Criminal Proceedings of Drunk Driving Cases in Sri Lanka: An Analysis of Law and Practice

KC Munasinghe

Sudath Perera Associates, Nawala, Sri Lanka

kasunchamaramunasinghe@gmail.com

Abstract - It is reported that, in Sri Lanka, there are almost 8000 road accidents take place per year and out of them a considerable number of accidents are occurred due to drunk driving. There are many rules and regulations presented as to how charges to be framed and the procedure of breathalyser tests shall be carried etc. in relation to drunk driving cases in Sri Lanka. Consequently, every person in the country reached into the attitude that the judicial system has failed to administration of justice over the parties of the drunk driving cases. This study follows the qualitative approach while analysing the existing legislative enactments, regulations, and case laws with the objective of evaluating the substantive and procedural aspects of the Sri Lankan legal framework relating to drunk driving, while inviting relevant stakeholders to revisit their approach towards drunk driving cases.

Keywords— drunk driving, Breathalyzer test, criminal charges, penalties, admission of guilt

I. INTRODUCTION

It is common fact to observe that, many drunk driving cases are being taken up and fines are being imposed against the persons who plead guilty for violating motor traffic law daily in the court houses in Sri Lanka (Wickramaisnghe, 2021) Yet, it is an exception to see an instance where an accused defending himself in a trial by pleading not guilty for such charge. This happens due to various reasons including, to get the case concluded on the very first day, therein, the accused shall not need to spend more time with the litigation and/or due to lack of knowledge on the defenses available to an accused in motor traffic law. Consequently, most of the Attorneys do not focus much on drunk driving law in Sri Lanka other than the penalties stipulated in law. Therefore, the study intends to articulate law relating to drunk driving and breathalyzer test, having the objective of evaluating the substantive and procedural aspects of the domestic legal framework relating to drunk driving.

II. THE MOTOR TRAFFIC ACT

The Motor Traffic Act, No. 14 of 1951, (hereinafter referred to as "MTA") which shall be read with the Increase of Fines Act, No. 12 of 2005, MTA (Amendment) Acts, Nos. 31 of 1979, 40 of 1984 and 10 of 2019, contains the law relating to drunk driving.

Further, according to the MTA, there are instances where the police frame charges including the offences stipulated in the Penal Code and Offences committed under the influence of Liquor Act, No. 41 of 1979, (hereinafter referred to as OCILA) which shall be referred with the Increase of Fines Act, No. 12 of 2005.

MTA was introduced in relation to motor vehicles and their use on roads, having the objective to regulate the provision of passenger carriage services and the carriage of goods by motor vehicles, and to provide for the regulation of traffic on roads and for other matters connected with or incidental to the matters aforesaid.

MTA (1951) stipulates that "no person shall drive a motor vehicle on a road after he has consumed alcohol or any drug". It is fascinating to note that, this section was amended by the MT (Amendment) Act, No. 31 0f 1979, and from that, the original section was repealed and substituted the aforementioned section. The section 151 (1) before the amendment was "No person shall drive a motor vehicle on a highway when he is under the influence of liquor."

The main difference was that the legislature removed the underlined part of the original section and incorporated new wording as "no person shall drive a motor vehicle on a road after he has consumed alcohol or any drug."

Offence mentioned in the section 151 (1) further extend as (1A) and (1B). These sections shall be read with sections 214, 215, 216, 216 (A) and 216 (B) as they relate according to the facts of the case.

Where, any person who contravenes any provision of this MTA or any regulation, or fails to comply with any order, direction, demand, requirement or notice lawfully issued, made or given (under any provision of MTA or any regulation) shall be guilty of an offense under MTA. Further, attempting to commit, or abetting the commission of, an offence shall have been recognized as offences under MTA.

The suspect/accused shall be trialed in the Magistrate court as a summary trial and if he is proven to be guilty, wrongdoer will be liable to a fine not less than twenty-five thousand rupees and not exceeding thirty thousand rupees or to imprisonment of either description for a term not exceeding three months or to both such fine and imprisonment and to the suspension of his driving license for a period not exceeding twelve months.

Further punishments are stipulated under the sections 216 (a) and (b) as the read with Section (1A) and (1B) of 151 of MTA.

