Edwin s/o Suse Nathen *v* Public Prosecutor
[2013] SGHC 194

Case Number	: Magistrate's Appeal No 116 of 2013
Decision Date	: 30 September 2013
Tribunal/Court	: High Court
Coram	: Sundaresh Menon CJ
Counsel Name(s)	: Nirmal Singh (Raj Kumar & Rama) for the appellant; DPPs April Phang and Marshall Lim Yu Hui (Attorney-General's Chambers) for the respondent.
Parties	: Edwin s/o Suse Nathen — Public Prosecutor

Criminal Procedure and Sentencing

30 September 2013

Sundaresh Menon CJ:

1 This is an appeal brought by Mr Edwin s/o Suse Nathen ("the appellant") against the decision of the District Judge in *PP v Edwin s/o Suse Nathen* [2013] SGDC 174 ("the GD"). The appellant pleaded guilty to an offence of driving while under the influence of drink under s 67(1)(*b*) of the Road Traffic Act (Cap 276, 2004 Rev Ed) ("the RTA"). The District Judge sentenced him to a fine of $3,000, in default 15 days' imprisonment, and disqualified him from holding or obtaining a driving license for all classes of vehicles for a period of two years. In the course of arguments, counsel for the appellant, Mr Nirmal Singh ("Mr Singh") drew my attention to a number of cases which involved parties who had committed the same offence as the appellant, but in circumstances where for one reason or another the offender appeared to be deserving of a more serious punishment than that which had been imposed on the appellant by the court below. Yet in those cases, the punishment that was in fact imposed appeared to be similar to that imposed on the appellant. I noted that a number of those cases were somewhat older and related to a time when the scourge of driving while under the influence of alcohol was perhaps less frequently encountered and so had been less vigorously condemned than in more recent times. I therefore invited further submissions addressing the question of what the appropriate sentence in this case should be having regard to the decisions over the last five years.

2 Having received and considered the further written submissions that were tendered, I am satisfied that in all the circumstances, the sentence below was manifestly excessive. I therefore allow the appeal to the extent that I reduce the period of disqualification to 21 months and the fine to $2,500.

3 Submissions have been made relating to the appropriate benchmark sentence for an offence under s 67(1)(*b*) and the relevant factors to be taken into account for sentencing. I address these in the detailed reasons which follow.

Background facts

4 On 17 November 2012 at about 2.10am, the appellant was driving his motor car along the Pan Island Expressway when he was stopped by traffic police officers for a spot check. The police officer noticed that the appellant smelled strongly of alcohol and administered a breathalyzer test. The

appellant failed the test and was placed under arrest. The appellant was then escorted to the Traffic Police Department and a Breath Evidential Analyser test was conducted at about 3.46am. The test results indicated that the proportion of alcohol in the appellant's breath was 64 microgrammes of alcohol for every 100 millilitres of breath. This was 1.82 times the prescribed legal limit of 35 microgrammes of alcohol for every 100 millilitres of breath. The appellant explained that during and after dinner with his friends he had drunk a few glasses of beer before driving home. He pleaded guilty to an offence under s 67(1)(*b*) of the RTA.

5 Section 67 provides as follows:

> **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.
>
> …

6 It will be apparent that by virtue of s 67(2), a person convicted of an offence under s 67 *shall* be disqualified from holding or obtaining a driving licence for a period of at least 12 months unless the court for "special reasons" thinks fit to order otherwise. The District Judge held that there were no "special reasons" to warrant her exercising her discretion not to impose a period of disqualification (at [14] of the GD). Nor has the appellant contended otherwise before me.

7 In determining the appropriate sentence, the District Judge gave due weight to the fact that the proportion of alcohol in the appellant's breath was about 1.82 times the prescribed limit. She was therefore of the view that the gravity of the offence did not fall at the lowest end of the spectrum (at [16] of the GD). The District Judge also applied the High Court authorities of *Ong Beng Soon v PP* [1992] 1 SLR(R) 453 ("*Ong Beng Soon*") and *Silvalingam Sinnasamy v PP* [2001] 2 SLR(R) 384 which establish that a harsher sentence should ordinarily be imposed where the alcohol level is higher (at [17] of the GD). The District Judge emphasised that the appellant had made the deliberate decision to drive home despite having consumed alcoholic drinks, and alluded to the need for a deterrent sentence (at [18] of the GD). A minimum fine and a minimum period of disqualification were therefore not thought to be appropriate under the circumstances. A fine of $3,000 and a disqualification order for a period of two years was accordingly imposed (at [19] of the GD).

