Chong Pit Khai v Public Prosecutor
[2009] SGHC 69

Case Number : MA 121/2008

Decision Date : 24 March 2009

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ

Counsel Name(s) : Krishnan Nadarajan (Aequitas Law LLP) for the appellant; Lee Jwee Nguan (Attorney-General's Chambers) for the respondent

Parties : Chong Pit Khai — Public Prosecutor

Criminal Law – Statutory offences – Road Traffic Act (Cap 276, 2004 Rev Ed) – Accused charged with drink-driving under s 67 – Whether s 68 antecedent should be treated as previous conviction for subsequent s 67 offence – Whether correct to apply term of imprisonment as starting point – Sections 67 and 68 Road Traffic Act (Cap 276, 2004 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Antecedents – Accused claimed he pleaded guilty to earlier offence out of convenience – Whether court should take into consideration accused's degree of culpability for earlier offence

24 March 2009

Chan Sek Keong CJ:

1 This was an appeal against sentence. The facts were that on 9 December 2007, the appellant was stopped at a random police road block at about 4.55am. He smelt strongly of alcohol and a breath analyser test conducted on him revealed 56µg of alcohol per 100ml of breath. He was arrested and subsequently charged in the District Court for drink-driving under s 67(1)(*b*) of the Road Traffic Act (Cap 276, 2004 Rev Ed) ("the Act") to which he pleaded guilty. For convenience, I shall call this offence the "s 67 offence".

2 The district judge ("the DJ") sentenced the appellant to two weeks' imprisonment and also disqualified him from holding or obtaining a driving licence for a period of two years. In imposing the sentence, the DJ took into consideration as an antecedent the appellant's conviction in District Arrest Case No 44505 of 2002 ("DAC 44505/2002") for the offence of being in charge of a motor vehicle whilst under the influence of drink under s 68(1)(*b*) of the Act. For convenience, I shall call this offence the "s 68 offence". The DJ also held that, because of this antecedent, the starting point for punishing the appellant was a custodial sentence.

3 The appellant's main ground of appeal was that the DJ should not have given any consideration to his earlier conviction under s 68 for the purpose of sentencing him for the s 67 offence as he had not committed the earlier s 68 offence but had pleaded guilty at that time to the relevant charge out of convenience. After hearing counsel for the appellant and the Prosecution, I allowed the appeal, set aside the custodial sentence and imposed the maximum fine of $5,000. Here are my reasons for allowing the appeal on sentence.

Sentencing issues on appeal

4 This appeal raised two issues relating to previous convictions for the purpose of sentencing. The first issue is whether, for the purpose of sentencing, the court should permit an offender to

explain the circumstances of a previous conviction on the ground that he did not commit the earlier offence but had merely pleaded guilty to the charge out of expediency. The second issue is the weight to be given to a previous conviction on a s 68 charge for the purpose of sentencing an offender (here the appellant) for a subsequent s 67 offence. Let me now examine these two issues.

Whether an offender is permitted to explain the circumstances of a previous conviction as an antecedent for the purpose of sentencing

5 As a general principle, an offender is permitted to explain to the sentencing court the reasons why he pleaded guilty to a previous charge for any offence. The reason is that defendants do plead guilty to criminal charges, especially for minor offences of which they may not be guilty, for a variety of reasons. This is a reality to which the court should not close its eyes or shy away from. In *PP v Liew Kim Choo* [1997] 3 SLR 699, the High Court observed at [89]:

> There were reasons why a person might plead guilty and admit to a statement of facts even though he was innocent and the statement of facts untruthful. These reasons include (a) a very strong prosecution's case which might be premised on evidence that is difficult to rebut; (b) a belief that it is better to plead guilty in the hope of a light sentence rather than to risk conviction and a heavier sentence; (c) his having been advised by his lawyers to plead guilty because they believe the likelihood of his conviction to be strong although he is not actually guilty; and (d) the accused falling outside of the category of persons eligible for legal aid and yet being unable to afford expensive legal representation, especially in complex cases.

