Bills Committee on
Road Traffic Legislation (Amendment) Bill 2008

Introduction

At the meeting of the Bills Committee on 7 April 2008, the Administration was requested to provide some additional information and response. The information and our response are set out below.

Penalties for the offence of drink driving

2. Under the existing drink driving legislation, the court is required to order disqualification penalty on a second or subsequent conviction. In the Bill, we propose that a disqualification penalty for a period of not less than three months should be imposed on offenders on a first conviction. A Member of the Bills Committee suggested that the proposed disqualification period should be lengthened to six months to one year.

3. We wish to point out that the proposed three-month disqualification period is a minimum rather than a maximum penalty. The court may, if it sees fit having considered all the relevant circumstances of a case, hand down a sentence of disqualification of any duration longer than three months.

4. Under the existing legislation, drivers on a second or subsequent conviction of drink driving is liable to be disqualified from driving for not less than 2 years. In practice, there were a number of cases in which the court disqualified the drivers for up to 3 years on a repeated conviction, including some cases not involving personal injuries. There were also cases whereby the court disqualified drivers on a first conviction, despite that at present there is no provision requiring order of disqualification on a first conviction.

5. Judgments on drink driving offences indicate that the court considers many factors when handing down a sentence. These include, for example, level of alcohol concentration, whether the driver has committed other traffic offences when caught, whether there was a traffic accident, whether there

were and if so the number of persons injured, the circumstances behind a guilty plea, etc. All these will be pointers for consideration by the court in dealing with convicted offenders in cases brought up before them.

6. There are some court cases in which judges have specifically stated that different alcohol concentration levels above the prescribed limit is a relevant factor in determining the levels of penalties, including the period of disqualification. At **Annexes A and B** are the judgments by High Court Judges on two magistracy appeal cases.

7. In one of the cases (**Annex A**), the High Court Judge comments that the extent to which the prescribed limit was exceeded is a relevant matter to the sentence. The High Court Judge of another case (**Annex B**) recommends that if the alcohol level exceeds the prescribed limit by only a small margin, a relatively short period of disqualification could be imposed, perhaps significantly less than 12 months. Where the excess is substantial, then 12 months would be proper. In cases where the excess doubles the limit or above, longer periods of disqualification would be appropriate. Where the excess approaches four times the prescribed limit, a disqualification period of over 18 months should be considered. In both cases, other relevant factors, such as the driving record of the offender, have been taken into account.

8. Under our current proposed package of deterrent measures, a driver who is not involved in any traffic accident, or has not committed any traffic offence, may still be prosecuted and convicted of drink driving if he is found to have consumed alcohol above the legal limit when driving, via a random breath test. He is then liable to the proposed new penalties of attending a mandatory driving improvement course, and disqualification from driving for at least three months, in addition to existing penalties including a fine and imprisonment. We consider these measures would be a strong deterrent against drink driving, and would discourage drivers who now tend to take a chance from driving after drinking. Moreover, drink driving offenders can be prosecuted and convicted of dangerous driving, or even causing death by dangerous driving depending on the circumstances and evidence of the cases concerned, and heavier penalties may be imposed.

9. In the light that the proposed disqualification for not less than three months on a first conviction is but one deterrent out of a proposed package of other additional measures to deter drink driving, and having regard to the decisions of the appellate courts on the relevance of alcohol concentration in addition to other relevant factors in determining the appropriate sentence, we suggest that the proposed package of deterrent measures should first be introduced. We will closely monitor the effectiveness of the new legislation upon its enactment, including the trends on the hit rate of the screening breath test, and accident and prosecution statistics, and consider introducing heavier penalties on drink driving offences as necessary.

Arrangements in conducting random breath tests by the Police

10. At the Bills Committee meeting of 7 April 2008, the Police explained that they would follow the proposed arrangements in conducting RBT as set out in Annex E to LC Paper No. CB(1)1174/07-08(02), and report in due course on the implementation of RBT to the Panel on Transport of the Legislative Council. If there are proposed changes to those arrangements in future, we will consult the Panel on Transport.

