《2008 年道路交通法例(修訂)條例草案》委員會

引言

二零零八年四月七日法案委員會會議上，委員要求當局提供額外資料及回應。下文載述有關資料及回應。

酒後駕駛罪行的罰則

2. 根據現行有關酒後駕駛的法例，法庭須取消第二次或再次被定罪者的駕駛資格。我們在草案建議規定取消首次被定罪者駕駛資格至少三個月，以作懲處。法案委員會一名委員提議，取消駕駛資格的建議期限不應少於六個月至一年。

3. 我們要指出，建議取消駕駛資格三個月的期限是最低而非最高的刑罰。法庭考慮每宗個案的相關情況後，如認為恰當，可判處多於三個月的取消駕駛資格期限。

4. 現行法例規定，第二次或再次因酒後駕駛被定罪的司機可被取消駕駛資格至少兩年。實際上，在一些個案中，法庭判處再次被定罪司機取消駕駛資格的期限長達三年，當中包括一些無人受傷的個案。另外，雖然現時法例並沒有規定首次被定罪的司機必須被取消駕駛資格，但法庭也在一些個案中，取消首次被定罪的司機的駕駛資格。

5. 有關酒後駕駛罪行的判詞顯示，法庭判刑時會考慮多項因素。舉例而言，這些因素包括酒精濃度、司機被捕時有否干犯其他交通罪行、是否發生交通意外、是否有人受傷及受傷人數，以及認罪個案的背景情況等。這些因素都會為法庭在日後就被定罪的犯案者判刑時提供指示性參考。

6. 在一些法庭個案中，法官特別指明，酒精濃度超出法定限度的不同程度是決定刑罰輕重(包括取消駕駛資格的期限)的一個相關考慮因素。**附件A**及**B**[1] 載述高等法院就兩宗裁判法院上訴個案所作的判詞。

7. 在其中一宗個案(**附件 A**)，高等法院法官認為，酒精濃度超出法定限度的程度與刑罰有關。在另一宗個案(**附件 B**)，高等法院法官建議，如果酒精濃度稍微超出法定限度，應該判處相對較短的取消駕駛資格期限，可能是一個明顯較 12 個月為少的期限；假如顯著超出限度，則適宜判處 12 個月期限；倘若超出一倍或以上，適宜判處較長期限；如超出訂明限度接近四倍，則應考慮判處 18 個月以上的期限。以上兩個個案，法庭也曾考慮過其他相關因素，例如違例者的駕駛記錄。

8. 我們現時建議的一系列遏止酒後駕駛措施，即使司機並沒有涉及任何交通意外或沒有干犯任何交通罪行，警方也可藉着隨機呼氣測試，發現司機駕駛時曾飲用酒精飲品而體內酒精濃度超過法定限度，司機因而可能會被控酒後駕駛而被定罪。一經定罪，他除了根據現行法例，可被判罰款及監禁之外，還可根據建議的新罰則，被強制規定參加駕駛改進課程，以及取消駕駛資格至少三個月。我們認為，這套懲處措施會對酒後駕駛發揮相當大的阻嚇作用，及有助遏止現時司機酒後也駕駛的心存僥倖情況。再者，視乎每宗個案的情況和證據，干犯酒後駕駛罪行者可被控告以及裁定危險駕駛或危險駕駛引致他人死亡的罪名，而法庭亦可判處更重刑罰。

9. 取消首次被定罪者駕駛資格至少三個月的建議，只是整套遏止酒後駕駛的新增措施的其中一環。而上訴法庭的判決亦顯示除其他相關因素外，酒精濃度的水平是上訴法庭決定合適刑罰的相關因素。有見及此，我們建議首先實施現時建議的整套遏止酒後駕駛措施。我們會密切監察新法例生效後的成效，包括接受檢查呼氣測試後發現超出法定限度的比率，以及檢控和交通意外統計數字的趨勢。在有需要時，會考慮進一步加重酒後駕駛罪行的罰則。

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[1] 有關判詞並沒有中文版本。

警方進行隨機呼氣測試的安排

10. 在二零零八年四月七日法案委員會會議上，警方解釋會按立法會 CB(1)1174/07-08(02)號文件附件 E 所載的建議安排進行隨機呼氣測試，並會在適當時候向交通事務委員會匯報進行隨機呼氣測試的情況。日後如擬改動上述安排，我們會諮詢立法會交通事務委員會。

運輸及房屋局
二零零八年四月十六日

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 One of the careless driving charges was withdrawn.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