Lim Kay Han Irene *v* Public Prosecutor
[2010] SGHC 87

Case Number	: Magistrate's Appeal No 331 of 2009
Decision Date	: 17 March 2010
Tribunal/Court	: High Court
Coram	: Chao Hick Tin JA
Counsel Name(s)	: Sant Singh and Chen Chee Yen (Tan Rajah & Cheah) for the appellant; Lee Lit Cheng (The Attorney-General's Chambers) for the respondent.
Parties	: Lim Kay Han Irene — Public Prosecutor

Criminal procedure and sentencing

17 March 2010

Chao Hick Tin JA:

Introduction

1 This was an appeal against the decision of the district judge ("the DJ") in *Public Prosecutor v Lim Kay Han Irene* [2009] SGDC 383 (the "GD"). In the district court, the appellant was convicted of one charge of drink driving and sentenced to a term of imprisonment of two weeks and a disqualification from driving for a period of four years. Unhappy with the custodial sentence, the appellant appealed. While imprisonment terms are not an uncommon punishment for drink driving offences, this particular appeal involved exceptional circumstances which warranted the allowing of the appeal. I set aside the imprisonment term and substituted in its place a fine of $5,000. I shall now set out the reasons for my decision.

The factual background

2 The appellant, a female of 59 years of age, was a member of the medical profession. In the early hours of 27 April 2009, at about 1:32 am, she was observed by an officer manning the Expressway Monitoring Advisory System ("EMAS") to be sitting on the driver seat of motor vehicle EV 4046S (the "car") which was stationary along the Pan Island Expressway ("PIE"). Another EMAS officer, Mahapandi Bin Embi ("Mr Embi") was dispatched to the scene, located along lane three of the PIE in the direction of Tuas near the exit of Clementi Avenue 6, to make enquiries. He arrived at 1:38 am and observed that the car was stationary with its engine running and the headlights on. However, its hazard lights were not turned on. Mr Embi approached the car and spoke to the appellant. In the course of their conversation, Mr Embi noticed that the appellant had alcoholic breath and informed the Traffic Police Ops Control Centre.

3 Shortly a traffic police officer, Cpl Noor Hibayah arrived at the scene and he observed that the appellant's breath smelled of alcohol. He conducted a breath analyzer test on the appellant which she failed. The appellant was subsequently placed under arrest for driving while under the influence of alcohol and escorted to the Traffic Police Department for a Breath Evidential Analyzer ("BEA") Test to be conducted. This was done at about 3:47 am. The BEA Test result revealed that, for every 100 millilitres ("ml") of the appellant's breath, there contained 129 microgrammes ("mg") of alcohol. Accordingly, a charge of drink driving, pursuant to section 67(1)(b) of the Road Traffic Act (Cap 276,

2004 Rev Ed) ("RTA"), was brought against the appellant. She did not contest the charge and pleaded guilty.

4 In mitigation before the DJ and in submissions before me, counsel for the appellant, Mr Sant Singh SC ("Mr Singh"), provided further context to the incident. Mr Singh explained that the appellant was a senior consultant with the KK Women's and Children's Hospital and possessed over 25 years' experience in the practice of radiology. On 26 April 2009, the day before the incident, the appellant and her husband took a friend and colleague of theirs, one Dr Marielle V Fortier ("Dr Fortier"), who had just arrived in Singapore and was temporarily residing in the appellant's home, to lunch during the course of which the appellant consumed some wine. After lunch, at around 3 pm, the appellant upon returning to her home, was notified that her aunt, Ms Lee Joo Har ("Aunt"), had suffered an extensive nasal haemorrhage. The appellant shared a very close relationship with her Aunt, a point which will be further elaborated on later (see [31] below). Immediately thereafter, the appellant arranged for her Aunt to be sent to the National University Hospital ("NUH"). This sequence of events was confirmed by Dr Fortier in a letter dated 29 May 2009. A discharge summary from NUH further confirmed that the Aunt was admitted into NUH on 26 April 2009.

5 After seeing to the administrative arrangements at the hospital, the appellant returned home at around 9 pm for dinner during which she again drank some wine. Mr Singh emphasised that the appellant was, at this time, very disturbed by her Aunt's hospitalisation. The appellant went to bed at around 10:30 pm. However, before turning in, the appellant consumed a glass of whisky as a nightcap. At 1:20 am, on 27 April 2009, the appellant was awoken up by a telephone call from NUH. She was informed that her Aunt's condition had taken a turn for the worse and her Aunt had been transferred to the Intensive Care Unit of NUH. Fearing that the worst might happen to the Aunt, the appellant immediately got into her car and drove to NUH, hoping to get there as quickly as possible. From her home at Ascot Rise, the appellant first drove along Dunearn Road before making a u-turn into Bukit Timah Road and heading north towards Clementi Road. The appellant had intended to turn left into Clementi Road but missed the turn and instead found herself turning into the PIE. Realising her mistake, the appellant intended to exit the PIE via the Toh Guan Exit. However, her car unexpectedly stalled, causing it to be stationary along the PIE. Thereafter, the events were as described in [2] and [3] above.

The DJ's decision

6 The DJ observed (at [10] of the GD) that, while generally a fine would be the norm for a first offender like the appellant, in circumstances where there were aggravating factors, a custodial sentence may be appropriate. She wrote:

> 10. As a starting point, as stated in *Sentencing Practice in the Subordinate Courts, Second Edition* at page 938-939: "Generally a fine is the norm for a first offender [for drink driving] 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."

She then continued by noting the various aggravating factors present in the case, which justified the imposition of a custodial sentence. In her mind, there appeared to be four main considerations.

7 First, the DJ observed that the appellant's level of alcohol was 3.68 times over the prescribed limit of 35 mg/ 100 ml of breath. This, in her view, was "sufficiently high to create a real risk of the Accused causing injury to people or damage to property on the road" (see [12] of the GD). To her, it was entirely fortuitous that there were no injuries, loss of lives and/or extensive property damage as

a consequence of her drink driving. Furthermore, the DJ found that "[t]he usual tariff for an offence of drink driving where the level of alcohol is more than three times the prescribed limit is a custodial sentence" (sse [6] of the GD). Evidently, she felt that precedents tended to suggest that an imprisonment term should be imposed where the alcoholic level in the offender's breath exceeded three times the prescribed limit. This appeared, from my reading of her written grounds, to be the single most influential factor in the DJ's decision.

8 Secondly, the DJ considered that the appellant made a deliberate and conscious choice to drive while in an inebriated state. According to her, the appellant should have been mindful enough to seek alternative transportation that were available 24 hours such as limousine or taxi services. The fact that the appellant was anxious about her Aunt's medical condition was, to the DJ, no justification for the appellant to drive while under the influence of alcohol.

9 Next, the DJ took cognisance of the appellant's poor medical condition. She noted that in the appellant's mitigation plea, it was argued that the appellant suffered from what was described as familial involuntary tremors. This is an uncontrollable condition which would affect her fine finger activities and her ability to drive properly. Given this condition, the DJ was of the view that the appellant should not have taken to the wheels on 27 April 2009.