6 However, reality (that an innocent accused has pleaded guilty) is one thing; the law is another. The law cannot countenance any attempt to question the reality and the conclusiveness of a conviction without creating chaos in the legal system. As a matter of law, the guilty plea is conclusive evidence of the offender's guilt. But for the purpose of sentencing the offender for a subsequent offence, the courts have been prepared to adopt a more tolerant attitude if the object of reviewing the earlier conviction is not to deny its existence or legality, but to show the degree of culpability of the offender for the purpose of treating it as an antecedent. The burden is on the offender to prove the degree or extent of his culpability in relation to the earlier offence. The courts generally are and should be sceptical of the genuineness of such claims since they are invariably made after the event and for a self-serving purpose. Nevertheless, there may be cases where the objective or undisputed facts on record can speak convincingly as to the certainty, probability or possibility of such claims being genuine. Each case must depend on its own facts. Let me now examine the facts in the present case.

The appellant's section 68 antecedent

7 The appellant had pleaded guilty to the following charge in DAC 44505/2002:

> You, Chong Pit Khai, M/23yrs
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> …
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> are charged that you, on the 16th day of August 2002, at about 5.15 am, along Balestier Road, Singapore, when in charge of motor car no: SBT 2788 T which was on a road but not driving, did have so much alcohol in your body that the proportion of it in your breath exceeded the prescribed limit and you have thereby committed an offence punishable under Section 68(1)(b) of the Road Traffic Act, Chapter 276.

8 The appellant's account of how he came to be arrested and charged was as follows. He was a full-time national serviceman, and had returned home from camp on the night in question. He alleged that he had bought a few alcoholic drinks from a nearby 7-Eleven store which he later consumed in his father's car whilst listening to some music. He had not driven the car but had merely slept in it with the car engine turned off. The car was parked in a parking lot alongside a road. He further alleged that he had pleaded guilty to the s 68 charge because he thought that the offence was a minor one and he did not want the trouble of a trial which would require him to commute between his camp and the court.

9 The appellant's account would suggest that he had not driven the car while under the influence of alcohol and this was consistent with what he had stated in his statement made under s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) which he had made in the course of police investigations before he was charged. The s 122(6) statement was as follows:

> I didn't know it was a chargeable offense to be sleeping in a car under the influence of alcohol. I wouldn't have do [*sic*] that if I knew earlier. Moreover the engine was off and the car was parked properly in my private apartment's parking lot.

10 As the account appeared credible, I called for the court records relating to DAC 44505/2002 to verify his account. The records showed that, at the first hearing of the case, the appellant appeared in person and admitted the statement of facts and made the following mitigation plea:

> Pleading for Leniency. I am in NS [national service] now. On that day, I went into car because I was not feeling well. I had car key, that was with me. The car was in parking lot. My intention was to rest in car. That is the place I park my car.

11 As the mitigation plea suggested that the appellant might not have driven the car at all, the district judge rejected his guilty plea and adjourned the hearing to another day. At the next hearing, the appellant again appeared in person, pleaded guilty unconditionally and in mitigation only asked for leniency. He was fined $1,600.

12 The relevant portions of the admitted statement of facts were as follows:

> 3 On 16.8.2002 at about 5.15 am, the complainant arrived at Balestier Road, on receipt of a message to attend a case. On arrival, the complainant spotted the defendant sleeping at the driver's seat with his head leaning against the window of motor car no: SBT 2788 T, which was parked at a parking lot. The engine was not switched on and the windows were wind [*sic*] up.
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> 4 The complainant woke the defendant and requested him to alight from the motor car. The complainant observed that the defendant had strong smell of alcoholic breath and speech was slightly slurred. The defendant admitted that he had consumed alcoholic drinks earlier. The complainant conducted a breathalyser test on him. He failed the test and was placed under arrest.
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> 5 The defendant was brought to Tanglin Police Division to have her [*sic*] breath tested with the Breath Evidential Analyser. On the same day at about 6.03 am, Sgt 99229, Chai Tze Chiang conducted the breath test on the defendant. The Breath Alcohol Test Record revealed that the breath specimen contained 82 microgrammes of alcohol per 100 millilitres of breath. The prescribed limit is 35 microgrammes of alcohol per 100 millilitres of breath.
>
> 6 The defendant has therefore committed the offence of [b]eing in charge of motor car whilst

under the influence of drink under Sec 68(1)(b) [Road Traffic Act] Cap 276.