8 In the further submissions filed on behalf of the appellant, Mr Singh submitted that having

regard to recent precedents and considering all the circumstances of this case, the appropriate sentence should be a fine of $3,000 and a disqualification order for a period of one year.

9 As against this, the Prosecution submitted that the District Judge's exercise of her discretion was in accordance with the established sentencing principles for an offence under s 67(1)(*b*) of the RTA, and that the sentence imposed on the appellant was consistent with the sentences imposed in similar cases. There was therefore no basis to find that the sentence imposed on the appellant was manifestly excessively.

The appropriate benchmark sentence for a s 67(1)(*b*) offence

10 There are two different offences in s 67. Under s 67(1)(*a*), the offence requires proof that a person is in fact unfit to drive by reason of being under the influence of intoxicating drink or drug. This offence requires proof of the *effect* that the consumption of the intoxicant has on the accused person's ability to have proper control of the vehicle and in particular proof that, as a consequence of such consumption and intoxication, he is incapable of having proper control over his vehicle. On the other hand, an offence under s 67(1)(*b*) is established by the single fact that the proportion of alcohol in the offender's body exceeds the prescribed limit which is set out in s 72(1) of the RTA.

11 The actual level of alcohol tolerance may vary as between particular individuals; and alcohol may affect the mental faculties and awareness of those intoxicated by it in different ways. Perhaps more importantly, it is often the case that those who consume alcohol or other intoxicating substances find their judgment so affected that they underestimate the adverse effects of the intoxicants consumed on their ability to control the vehicle properly, and this can have the most tragic of consequences. This is the context in which an offence under s 67(1)(*b*) is to be considered. To put it simply, a person who has been drinking cannot claim ignorance of the amount of alcohol that he has consumed. And any attempt to rely on his own judgment that his ability to drive has not been impaired will be futile.

12 A first offender under s 67 is subject to two separate components of punishment – a fine or imprisonment under s 67(1) *and* mandatory disqualification from holding or obtaining a driving license for a period of at least 12 months unless, as noted above, the court is satisfied that there are special reasons to order otherwise under s 67(2). In relation to the first component of punishment, a fine is the norm for a first offender, at least in relation to an offence under s 67(1)(*b*), unless there are egregious or aggravating circumstances that warrant a custodial sentence (see *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) at p 938–939).

13 It should be noted, however, that the two components of the overall sentence generally are not to be regarded as mutually compensatory. Thus, an increase in the quantum of the fine imposed or even the imposition of a custodial sentence should not be taken to mandate the imposition of a reduced period of disqualification than would otherwise have been ordered. A disqualification order combines three sentencing objectives: punishment, protection of the public and deterrence (see Peter Wallis gen ed, *Wilkinson's Road Traffic Offences* (Sweet & Maxwell, 20th ed, 2001) at para 4.412; Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at paras 32.150 – 32.159). Due to the limited range of fines from $1,000 to $5,000 for a first time offender, the mandatory disqualification order is in fact the principal punitive element of an offence under s 67(1), and the impact of a disqualification order is likely to be felt much more acutely than any marginal increase in the quantum of the fine.

14 Where an offence reflects a blatant disregard for the safety of other road users and a lack of personal responsibility, there is a public interest in taking such a driver off the roads for a substantial

period of time. The aims of deterrence are also served by sounding a stiff warning that such drivers can expect a lengthy disqualification order. The disqualification order should therefore increase in tandem with the severity of the offence, whether or not it is also accompanied by a substantial fine or period of imprisonment.