According to Section 216 (a), "any person who is guilty of the offence of contravening Section 151 (1A) shall, on conviction after summary trial before a Magistrate, be liable to a fine not less than twenty-five thousand rupees and not exceeding thirty thousand rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment and the cancellation of his driving license"

Section 216 (b) states that, "any person who is guilty of the offence of contravening the provision (1B) of section 151 shall, on conviction after summary trial before a Magistrate, be liable:

(a) where he causes death to any person, to a fine not less than one hundred thousand rupees and not exceeding one hundred and fifty thousand rupees or to imprisonment of either description for a term not less than two years and not exceeding ten years or to both such fine and imprisonment and to the cancellation of the driving license;

(b) where he causes –

(i) hurt to any person, to a fine not less than thirty thousand rupees and not exceeding fifty thousand rupees or to imprisonment of either description for a term not exceeding one year or to both such fine and imprisonment and to the cancellation of his driving license; or

(ii) grievous injury to any person, to a fine not less than fifty thousand rupees and not exceeding one hundred thousand rupees or to imprisonment of either description for a term not exceeding five years or to both such fine and imprisonment and to the cancellation of his driving license" (Sri Lanka No. 14 of 1951).

According to section (1) (cc) of the 151 of the MT Act, a police officer can arrest any person without a warrant if he has reasonable grounds to believe that such person has committed an offence under this section.

Furthermore, subsections (a) and (c) of 1 (c) of section 151 stipulates that, where a police officer suspects that the driver of a motor vehicle on a road has consumed alcohol or drug, he may require such person to submit himself immediately to a breath test for alcohol or an examination by a Government medical officer in order to ascertain whether such person has consumed alcohol and that person shall thereafter comply with any such requirement as the case may be.

Under the same subsection (b and d), if the suspect refuses to face for any such examination, law permits the court to presume that he has consumed alcohol or drugs unless, evidence to the contrary is presented, and the report of the government medical officer constitutes sufficient evidence that such person had consumed liquor or drug, unless contrary is proven.

III. OCILA AND THE PENAL CODE

At times, it can be observed in courts that, Police officers use offences stipulated in the OCIL Act and the Penal Code together, at the instance where framing charges on drunk driving depending on the facts of the particular cases.

In such situations, section 2 of the OCIL Act, section 2 shall be read together with section 12 (2) and section 3. According to section 2, "Any person who, being under the influence of liquor, in any public place or any place where it is trespass for him to enter and there conduct himself in such a manner as to cause annoyance to any person shall be guilty of an offence".

Further in reference to the above-mentioned section 12 (2), it states, "Every person guilty of an offence under section 2 or 4 of this Act shall on conviction after trial be liable to a fine not less than one thousand five hundred rupees and not exceeding three thousand five hundred rupees or to imprisonment of either description for term of not less than one year and not exceeding two years

notwithstanding that such fine or imprisonment is excess of the original jurisdiction of such Court".

Moreover, if any person has caused any damage to a public property, the police can raise a charge against such accused by utilizing section 3 of the OCIL Act where it states that, "Any person who, being under the influence of liquor, causes damage to public property shall be guilty of an offence shall be liable upon conviction to be punished with imprisonment of either description for a term of not less than six months and not exceeding two years and shall also be liable to a fine not less that one thousand five hundred and not exceeding five thousand rupees".

Similarly, it is common practice of the Police to refer to the following offences prescribed in the Penal Code (1889) in drunk driving cases depending on the facts of the cases.

For istance, section 298 states of the Penal Code (1889) that, "Whoever causes death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished shall be punished with imprisonment of either description for a term which may extend to five years or with fine or with both" Thus, this section will be employed in the event someone is accused of causing death by negligence.

Further, in an instances where the aggrieved party had been injured, the police will refer to Section 317 which states sets out the punishment for voluntarily causing hurt; "Whoever, except in the case provided for by section 325, voluntarily causes hurt shall be punished with imprisonment of either description for a term which may extended to one year or with fine which may extend to one thousand rupees or with both"

Police would also avail Section 316, which provides for the punishment for voluntarily causing grievous hurt in cases where there are any fatal injuries. That section states, "whoever, except in the case provided for by section 326, voluntarily causes grievous hurt shall be punished with imprisonment of either description for a term which may extended to seven years and shall also be liable to a fine"

IV. REGULATIONS AND IGP ORDERS

MTA enabled the regulations to be made the manner in which breath tests should be taken, the concentration of alcohol in a person's blood at or above which a person should be deemed to have consumed alcohol or any drug, mode and manner in which such examination should be conducted on a driver.

Accordingly, the way procedure of the breathalyzer test shall be conducted is stipulated in the Motor Traffic (Alcohol and Drugs) Regulations (1979) (hereinafter referred to as "1979 regulations"), Extra ordinary gazette No. 708/18 referred to as "Regulations pertaining to offences committed after consuming alcohol 1991" (hereinafter referred to as "1991 regulations") and in IGP Circular No. 697/87 (Motor Traffic Circular 28/87).

