Rangasamy Subramaniam v Public Prosecutor
[2009] SGHC 255

Case Number : MA 312/2008

Decision Date : 13 November 2009

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : S K Kumar (S K Kumar & Associates) for the appellant; Gillian Koh Tan (Attorney-General's Chambers) for the respondent

Parties : Rangasamy Subramaniam — Public Prosecutor

Criminal Law

Road Traffic – Offences – Drink driving

13 November 2009 Judgment reserved.

Lee Seiu Kin J :

1 This is an appeal by the appellant against both his conviction and sentence in District Arrest Court No 51987 of 2007 on a charge of drink driving under s 67(l)(b) of the Road Traffic Act (Cap 276, 2004 Rev Ed) ("RTA"). He was fined $3,000 and disqualified from holding or obtaining a driving licence for two years. The charge was as follows:

> … you, on the 3rd day of December 2007 between 2 am and 3:54 am, along Pan Island Expressway 14.5 km mark towards Tuas, Singapore, when driving motor vehicle SGG 4774 D, did have so much alcohol in your body that the proportion of it in your breath, to wit, not less than 43 microgrammes of alcohol in 100 millilitres of breath, exceeded the prescribed limit of 35 microgrammes of alcohol in 100 millilitres of breath, and you have thereby committed an offence punishable under section 67(1)(b) of the Road Traffic Act, Chapter 276.

2 The facts are as follows. On 2 December 2007, at about 10pm, the appellant went to a coffee shop at Tanjong Pagar. He claimed that he drank a bottle of beer which he finished by 11pm. He remained at the coffee shop until about 2am, 3 December 2007, when he got into his car and started to drive home. Whilst travelling along the Pan-Island Expressway ("PIE"), he felt sleepy and nauseated and stopped his car at the road shoulder. The appellant estimated that he would have been driving for about 15 minutes at this point. He then fell asleep in his car. When the appellant woke up, he felt like throwing up and stepped out of the car. The time then was 3.54am because the police received a telephone call from someone stating that "there is a car parked on the PIE with the driver's door open and he is partially coming out of the car."

3 The police despatched a patrol car to the scene and found the appellant inside his car at the road shoulder of the PIE at the 14.5km point in the direction of Tuas. The police found that the appellant's speech was slurred and his eyes were bloodshot. A breathalyser test was administered on him at 4.42am pursuant to s 69(1) RTA. He failed the test and was arrested. He was brought to the traffic police division headquarters where a breath evidential analyser ("BEA") test was administered on him at 5.42am pursuant to s 70(1). The appellant's breath was found to contain 43 microgrammes of alcohol per 100ml of breath. This was above the legal limit of 35 microgrammes of alcohol per 100ml of breath. The appellant claimed that he had stopped driving at about 2.15am. This would have meant

that when the breathalyser test was administered at 4.42am, he had not been driving for more than two hours.

4 In the circumstances that the appellant was found, he could have been charged under s 68(1)(b) RTA which provides as follows:

> **Being in charge of motor vehicle when under influence of drink or drugs**
>
> **68**. —(1) Any person who when in charge of a motor vehicle which is on a road or other public place but not driving the vehicle —
>
> (a) is unfit to drive in that he is under the influence of drink or of a drug or an intoxicating substance to such an extent as to be incapable of having proper control of a vehicle; or
>
> (b) has so much alcohol in his body that the proportion of it in his breath or blood exceeds the prescribed limit,
>
> shall be guilty of an offence and shall be liable on conviction to a fine of not less than $500 and not more than $2,000 or to imprisonment for a term not exceeding 3 months and, in the case of a second or subsequent conviction, to a fine of not less than $1,000 and not more than $5,000 and to imprisonment for a term not exceeding 6 months.
>
> (2) For the purpose of subsection (1), a person shall be deemed not to have been in charge of a motor vehicle if he proves —
>
> (a) that at the material time the circumstances were such that there was no likelihood of his driving the vehicle so long as he remained so unfit to drive or so long as the proportion of alcohol in his breath or blood remained in excess of the prescribed limit; and
>
> (b) that between his becoming so unfit to drive and the material time, or between the time when the proportion of alcohol in his breath or blood first exceeded the prescribed limit and the material time, he had not driven the vehicle on a road or other public place.