15 An offence under s 67(1)(*b*) can of course traverse a wide spectrum of circumstances. How is the appropriate sentence to be calibrated against these circumstances? In *PP v Lee Meng Soon* [2007] 4 SLR(R) 240 ("*Lee Meng Soon*"), Lee Seiu Kin J observed as follows at [21]:

> There have been many cases where a first offender under s 67(1) had been sentenced to a fine only and germane to the present appeal are the factors that would affect the decision to impose a sentence of imprisonment rather than a fine. It is useful to consider the matter from the extreme ends of the spectrum of punishment. At the minimum end is the case of a person who, after consuming a small amount of alcohol, drives a vehicle on the road. He is able to control his vehicle but is stopped for a random breath alcohol test which discloses a level that is at or just over the prescribed limit. He is guilty of an offence under s 67(1)(*b*). In the absence of any other material factor, it would be appropriate to sentence him to the minimum fine of $1,000 or an amount not far from this sum. The disqualification period imposed under s 67(2) would be the minimum period of 12 months unless there are special reasons not to do so. At the maximum end of the spectrum is the case of a heavily intoxicated driver who careens from one side of the road to the other at high speed, causing danger or even injury to other persons and damage to property. The level of alcohol in his body is many times over the prescribed limit. He would be accorded a punishment at the maximum end of the scale, with imprisonment for a term at or close to the maximum of six months and disqualification for a long period, possibly for life.

16 Because there is such a wide spectrum of facts that can implicate a charge under s 67(1)(*b*), in determining the appropriate sentence, it is incumbent on the court to consider the particular facts presented by applying a systematic framework, first considering the extent to which the concentration of alcohol in the offender's blood or breath exceeds the prescribed limit, and then examining whether there are any other aggravating or mitigating factors. This is in accordance with the approach generally reflected in the sentencing precedents. *Prima facie*, an offender with a higher alcohol concentration is in more flagrant violation of the law and is therefore deserving of more serious punishment: see *Ong Beng Soon* at [7].

17 Having examined the precedents, in my judgment, in the absence of aggravating factors, and where a first offender pleads guilty, a disqualification order at or near the minimum period of 12 months is warranted for cases at the borderline where the offender's alcohol level is close to the prescribed limit: see *Lee Meng Soon* at [21] (cited above at [15]); *V Mahetheran v PP* Magistrate's Appeal No 234 of 2009, where the level of alcohol was 43 microgrammes per 100 millilitres of breath and the disqualification order was reduced to 12 months on appeal though the fine of $3,000 was upheld; *PP v Chan Soo Sen*, where the level of alcohol was 50 microgrammes per 100 millilitres of breath and a fine of $2,000 and a disqualification order of 12 months was imposed; *Jason Tan v PP* Magistrate's Appeal No 269 of 2008, where the level of alcohol was 51 microgrammes per 100 millilitres of breath and the disqualification order was reduced to 12 months on appeal but the fine of $3,000 was upheld; *Chris-Lyn Ng v PP* Magistrate's Appeal No 213 of 2010 and *Mohamad Faizal bin Mohd Alias v PP* Magistrate's Appeal No 197 of 2010, where the level of alcohol was 53 microgrammes per 100 millilitres of breath and a fine of $2,000 and a disqualification order of 18 months was imposed on appeal. In my judgment, as Parliament has legislated a minimum period of disqualification of 12 months, this is sufficient indication that offences that fall at the lower end of the spectrum can and should be punished by a disqualification order for a period of between 12 months and 18 months. This is closely calibrated to the gravity of the offence and there would generally be no basis for imposing,

as a default, a disqualification order in excess of this for first offenders at the lower end of the spectrum in the absence of aggravating factors. This is equally true of the fines that are imposed. Parliament has provided a range of fines that the court may impose if it is satisfied that a custodial sentence is not warranted; and the court should ordinarily utilise the full range of the permitted fines according to the gravity of the offence before it: see *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR(R) 653 at [84].

