Madiaalakan s/o Muthusamy v Public Prosecutor
[2001] SGHC 327

Case Number : MA 53/2001

Decision Date : 31 October 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : S Kumar (SK Kumar & Associates) for the appellant/respondent; Anandan Bala and Chng Hwee Chin (Deputy Public Prosecutors) for the respondent/appellant

Parties : Madiaalakan s/o Muthusamy — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Failure to provide breath sample – Enhanced penalties – Whether to treat conviction under s 70(4)(a) Road Traffic Act (Cap 276, 1997 Ed) as substantive conviction under s 67 – Accused having prior conviction under s 67 – ss 67 & 70(4)(a) Road Traffic Act (Cap 276, 1997 Ed)

Road Traffic – Offences – Drink driving – Failure to provide sufficient breath sample – Accused suffering from Chronic Obstructive Lung Disease – Reasonable excuse – Elements – s 70(4)(a) Road Traffic Act (Cap 276, 1997 Ed)

Words and Phrases – 'reasonable excuse' – s 70(4)(a) Road Traffic Act (Cap 276, 1997 Ed)

: For ease of reference, Madiaalakan s/o Muthusamy will be referred to as the appellant, and the Public Prosecutor as the respondent. This was an appeal from the decision of District Judge Christopher Goh (`the judge`), in which he convicted the appellant of an offence under s 70(4)(a) of the Road Traffic Act (Cap 276, 1997 Ed) and of an offence under s 120(1)(b) of the same Act, and acquitted him of a charge under s 67(1)(a) of the same Act. In respect of the s 70(4)(a) offence, the appellant was fined $2,500 and disqualified from holding and obtaining a driving licence for all classes of vehicles for two years. In respect of the s 120(1)(b) offence, the appellant was fined $500. The appellant appealed against his conviction for the s 70(4)(a) offence. The respondent cross-appealed against the sentence imposed for the same offence. I dismissed the appeal and allowed the cross-appeal, and now give my reasons.

The charge

Only the second charge was relevant to the present appeal, and references to other charges will be omitted. The second charge read as follows:

> *That you, Madiaalakan s/o Muthusamy, male 39 years, NRIC No S2514101A are charged with that you, on the 12th day of February 2000 at about 12.52am, at Clementi Police Division, Singapore, being a person who was arrested under s.69(5) of the Road Traffic Act, Cap 276, did without reasonable excuse, fail to provide a specimen of breath for analysis by means of a Breath Evidential Analyser (BEA) device No : A0131 when required to do so by Police Sergeant 7671, Muhammad Jailani bin Sin, and at the time of your arrest under s.69(5), you were riding motor cycle No. FM5770M and you have thereby committed an offence punishable under s.70(4)(a) of the Road Traffic Act Cap 276 read with s.67(1) of the same Act.*

The prosecution`s evidence

Just before midnight on 11 February 2000, the appellant, riding a motorcycle, did not obey a red light signal at the junction of Clementi Avenue 6 and Jalan Lempang. Sergeant Lim Chong Wee (PW1) and Corporal Abdul Razak (PW2) gave chase in a police car. The appellant stopped after he was flagged down by the police officers. The police officers conducted a breathalyser test on the appellant. He was told to blow three times into a breathalyser device, but failed to provide a sufficient breath specimen each time. He was then placed under arrest and brought to a police station.

At the police station, Sergeant Mohd Jailani bin Sin (`PW3`) administered a Breath Evidentiary Analyser (`BEA`) test. PW3 explained the test procedure and informed the appellant that he had three minutes to provide a sufficient breath specimen. PW3 also asked the appellant if he had any illness. The appellant responded in the negative. The appellant attempted to blow into the machine five times, but failed to provide a sufficient breath specimen each time.

The defence`s evidence

The appellant admitted to drinking a small glass of beer that night. He claimed he had to take the first breathalyser test while he was wearing his helmet. He also claimed that he had experienced chest pains while taking the BEA test. He said that he had informed an Indian Muslim officer of this. However, he did not know the officer`s identity.