Transport and Housing Bureau
16 April 2008

HCMA 401/2004

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO. 401 OF 2004
(ON APPEAL FROM TMCC 881 OF 2004)

BETWEEN

HKSAR Respondent

and

TSE WAI LUN Appellant

Before: The Honourable Mrs Justice V. Bokhary in Court
Date of Hearing: 3 June 2004
Date of Judgment: 3 June 2004

J U D G M E N T

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1. On 22 March 2004 the Appellant, a man aged 60, appeared before T.S. Jenkins, Esq. in the Magistrate's Court at Tuen Mun to face two charges of careless driving and one charge of driving a motor vehicle with an alcohol concentration in breath above the prescribed limit. One of the careless driving charges was withdrawn. The Appellant then pleaded guilty

to the other two charges. On the careless driving charge, the Magistrate fined the Appellant $2,500, and there is no appeal against that. But on the alcohol charge, the Magistrate sentenced the Appellant to 3 months' imprisonment, and there is an appeal against that.

2. The proportion of alcohol in the Appellant's breath was 122 micrograms of alcohol in 100 millilitres of breath, which was five times over the prescribed limit of 22 micrograms of alcohol in 100 millilitres of breath. This offence occurred on 31 January 2004. It was not the first time that the Appellant had committed such an offence. On 28 October 2000 he drove a motor vehicle with 105 micrograms of alcohol in 100 millilitres of breath, which was four times over the prescribed limit. On 29 December 2000 he was, for that offence, fined $2,000 and disqualified from driving for 3 months.

3. In sentencing the Appellant to 3 months' imprisonment on the alcohol charge, the Magistrate attached weight, as he was bound to do, to the extent by which the prescribed limit was exceeded and to the fact that the Appellant had committed such an offence before, receiving a non-custodial sentence which did not deter him from offending again. Did he attach undue weight to these matters?

4. The Perfected Grounds of Appeal Against Sentence read as follows:

> 1. The sentence in respect of charge 3 was manifestly excessive in that the learned Magistrate:-
>
> (a) Attached undue weight to the high level of breath/alcohol at the time of the commission of the offence and the fact that he

was a second offender who had been dealt with leniently in 2000.

(b) He was unduly influenced by the high reading as an aggravating feature of the offence without fully recognising the circumstances surrounding the scene of collision, that there was no personal injury or substantial damage to 3rd party property.

(c) He did not pay sufficient weight to the mitigation advanced, in particular the defendant's good driving record prior to 2000 and had never been to prison before.

(d) He should have suspended a prison sentence."

5. The extent to which the prescribed limit was exceeded was a relevant matter. So was the fact that the Appellant had committed such an offence before and had not been deterred by the non-custodial sentence which he received. The Magistrate certainly attached considerable weight to these matters. But I do not think that he attached undue weight to them. Nor do I think that the Magistrate failed to give full recognition to all the circumstances. I do not think that he failed to pay sufficient weight to the mitigation advanced. The Appellant's good driving record prior to 2000 was of limited weight given the offences which he has committed since then. As for the fact that the Appellant has never been to prison before, the whole point of the Magistrate's thinking was that prison might be the only thing that would deter this Appellant from this sort of conduct which is a potential danger of a very great kind to himself and others. In my view, the Magistrate was justified in thinking along such lines.

6. In all the circumstances, I am not persuaded that the Magistrate was obliged to suspend the prison sentence. In my view, he was entitled to pass immediate custodial sentence which he passed.