18 When the level of alcohol is moderate to high, it is appropriate to reflect the relative severity of the offence committed by the imposition of a higher fine coupled with a longer period of disqualification ranging from 18 to 24 months. Precedents that are consistent with this include: *PP* v *Ho Shee Ying* [2008] SGDC 79, where the level of alcohol was 58 microgrammes per 100 millilitres of breath and a fine of $3,000 and a two-year disqualification order was upheld on appeal; *PP v Kunath Prasanth Menon* [2013] SGDC 125, where the level of alcohol was 63 microgrammes per 100 millilitres of breath and a fine of $2,000 and a two-year disqualification order was not appealed against; *PP v Tan Lee Pheng* [2010] SGDC 121, where the level of alcohol was 64 microgrammes per 100 millilitres of breath and a fine of $3,000 and a two-year disqualification order was upheld on appeal; *PP v Colin Chua Beng Yam* District Arrest Case No 047291 of 2012, where the level of alcohol was 65 microgrammes per 100 millilitres of breath and a fine of $2,500 and a disqualification order of 18 months was imposed; *PP v Dilip Kumar s/o Nirmal Kumar* District Arrest Case No 045102 of 2012, where the level of alcohol was 69 microgrammes per 100 millilitres of breath and a fine of $3,000 and a disqualification order of 18 months was imposed. In its further submissions, the Prosecution also tendered an extensive list of precedents involving offences committed between July and December 2012, where the level of alcohol ranged from 60 to 70 microgrammes per 100 millilitres of breath. I recognise that the trend has generally been to impose a period of disqualification of 24 months, but, on the other hand, there have been some instances where a shorter disqualification period of 18 months was imposed. Moreover, as will be apparent in my further analysis below, the same disqualification period of 24 months has often been ordered even where the level of alcohol is more than two times the prescribed limit and where accidents have been caused by the offender. In my judgment, this calls for some rationalisation as the period of disqualification ought to be sufficiently sensitive to the facts and reflect a broad proportionality to the varying levels of *severity* of the offence.

19 Disqualification orders of between two and three years have generally been imposed where the offender's level of alcohol is more than double the prescribed limit: see *PP v Vasudevan s/o Thambyrajah* [2010] SGDC 379, where the level of alcohol was 70 microgrammes per 100 millilitres of breath and a fine of $3,500 and a disqualification order of two years was imposed notwithstanding that the appellant claimed trial; *PP v Woo Keen Meng* [2009] SGDC 168, where the level of alcohol was 77 microgrammes per 100 millilitres of breath, and a fine of $3,000 and a disqualification order of two years was upheld on appeal; *Thrumoorthy s/o Ganapathi Pillai v PP* [2010] 4 SLR 788, where the level of alcohol was 80 microgrammes per 100 millilitres of breath and a disqualification order of two years was upheld on appeal; *PP v Tan Peng Yew Melvin* [2005] SGDC 24, where the level of alcohol was 84 microgrammes per 100 millilitres of breath and a fine of $3,800 and a disqualification order of 30 months was upheld on appeal; *PP v Selvarajah s/o Murugaya* [2007] SGDC 283, where the level of alcohol was 86 microgrammes per 100 millilitres of breath and a fine of $3,500 and a disqualification order of three years was upheld on appeal; *PP v Iskandar Mirzah Bin Aripin* [2012] SGDC 303, where the level of alcohol was 87 microgrammes per 100 millilitres of breath and a fine of $3,000 and a disqualification order of 30 months was upheld on appeal.

20 When the level of alcohol very substantially exceeds the prescribed level such that it is well beyond twice the prescribed limit, or where the offender has displayed a grave, blatant and evident disregard of the prohibition against driving under the influence of drink, the amount of the fine and

period of disqualification ordered ought to reflect this. In such cases, the starting point for disqualification should range from three to four years and in appropriate cases, it might be even longer: see *PP v Lim Chuan Lam* [2011] SGDC 191, where the level of alcohol was 93 microgrammes per 100 millilitres of breath and a fine of $4,000 and a disqualification order of three years was upheld on appeal; *PP v Ng Choon Hoe Kelly* [2008] SGDC 173, where the level of alcohol was 100 microgrammes per 100 millilitres of breath and a fine of $3,000 and a disqualification order of three years was upheld on appeal; *PP v Sivaji Rajah s/o Mariappan* [2012] SGDC 93, where the level of alcohol was 106 microgrammes per 100 millilitres of breath and a fine of $4,000 and a disqualification order of three years was imposed; *Lim Kay Han Irene v PP* [2010] 3 SLR 240 ("*Irene Lim*"), where the level of alcohol was 129 microgrammes per 100 millilitres of breath and a disqualification order of four years was upheld on appeal but a two-week imprisonment sentence was set aside and substituted with a $5,000 fine.