The appellant claimed to have experienced this problem six to seven months prior to the incident. He first sought medical attention at the Singapore General Hospital (`SGH`) for this problem on 3 August 1999. On 30 August 2000, more than six months after the incident, he consulted Dr Tan Kok Leong (`DW2`). In the light of the medical tests which he conducted on the appellant and of the medical reports from SGH, DW2 concluded that the appellant had Chronic Obstructive Lung Disease (`COLD`).

The district judge`s decision

The judge set out the prosecution`s case and the defence`s case. He then accepted that, as the appellant was suffering from COLD at the material time, he had a defence of reasonable excuse. However, he also held that the prosecution had disproved this defence on a balance of probabilities because the appellant did not tell PW3 about his illness and, in any case, the appellant was not suffering from an asthma attack then. The judge was of the opinion that the appellant had used his medical condition as an excuse, after he was charged. In sentencing the appellant, the judge considered his antecedents, including one under s 67(1). He was not moved by the appellant`s plea in mitigation.

The issues

The issues in the appeal were:

(1) Whether the appellant had a defence of `reasonable excuse` within the meaning of s 70(4).

(2) Whether the present conviction should have been treated as a `second conviction` for the purposes of s 67(1).

THE FIRST ISSUE: WHETHER THE APPELLANT HAD A DEFENCE OF `REASONABLE EXCUSE`

Section 70(4) provides:

> *A person who fails, **without reasonable excuse**, to provide a specimen when required to do so in pursuance of this section shall be guilty of an offence and if it is shown that at the time of any accident referred to in section 69 (1) (d) or of his arrest under section 69 (5) -*
>
> *(a) he was driving or attempting to drive a motor vehicle on a road or any other public place, **he shall be liable** on conviction **to be punished as if the offence charged were an offence under section 67** ... [Emphasis is added.]*

The first question was, what amounted to a reasonable excuse? **R v Lennard** [1973] 2 All ER 831[1973] 1 WLR 483 advanced a rather narrow test:

> *In our judgment no excuse can be adjudged a reasonable one unless **the person** from whom the specimen is required **is physically or mentally unable to provide it or the provision of the specimen would entail a substantial risk to his health**. [Emphasis is added.]*

Cotgrove v Cooney [1987] RTR 124 held that a person who was unable to provide a sufficient breath specimen despite having `tried as hard as he could` had a reasonable excuse, otherwise he would be convicted where there was no mens rea. This was an example of the concept of `physically or mentally unable` in ***Lennard*** , and served to broaden the defence somewhat.

The second question then was, did the appellant have a reasonable excuse? The defence argued that, because the appellant had COLD (`the first element`), he was unable to produce a sufficient breath specimen, even though he had tried his best (`the second element`). As for the first element, the judge accepted that the appellant had COLD.

The second element could be proved in two ways. One, from a subjective point of view. This was, however, difficult for the defence to prove, because no one but the appellant could attest to the truth of this, and the court may well have been sceptical of the appellant`s bare assertion that he did try his best. Two, by an inference from objective evidence. If the appellant was incapable of giving a sufficient breath specimen, then it could be inferred that he had tried his best, but failed. If the appellant was capable of giving a sufficient breath specimen, but did not, the necessary inference was that he had not tried his best. The medical evidence showed that the appellant was capable of giving a sufficient breath specimen. DW2 said that there were two types of COLD, the obstructive version and the restrictive version. The appellant suffered from the restrictive version. One who suffered from this version would still be able to give a sufficient breath specimen. He would be unable to do so only if there was an obstruction in his respiratory system, for example, he was suffering from an asthma attack. There was no evidence that this was the case here. Hence the appellant did not have a reasonable excuse.