10 The last factor the DJ took into account was public policy. She cited Yong Pung How CJ who stated in *Sivakumar s/o Rajoo v Public Prosecutor* [2002] 1 SLR(R) 265 (at [28]) that:

> 28 [r]oads in Singapore have to be made as safe as possible for law-abiding road users and pedestrians. In cases of drink-driving, the courts are always mindful that a motor car in the hands of an inebriated person is a potentially devastating weapon.

The DJ felt that the policy of protecting members of the public from intoxicated drivers necessitated a strict approach. In her view, like-minded individuals should be deterred from committing the same offence.

11 In the circumstances, the DJ felt that an appropriate sentence would be 2 weeks' imprisonment and a period of four years' disqualification from holding or obtaining a driving licence for all classes of vehicles, reckoned from the date of her release from prison.

The appellant's case

12 Mr Singh contended before me that the Judge's sentence was manifestly excessive and, for that reason, the custodial sentence should be set aside. In essence, there were three pillars to Mr Singh's submissions. First, Mr Singh contended that the Judge, in finding that the appellant made a conscious and deliberate decision to flout road safety laws, failed to appreciate the factual matrix of the case. In particular, the Judge failed to fully understand the close and intimate relationship shared between the appellant and her Aunt as well as the appellant's mental state of mind in the evening of 26 April 2009 and the morning of 27 April 2009. Next, it was argued that the Judge failed to give due weight to various mitigating factors including the fact that the appellant was a first time offender, was deeply remorseful for her actions, has contributed significantly to the progress of Singapore society, and suffered from poor health. Insofar as the deterrent principle was concerned, it was submitted that such a principle has no application in the present circumstances. Finally, contrary to what the DJ had found, Mr Singh argued that previous cases did not establish a pattern of imposing a term of incarceration whenever the level of alcohol in an offender's breath was more than three times over the legally prescribed limit. In fact, he sought to demonstrate that the contrary was true.

The respondent's case

The respondent's case

13 The respondent's case was straightforward. DPP Lee Lit Cheng ("DPP Lee") essentially made three points. First, she urged the court to attribute little weight to the various mitigating factors that had been highlighted including the argument that the appellant had occasioned no accident and had posed little danger to the public, was remorseful, had (previous to the offence) a clean driving record, was in ill health and contributed to society. Secondly, she argued, in reference to the events leading to the commission of the offence, that the appellant had, in fact, deliberately driven in full knowledge of the fact that she had consumed alcohol earlier. It was not the case that the appellant had forgotten that she was intoxicated, as portrayed by Mr Singh. Finally, DPP Lee urged the court to uphold the deterrent sentence imposed by the DJ. She contended that the level of alcohol in the appellant's breath was so high that an imprisonment term was appropriate.

The statutory provisions

14 The offence of drink driving is punishable under section 67 of the RTA. That provision states 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.

Principles governing appellate intervention

15 It is a trite law that an appellate court should only intervene in the sentence imposed by a lower court where (i) the judge below had erred as to the proper factual basis of the case; (ii) the judge below had failed to appreciate the material placed before him; (iii) the sentence imposed was wrong in principle and/or law; or (iv) the sentence imposed was manifestly excessive or manifestly inadequate as the case may be – see *Tan Koon Swan v Public Prosecutor* [1985-1986] SLR(R) 976 (at [4], [5] and [8]) and *Public Prosecutor v Cheong Hock Lai* [2004] 3 SLR(R) 203 (at [26]). For the purposes of this appeal, factors (ii) and (iv) were particularly germane.

Sentencing precedents and high alcohol level

16 As the main reason why the DJ thought it necessary to impose a custodial sentence on the appellant was on account of precedents, I shall now turn to consider them. But I would hasten to add that precedents would, at best, only provide guidelines. Much would depend on the facts and circumstances of each individual case. Here I am reminded that for the purposes of sentencing, the factual matrix of the case remains the paramount consideration: see *Tan Kay Beng v Public Prosecutor* [2006] 4 SLR(R) 10 at [45]. Of course, the court is not totally at liberty, nilly willy, to disregard precedents. I think the following observations of the High Court in *Soong Hee Sin v Public Prosecutor*, [2001] 1 SLR(R) 475 (at [12]) aptly describes the position:

> [T]he regime of sentencing is a matter of law which involves a hotchpotch of such varied and manifold factors that no two cases can ever be completely identical in this regard. While past cases are no doubt helpful and sometimes serve as critical guidelines for the sentencing court, that is also all that they are, ie mere guidelines only. This is especially so with regard to the unreported cases, in which the detailed facts and circumstances are hardly, if ever, disclosed with sufficient clarity to enable any intelligent comparison to be made. At the end of the day, every case which comes before the courts must be looked at on its own facts, each particular accused in his own circumstances, and counsel be kept constantly and keenly apprised of the fact that it is just not possible to categorise cases based simply on mere numerals and decimal points.

Central to the DJ's decision was that, in her view, previous cases have established a pattern of imposing a custodial sentence where the level of alcohol involved was three or more times over the prescribed limit. However, it should be noted that the DJ did not cite any case in support of that assertion.

17 The only case which DPP Lee pointed to was *Kim Seung Shik v Public Prosecutor*, MA 277/2009/01 ("*Kim Seung Shik*"). That was a case which I decided last year and for which no written judgment was issued. As such, a brief summary of the facts is in order. The case involved a South Korean national, aged 40, who was working in Singapore for a Korean company. His three children were staying with him in Singapore and his wife had returned to South Korea to seek treatment for a medical condition. After a company event in which the offender had consumed alcohol, he decided to return home quickly as he was worried about his children who were left without any parental supervision. As the offender was driving out of the carpark of Katong Mall, he turned into a wall. Shortly thereafter, having exited from the carpark onto East Coast Road, he collided into the side of a motor taxi. Later, it was established that the offender's level of alcohol was 117 mg/100 ml of breath, or 3.34 times over the prescribed limit. In the district court, the offender was sentenced to 3 weeks' imprisonment and a disqualification period of 2 years for all classes of vehicles from the date of his release from imprisonment. On appeal, I reduced the imprisonment term to 1 week. However, I note that there were at least three important differences between *Kim Seung Shik* and the present case. First, no damage was caused in the present case. In fact, the appellant in the instant case did not even get into an accident. Secondly, unlike the offender in *Kim Seung Shik*, no evidence was tendered before this court to demonstrate that the appellant could not control her car. This is a point which I will explore further at [27] – [28]. Thirdly, the offender in *Kim Seung Shik* deliberately drove with full knowledge that he was under the influence of alcohol. As I will explain later (at [31] – [34]), the same factor was not present in the instant case.