21 I have relied largely on more recent precedents as I consider the older cases of limited value in determining the appropriate benchmark sentence. The gravity of an offence under s 67(1) should be assessed in the light of the presently prevailing traffic environment and driving habits of the public. This is entirely appropriate because sentencing is a tool by which the imperatives of the criminal justice system can be achieved in a manner that is sensitive and responsive to the realities affecting society. For this reason, I do not think that the older cases, which might have imposed somewhat more lenient sentences, should be regarded as helpful.

22 Based on the above survey of the precedents, I set out the appropriate range of sentences for first time offenders – categorised within broad bands according to the level of alcohol – as follows:

Level of alcohol (µg per 100 ml 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)

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. Nor are these categories to be seen as rigid or impermeable. The precise sentence to be imposed in any individual case will, as it must always do, depend on an overall assessment of all the factual circumstances. But in general, the higher the alcohol level, the greater should be the fine and the longer should be the disqualification period.

23 I recognise, of course that sentencing is not a process that lends itself to formulaic or mechanistic application. It is therefore seldom helpful to attempt to isolate points of difference between a particular precedent and the case at hand and then to argue that because of some such isolated difference, the sentence to be imposed should be lower or higher (as the case may be). Of course, cases that are broadly alike should be treated in a manner that is broadly alike. But sentencing is a multi-layered determination of what is just in the circumstances before the court. It is thus entirely to be expected that even with these guidelines, there will be variances in their application according to the particular circumstances presented.

Relevant aggravating or mitigating factors

Relevant aggravating or mitigating factors

24 I preface my discussion of the factors that would justify the imposition of a sentence that departs from the benchmark guideline sentences set out above with the observation that the absence of aggravating factors cannot in itself be a mitigating factor that would justify the imposition of a sentence below the appropriate benchmark. Mr Singh submitted that the District Judge had failed to give sufficient weight to the following factors which he submitted were mitigating, namely, that the appellant:

(a) had not been speeding or driving in a manner that was careless or dangerous;

(b) had not caused any accident resulting in injury or damage to property; and

(c) had been driving late at night when there was only minimal traffic flow on the roads.

This overlooks the fact that an offence under s 67(1)(*b*) is *ipso facto* established where the level of alcohol in the accused's blood or breath exceeds the prescribed level. The fact that an offender had not displayed poor control of his vehicle or had not caused an accident resulting in property damage or injury is plainly relevant in deciding whether the seriousness of the offence had been *aggravated*; but the obverse proposition, that the absence of such an aggravating factor may be called in aid as a mitigating factor, is misconceived and simply does not follow. The presence or absence of a particular factor may be seen in one of three ways – aggravating, neutral or mitigating. There is no basis at all for assuming that the absence of an aggravating factor is to be regarded as mitigating (and vice versa): see Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th Ed, 2010) at p 158. On the contrary, the mere absence of an aggravating factor is just that and it is in that sense a neutral factor when it comes to sentencing.

25 This was also the view of Steven Chong J in *PP v Chow Yee Sze* [2011] 1 SLR 481 at [14] when he observed that "the lack of aggravating factors cannot be construed as a mitigating factor" (and see also *PP v AOM* [2011] 2 SLR 1057 at [37]).

26 The weight that a court ought to place on a recognised aggravating or mitigating factor should generally be linked to the rationale of sentencing that applies in relation to that offence, though this is not an inflexible principle: see Andrew Ashworth, "Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing" in *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) (Julian V. Roberts ed) ch 2 at p 25. When the fundamental sentencing rationale is proportionality, aggravating or mitigating factors are readily explicable as reflections of increased or diminished seriousness of the offence. Where deterrence or prevention is an additional consideration, the presence of these factors in locating the seriousness of the offence along a sliding scale may also determine whether these aims would be advanced by an appropriate adjustment in the sentence. The absence of an aggravating factor that renders an offence more serious only makes the offence less serious in *relative* terms. But where a benchmark sentence is adopted as a yardstick, an offence cannot be regarded as less serious in *absolute* terms merely because an aggravating circumstance is not present; nor can an offender plausibly argue that he ought to be given credit for not having committed an aggravated version of the offence. For these reasons, the factors cited by Mr Singh on the appellant's behalf were not in fact mitigating in the true sense.