If I am wrong, and the appellant did have a reasonable excuse, it would be necessary to consider the third question. As was said in **Rowland v Thorpe** [1970] 3 All ER 195, `once the defence is raised of reasonable excuse, it is for the prosecution in every case to negative it ...`. The third question then was, had the prosecution negatived the defence? The appellant did not tell PW3 about his illness, even though he was expressly asked. Although the appellant claimed to have told an Indian Muslim

officer, he did not provide sufficient information for him to be identified and called as a witness. Hence the defence was negatived.

THE SECOND ISSUE: SENTENCE

Section 70(4)(a) provides that one who is convicted thereunder `shall be liable on conviction to be punished as if the offence charged were an offence under section 67`. Section 67 provides:

> *(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 ...*
>
> *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*** *. [Emphasis is added.]*

The key question was, should the words `punished as if the offence charged were an offence under section 67` be read as `punished as if he had been ***charged and*** convicted under s 67`? If so, then a conviction under s 70(4)(a) should not be deemed a substantive conviction under s 67.

There were two arguments which could be advanced against such a reading, but both could be refuted. The first argument related to the manner in which s 70(4)(a) was drafted. It would be useful at this juncture to refer to s 67A:

> *(1) Where a person having been convicted on* ***at least 2 previous occasions*** *of any one or more of the offences under sections 43 (4), 47 (5), 47C (5), 63 (4), 64 (1), 66 (1), 67 (1) and 70 (4) is again convicted of an offence under section 43 (4), 47 (5), 47C (5), 63 (4), 64 (1), 66 (1), 67 (1) or 70 (4), the court shall have the power to impose a punishment in excess of that prescribed ... [the provision goes on to prescribe enhanced penalties] [Emphasis is added.]*

It could be argued that, had Parliament wanted to treat a conviction under s 70(4)(a) as one under s 67, it could easily have drafted s 67 in terms similar to s 67A. That method would have been clearer than drafting s 70(4)(a) to refer to s 67. The answer to that argument was that Parliamentary intention could be clearly ascertained from Hansard. It could be seen that Parliament intended at least two things. One, to deter repeat offenders. When s 67A was first introduced, the Minister for Law said (18 January 1993):

> *The proposal in the Bill ... is to give our courts the power ... to impose the enhanced penalties and potential offenders would be put on notice that* ***they cannot get off lightly if they repeatedly flout the law****. [Emphasis is added.]*

Two, not to allow repeat offenders to escape the enhanced penalties by depriving the prosecution of evidence necessary for a subsequent conviction. On 27 February 1996, the Minister for Home Affairs said:

> *The new section 67A has ... been amended to include the offence of refusal to provide blood sample under section 70(4) as one of the offences which would attract the enhanced penalty.* ***A recalcitrant motorist will not escape the enhanced penalties simply by refusing to provide his blood or breath samples****. [Emphasis is added.]*

The second argument concerned the concept of moral agency. The problem with equating an act of drink driving with a failure to provide a breath or blood sample was that an ***omission*** would be treated as a culpable ***act*** . The answer to this was that, in a situation where it is much easier for an accused person to prove his innocence than for the prosecution to prove his guilt, the law has not shrunk from laying presumptions in order to level the field. For example, under s 123(1) of the Criminal Procedure Code (Cap 68), the court, in deciding whether to commit the accused for trial or whether there is a case to answer, can draw adverse inferences if the accused failed to mention material facts which he could reasonably have been expected to mention. In this case, a person charged with drink driving could easily prove his innocence by giving a sufficient breath sample, or if he is unable to do so, a blood sample.

From the above, it can be seen that a conviction under s 70(4)(a) should be treated as a substantive conviction under s 67. As the appellant was convicted under s 67 on 16 January 1991, his conviction under the present charge should be treated as a second conviction under s 67.

Conclusion

For the above reasons, I dismissed the appeal. I also allowed the cross-appeal, and enhanced the sentence to: six months` imprisonment, a fine of $5,000 ($2,500 of which has been paid, in default three months` imprisonment) and disqualification from holding and obtaining a driving licence for all classes of vehicles for three years.

Outcome:

Appeal dismissed; cross-appeal allowed.