18 On the other hand, Mr Singh took pains to point out various cases which seemed to suggest that the contrary was, in fact, true – that first time offenders of drink driving, even where the level of alcohol involved was significantly high, were usually punished with a fine and a period of disqualification from driving. He referred, first, to the case of *Wong Kwee Cheong v Public Prosecutor*, MA 208/2001/01 ("*Wong Kwee Cheong*"). This case is unreported but may be found summarised in

Sentencing Practice in the Subordinate Courts, (LexisNexis: 2003, 2nd Ed) ("*Sentencing Practice*") (at [945]) as follows:

> WONG KWEE CHEONG v PP
>
> MA 208/2001/01
>
> *Breath alcohol concentration of 98 mcg – Pleaded guilty – First offender*
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> **Facts**: Offender pleaded guilty to two charges: (1) drunk driving: s 67(1)(b); (2) inconsiderate driving: s 65. The offender drove without due care and attention by failing to keep a proper lookout, and collided with a parked taxi in a carpark. Both vehicles were slightly damaged and no one was injured. The offender failed the breathalyser test and was arrested. At the Traffic Police HQ, the Breath Evidential Analyser test was conducted and his breath specimen was found to contain 98 mcg of alcohol per 100 ml of breath. He was a first offender.
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> **Sentence imposed by a trial court**: Fined $2,500 and disqualified from holding or obtaining a driving licence for all classes of vehicles for three years on the s 67(1)(b) charge. Fined $500 on the s 65 charge.
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> **Results of appeal**: Offender's appeal lapsed.

Notably, while the breath alcohol level of the offender in *Wong Kwee Cheong* (being 2.8 times above the legal limit) was not as high as the appellant's in the instant case, the drink driving in *Wong Kwee Cheong* resulted in a collision with a parked taxi and both vehicles were slightly damaged.

19 Another case relied upon by the appellant was *Public Prosecutor v Emmett Ian Michael*, [2004] SGDC 251 ("*Emmett Michael*"). In this relatively straightforward case, the offender was involved in traffic accident when the car he was driving collided with another vehicle along Clemenceau Avenue. It was found that at the relevant time, the alcohol level in the offender's breath was 96 mg/100 ml. This, as the district judge in the case noted, was more than two and a half times the prescribed limit and was "[t]he most serious aggravating factor in this case": see [12] of *Emmett Michael*. In the circumstance, the district judge there chose to impose a $4,300 fine and a 3-year disqualification. On appeal, the period of disqualification was reduced to 2 years. No imprisonment term was imposed. Again, it is significant to note that property damage was caused by the offender's drink driving.

20 Finally, Mr Singh also made reference to the case of *Public Prosecutor v Tay Wee Wah*, DAC 63960/2009 ("*Tay Wee Wah*"). This was a case recently decided by the district court on 9 December 2009. The statement of facts indicated that the offender was involved in a minor accident along the ECP. The proportion of alcohol in the offender's breath was 107 mg/100 ml. Other than the above, no other material information could be discovered from the statement of facts. The same DJ that decided this case at the court below imposed, in *Tay Wee Wah*, a sentence of a $4000 fine (in default 20 days' imprisonment) and 3 years' disqualification for all classes. It would be noted that 107mg/ 100 ml of breath was 3.06 times over the prescribed limit.

21 In addition to the cases cited by the appellant, *Sentencing Practice* provides (at [941] – [942]) further examples of cases where the level of alcohol in the offender was considered high but where a term of imprisonment was not imposed. These cases are summarised in the following table.

Case Name	Brief Facts	Alcohol Concentration of Accused	Sentence by Trial Court	Result of Appeal
PP v Oh Tiam Chin (MA 36/95/01)	The offender was riding a motorcycle at the material time.	235 mg/100 ml of blood (2.94 times over the prescribed limit) Note: the prescribed limit based on blood test was 80mg/100ml	Fined $3000 and one year's disqualification from holding or obtaining a driving licence on class 2 vehicles.	Prosecution's appeal allowed. The disqualification period was extended to all classes for a year.
Hoo Tee Tuan v PP (MA 247/96/01)	The offender was stopped at a road block.	155 mg/100 ml of blood (1.94 times over the prescribed limit)	Fined $3,500 and disqualified from holding a driving licence on all classes for one year.	Offender's appeal dismissed.
U Hlaing Win v PP (MA 90/97/01)	Offender was found reversing his vehicle for a short distance against the flow of traffic along a busy road.	201 mg/100 ml of blood (2.5 times over the prescribed limit)	Fined $5,000 and disqualification from driving all classes of vehicles for 3 years.	Offender's appeal dismissed.

All of the above three cases also did not involve any collision with another vehicle or damage to other property. The only case cited in *Sentencing Practice* in which the offender's blood alcohol content was significant and a custodial sentence imposed in spite of the fact that there was no accident was the case of *Thakur Kewalram Samtani v Public Prosecutor*, MA 368/1994/01 ("*Thakur Samtani*"). In that case, the offender was observed by the police to be driving in a zigzag manner. After testing, it was found that he had a blood alcohol content of 276 mg/ 100 ml. This was 3.45 times over the prescribed limit. In the circumstances, the trial court imposed a sentence of two weeks' imprisonment and a disqualification order from driving for five years. However, unlike the present case, the offender in *Thakur Samtani*, like the one in *Kim Seung Shik*, was clearly shown to have been unable to control his vehicle. Moreover, in *Thakur Samtani* the offender did not have the same mitigating circumstances as the present case, *ie*, being awoken up in the dead of night and being told that the condition of someone who was very dear, and was in hospital, had deteriorated badly.

22 Hence, the precedents were, at best, inconclusive as to whether there was a rule or trend of imposing custodial sentences in cases where the blood alcohol content in an offender was high. In any case, it certainly could not be said, as the DJ did (at [6] of the GD), that the "usual tariff for an offence of drink driving where the level of alcohol is more than three times the prescribed limit is a custodial sentence." There was no pattern that the court would impose custodial sentence as long as the alcohol level of the offender was three or more times over the prescribed limit. Indeed, there was no basis for any court, in working out the appropriate sentence for drink driving offences, to begin with that premise. The judge should consider the full range of sentences that avails her at law, taking into account all aggravating and mitigating factors.

23 In this respect, the case of *Public Prosecutor v Lee Meng Soon*, [2007] 4 SLR(R) 240 ("*Lee Meng Soon*"), is instructive. In that case, the offender failed to keep a proper lookout while on his way to have supper and collided with a motorcycle that was travelling in front of his car. The rider of the motorcycle and the pillion rider both suffered serious injuries. After being apprehended, the respondent was found to have 77mg of alcohol in every 100 ml of breath. This was 2.2 times over the prescribed limit. Two charges were brought against him, one for drink driving and the other for failure to render assistance. Insofar as the drink driving charge was concerned, the trial court imposed a $3,000 fine and a disqualification period of two years. Against this sentence the prosecution appealed. On appeal, the High Court imposed a two-week imprisonment term and a disqualification period of three years. In so doing, the High Court held (at [21]) as follows:

> 21 There have been many cases where a first offender under s 67(1) had been sentenced to a fine only and germane to the present appeal are the factors that would affect the decision to impose a sentence of imprisonment rather than a fine. It is useful to consider the matter from the extreme ends of the spectrum of punishment. At the minimum end is the case of a person who, after consuming a small amount of alcohol, drives a vehicle on the road. He is able to control his vehicle but is stopped for a random breath alcohol test which discloses a level that is at or just over the prescribed limit. He is guilty of an offence under s 67(1)(b). In the absence of any other material factor, it would be appropriate to sentence him to the minimum fine of $1,000 or an amount not far from this sum. The disqualification period imposed under s 67(2) would be the minimum period of 12 months unless there are special reasons not to do so. At the maximum end of the spectrum is the case of a heavily intoxicated driver who careens from one side of the road to the other at high speed, causing danger or even injury to other persons and damage to property. The level of alcohol in his body is many times over the prescribed limit. He would be accorded a punishment at the maximum end of the scale, with imprisonment for a term at or close to the maximum of six months and disqualification for a long period, possibly for life.
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> 22 The cases have established that the principal aggravating factors in an offence under s 67(1) are the level of alcohol in the breath or blood *and the degree of control of the vehicle*.
>
> …
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> 29 Where a first offender of an offence under s 67(1) has a high level of alcohol combined with poor control of his vehicle, *notwithstanding that by itself any of those factors would not have merited a sentence of imprisonment*, a sentence of imprisonment could be justified. In my view, it is justified on the facts of this case and I find the sentence of a fine imposed on the respondent to be manifestly inadequate.
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> (emphasis added)

In *Lee Meng Soon*, the court considered that the offender's breath alcohol level, being 2.2 times over the legally prescribed limit, was high. However, the court made clear that that factor alone would not merit an imprisonment sentence. It was the combination of the high alcohol level and the fact that the offender had poor control of his vehicle that warranted a custodial term.

24 In the present case, it was clear that the alcohol level in the appellant's breath, being 3.68 times over the prescribed limit, must be considered to be significantly high. However, like the High Court in *Lee Meng Soon*, I did not think that this fact in itself was sufficient to warrant a custodial sentence, particularly for a first time offender. It must be borne in mind that the extent to which a person would be affected by a certain level of alcohol in the body would differ from person to person. Thus, how well an offender could control his vehicle would be a very pertinent consideration. Of

course, I do not rule out the possibility of a situation whereby the alcohol level involved was so high as to merit an imprisonment term on its own. For the purposes of this case, I need not have to speculate whether an offender in that condition would in any case be able to control his vehicle. Here, however, although the alcohol level in the appellant's body was significantly higher than the prescribed limit, to warrant the imposition of a custodial sentence, there had to be other aggravating factors present. I will now turn to consider these other factors.

Ability to control vehicle

25 It will be recalled that, in *Lee Meng Soon* (see [23] above), it was held that the offender's ability to control his vehicle was an important consideration in determining whether a custodial sentence should be imposed for an offence of drink driving. An offender's ability to control his vehicle is relevant in both situations where the offence of drink driving could be committed under s 67 of the RTA (see [14] above). First, under s 67(1)(a), if due to intoxication, a driver is unable to control his vehicle, he would be guilty of the offence of drink driving. This factor, thus, goes directly towards the commission of the offence. Secondly, if the alcohol level in a driver's body exceeds the prescribed limit, he would *ipso facto* be guilty of the offence of drink driving under s 67(1)(b) and it does not matter whether at the relevant time, he was or was not able to control the vehicle. However, if in addition, the driver was, in fact, unable to control his vehicle, that would be an aggravating factor for imposing a heavier sentence. Thus, under s 67(1)(b), an offender's ability to control his vehicle is relevant for the purposes of sentencing. I now turn to consider whether the appellant, in addition to breaching the prescribed limit of alcohol in her breath, was also unable to control her vehicle.

26 For sentencing purposes, it must be borne in mind that just because the breath or blood alcohol level of an offender exceeds the prescribed limit does not mean that he is also unable to control his vehicle. This is because under s 67(1)(b) of the RTA, once a driver was caught with a blood or breath alcohol level beyond the prescribed limit, he would *ipso facto* be guilty of the offence of drink driving. This can also be discerned from the legislative history of section 67 of the RTA, aptly summarised in *Lee Meng Soon* (at [17] – [19]) as follows:

> 17 …Section 70 of the old Act provided a rebuttable presumption that a person was incapable of having proper control of his vehicle if the alcohol level in his blood exceeded a certain level. Section 70 of the old Act provided as follows:
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> > Any person who has been arrested under section 67 or 68 shall be presumed to be incapable of having proper control of a motor vehicle if the specimen of blood provided by him under section 69 is certified by a medical practitioner to have a blood alcohol concentration in excess of 80 milligrammes of alcohol in 100 millilitres of blood
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> 18 The Minister for Home Affairs, Mr Wong Kan Seng, in his second reading speech on 27 February 1996, explained the objective of the present provisions in the following manner (*Singapore Parliamentary Debates, Official Report* (27 February 1996) vol 65 at cols 723-724):
>
> > Currently, under existing section 70 of the Act, a person is presumed to be incapable of having proper control of his vehicle if the amount of alcohol found in his blood is above the prescribed legal limit. This has given rise to a situation where the defence tries to rebut this presumption by trying to prove in each case that the defendant did not lose control of the vehicle.
> >
> > To prevent unnecessary debate, clause 9 of the Bill seeks to re-enact section 67(1)(b) to make the presence of alcohol exceeding the legal limit in a driver's blood or breath an offence

> in itself without linking it to the control of vehicle. The new section 67(1)(b) makes it clear that an offence is committed once the driver's alcohol content exceeds the prescribed limit. This provision is similar to the provisions in Malaysian and UK legislation.
>
> 19 Therefore it is clear that the prohibition encompassed by s 67(1) covers the situation where a person drives a vehicle while:
>
> (a) he is incapable of having proper control over his vehicle on account of alcohol, even though the amount of alcohol in his body does not exceed the prescribed limit; and
>
> (b) the amount of alcohol in his body exceeds the prescribed limit even though he is capable of proper control of his vehicle.
>
> Therefore, the Legislature had decided that a person who has consumed such amount of alcohol that his breath or blood alcohol level exceeds the prescribed limit is likely to be incapable of driving a vehicle safely, and that as a matter of policy, he should be prohibited on pain of punishment under penal law from driving irrespective of whether he is capable of so doing.

Thus, it would not follow from the mere commission of an offence under s 67(1)(b) that the driver was also incapable of controlling his vehicle ((cf *Stafford Rosemary Anne Jane (administratrix of the estate of Stafford Anthony John, Deceased) v Goo Tong Sing and another)*, [2006] 3 SLR(R) 277 at [38]). This further fact must be proved. Hence, in order that the court may take this fact into account for the purposes of sentencing, it must be demonstrated by the prosecution, by adducing cogent evidence, that the offender was unable to control his vehicle independently of the alcohol level in the offender's blood or breath. The nature of such evidence may include, but is not limited to, the manner in which the offender had gotten into an accident/s such as in *Kim Seung Shik* and *Lim Meng Soon* or the fact that the offender was driving in a strange and dangerous manner such as in *Thakur Samtani*.

