Choo Kok Hwee *v* Public Prosecutor
[2014] SGHC 126

Case Number : Magistrate's Appeal No 305 of 2013

Decision Date : 30 June 2014

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : S K Kumar (S K Kumar Law Practice LLP) for the appellant; Carene Poh and Crystal Tan (Attorney-General's Chambers) for the respondent.

Parties : Choo Kok Hwee — Public Prosecutor

Criminal Law – Statutory offences – Road Traffic Act – Driving under the influence of drink

30 June 2014

Choo Han Teck J:

1 On 2 September 2012, the appellant was driving his car in the motor car departure lane at the Woodlands Checkpoint. He was involved in a collision with another vehicle. A police officer arrived at the scene, and while interviewing the appellant, smelled alcohol on the appellant's breath. The appellant's breath was found to contain 61 microgrammes of alcohol per 100 millilitres of breath. The alcohol exceeded the prescribed limit of 35 microgrammes of alcohol per 100 millilitres of breath. While on bail, on 23 May 2013, the appellant drove his car along Jalan Bukit Merah. A police officer noticed that the car was being driven in an unsteady manner, and followed it. She eventually requested the appellant to stop and she tested the appellant for alcohol consumption. This time, the appellant's breath was found to contain 75 microgrammes of alcohol per 100 millilitres of breath.

2 Before the District Judge on 15 November 2013, the appellant pleaded guilty to two charges of driving under the influence of drink pursuant to s 67(1)(*b*) of the Road Traffic Act (Cap 276, 2004 Rev Ed) ("RTA"), which related to the incidents on 2 September 2012 (DAC 36181/2012) and 23 May 2013 (DAC 26226/2013), and one charge of driving without due care and attention under s 65(*a*). The prosecution proceeded on the two s 67(1)(*b*) charges, and applied to have the s 65(*a*) charge taken into consideration for the purpose of sentencing. Preferring the s 67(1)(*b*) charges against the appellant, the prosecution stated that the appellant was liable to enhanced punishment under s 67(1) because he had previously been convicted, on 31 March 1988, for one count of driving under the influence of drink, under s 67(1) of the Road Traffic Act (Cap 276, 1985 Rev Ed). Section 67(1) of the RTA reads:

> 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
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> (*b*) has so much alcohol in his body that the proportion of it in his breath or blood exceeds the prescribed limit,
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> 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.

3 The District Judge convicted the appellant and sentenced him to a total of five weeks' imprisonment and five years' disqualification from all classes of vehicles (see *PP v Choo Kok Hwee* [2014] SGDC 15). The appellant appealed against the sentence imposed, arguing that the District Judge erred in fact and law in that he:

(a) Counted the appellant's 1988 conviction as a first conviction for the purpose of enhanced sentencing under s 67(1);

(b) Held that a jail term was mandatory for a second offender under s 67(1); and

(c) Failed to accord sufficient weight to all the mitigating factors such as the appellant's willingness to plead guilty and cooperate with the authorities.

I found that none of these had merit, and dismissed the appeal in its totality. These are my grounds.

4 First, was the District Judge correct to count the 1988 conviction as a first conviction? The controversy here – according to the appellant – was that in the Road Traffic Act (Cap 276, 1985 Rev Ed), there was only the offence of being unfit to drive to the extent of being incapable of having proper control of the vehicle, the equivalent of s 67(1)(*a*) of the RTA. There was no offence of simply having an excessive amount of alcohol in the body, which was only found in subsequent versions of the act (s 67(1)(*b*) of the RTA). Section 67(1) of the 1985 edition reads:

Any person who, when driving or attempting to drive a motor vehicle on a road or other public place, is under the influence of drink or of a drug 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 not exceeding 6 months, and in the case of a second or subsequent conviction to a fine not exceeding $2,000 or to imprisonment for a term not exceeding 12 months or to both.