13 It should be noted that nowhere in the statement was there an admission that he had driven the car at any time. This raised a question of construction of s 68 as to whether Parliament intended to make it a s 68 offence for a person to *merely* sleep in a car whilst under the influence of drink (since the appellant had admitted to having consumed alcohol before he slept in the car), or there must be some evidence of the accused having driven the car before he was found in it. The district judge in DAC 44505/2002 did not have to decide this issue as the appellant had pleaded guilty to the s 68 charge. But it should be noted that what the appellant admitted to in the statement of facts was, in substance, no different from what he had claimed at the earlier hearing when his plea of guilt was rejected. Before me, counsel for the appellant did not make this argument but merely contended that the DJ was wrong to treat the conviction as an antecedent as the appellant did not commit the offence but had pleaded guilty out of convenience or expediency. The DJ rejected the submission, and treated the conviction as a relevant factor in assessing the proper sentence for his s 67 offence.

14 Since, in the eyes of the offender and the public, a custodial sentence is generally regarded as a reflection of the higher culpability of the offender, it is incumbent on the court to consider carefully the facts of each case and the arguments of counsel. In the present case, counsel argued that, firstly, the appellant's conviction under s 68 was not a first offence for the purpose of sentencing him for the s 67 offence and, secondly, the previous s 68 offence should not be given any weight as he had pleaded guilty only out of convenience. These two arguments are distinct, and I shall deal with them separately.

Relationship between sections 67 and 68 of the Act

15 This appeal centres on the appropriate sentence for a s 67 offence and not for a s 68 offence. The s 67 offence involves a person, who being unfit to drive, drives or attempts to drive a motor vehicle whilst under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, or when the driver's alcohol level exceeds the prescribed limit for the offence. Section 67 is so drafted to take into account the physiological effect of alcohol or any drug on the consumer. A s 68 offence, however, involves a person being "in charge" of a motor vehicle which is on a road or other public place when under the influence of drink or drugs or when his alcohol or drug level exceeds the prescribed limit for the offence. Both offences target the same mischief, *viz*, the risks to other users of the road when the driver may not be fully in control of his actions. However, a s 67 offence is more serious than a s 68 offence because the risk has actualised in a s 67 offence, whereas, in a s 68 offence, the risk has either passed or may only actualise in the future. This distinction is reflected in the punishments prescribed for both offences.

16 Section 67 provides as follows:

> **Driving while under influence of drink or drugs**
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> **67**.—(1) Any person who, when driving or attempting to drive a motor vehicle on a road or other public place —
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> (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.

…

17 Section 68 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.

(3) On a second or subsequent conviction for an offence under this section, the offender 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 12 months from the date of his release from prison.

(4) Where a person convicted of an offence under this section has been previously convicted of an offence under section 67, he shall be treated for the purpose of this section as having been previously convicted under this section.

[emphasis added]

18 The following points may be noted on a plain reading of the two sections. First, the penalty prescribed for a s 67 offence is about *twice as serious* as a s 68 offence. In fact, the prescribed penalty for a *first* s 67 offence is the same as the penalty for a *second* s 68 offence. The reason for the different treatment can be explained on the basis that, in a scenario involving a s 67 offence, the risk of injury to life and limb as well as damage to property is current (as he is driving or about to drive) whereas for a s 68 offence, the risk is past and gone. The offender of a s 68 offence is being punished for *having driven* even though he might not have caused any injury to life and limb. The s 68 offence is to deter people from driving in those two situations prescribed by the section.

