trouble in prosecuting them. So in taking account of these offences, the court will not forget that considerable time and trouble are saved by this act of the accused. In awarding sentence, the court will therefore, favour the accused. This must be right. If a timeous plea of guilt, which saves the court considerable time and trouble, is rewarded with a sentencing discount, a fortiori an admission to outstanding offences in order that they may be taken into account in sentencing.

23 The DPP's response was that the effect of taking into consideration outstanding offences for sentencing purposes was to enhance the sentence that would otherwise be imposed for the offence which the accused person was convicted of (see *Public Prosecutor v Mok Ping Wuen Maurice* [1998] 3 SLR(R) 439 at [19]). It was argued that in this case, the Directional Offence involved an act of dangerous driving and was an aggravating factor in determining the appropriate sentence for the Drink-driving Offence (see *Edwin s/o Suse Nathen* at [27]). Therefore, the DPP submitted, the Directional Offence had the effect of increasing the appellant's culpability for the Drink-driving Offence and should in turn result in an enhanced sentence for the latter offence. This meant that the length of the disqualification period imposed for the Drink-driving Offence could be increased.

24 It seemed to me that the Prosecution's argument did not really address the point. The appellant was not saying that the sentence imposed for the Drink-driving Offence should not be enhanced. It is clear that taking into consideration the Directional Offence must lead to an enhanced sentence for the Drink-driving Offence. Rather, the appellant's point was that this enhancement of punishment must be restricted to the forms of punishment provided for the Directional Offence, *viz*, either a fine or imprisonment. Since a disqualification order is not one of the prescribed forms of punishment for the Directional Offence, that offence should not affect the appropriate length of the disqualification period imposed for the Drink-driving Offence just because it was to be taken into consideration for the purposes of sentencing. The Prosecution was assuming that when the sentence for the offence charged was to be enhanced, all the forms of punishment which could be imposed for that offence could be adjusted. However, this need not be the case. It would depend on the forms of punishment permissible to be imposed for the offence taken into consideration for the purposes of sentencing for the offence charged.

25 I also found that the appellant's approach was conceptually aligned with how the taking into consideration of an outstanding offence should affect sentencing. Working from first principles, Prof Tan Yock Lin in *Criminal Procedure* (ch XVIII at para 4354) explains how enhancement of a sentence when taking into consideration outstanding offences should be done:

> … [T]he law has yet to furnish a more precise formula for determining the relationship between offences taken into account and sentence enhancement. The policy is partly pragmatic. The procedure has a double object: to punish such offences as aggravation and to save judicial time on their trial. *That being the case, it may be possible to formulate what uplift should be applied to the base sentence which is imposed on the offence charged.* The procedure appears to provide a useful complement to cumulative sentencing and although authority is lacking, *it would seem right and just to measure the distance between the sentence awarded and the maximum which would have been awarded if the offences taken into consideration had instead been prosecuted to conviction and to apply such uplift to the base sentence as reflects an appropriately discounted measure of that distance*, subject to the limitation that the eventual sentence must not exceed the maximum prescribed for the offence charged. [emphasis added]

26 In my view, Prof Tan's approach is a sensible starting point to adopt. Using the present case as

an example, this approach hypothesises that the offence taken into consideration (*viz*, the Directional Offence) is proceeded with to conviction, and an overall sentence is imposed for both the Drink-driving Offence and the Directional Offence. The court will then measure the difference in severity between this overall sentence and the sentence imposed if only the Drink-driving Offence were prosecuted to conviction. This difference is then subjected to a discount and used as the starting point for the extent of enhancement of the sentence imposed for the Drink-driving Offence taking into consideration the Directional Offence. Mr Au-Yong's submission is in accordance with this approach. Since a disqualification order is not a permissible sentence to impose for the Directional Offence, that offence cannot and should not affect the length of the disqualification period imposed for the Drink-driving Offence if an overall sentence were to be meted out for both offences – the fine for the Drink-driving Offence could be increased, which was indeed what happened in the court below, but not the disqualification period as the Directional Offence is not an offence which is punishable by a disqualification order. Accordingly, I was of the view that as a matter of principle, when an outstanding offence was taken into consideration for the purposes of enhancing the sentence for another offence which the accused person had been convicted of, the enhancement could only be in respect of the forms of punishment which were prescribed for the offence that was taken into consideration. In this case, since a disqualification order is not a prescribed form of punishment for the Directional Offence, the DJ's enhancement of the length of the disqualification period imposed for the Drink-driving Offence was wrong in principle.

27 I would further add that this principle would also be applicable in a case where the aggravating factors in question are themselves capable of constituting an offence under the law. If it were otherwise, this could result in the peculiar situation where an accused person might be worse off if he is not charged with the offence constituted by the aggravating factors and those factors are, instead, taken into consideration *vis-à-vis* sentencing for the offence charged.

Was the disqualification period manifestly excessive?

28 Mr Au-Yong's submission was that while the appellant's act in making a left turn on a lane which permitted only a right turn was dangerous, it was not as dangerous as driving against oncoming traffic while on the wrong side of the road.

29 The DPP agreed with Mr Au-Yong that making a turn on the wrong lane was less dangerous than driving against oncoming traffic while on the wrong side of the road. However, the DPP submitted that the appellant had nonetheless posed a potential danger to road users, and that was enough reason for the sentence for the Drink-driving Offence to be enhanced from the neutral starting point derived from the sentencing guidelines in *Edwin s/o Suse Nathen* to the eventual sentence imposed by the DJ.

30 Bearing in mind what has been stated above at [26] (*viz*, that the Directional Offence could not be a basis for enhancing the disqualification period imposed for the Drink-driving Offence), I found, having regard to the benchmarks set in *Edwin s/o Suse Nathen*, that the disqualification period of three years imposed by the DJ was manifestly excessive.

Conclusion

31 Accordingly, I allowed the appeal to the extent that the disqualification period for the Drink-driving Offence was reduced from three years to two years. The fine of $3,000 imposed for that offence remained unchanged.

Addendum to my grounds of decision

27 May 2014

Subsequent to the release of my written grounds of decision on 7 April 2014, the Deputy Public Prosecutor wrote to the court on 17 April 2014, drawing the court's attention to s 42(1) of the Act and expressing her regret for this omission. The provision reads:

> **Disqualification for offences**
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> 42.—(1) A court before which a person **is convicted** of any offence in connection with the driving of a motor vehicle may, in any case except where otherwise expressly provided by this Act and shall, where so required by this Act, order him to be disqualified from holding or obtaining a driving licence for life or for such period as the court may think fit.
>
> [emphasis added]

However, I note that this provision only applies where an accused is convicted of an offence in connection with the driving of a motor vehicle. In the context of this case, the Directional Offence was only taken into account for the purpose of sentencing; there was no conviction recorded against the appellant for it. Thus the provision was not engaged in relation to the case. That said, I agree with the DPP that the phrases "[s]ince a disqualification order is not a permissible sentence to impose for the Directional offence" and "a disqualification order is not a prescribed form of punishment for the Directional Offence" which appear in [26] of my grounds of decision need to be read bearing in mind s 42(1) as well as the context of this case where the Directional Offence was only taken into account for sentencing. Counsel for the appellant who gave his views on this issue by letter also arrived at the same conclusion. Nevertheless, what I have stated at [26]–[27] of my grounds of decision regarding the general principle of law on that issue may still be pertinent in other contexts.