Fam Shey Yee *v* Public Prosecutor
[2012] SGHC 134

Case Number	: Magistrate's Appeal No 33 of 2012, Criminal Motion No 30 of 2012 and Criminal Revision No 5 of 2012
Decision Date	: 28 June 2012
Tribunal/Court	: High Court
Coram	: Chan Sek Keong CJ
Counsel Name(s)	: Udeh Kumar s/o Sethuraju (S K Kumar Law Practice LLP) for the petitioner/appellant; Charlene Tay Chia (Attorney-General's Chambers) for the respondent.
Parties	: Fam Shey Yee — Public Prosecutor

Criminal Procedure and Sentencing

28 June 2012 Judgment reserved.

Chan Sek Keong CJ:

Introduction

1 Fam Shey Yee ("the appellant"), who was unrepresented in the proceedings below, pleaded guilty to two charges in the District Court. The first charge was for driving along Crawford Street on 10 July 2011 at around 11.50pm while under disqualification ("the first charge"), an offence under s 43(4) of the Road Traffic Act (Cap 276, 2004 Rev Ed) ("the RTA"). The second charge was for the connected offence of driving without the necessary third-party insurance coverage ("the second charge"), an offence under s 3(1) of the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed).

2 The appellant was sentenced to six weeks' imprisonment and three years' disqualification from holding or obtaining a driving licence for all classes of vehicles on the first charge. On the second charge, the district judge fined him $500 and imposed 12 months' disqualification from holding or obtaining a driving licence for all classes of vehicles. The appellant has appealed to this court against the sentence for only the first charge.

Criminal Motion No 30 of 2012 and Criminal Revision No 5 of 2012

3 As at 10 July 2011, the appellant was already subject to a previous disqualification order because he had, in District Arrest Case No 39929 of 2010 ("DAC 39929/2010"), pleaded guilty on 2 September 2010 to a charge under s 70(4)(*a*) of the RTA for failing, without reasonable excuse, to provide a breath specimen when required to do so. On that occasion, the District Court had fined the appellant $2,000 and had also disqualified him from holding or obtaining a driving licence for all classes of vehicles for 18 months.

4 Before me, counsel for the appellant mounted a collateral attack on the appellant's conviction in DAC 39929/2010. Counsel contended that the appellant had been wrongly convicted as he had a reasonable excuse for failing to provide a breath specimen, and accordingly, the disqualification of 18 months imposed on the appellant was unlawful. The appellant filed Criminal Motion No 30 of 2012 on

17 April 2012 for leave to adduce further evidence about the circumstances in which he had failed to provide a breath specimen. When informed that the application was irregular and improper and that he should have applied by way of a criminal revision, the appellant filed Criminal Revision No 5 of 2012 on 3 May 2012. His criminal motion thereupon either lapsed or was deemed to have been withdrawn.

My decision

5 Before this court, counsel for the appellant submitted that the conviction of the appellant in DAC 39929/2010 was unsafe because the appellant had been suffering from an asthmatic attack brought upon by his nervousness at the time his breath specimen was required. In support of this contention, counsel relied on two medical reports from Dr Tan Kok Leong of The Revival Medical Centre. The first, dated 17 April 2012, stated that the appellant had suffered from hypertension, chest tightness and mild diabetes mellitus since 2005. The second, dated 23 April 2012, stated that the appellant suffered from an asthmatic condition, and that breathing difficulties could have prevented him from providing a breath specimen. The appellant's counsel contended that these medical reports showed that the appellant had "reasonable excuse" for his failure to provide a breath specimen. It was accordingly argued that the offence under s 70(4)(*a*) of the RTA for which the appellant was convicted in DAC 39929/2010 had not been made out.

6 In my view, there is no basis whatever for a criminal revision of the appellant's conviction in DAC 39929/2010 for the following reasons. First, he pleaded guilty to the charge in that case. Second, he did not at that time raise the medical conditions which he now raises. It is established law that the court will not exercise its revisionary power except where the conviction is illegal or where there is serious injustice (see *Mohamed Hiraz Hassim v Public Prosecutor* [2005] 1 SLR(R) 622 at [9]; *Yunani bin Abdul Hamid v Public Prosecutor* [2008] 3 SLR(R) 383 at [56]; and *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR(R) 47 at [26] and [28]). The appellant has not alleged that in DAC 39929/2010, he was unaware of the nature of the offence which he was charged with or was improperly pressured into pleading guilty. The Statement of Facts that the appellant admitted to in that case made no mention of his alleged breathing difficulties.