5 This provision caters for the situation where a person is not apprehended while driving or attempting to drive a vehicle, but where he can be said to be in charge of the vehicle, such as in the present case where he had stopped it at the road shoulder and had fallen asleep in it. If, at the time he was apprehended, his breath or blood alcohol level had exceeded the prescribed limit, then he is guilty of an offence under s 68(1)(b) RTA. However s 68(2) in effect provides that, notwithstanding that the alcohol level was over the limit at the time he was apprehended, if he can prove that there was no likelihood of his driving the vehicle, and he had stopped doing so, before his breath or blood alcohol level had reached the limit, he is deemed not to have been in charge of the vehicle and consequently he would not have committed the offence in s 68(1).

6 Instead of proceeding under s 68(1)(b) RTA, the prosecution charged the appellant under s 67(1)(b), which provides as follows:

> **Driving while under influence of drink or drugs**
>
> **67**. —(1) Any person who, when driving or attempting to drive a motor vehicle on a road or other public place —
>
> (a) is unfit to drive in that he is under the influence of drink or of a drug or an intoxicating

substance to such an extent as to be incapable of having proper control of such vehicle; or

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

shall be guilty of an offence and shall be liable on conviction to a fine of not less than $1,000 and not more than $5,000 or to imprisonment for a term not exceeding 6 months and, in the case of a second or subsequent conviction, to a fine of not less than $3,000 and not more than $10,000 and to imprisonment for a term not exceeding 12 months.

(2) A person convicted of an offence under this section shall, unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified from holding or obtaining a driving licence for a period of not less than 12 months from the date of his conviction or, where he is sentenced to imprisonment, from the date of his release from prison.

7 The punishment under s 67(1)(b) RTA for a first offender is a fine of between $1,000 and $5,000, or imprisonment up to 6 months. In addition, there is – in the absence of special reasons – a mandatory disqualification from holding or obtaining a driving licence for not less than 12 months. On the other hand, the punishment for a first offender under s 68(1)(b) is a fine ranging from $500 to $2,000 or imprisonment up to 3 months. More importantly it does not provide for driving disqualification for a first offence. It is therefore not surprising that the appellant would prefer to be charged under s 68 rather than s 67.

8 To prove the offence under s 67(1)(b) RTA, the prosecution must have evidence of the two elements of the charge, *viz*: (a) that the appellant had driven his car; and (b) that while driving his car, the proportion of alcohol in his breath exceeded the prescribed limit. For element (a), the prosecution relied on a statement given by the appellant to the police, which was admitted in evidence as exhibit P1, in which he said that he had driven his car from Tanjong Pagar to the PIE (along which he was found by the police), and that he had started off at about 2am. For element (b), the prosecution relied on s 71A(1) which provides that the court shall assume that the breath alcohol level of the person charged at the time of the alleged offence was not less than that found in the specimen of breath provided by him subsequently. The BEA test was done at 5.42am at traffic police division headquarters and the breath of the appellant was found to contain 43 microgrammes of alcohol per 100ml of breath. The prosecution submitted that there is nothing in s 71A that precluded its operation in a charge under s 67 even if the appellant in this case was not apprehended while driving or attempting to drive a vehicle. Therefore, s 71A(1) operated to deem that the breath alcohol level of the appellant at 2am, when he was driving the car, was not less than 43 microgrammes per 100ml. The district judge agreed with this submission and convicted the appellant of the charge.

9 On the other hand the appellant submitted that the assumption in s 71A RTA can only be used in support of a charge under s 67(1)(b) if an offender was stopped while he was driving or attempting to drive a vehicle, as opposed to a situation where he was merely in charge of a vehicle within the meaning of s 68. Where a person is apprehended while he is in charge of a vehicle, s 71A may only be used for the purposes of a charge under s 68 and not s 67. If the appellant is right, then the conviction cannot stand as there would be no evidence of his breath alcohol level at the time he drove the car.

10 I turn to consider the scope of s 71A RTA, which provides as follows:

Evidence in proceedings for offences under sections 67 and 68

71A. —(1) In proceedings for an offence under section 67 or 68, evidence of the proportion of alcohol or of any drug or intoxicating substance in a specimen of breath or blood (as the case may be) provided by the accused shall be taken into account and, subject to subsection (2), it shall be assumed that the proportion of alcohol in the accused's breath or blood at the time of the alleged offence was not less than in the specimen.