19 Secondly, a conviction for a s 67 offence is deemed to be a previous conviction for a s 68 offence for the purpose of sentencing an offender for a subsequent s 68 offence, but a conviction for a s 68 offence is not deemed as a previous conviction for a s 67 offence for the purpose of sentencing an offender for a subsequent s 67 offence. Again, the difference in treatment can be explained by the fact that a s 68 offence is already subsumed in a s 67 offence. A person who is driving a vehicle must, perforce, be *in charge* of the vehicle, in the sense of having control of its operation. That also explains why a s 67 offender is punished twice as much as a s 68 offender. If one point is assigned to a s 68 offence (A) and two points to a s 67 offence (B), there would be no difference mathematically between A+B and B+A, as each combination has three points. However, there is a difference in terms of assessing the gravity of either A or B in a second offence for the purpose of punishment. In a B+A combination, the offender has already been punished for B (a two-point offence): therefore, using B (a two-point offence) as a previous conviction for A (a one-point offence) to punish him for a one-point offence would not be unfair since, theoretically, the punishment is on a 1+1 basis (treating B as a one-point offence) or, alternatively, on a 2+1 basis. In contrast, in an A+B combination, using A (a one-point offence) as a previous conviction for B (a two-point offence) would result in punishment on a 1+2 basis or, alternatively, on a 2+2 basis (treating A as a two-point offence) which would not be proportionate to the gravity of his culpability, and therefore unfair to the offender. Treating a s 68 offence as a previous conviction for a subsequent s 67 offence would have deemed a s 68 offence as a s 67 offence for the purpose of punishing an offender for a subsequent s 67 offence.

20 The third point is that neither s 67 nor s 68 explicitly imposes a mandatory custodial sentence for subsequent offenders although the punishment is enhanced by making the offender liable to both a fine and imprisonment. However, there is an *obiter dictum* of the Court of Appeal to the effect that ss 67 and 68 should not be given their plain meaning and should be read to impose a mandatory jail sentence for a repeat offender under either section. The correctness of this *dictum* turns on the meaning of the words "shall be liable" in the context of ss 67 and 68. This issue is discussed below.

Meaning of "shall be liable ... to" in sections 67 and 68

21 In *PP v Lee Soon Lee Vincent* [1998] 3 SLR 552 ("*Vincent Lee*"), Yong Pung How CJ, in correcting his remarks on the meaning of "shall be liable" in his earlier decision in *Seah Swee Hock v PP* Magistrate's Appeal No 176 of 1997, said at [14] that:

> In my view, prima facie, the phrase 'shall be liable' (as opposed to 'shall be punished') contained no obligation or mandatory connotation. In *Ng Chwee Puan v R* [1953] MLJ 86, Brown J had said that:
>
> > [T]he word 'liable' contains no obligatory or mandatory connotation. Sitting in this court, with a table fan blowing directly on to me, I am 'liable' to catch a cold. But it does not follow that

I shall.

Having accepted that to be the established meaning of the expression in *Seah Swee Hock v PP*, Yong CJ, in *Vincent Lee*, declined to apply it to the same expression used in s 67(1) of the Road Traffic Act (Cap 276, 1985 Rev Ed) ("the 1985 Act") as amended in 1990 ("the 1990 version"). To appreciate his reasoning, it is necessary to set out the terms of the 1990 version and the preceding 1985 version of s 67(1), ("the 1985 version").

22 In the 1985 version of s 67(1), it was provided that a person found guilty of drink-driving "*shall be liable* on conviction to a fine … *or* to imprisonment … and in the case of a second or subsequent conviction to a fine … *or* to imprisonment … *or to both*" [emphasis added]. On the other hand, in the 1990 version of s 67(1) (which remains the same today), it was provided that a person found guilty of drink-driving "*shall be liable* on conviction to a fine … *or* to imprisonment … and, in the case of a second or subsequent conviction, to a fine … *and* to imprisonment" [emphasis added].