27 In the present case, there was no evidence to show that the appellant was unable to control her car in the early morning of 27 April 2009 when she was attempting to get quickly to NUH to be with her Aunt. What was notable was the fact that she had driven for some distance from her home in Ascot Rise to somewhere near the PIE exit of Clementi Avenue 6 without being involved in an accident. In short, there was absolutely no evidence that the appellant's manner of driving was dangerous or, in any other way, beyond what is ordinarily acceptable bearing in mind that EMAS cameras were installed along the PIE.

28 At this juncture, I must address a point made by the DJ in her GD (at [12]), where she stated that:

> …[the appellant's] level of alcohol is clearly sufficiently high to create a real risk of the Accused causing injury to people or damage to property on the road. She was clearly a menace to other road users when she took to the wheels of her car with such a high level of alcohol in her system and was a danger not only to herself but also to other road users…It was only fortuitous that there were no injuries, loss of lives and/or extensive property damage as a consequence of her drink driving.

It appeared to me that the DJ had used the level of alcohol in the appellant's breath to presume that the appellant was incapable of controlling her car and that the appellant would, if given enough time on the road, eventually have caused personal or property damage. As such, the DJ had considered the possibility of the appellant causing an accident to be an aggravating factor. She would appear to

have assumed that just because the alcohol level in the appellant's body was high that the appellant was likely to have caused injury to others or damaged property. With respect, I think the DJ's reasoning was flawed. As I have earlier explained (see [25] – [26], above) a driver would be guilty of an offence under s 67(1)(b) by the mere fact that he has a certain level of alcohol in his breath or blood. His guilt did not depend on the extent of his inability to control the vehicle. In ascertaining the appropriate sentence, the degree to which an offender was unable to control his vehicle must be demonstrated by objective evidence: see, for example, *Lim Meng Soon* (at [28] – [29]). In the present case, there was absolutely no evidence that the appellant's ability to control her car was hampered in any way. The fact of the matter was that the appellant was not involved in any accident. Neither had she injured any person. Hence, it was wrong on the part of the DJ to speculate that the appellant would likely to have caused personal injury or damage to property and, on that assumption, to inflict a heavier sentence on the appellant. I would reiterate that there was nothing in evidence to suggest that the appellant was unable to control her car that morning and thus, other than the mere fact of a high alcohol content in her breath, there was no other aggravating factor.

Culpability of appellant

29 I now turn to consider a very important factor in ascertaining the appropriate punishment for the appellant, *ie*, the degree to which the appellant was culpable for the offence. Culpability must be distinguished from guilt. There was no doubt that the appellant in this case was guilty of the charge brought against her and demonstrating her remorse, she had pleaded guilty forthwith. She should, thus, be punished for the offence. However, the sentence which should be meted out to the appellant must be calibrated according to the degree to which she was culpable for the offence. Unlike guilt, which simply refers to the satisfaction of the legal requirements of the offence as set out in statutory materials, culpability pertains to the moral blameworthiness of the offender. Thus, while guilt sees things in black and white, culpability takes a more nuanced approach, viewing matters in shades of grey and blue. Deliberate, purposeful and calculated harm-causing must be differentiated from unintended or incidental peccadilloes. In assessing the degree of culpability of an offender, the court must take into account, all the circumstances, including the reason why the person drove on that occasion and only when this is done would the sentence meted out be fair and proportionate.

30 At [13] of her GD, the DJ had taken the view that the appellant had deliberately chosen to drive with full awareness that she was inebriated. The DJ wrote as follows:

> 13 **The decision to drive after consumption of alcoholic drinks is a matter of choice and a deliberate act on the part of the driver**. Although it was stated that the Accused was anxious to go straight to her aunt as quickly as possible, this cannot be regarded as justification for a person to drive while under the influence of drinks… The Accused, having consumed wine during lunch as well as dinner including a glass of whisky (known for its high alcohol content) as a nightcap before she turned in at 10.30 pm that night could and should have opted for alternative means of transport to the hospital such as calling for a taxi which is available 24 hours or to engage the services of Nev and Freddy Limousine Svcs or to engage the services of Nev and Freddy Limousine Svcs which appeared to be available 24 hours a day as shown in the invoices in Annex 2 of the her (*sic*) plea in mitigation. The present case was clearly not an instance where no other forms of transport [were] available to the Accused.
>
> [Emphasis added]

The DPP took very much the same approach in her argument before me and this was set out at [23] of her written submissions:

> 23 Based on the appellant's account, she had "some wine" over dinner at about 8 or 9pm, and a glass of whisky as a nightcap before she went to bed at about 10:30pm. The hospital called her at 1.20am and her car was spotted on the PIE at about 1.32am. The breathalyser test was administered at 3.47 am and the result was 129 microgrammes of alcohol in every 100 millilitres of breath. The time that the breathalyser was administered is crucial because it shows that the alcohol level in the appellant's body was a staggering three and a half times that of the legal limit of 35 microgrammes *some 5 hours* after the appellant had last consumed alcohol! It is submitted that there can only be one of two possible scenarios to explain this. First, if we accept that the appellant had her last drink at about 10:30pm, she must have consumed *a lot of alcohol* that evening before she went to bed. If so, it would have been highly unlikely that the appellant would have forgotten that she had taken many drinks that evening. The second possible scenario is that the appellant had been drinking till late and only stopped drinking close to the time she drove. In this case, it would also be far-fetched for the appellant to claim that she had so quickly forgotten that she had consumed alcohol not too long ago.
>
> [Emphasis in original]

In my view, both the DJ and the respondent had taken too clinical a reading of the situation without fully appreciating the emotional state of the appellant at the relevant time when she received the call from the hospital and decided to drive there straight away. Let me explain.

31 In order to understand the trauma which the call from the hospital had caused in the appellant, the most critical fact which must be borne in mind was the extremely close relationship which the appellant shared with her Aunt. Mr Singh explained that the Aunt had looked after the appellant when the latter was young whilst the latter's parents were away. Accordingly, a bond akin to a mother-daughter relationship developed between them over several decades. This intimacy was further accentuated when the appellant moved into her current home at 10 Ascot Rise which was next door to her Aunt's home at 8 Ascot Rise. Moreover, the appellant had always taken care of her Aunt's health and medical needs. This close relationship was also evidenced by the fact that the Aunt had named the appellant as the major beneficiary under the Aunt's will and given the appellant a power of attorney to handle matters on her behalf.