Danger posed by the act

27 In my judgment, there are a number of recognisable factors that may aggravate or mitigate the gravity of an offence under s 67(1)(*b*). First, such an offence may be aggravated by reason of the *actual or potential danger* posed by the offender's conduct in committing the offence. This may be

manifested by the *manner of driving*: see *Lee Meng Soon* at [22], where Lee Seiu Kin J identified the degree of lack of control of the vehicle as one of the principal aggravating factors; this was also cited with approval in *Irene Lim* at [25]. For example, the offender may have exhibited poor control of his vehicle; he might have been apprehended for speeding; or he might have been found driving dangerously or recklessly, such as driving against the flow of traffic or being involved in a car chase in an attempt to avoid apprehension by the police. Each of these would be an aggravating factor because of the increased danger to road users posed by the offender's conduct. I should state however, that none of these is a constituent element of an offence under s 67(1)(*b*), and the relevant facts must either be part of the agreed statement of facts or proven by the Prosecution with relevant evidence (see *Irene Lim* at [26]). There is no basis for *presuming* that an offender whose alcohol level exceeded the prescribed limit had not been able to control his vehicle.

28 Aside from the manner of driving, the offence may also be aggravated by reason of other circumstances that increase the danger to road users, such as where the offender drives during the rush hours when the volume of traffic is heavy; or where he drives within a residential or school zone; or where the offender drives a heavy vehicle that is more difficult to control and requires a quicker reaction time; or where he intends to travel a substantial distance to reach his destination. These are factors that are not related to the offender's *manner* of driving but which nonetheless heighten the danger that is posed to road users by the offender's conduct. I would add that the last mentioned factor may, depending on the precise circumstances, constitute a mitigating factor where the offender only intends to drive for a very limited distance, as the potential danger caused could be reduced in such circumstances: see *Cheong Wai Keong v PP* [2005] 3 SLR(R) 570, where Yong Pung How CJ held that the fact that an offender only drove for a short distance in order to get his vehicle to a car park when he realised that he had parked his car along double yellow lines the previous night, was not a "special reason" to justify the non-imposition of a disqualification order under s 67(2), but he then imposed only a one-year disqualification order notwithstanding the fairly high level of alcohol in the offender's breath. Similarly, in *PP v Ng Poh Tiong* [2006] SGDC 233, the District Judge considered that it was a mitigating factor that the offender had only driven his car a distance of two feet into another parking lot.

Real consequences of the act

29 Where the danger caused by drunk driving eventuates in actual harm, this must also, in my judgment, be regarded as an aggravating factor. In such circumstances, the commission of the offence under s 67(1)(*b*) has resulted in the very consequences that the criminalisation of that act was intended to prevent. Thus, if the offender has been involved in a collision or accident that has caused property damage, injury or even death, this would be an aggravating factor that should be reflected in both the quantum of the fine or length of an imprisonment sentence, and in the period of disqualification. The weight to be given to this factor must of course depend on the nature and magnitude of damage or harm caused and all other relevant circumstances.

30 The learned Deputy Public Prosecutor, Ms April Phang ("Ms Phang"), submitted in the course of her oral argument that the key consideration in determining the appropriate sentence for an offence under s 67(1)(*b*) ought to be the level of alcohol concentration in the offender's blood or breath, and not whether any property damage or injury was caused. Ms Phang contended that where an accident has resulted, the Prosecution would prefer additional charges of reckless or dangerous driving under s 64(1) or of driving without due care or reasonable consideration under s 65 of the RTA. She therefore submitted that the question of whether damage or injury was caused should only be of ancillary importance. I do not agree, though I note that the sentencing precedents do not appear to have given sufficient weight to this factor in determining the appropriate period of the disqualification order. The simple point is that the offence has been aggravated by reason of the harm being *actual*

rather than merely *potential*, and I see no reason why the appropriate sentence should not reflect this. I acknowledge that there may be arguments over the vagaries of fortune – a drunk driver might fortuitously escape the consequence of harm – but from a punitive or deterrent viewpoint, serious consequences that flow from antisocial, risk-taking behaviour which are the very consequences that were meant to be avoided by the enactment of the offence ought to be visited with sentences of appropriate severity.