7. Accordingly, I dismiss this appeal.

(V. Bokhary)
Judge of the Court of First Instance
High Court

Mr Duncan PERCY, instructed by Messrs Clarence Wong, Cheung & Liu, for the Appellant: TSE Wai-lun

Miss Vinci LAM, GC of the Department of Justice, for the Respondent

HCMA1088/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

(Appellate Jurisdiction)

MAGISTRACY APPEAL NO. 1088 OF 2006

(ON APPEAL FROM ESCC 4109 OF 2006)

BETWEEN

HKSAR Respondent

and

WONG MAN (黃文) Appellant

Before : Hon McMahon J in Court
Date of Hearing : 23 January 2007
Date of Judgment : 23 January 2007

J U D G M E N T

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1. The appellant was convicted on her own plea of an offence of driving a motor vehicle with a breath alcohol concentration exceeding the prescribed limit, contrary to section 39A(1) of the Road Traffic Ordinance, Cap. 374. She was made the subject of a community service order of 200 hours and disqualified from holding a driving licence for two years. She appeals her sentence on the basis that it is manifestly excessive.

2. The facts of the case were that the appellant was driving her motor vehicle at 4:30 a.m. in Kornhill in Quarry Bay when it mounted a pavement and collided with separation railings and a sign "Pedestrians ahead". Her vehicle was also badly damaged, but no one was injured.

3. Police attended the scene and breath tested the appellant. She was found to have 82 micrograms of alcohol present in 100 millilitres of her breath, that is nearly four times the prescribed limit of 22 micrograms. The appellant remained silent when arrested and cautioned. She was not charged with careless driving as, for some reason, it was considered there was insufficient evidence.

4. The appellant prior to this had been driving for 14 years and had a clear record. Both Mr Hung for the appellant and Mr Lee for the respondent have taken me through a large number of magistracy appeal authorities concerning penalties which had previously been imposed in drink driving cases.

5. Those authorities are perhaps noteworthy for the variations in the sentences imposed for offences of this sort involving relatively large levels of breath alcohol, and particularly so in terms of the licence disqualification period imposed.

6. But one general principle clearly emerges. The degree to which the level of alcohol in the breath of the offender exceeds the prescribed limit is relevant to the period of disqualification imposed. (See *Lau Shu Wing*, HCMA1124/1998.)

7. Obviously the greater the margin by which the prescribed level is exceeded then the greater the culpability of the offender. Without attempting to set out tariffs, but with a view to promoting some consistency in penalty in respect to this offence, it seems to me that where a first offender's breath alcohol level exceeds the prescribed limit by only a small margin, a relatively short period of disqualification could be imposed, perhaps significantly less than 12 months. Where the excess is substantial, then 12 months would be a proper disqualification period, as reflected in many of the authorities produced to me today. In circumstances where there is a doubling or more of the prescribed limit, longer periods of disqualification would be appropriate. Where the breath alcohol level of an offender approaches four times the prescribed limit, a disqualification period of over 18 months should be considered.

8. In the present case the appellant's breath alcohol level was nearly four times the prescribed level. That in my view justified the period of disqualification imposed by the magistrate. It may be thought that, in comparison to the periods of disqualification imposed in previous cases, it is somewhat high, but regardless of whether or not the appellant was charged with careless driving, the effect of that alcohol level upon her driving was plain to see.

9. For no obvious reason other than the effect her alcohol consumption had on her driving, she simply failed to negotiate a reasonably gradual right hand bend and ran onto the pavement. She was obviously travelling at a reasonably fast speed at the time and it was fortuitous there was no one injured.

10. In the circumstances I do not see that the period of disqualification can be said to be manifestly excessive.

11. So far as the further penalty of 200 hours' community service is concerned, however, I think that to be too high. It approaches the upper range of such orders. I note from the report obtained by the magistrate prior to sentencing that 80 hours of service for the appellant was recommended by the probation officer.

12. In my judgment the 200 hours of community service ordered combined with the period of licence disqualification leads to too great a totality of sentence in the circumstances of this case, bearing in mind also the previous clear traffic record of the appellant.

13. In my view an appropriate order in this regard would be 100 hours.

14. Accordingly, the appeal against sentence is dismissed except that the order that the appellant serves 200 hours' community service is set aside and replaced with an order that she serves 100 hours of community service.

(M.A. McMahon)
Judge of the Court of First Instance,
High Court

Mr Robert K.Y. Lee, SGC of the Department of Justice, for HKSAR

Mr Hung Wan Shun, Stephen, of Messrs Pang, Wan & Choi,
for the Appellant