23 Yong CJ was initially of the view that the word "or" in relation to a first-time offender meant that the latter was liable to be fined or imprisoned but not both but, in the case of a second-time offender, the word "and" meant that he was liable to be fined and imprisoned, but neither was mandatory. However, he was persuaded by the Prosecution that, when Parliament removed the words "or to imprisonment … or to both" from these two sections and substituted them with the words "and to imprisonment", it had intended to make the sentence of imprisonment mandatory for a second offence. The Prosecution had referred to *dicta* in previous decisions, and also to the parliamentary statement of the competent Minister when moving the amendment to the 1985 Act in 1990, in submitting that the sentence of imprisonment for a second s 67 offence was mandatory. Yong CJ also referred to the following statement of law made by the Court of Appeal in *PP v Tan Teck Hin* [1992] 1 SLR 841 at 844, [7] that:

> 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.

24 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, however, in this connection, 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. In any case, as I have said earlier, whatever the

correct interpretation may be, the court has the power to impose a custodial sentence even for a first offence in an appropriate case, and *a fortiori* for a second offence.

25 In her grounds of decision ("the GD"), the DJ discussed the sentencing principles relating to offences under ss 67 and 68 (see *PP v Chong Pit Khai* [2008] SGDC 121 at [24]) as follows:

> [I]f an Accused person is convicted under Section 68 and has a previous conviction under Section 67, the Act treats it (as per Section 68(4)) as if he was a second offender for the purposes of Section 68 and prescribes imprisonment *and* a fine plus disqualification. However, the Act is silent in the case of an accused person who is convicted under Section 67 but has a previous conviction under Section 68. Since a current Section 68 and a previous Section 67 attracts a penalty of up to 6 months' imprisonment *and* fine and given that a current Section 67 and a previous Section 68 is a more serious combination of offences – in the sense that the current offence is more serious than the previous one – an imprisonment term should also be the *starting point*, to maintain parity in sentencing. [emphasis added]

There are two points in this passage that require comment. The first is the principle of parity in sentencing. The second is the use of a starting point in sentencing: in this case, for the purpose of maintaining parity in sentencing.

26 As to the first point, the DJ's statement of the sentencing principle in the two sets of circumstances referred to in the passage just quoted is too wide and her analysis of the law is wrong. First, if there was a need for parity in the prescribed punishment, Parliament would have said so. Instead, Parliament has provided to the contrary. Second, it is incorrect to treat the combination of a previous s 68 offence and a current s 67 offence as more serious than the combination of a previous s 67 offence and a current s 68 offence. As I have shown earlier (at [19] above), Parliament in fact did not treat the combination B+A as being more serious than the combination A+B for the purpose of punishment. What Parliament intended was to treat a combination of B+B as more serious than a combination of A+A. Parliament was not addressing the issue of parity in the combinations discussed at [19] above. For this reason, the principle of parity is not relevant in the present case. It also follows from this that, with respect to the second point, it was wrong of the DJ to adopt a term of imprisonment *as a starting point*.

27 The DJ's decision to impose a custodial sentence as deterrence is, however, understandable from a policy point of view in order to reduce the prevalence of drink-driving. At [32] and [33] of the GD, the DJ said:

> For many years, the Traffic Police have been relentless in their annual campaigns against "drink driving". The Traffic Police has also intensified its efforts to curb the ever increasing number of drink driving cases with rigorous enforcement as well as public education campaigns. The Traffic Police have been continually trying to impress upon the motoring public that drinking and driving "do not mix" and that if one drinks, one should not drive. Such campaigns are intensified during festive periods, and the Traffic Police have used various means to spread this message. Despite the stepped up efforts by the Traffic Police including 'ring fencing' of popular nightspots particularly during the festive season and its ongoing publicity on the widespread problem of drink driving and its dire consequences, the number of offenders caught remains high. Indeed the oft cited excuse by offenders caught driving while … being under the influence of alcohol is the belief that they were 'in control' of their vehicles or that they were not drunk.
>
> In a front page Straits Times report titled "Cops to 'ring-fence' nightspot areas to sniff out drink drivers" on 23 January 2008, it was reported, amongst others, that the number of persons caught

> for drink driving in 2007 was 4009, a 7% increase from the 2006 figures although the number of drink driving casualties fell by 83 to 278 last year. This upward trend is indeed worrying and continues to be of utmost concern to the Courts. As such, the [court] must continue to reflect its stern view of such offences as well as its zero tolerance approach to drink driving in its sentencing policies.