(2) Where the proceedings are for an offence under section 67 (1) (a) or 68 (1) (a) and it is alleged that, at the time of the offence, the accused was unfit to drive in that he was under the influence of drink, or for an offence under section 67 (1) (b) or 68 (1) (b), the assumption referred to in subsection (1) shall not be made if the accused proves —

(a) that he consumed alcohol after he had ceased to drive, attempt to drive or be in charge of a motor vehicle on a road or any other public place and before he provided the specimen; and

(b) that had he not done so the proportion of alcohol in his breath or blood —

(i) would not have been such as to make him unfit to drive a motor vehicle in the case of proceedings for an offence under section 67 (1) (a) or 68 (1) (a); or

(ii) would not have exceeded the prescribed limit in the case of proceedings for an offence under section 67 (1) (b) or 68 (1) (b).

11 The "assumption" in s 71A(1) RTA is not rebuttable unless the appellant can prove that it falls under s 71A(2): see *Beauchamp-Thompson v DPP* [1988] Crim L R 758 ("*Beauchamp-Thompson*"). The appellant there was convicted of driving with excess alcohol in his blood. The Divisional Court of the Queen's Bench held that the assumption encompassed in s 10(2) of the UK Road Traffic Act 1972 ("RTA 1972"), which is the English equivalent of s 71A RTA, was an irrebutable one. It was not open to the court to receive evidence designed to show that the blood-alcohol level may have been lower at the time that the appellant was driving the vehicle. The Divisional Court is reported to have observed at 759 that:

> There was no ground for construing [the presumption in section 10(2) of the Road Traffic Act 1972] as rebuttable rather than irrebuttable. The provisions of section 6(1) of the original Act of 1972 had resulted in a driver being convicted because of the subsequent analysis even though at the moment of driving he was not over the limit. The object of the legislation was to try to ensure that people did not drive after they had drunk such a quantity of alcohol as to make it imprudent for them to do so. The problem was resolved by construing the words of the section in their context and having regard to what must be assumed to have been Parliament's intention when passing the section in that form. Furthermore it would be very strange if there were a rebuttable presumption followed in the same subsection by an exception in respect of which the burden of proof was thrown upon the defendant.

Therefore the court must assume that the minimum alcohol level at the time of the offence is that in the sample taken after the offence had been committed. On the other hand, it is open to the prosecution to prove that the alcohol level was in fact higher than that of the specimen.

12 This irrebuttable assumption imposes an onerous burden on the appellant. But in the light of the judgment of the Divisional Court in *Beauchamp-Thomson*, it is not difficult to accept the policy behind the provision, given the consequences of drink driving. A driver stopped on the road and found to be over the limit would be precluded from proving that his alcohol level was not over the limit when he

was apprehended by showing that, in the interval between that time and the time of the test, it had gone up. Similarly a person found asleep on the driver's seat in a car stopped at the roadside would be precluded from proving that his alcohol level was not over the limit at the time he was apprehended if the test on a breath specimen given subsequently showed that it was. However on a charge under s 68(1) RTA, it is open to him to prove the circumstances in s 68(2), *viz* that at the time he was driving the vehicle, his alcohol level was not over the limit, even though by operation of s 71A(1), his alcohol level at the time he was apprehended would be assumed to be not less than the level found in the specimen given by him. If s 71A(1) were applicable to a charge under s 67(1) in the circumstances of the present case, the appellant would be deprived of the defence available to him under s 68(2) if he had been charged under s 68(1).

13 There is no authority, certainly none binding on this court, for the propositions of the prosecution or the appellant. The prosecution referred me to two English cases which I found, for the reasons given later in this judgment, did not provide any guidance on the issue before me. It is therefore necessary to consider the scope of s 71A RTA from first principle. To do so, it is necessary to examine the section in the context of the entire RTA, in particular two of the preceding provisions, s 69 and s 70 which are set out hereunder:

Breath tests

69. —(1) Where a police officer has reasonable cause to suspect that —

(a) a person driving or attempting to drive or in charge of a motor vehicle on a road or other public place has alcohol in his body or has committed a traffic offence whilst the vehicle was in motion;

(b) a person has been driving or attempting to drive or been in charge of a motor vehicle on a road or other public place with alcohol in his body and that he still has alcohol in his body;

(c) a person has been driving or attempting to drive or been in charge of a motor vehicle on a road or other public place and has committed a traffic offence whilst the vehicle was in motion; or

(d) a person has been driving or attempting to drive or been in charge of a motor vehicle on a road or other public place when an accident occurred —

(i) between that motor vehicle and one or more other motor vehicles; or

(ii) causing any injury or death to another person,

the police officer may, subject to section 71, require that person to provide a specimen of his breath for a breath test.