31 The sentencing precedents in this respect appear to me to be rather inconsistent. In *Kim Seung Shik v PP* Magistrate's Appeal No 277 of 2009, the offender had a breath alcohol concentration of 117 microgrammes per 100 millilitres and collided with another vehicle. He was sentenced to one week's imprisonment on appeal, but was only disqualified from holding a driving license for two years. In *PP v Sim Yew Jen Jonathan* [2008] SGDC 272, the offender, who had a breath alcohol concentration of 57 microgrammes per 100 millilitres, was involved in a collision with a traffic light pole, causing it to be uprooted. He was sentenced to three weeks' imprisonment and a two year disqualification order was imposed. Although the court considered that the offences were of sufficient gravity for a custodial sentence to be imposed, the length of disqualification ordered was not increased. Mr Singh also relied on a number of other cases where minor collisions had taken place but where the offenders had been disqualified for only two years notwithstanding this aggravating factor, *viz*, *PP v Ng Fook Liat* [2007] SGDC 20, *PP v Azhar Bin Abdullah* [2011] SGDC 358, *PP v Tham Chee Mun* District Arrest Case No 52605 of 2010 (unreported) and *PP v Chew Chin Kiat* District Arrest Case No 20009 of 2011 (unreported) ("*Chew Chin Kiat*"). While there can be no blanket rule, in my judgment, a longer period of disqualification should generally be imposed – in conjunction with a higher fine or, where appropriate, a custodial sentence – when injury or property damage has been caused, so as to reflect the aggravation of the offence.

Conduct upon apprehension

32 Mr Singh also submitted that the appellant had driven "responsibly and stopped when directed by the police to do so for a spot check without any untoward incident". He referred me to a precedent relied on by Ms Phang, *Chew Chin Kiat*, where the offender had been sentenced to a fine of $3,000 and disqualified from driving for two years. The offender's vehicle in that case had collided with another vehicle, and the offender had behaved aggressively and refused to cooperate with the traffic police at the scene. Mr Singh submitted that the circumstances were clearly more aggravated in that case, but the sentence imposed was identical to that of the appellant in the present case. I accept that belligerent and violent conduct upon apprehension is yet another type of aggravating factor that may justify an increased fine or – in exceptional cases – imprisonment. But such conduct would not ordinarily affect the length of the disqualification order as it bears only a minimal relation to the rationale behind the imposition of a disqualification order. To put it another way, such conduct has no bearing in itself on the dangers to road users which is what the offence and in particular the disqualification order is generally meant to address. But this has no direct relevance in the presence case because, as I have already noted, the absence of an aggravating factor does not amount to a mitigating factor.

Reasons for driving

33 An offender's reason or motivation for driving may either be an aggravating or mitigating factor that impacts his level of culpability. For example, if an offender is driving a passenger for hire or reward, this would be an obvious example of conduct that increases the gravity of the offence. Conversely, if an offender drives because he is faced with an emergency or because of other extenuating circumstances, this might be a mitigating factor that could warrant a sentence lower than the benchmark. In *Sivakumar s/o Rajoo v PP* [2002] 1 SLR(R) 265 ("*Sivakumar*"), the offender

had driven out of impulse when he received a call from his friend who told him that she was thinking of committing suicide with her children. While Yong Pung How CJ did not accept that this constituted a "special reason" under s 67(2) to warrant not ordering the mandatory minimum period of disqualification, he also accepted (at [29] of *Sivakumar*) that the court ought to have due regard for the motivation leading to the commission of the offence. Similarly, in *Irene Lim*, the court was of the view that the offender had been in a state of anxiety and panic when she received a call from the hospital informing her that a close relative was in a critical condition, and that she had not then appreciated that she had consumed alcohol earlier in the day when she made the decision to drive; her level of culpability therefore could not be equated with someone who had deliberately driven with the full knowledge that he was intoxicated (at [33]–[34] of *Irene Lim*). In the present case, there was nothing of an exonerating nature in the appellant's conscious decision to drive home after several drinks.

The appropriate sentence in the present appeal

34 Mr Singh initially submitted that the appropriate sentence ought to be a fine of around $2,000 and a disqualification order of not more than one year. In his further written submissions, he took the position that the fine of $3,000 could remain but maintained that the period of disqualification should be reduced to not more than one year. Ms Phang, on the other hand, submitted that the sentence imposed by the District Judge was consistent with the precedents and could not be said to be manifestly excessive.