7 Counsel for the appellant also argued, in the alternative, that the sentence of 18 months' disqualification in DAC 39929/2010 was outside the scope of s 70(4)(*a*) of the RTA, which provides as follows:

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

The punishment laid down by s 67 of the RTA reads:

> **Driving while under influence of drink or drugs**
>
> **67.**—(1) Any person [convicted under this section] …

…

... 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 ... be disqualified from holding or obtaining a driving licence for a period of not less than 12 months from the date of his conviction ...

…

8 The appellant's argument on these two sections read together is that *only* the punishment imposed by *s 67(1)* applies to an offence under s 70(4)(*a*). It is argued that the mandatory disqualification imposed by *s 67(2)* does *not* apply to a s 70(4)(*a*) offence because s 67(2) is expressed to apply only to "[a] person convicted of an offence *under this section*" [emphasis added], *ie*, an offence under s 67. A conviction for an offence under s 70(4)(*a*), it is contended, is not a conviction for an offence *under* s 67.

9 The Prosecution's main argument is that a conviction for a s 70(4)(*a*) offence should be treated as a conviction for a s 67 offence, and is based on the decision of the High Court in *Madiaalakan s/o Muthusamy v Public Prosecutor* [2001] 3 SLR(R) 580 ("*Madiaalakan*"). In that case, an issue arose as to whether a prior conviction under the then equivalent of s 70(4)(*a*) ought to be treated as a conviction under the then equivalent of s 67 for the purposes of determining whether the accused was a *repeat* offender under the latter provision. The High Court said at [13] and [16] of *Madiaalakan*:

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

...

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

10 I am unable to agree with the reasoning in these passages in *Madiaalakan*. The language of s 70(4)(*a*) is reasonably simple and clear. The phrase "shall be liable on conviction to be *punished* as if the offence charged were an offence under section 67" [emphasis added] refers to the punishment only. It is not fairly capable of being read as saying that a conviction under s 70(4)(*a*) is to be treated as if it were a conviction under s 67 for all purposes. To say that an offender of offence X is to be punished as if he were an offender of offence Y is quite different from saying that a conviction for offence X is to be treated as a conviction for offence Y. Where the legislative intention is to treat a conviction for one offence as the same as a conviction for another offence, it will be clearly expressed. For example, s 68(4) of the RTA states that "[w]here a person convicted of an offence under [s 68] has been previously convicted of an offence under section 67, he shall be treated for the purpose of [s 68] as having been previously convicted under [s 68]".

11 Although the Prosecution's submission based on *Madiaalakan* is wrong on the issue of whether a conviction under s 70(4)(*a*) is to be treated as a conviction under s 67, I accept its alternative submission that the punishment in s 67(2) would in any event also apply to a s 70(4)(*a*) offence. Section 70(4)(*a*) clearly provides that a person convicted of an offence under s 70(4) "… shall be liable on conviction to be punished as if the offence charged were an offence under section 67". The offence under s 67 is punishable with the penalties set out in ss 67(1) and 67(2).

12 The appellant's final argument was that the sentence of six weeks' imprisonment was wrong as the district judge placed too much weight on his conviction in DAC 39929/2010 as an aggravating factor. The appellant's counsel relied on my decision in *Chong Pit Khai v Public Prosecutor* [2009] 3 SLR(R) 423 ("*Chong Pit Khai*") in support of his argument that the culpability of the appellant in DAC 39929/2010 was low because he had been medically handicapped from providing a breath specimen. The facts in *Chong Pit Khai* are markedly different from those in the present case. Here, in relation to DAC 39929/2010, the appellant had failed, without reasonable excuse, to provide a breath specimen. Despite having many opportunities to mention his alleged breathing difficulties, the appellant raised it only at this appeal, more than two years after he had failed to provide a breath specimen. It is also not disputed that the sentence of six weeks' imprisonment meted out in the present case falls within the usual tariff of four to eight weeks' imprisonment: see, *eg*, *Public Prosecutor v Tan Chen Chey* [2009] SGDC 485; *Public Prosecutor v Choo Puay Lan* [2010] SGDC 64; *Public Prosecutor v Muhammad Fazil Bin Azman* [2010] SGDC 168; *Public Prosecutor v Lian Chee Yeow Michael* [2011] SGDC 190; and *Public Prosecutor v Tan Thiam Soon* [2011] SGDC 228. Hence, this ground of appeal also fails.

Conclusion

13 For the above reasons, the appellant's criminal revision and appeal are both dismissed. No order is necessary on the appellant's criminal motion since (as mentioned at [4] above) it has either lapsed or been deemed withdrawn.