(2) A person may be required under subsection (1) to provide a specimen of his breath either at or near the place where the requirement is made or, if the requirement is made under subsection (1) (d) and the police officer making the requirement thinks fit, at a police station specified by the police officer.

(3) A breath test required under subsection (1) shall be conducted by a police officer.

(4) A person who fails, without reasonable excuse, to provide a specimen of his breath when required to do so in pursuance of this section 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.

(5) A police officer may arrest a person without warrant if —

(a) as a result of a breath test he has reasonable cause to suspect that the proportion of alcohol in that person's breath or blood exceeds the prescribed limit;

(b) that person has failed to provide a specimen of his breath for a breath test when required to do so in pursuance of this section and the police officer has reasonable cause to suspect that he has alcohol in his body; or

(c) he has reasonable cause to suspect that that person is under the influence of a drug or an intoxicating substance.

…

Provision of specimen for analysis

70. —(1) In the course of an investigation whether a person arrested under section 69 (5) has committed an offence under section 67 or 68, a police officer may, subject to the provisions of this section and section 71, require him —

(a) to provide a specimen of his breath for analysis by means of a prescribed breath alcohol analyser; or

(b) to provide at a hospital a specimen of his blood for a laboratory test,

notwithstanding that he has been required to provide a specimen of his breath for a breath test under section 69 (1).

(2) A breath test under this section shall be conducted by a police officer and shall only be conducted at a police station.

(3) A requirement under this section to provide a specimen of blood —

(a) shall not be made unless —

(i) the police officer making the requirement has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required;

(ii) at the time the requirement is made, the prescribed breath alcohol analyser is not available at the police station or it is for any other reason not practicable to use the breath alcohol analyser; or

(iii) the police officer making the requirement has reasonable cause to suspect that the person required to provide the specimen is under the influence of a drug or an

intoxicating substance; and

(b) may be made notwithstanding that the person required to provide the specimen has already provided or been required to provide a specimen of his breath.

(4) 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; or

(b) he was in charge of 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 68.

(5) A police officer shall, on requiring any person under this section to provide a specimen for a laboratory test, warn him that failure to provide a specimen of blood may make him liable to imprisonment, a fine and disqualification, and, if the police officer fails to do so, the court before which that person is charged with an offence under subsection (4) may dismiss the charge.

14 Under the scheme in these provisions, a police officer may require a person to provide a specimen of his breath for a breath test if, *inter alia*, he has reasonable cause to suspect that such person, while driving or attempting to drive or in charge of a vehicle, has alcohol in his body or had done so while he had alcohol in his body: s 69(1) RTA. That person may be required to provide a specimen of his breath on the spot or, if s 69(1)(d) applies, at a police station. Failure to comply with the requirement to provide a breath sample without reasonable excuse is an offence punishable by fine or imprisonment: s 69(4). A police officer may arrest a person without warrant if: (a) the result of the breath test given pursuant to s 69(1) gives him cause to suspect that the alcohol level exceeds the prescribed limit; (b) the person fails to provide a breath specimen pursuant to s 69(1) and the police officer suspects he has alcohol in his body; or (c) the officer has reasonable cause to suspect the person is under the influence of a drug or intoxicating substance: s 69(5).

15 A person arrested under s 69(5) RTA may be required to provide a specimen of his breath for analysis by a prescribed breath alcohol analyser at a police station: s 70(1)(a), s 70(2), or he may be required to provide a blood specimen at a hospital: s 70(1)(b). Failure to provide such specimens, unless there is reasonable excuse, also constitutes an offence: s 70(4). Although there is no specific punishment prescribed for this offence, resort may be had to the general penalty provision in s 131(2) which provides for a fine up to $1,000 or imprisonment up to three months for a first offender. However s 70(4) provides that if it is shown that at the time of his arrest under s 69(5), the person was:

(a) driving or attempting to drive a vehicle, he shall be liable to be punished as if the offence charged were an offence under s 67; and

(b) in charge of a vehicle, he shall be liable to be punished as if the offence charged were an offence under s 68.