32 Against that backdrop, it would be understandable if the appellant, prior to retiring to bed the evening before, was very disturbed by the fact that her Aunt had been admitted into NUH as a consequence of the latter suffering from an extensive nasal haemorrhage. Therefore, I could hardly disagree with the appellant's counsel's claim that the appellant went to bed distraught and in an agitated state of mind. This assertion was supported by the letter from Dr Fortier, dated 29 April 2009, tendered in evidence. Dr Fortier had written as follows:

> I took Dr Lim (the appellant) and her husband out to a Dim Sum lunch at Xin in the Holiday Inn. During this lunch, we shared a bottle of wine. During our return to 10 Ascot Rise, Dr Lim was phoned by her Aunt's maid to tell her that her Aunt was bleeding heavily from her chronic sinus tumour....Dr Lim arranged for her emergency admission to the National University Hospital and went there to settle things. Dr Lim and her husband returned for a late dinner and we shared another bottle of wine. She also had some whisky after dinner, but I did not think she was intoxicated. She was extremely upset and very distraught at her Aunt's collapse. She has spoken of the Aunt as being like a mother to her.

Such emotional fragility could only have been exacerbated by the early morning call from NUH on 27 April 2009, informing the appellant that her Aunt's condition had deteriorated. In those circumstances, I could hardly disagree with Mr Singh that the only thought in the appellant's mind at

that moment was to get to her Aunt at NUH as quickly as possible as the appellant feared for the worst. Nothing demonstrated the haste at which the appellant proceeded more than the fact that the call came at 1:20 am and, by 1:32 am, the appellant's car was observed to be stationary along the PIE in the direction of Tuas. Given this time frame and the fact that the appellant would have required time to get ready to leave the house, it was clear that panic overcame her. This explained why calling for a taxi or her regular limousine service was not in her mind at the relevant time.

33 Under such circumstances, it was, to me, understandable that the appellant had not fully appreciated the fact, when she took to the wheels at that unearthly hour, that she had drunk alcohol at lunch and dinner the night before. In her anxiety to see her Aunt, it was not improbable that what she had drunk the day before was not foremost in her mind. I could not agree with the DJ that the appellant had made a conscious and deliberate decision to flout the road traffic laws of Singapore. She acted on the spur of the moment. I also found it hard to accept the respondent's contention that the appellant could not have forgotten about her consumption of alcohol since the alcohol level in her breath was very high. In my opinion, such an argument did not sufficiently take into account the state of anxiety and panic the appellant was in - being awoken abruptly in the middle of the night and being told that her Aunt's condition had deteriorated. It was entirely human if her thoughts then were to get to her Aunt's bedside as soon as possible, lest the Aunt might slip away before she reached there. Panic had simply overwhelmed her. It was an emotional crisis. It was therefore necessary for the court to view her action, and in turn her state of mind, in that condition, and not that of a mind which was cool and calm and unaffected by such emotional trauma. While it was true that the appellant had voluntarily consumed wine and some hard liquor that evening, she had no plans at all to leave the house. She was in bed by 10.30 pm and what happened two and a half hours later was something totally unexpected. That must have come as a shock.

34 This factual matrix served as the context to the appellant's behaviour, a context that must be fully appreciated in order to correctly ascertain the culpability of the appellant. When evaluating such an offender's culpability, the court should refrain from using *ex post facto* reasoning, viewed from the perspective of an objective person not under similar stress, to gauge the reasonableness of the offender's actions. Such an approach would be artificial and unfair to the offender, as in determining the degree of culpability of the offender, the court is essentially seeking to understand his or her actions in their context. The court should step into the shoes of the offender and see the material events unfold through the eyes of the offender. Only by so doing would the court be able to correctly appreciate the various variables that contributed to the offender's behaviour. In the present case, although the appellant's actions could not be said to be reasonable or responsible if a purely objective test was used, it could also not be denied that her sense of judgment was gravely affected by the emotional crisis, and the fear of what would happen to the Aunt. Putting it another way, it would be fair to say that her good sense of judgment had momentarily taken leave of her. While I am not for a moment suggesting that she had not committed an offence under s 67(1)(b), and indeed she had, it is altogether another thing to say that she had committed the offence with full knowledge that she was intoxicated. It would be unjust to equate her behaviour to that of someone who had deliberately driven with full knowledge that he was intoxicated. It was not even analogous to a situation where an offender placed himself in a difficult position by driving out for drinks, for such a person should have appreciated the possible consequences of his actions. Looking at the action of the appellant at its worst, the appellant's fault lay in not taking time to compose herself and consider the fact that she had consumed alcohol just hours before.

35 To summarise, the special circumstances of this case were two-fold. First, the appellant, at no time, had ever intended to drink and drive. At the time when the appellant consumed alcohol, during lunch and dinner of 26 April 2009, she had no intention of taking the wheel. When the appellant decided to drive to the hospital, in the early hours of 27 April 2009, the fact that she had consumed

alcohol earlier had understandably slipped her mind. Secondly, the appellant's failure to appreciate that she had consumed alcohol could, to an extent, be understood. She had gone to bed on 26 April 2009, expecting the effects of the alcohol to be dispelled when she woke up the next morning. Unfortunately, she was awoken prematurely by the urgent call from NUH. To worsen matters, the call brought grave news that her Aunt was in critical condition. In such extenuating circumstances, it was not surprising that panic took over and the appellant failed to appreciate that she had consumed alcohol a few hours earlier. Accordingly, I was of the view that the level of the appellant's culpability was not of that level which the DJ had sought to attribute to her.

Public policy

36 Another important pillar in the DJ's decision rested on the public policy of deterring drink driving. She felt that the general and specific deterrence considerations warranted a custodial sentence. This was also a point that the respondent pursued in the appeal. In *Public Prosecutor v Tan Fook Sum*, [1999] 1 SLR(R) 1022, Yong Pung How CJ, sitting in the High Court, explained the two facets to the principle of deterrence. He stated as follows (at [18]):

> 18 There are two aspects to this: deterrence of the offender and deterrence of likely offenders, corresponding to specific and general deterrence respectively. Specific deterrence will be appropriate where the offender is a persistent offender or where the crime is premeditated, though its value in the case of a recidivist offender may be questionable. General deterrence aims at educating and deterring other like-minded members of the general public (*Meeran bin Mydin v PP* [1998] 1 SLR(R) 522 at [7]-[9]) by making an example of the particular offender. The foremost significance of the role of deterrence, both specific and general, in crime control in recent years, not least because of the established correlation between the sentences imposed by the courts and crime rates, need hardly be mentioned.

I shall now consider briefly whether the principles of general and specific deterrence were relevant considerations in the present appeal.

37 The concept of specific deterrence revolves around the idea of discouraging an offender from re-offending. As was explained by V K Rajah J in *Public Prosecutor v Law Aik Meng*, [2007] 2 SLR(R) 814 ("*Law Aik Meng*") (at [21]):

> 21 Specific deterrence operates through the discouraging effects felt when an offender experiences and endures the punishment of a particular offence. Drawing from the maxim "once bitten twice shy", it seeks to instil in a particular offender the fear of re-offending through the potential threat of re-experiencing the same sanction previously imposed.