28 I agree entirely with the DJ that the courts should not condone or overlook the social and economic costs to society of the consequences of drink-driving, where other road users are injured or killed or where property is damaged by accidents caused by drivers under the influence of drink. However, that does not mean that every drink-driver must be imprisoned for the purpose of general deterrence, especially since Parliament has not provided a mandatory custodial sentence for a first offence. Parliament has left it to the courts to punish a drink-driver within a range of punishments from a fine to imprisonment and disqualification or a combination of them, depending on the circumstances of each case, and, in particular, the consequences, if any, of the first offence. The very structure of the punishment scheme implies that the punishment to be meted out to drink-drivers must depend on the facts of each case. Of course, this does not mean that the courts must consider every case as if it were an entirely new case. Over time, sentencing precedents will be established and, in the nature of things, a large number of cases will fall within the parameters of the sentencing precedents.

29 In the present case, it is accepted by the Prosecution and the appellant's counsel that there is no reported High Court precedent for a case where the offender of a s 67 offence has also had a previous conviction for a s 68 offence. It may therefore be necessary for this court to set a sentencing precedent for future cases, but, in my view, using an imprisonment term *for each and every case* as a starting point is not necessarily desirable as a sentencing precedent. The present case shows why it is not desirable.

Did the appellant commit a section 68 offence in DAC 44505/2002?

30 I will now consider the question whether the appellant committed a s 68 offence in 2002. It may be recalled that the appellant was found asleep at 5.15am at the driver's seat with his head leaning against the window of motor car No SBT 2788 T. The vehicle was parked in a gazetted parking lot beside a public road outside his flat. The engine was not switched on and the windows were wound up. He was woken up by a policeman, who administered a breath analyser test on him, which he failed. He was then brought back to Tanglin Police Station where he underwent another breath test which showed that he had 82µg of alcohol per 100ml of breath. The prescribed limit was 35µg of alcohol per 100ml of breath. If he had not been woken up by the policeman, he would probably have slept on until the effect of the alcohol had dissipated. It was on these facts that he was charged under s 68(1) of the Act for being in charge of a motor vehicle while having an amount of alcohol in his body in excess of the prescribed limit.

31 Section 68(1) does not define the meaning of the words "being in charge of". That phrase implies the ability to control or having the power to do something with the motor vehicle, such as to drive it somewhere. The offender should at least have some degree of physical ability to do any of these things by himself. It is difficult to envisage a person being in charge of a vehicle if he is simply sleeping in it, especially when the vehicle is properly parked in a designated parking lot. Nevertheless, in *PP v Oh Yin Yan Ronnie* [2007] SGDC 35, it was held that a driver found sleeping in a lorry along an expressway was still in charge of the lorry. In that case, it could reasonably be inferred that the driver had driven the lorry before stopping. Otherwise, it could not have been on the shoulder of an expressway. But, the same inference could not necessarily be made in the case of the appellant with respect to the s 68 offence.

32 The issue is: What is s 68 of the Act directed against? It is directed against any person *in charge* of a vehicle who is either unfit to drive (because he is, say, drunk) or because he has an excess amount of alcohol in his blood. But suppose there is evidence that the vehicle cannot be driven at all because it cannot be started for some reason, or the accused is able to prove that he simply wanted to rest in his car (without having previously driven it). For both of these illustrations, s 68(2) would literally apply, but should the accused be convicted, or even charged? Is s 68 directed against the risk of the person in charge of a vehicle driving it before he becomes fit to drive or before the effects of alcohol on him have worn off? To my mind, it is evident that s 68 is directed against a potential harm to the public (or to oneself). An offence should not be directed against an act which is harmless. It is therefore reasonable to construe the scope of s 68 with this basic objective in mind.