This means that it is not possible for a person to escape punishment for offences under s 67 or s 68 by refusing to provide a breath or blood specimen. The scheme of the RTA suggests that the breath

or blood specimens are to be used for the purposes for which they are given.

16 Returning to s 71A(1) RTA, this states that "[i]n proceedings for an offence under section 67 or 68, evidence of the proportion of alcohol … in a specimen of breath … provided by the accused shall be taken into account and, subject to subsection (2), it shall be assumed that the proportion of alcohol in the accused's breath … at the time of the alleged offence was not less than in the specimen." It must be borne in mind that when the appellant was apprehended by the police along the PIE shortly before 4.42am, the police only had reasonable cause to suspect that he was in charge of a motor vehicle when under influence of drink, an offence under s 68(1). The order under s 69(1)(a) to provide the breath specimen for the breathalyser was made on the basis of the s 68(1) offence. When the result showed he had exceeded the limit, he was arrested pursuant to s 69(5)(a), but again only in relation to the offence under s 68(1). Similarly, when the BEA test was administered at the police station at 5.42am, it was also in respect of the same offence. It was after the appellant had given his statement, in which he said that he had driven the car from 2.00am to 2.15am, that the police had evidence that he had driven the car at the said time.

17 Furthermore, as discussed in [15] above, under s 70(4) RTA, where a person fails to provide a sample without reasonable excuse, if it is proved that, *at the time of his arrest under s 69(5)*, that:

> (a) he was driving or attempting to drive a vehicle, he shall be liable to be punished as if he had committed an offence under s 67(1); and
>
> (b) he was in charge of a vehicle, he shall be liable to be punished as if he had committed an offence under s 68(1).

If s 71A(1) were applicable where a person, apprehended while he was in charge of a vehicle (as opposed to while he was driving it), is charged with an offence under s 67(1), then it would mean that he is better off refusing to provide a breath or blood specimen. This is because without the result from the specimen, he can only be convicted of an offence under s 68(1), but if he gave a specimen and admitted that he had driven the car earlier, he could be liable to be convicted on the more severe offence under s 67(1).

18 Therefore the respondent's position, that s 71A(1) RTA is applicable in the present case, in which the appellant is arrested while in charge of a vehicle but is subsequently charged under s 67(1), would result in the anomalies identified in [12] and [17] above. This could not have been the intention of s 71A(1) and if the scheme suggested by it (see [14]–[15] above) is taken into consideration, the conclusion that can be drawn is that it may be used only in relation to the offence under which the person is arrested.

19 The prosecution referred me to two English cases which they submitted support their position. The first was *DPP v Williams* [1989] Crim L R 382 ("*Williams*"), in which police officers came across the respondent at about 4am. They also found a car parked nearby. The respondent admitted that he had driven the car that night and he had had his last drink some five hours earlier. A breathalyser test was administered on him, yielding a positive result. He was later charged with driving with excess alcohol under s 6(1)(a) RTA 1972. It should be noted that the respondent was not arrested while driving his vehicle. He was acquitted at first instance because, *inter alia*, the prosecution had failed to prove that, at the time of driving, the respondent was in excess of the prescribed limit. On appeal, the Queen's Bench Divisional Court remitted the case to the Justices, and the court was reported to have observed at 382 that:

> … the effect of s 10(2) [RTA 1972] was to require a court to assume, unless an accused on a

balance of probabilities proved to the contrary, that he had had at least as much alcohol in his body when he was last driving as was shown in the specimen taken from him. Thus the respondent bore the burden of displacing the assumption that his breath/alcohol proportion had exceeded the statutory limit when he had driven … Once he had admitted driving, and once the specimen he gave showed that he was over the prescribed limit at the time of sampling, section 10(2) operated to transfer the burden to the defendant to displace the assumption that he was over the limit at the time he had driven.