The appellant's argument involved two contentions. The first was that, in considering whether an offender was liable to enhanced sentencing under s 67(1) of the RTA, a distinction must be drawn between previous convictions under s 67(1)(*a*) and the like under s 67(1)(*b*). The second, following on from the first, was that a person's previous convictions under s 67(1)(*a*) could not count for the purpose of enhanced sentencing if he were subsequently charged and convicted under s 67(1)(*b*).

5 In support of his first contention, he cited *Edwin s/o Suse Nathen v PP* [2013] 4 SLR 1139 ("*Edwin*"). Although the High Court in *Edwin* did highlight the differences between the two limbs of s 67(1) of the RTA (at [12]), it did so in the context of considering the appropriate sentence to be imposed for a first offender under s 67(1)(*b*). *Edwin* did not stand for the proposition – nor did it even imply – that the difference between the two limbs would affect the enhanced sentencing regime.

6 On the contrary, the High Court in *Silvalingam Sinnasamy v PP* [2001] 2 SLR(R) 384 ("*Silvalingam*") held that "s 67(1) does not draw a distinction between s 67(1)(*a*) and s 67(1)(*b*) for the purposes of enhanced penalties for second-time offenders" (at [10]). In *Silvalingam*, the accused pleaded guilty to a charge under s 67(1)(*b*) of the Road Traffic Act (Cap 276, 1997 Rev Ed). He had been previously convicted under s 68(1) of the Road Traffic Act (Cap 92, 1970 Rev Ed) – which was the equivalent of s 67(1)(*a*) of the 1997 edition, namely, driving while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle. The question was whether

his previous conviction would count for the purpose of enhanced sentencing under s 67(1). The court held that it would.

7 Even if the appellant's first contention were accepted, the second would lead to absurd results. There are two offences spelt out in s 67(1) of the RTA. The offence under s 67(1)(*a*) requires that, as a consequence of intoxication, the driver is incapable of having proper control of the vehicle. An offence under s 67(1)(*b*), however, is established by the single fact that the proportion of alcohol in the offender's body exceeds the prescribed limit set out in s 72(1) of the RTA. Even if a distinction was to be drawn between the two, it would be illogical to argue that previous convictions of the more egregious offence (under s 67(1)(*a*)) could not count for enhanced sentencing when an offender faced a subsequent s 67(1)(*b*) conviction. I hence found that the District Judge was correct to have considered the appellant's 1988 conviction as a first offence for the purpose of enhanced sentencing under s 67(1) of the RTA.

8 Second, is a jail term mandatory for a second offender under s 67(1)? The High Court in *PP v Lee Soon Lee Vincent* [1998] 3 SLR(R) 84 dealt with this very question, and answered it in the affirmative (at [38]). It cited a portion of the second reading of the Road Traffic (Amendment) Bill 1990 (at [37]), where the Minister for Home Affairs stated that "[f]or a repeat offender, the fine will be between $3,000 and $10,000, but this repeat offender will be subject to mandatory imprisonment…" The District Judge below followed the decision of the High Court.

9 This point was also dealt with by the Court of Criminal Appeal in *PP v Tan Teck Hin* [1992] 1 SLR(R) 672. In that case, the court observed that, under s 67(1) of the Road Traffic Act (Cap 276, 1985 Rev Ed), repeat offenders were subject to both a fine and a mandatory term of imprisonment (at [7]). The s 67(1) that the court in *Tan Teck Hin* dealt with was different from the s 67(1) cited above (at [4]), as the former had incorporated the amendments that took effect from 2 April 1990. The s 67(1) that the court in *Tan Teck Hin* dealt with reads:

> Any person who, when driving or attempting to drive a motor vehicle on a road or other public place, is under the influence of drink or of a drug 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.

Comparing the pre-amendment 1985 edition of s 67(1) (cited above at [4]) with the post-amendment version, it is clear that (other than the amount of the fines) the main difference lies in the phrase "and to imprisonment" found in the latter (which replaced "or to imprisonment" in the former). Section 67(1) of the RTA, the version presently in force and under which the appellant in this case was charged, is drafted in a similar manner to the post-amendment 1985 edition of s 67(1) with regard to the punishment provision for repeat offenders.