33 In the present case, the appellant claimed that he had not driven his father's car but had only slept in it because he felt unwell, presumably from too much drinking. He had told a consistent story even though he had pleaded guilty to the s 68 charge after his first qualified plea had been rejected. But subsequently he pleaded guilty again on substantially the same facts, and the plea was then accepted. It is of course arguable that he must have driven the car as he was found asleep at the driver's seat. If he had wanted to rest in his father's car, the obvious thing to do would be to sit at the back seat where he could lie down and rest more comfortably. However, the appellant also said that he wanted to listen to some music, and of course he would have to open the door of the car first before he could get in, and it is normal to do so by opening the front door where the driver's seat is. So, his story was not entirely improbable. If this raises a question of reasonable doubt, then he ought to be entitled to that doubt.

34 Nonetheless, as the appellant had pleaded guilty to the s 68 charge voluntarily after he had ample time to think about whether he should defend the charge, I am unable to hold that the DJ was wrong to treat the appellant's conviction for the s 68 offence as an antecedent (but not as a first offence) for the purpose of sentencing him for the s 67 offence. However, for the reasons I have given above, I gave the appellant the benefit of the doubt and treated his s 68 conviction as a very weak antecedent in the present case.

The appropriate sentence

35 The DJ referred to two decisions in support of the custodial sentence she imposed on the appellant. In the first case, that of *PP v Lechimanan s/o G Sangaran* [2007] SGDC 229, the offender was convicted of a s 67 offence for drink-driving and a s 65(*a*) offence for driving without due care and attention. He also had a previous conviction for a s 68 offence (fined $1,000) and for a s 65 offence for driving without due care or reasonable consideration (fined $1,000). He was sentenced to three weeks' imprisonment for the s 67 offence. The sentence was affirmed on appeal by the High Court (*Lechimanan s/o G Sangaran v PP* Magistrate's Appeal No 136 of 2007). In the second case, that of *PP v Goh Whei-Cheh Benedict* [2007] SGDC 304, the offender was sentenced to three weeks' imprisonment for a s 67 offence. In that case, not only did the offender have a previous conviction for a s 68 offence, he was also facing one other charge under s 65(*b*) (for inconsiderate driving). To aggravate matters, a charge under s 68 and one under s 182 of the Penal Code (Cap 224, 1985 Rev Ed) (for making a false statement to a public servant) stemming from a separate incident were taken into consideration for the purpose of sentencing.

36 Both these cases were distinguishable from the present case in that in both of them the offenders had lost control of their vehicles which resulted in collisions with water barricades along an expressway in one case and a stationary vehicle on an expressway in the other. Neither case was appropriate as a precedent for the present case as in both of them the risk that the law was designed to prevent did in fact materialise. In such cases, it would be appropriate and justifiable to

impose a custodial sentence on the offender for the social and economic costs he has inflicted on the rest of society.

37 The DJ also dealt with the nature of aggravating circumstances for the purpose of sentencing a drink-driving offender. At [20] of the GD, the DJ referred to *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) at pp 938–939, which states that:

> Generally, a fine is the norm for a first offender [for a s 67 offence] unless there are aggravating circumstances. The aggravating circumstances are usually high levels of impairment of driving or intoxication as well as involvement in an accident resulting in personal injuries.

However, I would qualify this statement by saying that a high level of alcohol is an aggravating circumstance in determining the level of fine to be imposed, but I do not consider it by itself to be a sufficient factor in raising the punishment to a custodial sentence unless the level of alcohol is sufficiently high to create a reasonable risk of the offender causing injury to people or damage to property on the road. It is the risk of inflicting social costs on the public that should be the aggravating factor. Each case must therefore depend on its own facts. That said, the facts showed that the level of alcohol in the appellant's body was moderate and that it did not impair his ability to drive or control his vehicle.

Conclusion

38 For these reasons, the DJ was wrong in principle in ratcheting up the normal sentence of a fine to a custodial sentence. But because the appellant has an antecedent, I increased the fine to the maximum of $5,000 which should be sufficient punishment for the appellant.