20 The respondent in *Williams* further contended that the prosecution had to prove that the driving had occurred at a time which was proximate to the time the specimen of breath was provided. In response, the court was reported to have held that:

As to the argument for the respondent that the prosecution had to prove a time when the driving occurred which was proximate to the finding of alcohol in his body. That would negative and render of little value the provision of section 10(2) in the majority of cases at which it was aimed where driving had clearly taken place and the alcohol was found within a maximum period of a day, but usually a matter of hours thereafter. If the prosecution were required to establish within some unspecified bracket a period of time which could be related to the alcohol found in a person's body for the provisions of section 10(2) to operate, it would effectively remove the reversal of the burden of proof, specifically provided for by Parliament .... In the instant case, the Justices had a clear admission that the respondent had driven that night, that he had had his last drink in the course of that night at 11 p.m., and that when the samples were taken at 4 a.m., the proportion of alcohol on his breath exceeded the prescribed limit. It was precisely the type of case for which the assumption in section 10(2) and the reversal of the burden of proof was aimed.

21 The second case was *Millard v DPP* [1990] Crim. LR 601 ("*Millard*"). There the appellant had consumed a bottle of wine sometime between 1.15pm and 3.45pm and returned to his office. At 5.30pm, he drove his car and parked it near a pub, where he drank a large whisky. At 6.10pm, he drove to another parking lot and returned to the pub. He then drank a pint of beer. Police officers arrived at the pub and administered a breathalyser test on him which turned out to be positive. He was taken to the police station where he provided two specimens of his breath. Both exceeded the legal limit. He was duly charged and convicted under the then s 6(1) RTA 1972.

22 The prosecution in *Millard* relied on the assumption found in s 10(2) RTA 1972 (which is in all material respects similar to s 71A of our RTA). The material portions of s 10 RTA 1972 are reproduced below for ease of reference:

(1) The following provisions apply with respect to proceedings for an offence under . . . section 6 of this Act.

(2) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall, in all cases, be taken into account, and it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen; but if the proceedings are for an offence under section 6 of this Act . . . the assumption shall not be made if the accused proves -

(a) that he consumed alcohol after he had ceased to drive, attempt to drive or be in charge of a motor vehicle on a road or other public place and before he provided the specimen; and

(b) that had he not done so the proportion of alcohol in his breath, blood or urine would not have

exceeded the prescribed limit …

At first instance, the appellant sought to admit expert evidence to calculate the effect of the whisky drunk prior to the last time he drove the car and of the beer drunk after he had driven it. The Justices ruled that it was not open to them to allow evidence pertaining to the whisky, but they could hear evidence as to effects of the beer. However the appellant's solicitor declined to call such evidence and the appellant was convicted. On appeal, the conviction was upheld by the Divisional Court. In particular, the court held that the assumption in s 10(2) of the RTA 1972 is not rebuttable. It is therefore clear that the assumption in s 10(2) is designed to prevent any consideration of the rate of absorption of alcohol between driving and being tested. It was open to the appellant to bring himself within the exception in s 10(2) by proving that the effect of the beer he had drunk subsequent to driving the car had brought his alcohol level above the limit, but he had declined to do so.

23 I note that in neither *Williams* nor *Millard* was the accused apprehended in circumstances where he was in charge of a vehicle, unlike the present case. In both those cases, the police apprehended the accused on suspicion of driving when under the influence, although it is not clear in the reports on what basis this was done. Such information could have showed more clearly the material differences between the present case and those English cases. Certainly the considerations I have set out in [12] and [17] above were not ventilated in *Williams* and *Millard*, possibly for the simple reason that they were not germane to those cases. I therefore considered that *Williams* and *Millard* provide no helpful authority for the decision I have to make in this appeal.

24 In the result, for the reasons given above, I hold that s 71A(1) RTA is not applicable in the present case where the appellant was apprehended while he was in charge of a vehicle. It would follow that the prosecution did not have evidence of his alcohol level at the time he drove the vehicle. I therefore quash the conviction of the appellant on the offence under s 67(1)(b) and set aside the sentence imposed. However there is sufficient evidence to convict the appellant under s 68(1)(b) as he was in charge of the vehicle at the time of apprehension and s 71A(1) operates such that the court shall assume that his breath alcohol level at the time was not less than the level in the BEA specimen taken at 5.42am. Under s 256(b)(ii) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) this court has the power to convict the appellant on an amended charge: see *Garmaz s/o Pakha v PP* [1995] 3 SLR 701 at 722: However whether it is appropriate in the circumstances of this case to exercise that power depends on whether the appellant wishes to claim trial on that charge. I will hear counsel for the appellant on this question.