10 Notwithstanding these pronouncements, the appellant maintained that the District Judge was wrong to hold that repeat offenders face mandatory imprisonment. He relied on the High Court decision of *Chong Pit Khai v PP* [2009] 3 SLR(R) 423 ("*Chong*"). In *Chong*, the appellant pleaded guilty to one count of s 67(1)(*b*) of the RTA. He was sentenced to two weeks' imprisonment and two years' disqualification. He appealed on the ground that the District Judge should not have given any consideration to his earlier conviction (under s 68(1)(*b*)), as he had not committed the s 68(1)(*b*) offence but merely pleaded guilty out of convenience. For the avoidance of doubt, a conviction for a s 68 offence is not deemed a previous conviction for a s 67 offence. As such, it was clear that *Chong* dealt strictly with the case of a first offender with respect to the s 67(1) offence. Nevertheless, the

court also considered whether repeat offenders under s 67(1) were liable to mandatory imprisonment. At [24], it stated:

> This issue is not relevant in the present appeal as the appellant is not a repeat offender with respect to the s 67 offence. I refer to this issue only because the drafting is unclear and it creates considerable difficulties for a court applying criminal sanctions, although in practical terms it may not matter that much as to whether Yong CJ was correct or wrong in his interpretation. I should mention… that I was a member of the Court of Appeal in *PP v Tan Teck Hin* that made the quoted statement. But, a closer study of the judgment in that case will show that the statement was *obiter* and that it was probably a restatement of the parliamentary statement made without any detailed examination of the words of the section. The controlling words in both the 1985 version and the 1990 version were the same, *ie*, "shall be liable ... to". Since Parliament retained the same words in the 1990 version, the presumption is that Parliament did not intend to change their meaning. Reduced to its essence, what ss 67 and 68 provide is that, for a first offence, the offender is liable to a fine or imprisonment, but, in the case of a second offence, the offender is liable to a fine and imprisonment. In the case of a first offence, the offender is liable to be punished in the alternative; in the case of a second offence, the offender is liable to be punished cumulatively. But since the controlling words were still "shall be liable ... to", it is difficult to understand the reasoning that their meaning has now changed in the context of the 1990 version as a matter of grammar or statutory construction. One explanation could be that the substitution of the words "or to imprisonment ... or to both" by the words "and to imprisonment" was due to a change in drafting technique and not a change in legislative intention.

For clarity, the "quoted statement" refers to *Tan Teck Hin* at [7], which reads:

> The position after the amendment is that for first offenders, there is still the alternative of a fine or imprisonment, but a minimum is imposed for the fine, though not for the imprisonment. For repeat offenders, the penalty has been drastically enhanced. They are now subject to both a minimum fine and a mandatory term of imprisonment.

11 As apparent from the quoted portions above, the court in *Chong* did not express a conclusive view on the matter of whether a second offender would be liable to mandatory imprisonment. In fact, its qualifier in the opening sentences of [24] made clear that it was not necessary to determine the matter. Although I agree with the apparent difficulties in statutory construction posed by s 67(1), referred to by the court in *Chong*, I find that the statement of the Minister for Home Affairs (cited above at [8]) left little room for doubt with regard to the question of mandatory imprisonment for second offenders. Accordingly, I found that the District Judge was correct in finding that a second offender was liable to a mandatory jail term.

12 Third, had the District Judge failed to accord sufficient weight to the appellant's decision to plead guilty and his cooperation with the authorities? The District Judge noted (at [15]) that he "did not see any mitigating factors" in the case. I found that he was correct to have discounted the appellant's "surrender". Even if the appellant chose to claim trial, the prosecution would have had little difficulty in proving its case. The evidence was incontrovertible. There is no mitigation value in such a plea of guilty (see *PP v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [33]). The sentence meted out by the District Judge was also in accordance with precedents involving similar facts.

13 For the reasons above, I dismissed the appeal.