35 In my judgment, there were no relevant aggravating or mitigating factors in this case. I therefore see no reason to depart from the sentencing framework I have set out above and the benchmarks I have laid down at [22]. Having regard to the fact that the appellant's alcohol level was 1.82 times the prescribed limit, there is no basis whatsoever for me to reduce the period of disqualification to no more than one year as sought by Mr Singh. Having regard to the fact that the appellant's alcohol level was near the middle of the applicable range, I hold that a disqualification order for a period of 21 months would be just in all the circumstances. This was sufficiently less than the period of two years imposed by the learned District Judge to warrant appellate intervention. For the same reason, I am of the view that the fine of $3,000 imposed by the Judge should be reduced to $2,500.

36 This leaves me with three points to clarify. First, Ms Phang submitted that the appellant had not in fact been stopped at a roadblock but had been singled out for a spot check by a highway patrol officer and, on that basis, she submitted that an inference ought to be drawn that the appellant must have been driving in an unsteady manner such that he had attracted the attention of the patrol officer. This did not form any part of the Statement of Facts on the basis of which the appellant had pleaded guilty to the offence he was charged with, and I was wholly unwilling to draw such an inference in the absence of proof. As I have already observed, where the Prosecution intends to rely on facts that are material to sentencing, it is incumbent on them to reflect this in the evidence or in the agreed Statement of Facts.

37 Second, I acknowledge that the appellant had an impeccable driving record prior to this offence and also that he had rendered meritorious service to the country as a regular serviceman with the Republic of Singapore Air Force. Mr Singh submitted these were relevant mitigating circumstances. I disagree. These personal factors did not justify a shorter period of disqualification in this case. A disqualification order combines the three rationales of punishment, deterrence and the protection of the public, and I did not think that any "social accounting" of his moral worth should be undertaken in the present circumstances. The danger to road users ultimately remains unaffected by these matters.

38 Finally in his submissions, Mr Singh drew my attention to *PP v Ngiam Hock Thiam* [2010] SGDC 415 ("*Ngiam Hock Thiam*"). In that case, the accused was convicted after trial of an offence under s 70(4)*(a*) of the RTA for failing to provide a breath specimen to a police officer at a police station. The accused had been apprehended at a road block. The district judge found that the accused had made a number of attempts to evade the consequences of driving after having consumed an unknown quantity of beer and had tried to mask his "beer breath" by drinking some medicated oil. The judge found specifically that "the [accused] had not been co-operative with the police, had attempted to prolong the time taken to have the alcohol level in his system tested and possibly evade being tested altogether" (at [94] of *Ngiam Hock Thiam*). The offence is punishable in the same way as if the offence charged were an offence under s 67. The district judge, having found the foregoing facts, imposed a fine of $2,400 and a period of disqualification of 18 months.

39 Mr Singh submitted that this was far more reprehensible conduct than that of the appellant before me. There is an instinctive appeal in what Mr Singh says but I make three observations:

(a) Although the offence under s 70(4)(*a*) is punishable in the same way as that under s 67, it is a different offence. It is therefore unprofitable to take guidance for the imposition of a sentence in relation to an offence under s 67 from a sentence which has been imposed for the different offence under s 70(4)(*a*).

(b) Having said that, in my judgment, an offence under s 70(4)(*a*) is directed at two types of interests – to punish and deter those who place others (and for that matter themselves) at risk by driving while intoxicated, but additionally to punish and deter those who seek to undermine the criminal justice system by trying to avoid giving a breath or blood sample. Those who take this course should expect that if they are found guilty of an offence under s 70(4)(*a*), they may well be punished not as a borderline or moderate offender under s 67(1)(*b*) but as a more serious offender. This is necessary in order to deter those who are apprehended from gaming the system and trying to get away with it. Such an offender, having prevented the drawing of a sample through deliberate efforts, should not be better off than one who co-operates and then faces a charge under s 67(1)(*b*) as a result.

(c) For this reason, *Ngiam Hock Thiam* should not be regarded as a reliable precedent.

Conclusion

40 For the foregoing reasons, I allow the appeal and order that the disqualification period be reduced to 21 months and the fine be reduced to $2,500.