In essence, specific deterrence seeks to add further disincentive to offending by increasing the costs of criminal endeavours. In this manner, the law hopes to persuade the offender, when faced with a similar situation, to choose the right path. However, it is important to appreciate that underlying the concept of specific deterrence is the premise that the offender was capable of making rational choices. The offender must have had the ability to consider the pros and cons of each course of action available to him. If this was not so, specific deterrence would have little or no weight since imposing a greater cost on criminal activities would have little impact on his future choices, made under similar circumstances. This was a point touched on in *Law Aik Meng* (at [22]) as follows:

> 22 Specific deterrence is usually appropriate in instances where the crime is premeditated: *Tan Fook Sum* ([18] *supra*) at [18]. This is because deterrence probably works best where there is a conscious choice to commit crimes. Nigel Walker and Nicola Padfield in *Sentencing: Theory, Law*

and Practice (Butterworths, 2nd Ed, 1996) ("Padfield & Walker, 1996") at p 99 explain the theory of "undeterribility". Pathologically weak self-control, addictions, mental illnesses and compulsions are some of the elements that, if possessed by an offender, may constitute "undeterribility", thus rendering deterrence futile. Such elements seem to involve some form of impulse or inability to make proper choices on the part of the offender, which, by definition, runs counter to the concept of premeditation. It should be pointed out here that this reasoning applies with equal cogency to general deterrence (discussed below from [24]-[28]).

38 The same point was underlined in *Public Prosecutor v Loqmanul Hakim bin Buang*, [2007] 4 SLR(R) 753 when the High Court made the following observations (at [26]):

> 26 A central premise underpinning such a sentencing philosophy is a belief in the ability of the person concerned to make rational choices, whether in relation to current or future conduct. In this respect, it is not surprising that considerations of specific deterrence are especially significant in situations involving premeditated crimes: see *PP v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [18]. As a corollary, it should be similarly self-evident that in most, if not all, situations involving factors outside the control of the accused, or where the accused acts on the basis of some irrational and uncontrollable impulse, specific deterrence would often be a less compelling, if not altogether irrelevant, consideration: see *PP v Aguilar Guen Garlejo* [2006] 3 SLR(R) 247 at [44]; *PP v Lim Ah Liang* [2007] SGHC 34 at [40].

39 In the present case, I was of the view that the case for a specific deterrence was a less compelling, although not altogether irrelevant, consideration in the sentencing of the appellant. First, I was persuaded that the appellant had, by nature, little or no propensity to drink and drive. Mr Singh pointed out that the appellant, in the first place, did not have the habit of driving regularly. Moreover, on occasions where she would be drinking, the appellant had always used limousine services so that she would not have to drive. Indeed, produced in evidence were tax invoices and a letter from Nev and Freddy Limousine Svcs showing that the appellant had regularly and frequently engaged their services since 2004. Such evidence pointed towards the fact that the appellant generally had the desire to avoid drink driving. Secondly, as I pointed out earlier, the circumstances in which the appellant committed her offence were unique. Unlike most other offenders of drink driving, the appellant was not deliberately being reckless. One could say that at the crucial moment in time, the appellant was simply not thinking rationally and the fear of what would happen to her Aunt dictated her actions.

40 I now turn to the question of general deterrence. In this regard, the specific or individual circumstances in which the particular offence was committed takes a backseat and the importance of upholding law and public order comes to the fore. As explained in *Law Aik Meng* (at [24] and [27]):

> 24 General deterrence aims to educate and deter other like-minded members of the general public by making an example of a particular offender: *Meeran bin Mydin v PP* [1998] 1 SLR(R) 522 at [9] ("*Meeran bin Mydin*").
>
> …
>
> 27 General deterrence is derived from the overarching concept of "public interest". In *Angliss* ([16] *supra*), I had specified that public interest in sentencing is tantamount to the court's view of how public security can be enhanced by imposing an appropriate sentence. A sentencing judge should apply his mind to whether the sentence is necessary and justified by the public's interest in deterring and preventing particular criminal conduct: *Angliss* ([16] *supra*) at [17]. This context should form the backdrop for the interpretation of my decision in *Tan Kay Beng*. The types of

offences and offenders for which punishment will be "certain and unrelenting" would therefore depend upon the corresponding interest of the public in preventing that kind of conduct and in restraining particular offenders. For example, given the current climate where international and domestic terrorist security threats are more prevalent than before, bomb hoaxers must inexorably be visited with draconian sentences. (See *PP v Mohammad Farhan bin Moh Mustafa* District Arrest Case No 1808 of 2004 where the accused was sentenced to three and a half years' imprisonment for a bomb hoax; the senior district judge correctly declared at [14] that "it [was] clear that the sentencing of [such] offences ... must be treated seriously and that a strong deterrent be sent to those whose idle minds might otherwise turn to creating false alarms".) Such offences are easy to commit and difficult to detect and could become rampant if not firmly dealt with. A clear signal must be unequivocally sent by the sentencing court, through an appropriate sentence, that such behaviour will be perennially viewed with grave and unrelenting disapprobation.

The High Court in *Law Aik Meng* further clarified (at [22]) that general deterrence, like specific deterrence, has little part to play in the sentencing of an offender when the crime was an "undeterrable" kind. This is because other like-minded individuals, when placed in a similar situation, would, like the offender, be unable to make a conscious decision to avoid committing the offence. The principle of general deterrence, accordingly, had little relevance to the present appeal.

41 However, I am in no way suggesting that normally drink driving is "undeterrable". Indeed, it is deterrable. It would only become "undeterrable" when the offence was committed in the extremely limited circumstances like the present where the appellant was in no position to overcome the extreme emotional upheaval which she was experiencing at that moment. As mentioned before (see [39] above), where the appellant was aware that she would be involved in drinking at an outing, she would arrange for the use of limousine services so as to avoid any incident of drink driving. In short, there was evidence to suggest that as far as drinking and driving were concerned, she was generally conscious of the need to be on the right side of the law. Therefore, where an offence of drink driving is committed, the court in determining the sentence, must take into consideration all the circumstances and calibrate the sentence to be imposed so that the ends of justice will be met.

42 At this juncture, I wish to state that this court was and is conscious that drink driving remains a serious problem in Singapore society. The DJ provided two tables containing some telling statistics in her GD (at [16)], reproduced as follows:

TABLE 1: NUMBER OF DRINK-DRIVING ACCIDENTS

	2007	**2008**
Fatal	14	18
Injury	174	156
TOTAL	**188**	**174**

TABLE 2: NUMBER OF PERSONS KILLED OR INJURED IN DRINK-DRIVING RELATED ACCIDENTS

	2007	**2008**
Killed	15	22

Injury	263	213
TOTAL	**278**	**235**

The above tables demonstrate two points. First, the number of fatal drink driving accidents and, correspondingly, the number of persons killed due to drink driving had increased from 2007 to 2008. Second, although the number of non-fatal drink driving accidents had decreased from 2007 to 2008, it still hovered at an undesirable level.

Appellant's medical condition

43 I turn, now, to address the last aggravating factor that the Judge had relied on in imposing an imprisonment term. The Judge had written (at [15]) of her GD as follows:

> 15. Further, as indicated in paragraph 39 of the written plea in mitigation as well as Annex 12, the Accused suffers from '*familial involuntary tremors for a long time which gets worse when she is nervous or stressed. These movements are not controllable and would hamper fine finger activities and even driving*'. Clearly, in such an inebriated state and with an existing medical condition which affects fine finger activities including driving the Accused should not have taken to the wheels that night.

44 It cannot be disputed that the appellant should not have driven her car on the morning of 27 April 2009 when she suffered from such a condition. However, as I have explained earlier, the grave emotional stress under which the appellant belaboured that morning were such that while her decision to drive remained unforgivable (in the sense that it did not excuse her for the offence of drink driving), it was at least understandable why she took to the wheels. More importantly, and in any event, the appellant's medical condition had nothing to do with her offence of drink driving. It was a wholly separate impediment to her ability to drive. Hence, while it may be a relevant consideration in assessing whether to allow the appellant to retain her driving licence, it certainly was not an aggravating factor justifying the imposition of a custodial term for the appellant's offence of drink driving.

45 On the other hand, I must also add that I was also not persuaded by Mr Singh's argument that the appellant's ill health was a relevant mitigating factor in this case. In *Leaw Siat Chong v Public Prosecutor*, [2001] 3 SLR(R) 646 ("*Leaw Siat Chong*"), Yong Pung How CJ addressed a similar argument, that the appellant's poor medical condition should warrant a lesser sentence, as follows (at [13]):

> 13 As for the appellant's health issues, namely high blood pressure and a pain in his right eye, I wish to reiterate the point I made in *PP v Ong Ker Seng* [2001] 3 SLR(R) 134 (at [30]) that **ill-health is not a mitigating factor except in the most exceptional cases when judicial mercy may be exercised**. In the present case, the appellant had not presented me with evidence that the health problems were of such a serious nature that I ought to reduce his sentence on that ground. I also found it pertinent that the appellant had been able to continue working despite his health problems.
>
> [Emphasis added]

Ultimately, whether a case is exceptional would depend upon the severity of the offender's illness.

The sort of circumstances in which judicial mercy has not been exercised were helpfully compiled by the High Court in *Chng Yew Chin v Public Prosecutor*, [2006] 4 SLR(R) 124 ("*Chng Yew Chin*"). In that case, the appellant, who suffered from nasopharyngeal cancer, was convicted of outraging the modesty of his domestic helper. It was argued that his medical condition should be a mitigation factor in his favour. In response, the court noted as follows (at [52]):

> 52 However, it is crucial to appreciate that the discretion to grant judicial mercy is one that is exercised with the utmost care and circumspection. I pause here to emphasise this important qualification by highlighting some cases on point, where the plea for judicial mercy has not succeeded:
>
> (a) In *Leaw Siat Chong v PP* ([50] *supra*), the appellant suffered from high blood pressure and a pain in his right eye. This was not found to be exceptional.
>
> (b) In *Viswanathan Ramachandran v PP* [2003] 3 SLR(R) 435 , the High Court held that the appellant's condition of chronic hypertension and diabetes was not exceptional.
>
> (c) In *PP v Thavasi Anbalagan* [2003] SGDC 61, the court did not accord significance to the accused's history of heart problems.
>
> (d) In *Md Anverdeen Basheer Ahmed v PP* [2004] SGHC 233, the appellant had complained of a "host of medical problems and ailments". Yong Pung How CJ reiterated, at [68], that "the cases have stated that ill-health would only be a mitigating factor in exceptional cases as an act of mercy, such as where the offender suffers from a terminal illness".
>
> (e) In *Lim Teck Chye* ([50] *supra*), the appellant was diagnosed with secondary diseases and low vision due to an acute eye disease. Even though this disease might potentially cause blindness, it was not found to be exceptional enough.
>
> (f) In *PP v Lee Shao Hua* [2004] SGDC 161, the court did not attach any weight to the accused's health difficulties, which included tuberculosis, asthma and heart problems.
>
> (g) In *PP v Shaik Raheem s/o Abdul Shaik Shaikh Dawood* [2006] SGDC 86, the appellant was diagnosed as suffering from high blood pressure, diabetes, and bilateral knee osteoarthritis. The pain in his right knee was permanent and likely to worsen. Though his disability was sufficient to qualify as a handicap under the Automobile Association of Singapore's guidelines, this did not move the court to exercise mercy.
>
> In each of these cases, the plea for mercy was disregarded simply because the illness complained of was not of a sufficient severity.

46 From precedents, judicial mercy has been exercised in two types of cases:

a. where the offender suffered from a terminal illness: see *Lim Teck Chye v Public Prosecutor*, [2004] 2 SLR(R) 525 and *Chng Yew Chin*; and

b. where the offender was so ill that a sentence of imprisonment would carry a high risk of endangering his life: see *Public Prosecutor v Tang Wee Sung*, [2008] SGDC 262.

47 In the present case, I did not think that the appellant's medical condition fell within either of the two categories in which judicial mercy has been exercised. It was submitted that, in addition to

the *familial involuntary tremors* described in [41] which only causes involuntary finger movements, the appellant suffered from two other ailments. The first, and more serious, one is a severe anaphylactic reaction. This is a reaction to an unknown food substance which may cause cardiovascular collapses. While this is a fairly serious condition, I am convinced that, with the proper attention and medical care, the appellant's condition can be sufficiently addressed in prison without endangering her life. The other ailment is what is known as Morton's metatarsalgia of the right foot. This merely results in pain in walking and requires that special footwear be made available. Such an ailment does not merit the exercise of judicial mercy.

Rendered Public Service

48 In passing, I should allude to counsel's submission that the appellant had rendered distinguished public service as a well-respected radiologist. That this was a factor which the court could take into consideration for purposes of sentencing was recognised in the case of *Glenn Knight v Public Prosecutor* [1992] 1 SLR(R) 523. However, in this case, I did not think I needed to rely on this as a further factor to come to my decision.

Conclusion

49 In conclusion, let me emphasise that I was, in this case, only concerned with the question as to what was a just punishment to impose on the appellant, taking into account all the circumstances. The fact that the appellant had committed an offence of drink driving was not in issue. To summarise, generally the norm in the sentencing of a first offender of drink driving is a fine. Sentencing precedents do not bear out the assertion that when the offender's blood or breath alcohol level was three times over the prescribed limit, a custodial sentence was usually imposed. Aggravating factors must be found to justify the imposition of an imprisonment term in the present case. None, in my view, could be found here. First, no evidence was adduced to demonstrate that the appellant was unable to control her vehicle. Secondly, there were extenuating circumstances when the appellant took to the wheels to drive to the NUH that morning- see [30] to [34] above. This was not the normal case of an offender who, after a drinking binge, decided to drive home. The appellant was deeply remorseful of her action. Accordingly, I found that there were no aggravating circumstances present warranting the imposition of a custodial sentence.

50 In the result, I made the following orders which I deemed just in the circumstances:

a. the term of two weeks' imprisonment be set aside;

b. the appellant be fined $5,000; and

c. the four year disqualification period from holding or obtaining a driving licence for all classes of vehicles imposed by the DJ be maintained, save that the period was to start immediately.