Further, there are few other Motor Traffic Circulars passed on arresting drunk drivers, using new Redline breathalyzer for breath test of drunk drivers and in regarding how to use Alcotest/Redline for drunk drivers.

As per the 1979 regulation, 1991 regulation and IGP Circular No. 697/87, the concentration of alcohol in a person's blood at or above which a person shall be deemed to have consumed alcohol shall be a concentration of 0.08 grams of alcohol per 100 milliliters of blood.

V. CONDUCTING BREATHALYZER TESTS IN SRI LANKA

Reference to the IGP Circular No. 697/87, if the police are of the opinion that the suspected and examined driver is mentally and physically sound to drive the vehicle thereafter, he should be advised to be present in the Court on the date given by the police. However, if the suspected driver is not in a position to drive the vehicle, then he should not be permitted to take the vehicle thereafter. In the occasion if there are any other accompanying person competent in driving except the suspected driver, then such person will be allowed to drive that vehicle and in the contrary, the police should take the vehicle to their custody and produce it to the Court.

The latest Circular 78/2014 provides comprehensive instructions as to how a breathalyzer tests is to be conducted. Accordingly, such test should not be carried out after the lapse of 20 minutes from the time of alcohol consumption. Furthermore, the examinee shall not be given an opportunity to smoke before the test. For this particular test, examinee`s mouth shall be washed using clean water and for that purpose, the police should only use a disposable cups. If silicon powder is to be seen on both ends of the tube, it should be cleaned and removed accordingly. After the examinee blows the balloon and results of the test are obtained, all the air in the

balloon should be removed using a white needle. Then the police officer should complete the police Form No. 414 specifying the details as to the expiry date of the balloon and the test tube, lot number of the polythene cover and should seal them together with that Form. It is stipulated in the circular that such test could be carried out in a police station or in a place where an embarrassment would not occur to the examinee. If the balloon turns into green colour and passes the red line of the balloon, the police should refer the matter to the nearest Court to be fixed for the earliest hearing date.

VI. ANALYSIS OF THE JUDICIAL PRACTICES OF SRI LANKA

As stated previously, it is a common practice in criminal courts of Sri Lanka for the accused to plead guilty for drunk driving charges. And the police draft the charges using the aforementioned offences either as a single charge or as joined charges. Subsequently, any aggrieved party is entitled to institute a civil action for the recovery of damages if any damage/hurt is done while drunk driving, from that respective driver.

Accordingly, in the event where such suspect driver pleads guilty for the charge of causing damages/hurt to someone by drunk driving and when he is brought before the Magistrate by the police, the question arises as to whether it amounts to an admission in a Civil suit which is instituted by the aggrieved party against such accused. It was held in the case of Mahipala and Others v Matin Singho (2006) that, "only if the accused had pleaded guilty in the Criminal Court, it would be admissible in the Civil suit" (Mahipala and Others v Matin Singho, 2006).

However, in the latest case of North Colombo Regional Transport Board v Aparekkage Wasantha Pushpakumara Perea (2016), the Court gave a much wider interpretation with regard to this matter as follows:

"The amendment brought to the Evidence Ordinance in 1998 by Act (No.33 of 1998), included a provision to say that, a conviction in a criminal Court is a relevant fact in a civil Court" (North Colombo Regional Transport Board vs A.W.P. Perera, 2016).

Section 41 A (2) states; "Without prejudice to the provisions of subsection (1), where in any civil proceedings, the question whether any person, whether such person is a party to such civil proceedings or not, has been convicted of any offence by any court or court martial in Sri Lanka, or has committed the acts constituting an offence, is a fact in issue, a judgment or order of such court or court martial recording a conviction of such person for such offence, being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant for the purposes of proving that such person committed such offence or committed the acts constituting such offence".

Therefore, this section provides that, a conviction would be admissible evidence in a civil suit, where the fact that he (the person whom so convicted) had committed the said acts constituting the offence is a fact in issue. The law before this amendment was brought was that, a conviction is admissible only if it is on an admission of guilt. The same stance was taken in the case of Mahipala and Others v Martin Singho (2006).

Thus, this position was changed by the legislature by making the conviction, irrespective of whether it is on an admission of guilt or otherwise, admissible in a civil suit. As a result, if an accused is willing to plead guilty for a charge of causing damages/hurt to another after consuming alcohol or drug, that accused person should bear in his mind that, such plea would amount to an admission in a Civil proceeding.

It is also important to note that, in order to use such an admission, the criminal case should be between the same parties. This was held in the case of De Mel and Another v Rev Somaloka (2002) and stated that, "the admissions must specifically relate to the items of negligent driving as set out in the plaint" (De Mel and Another v Rev Somaloka, 2002). This position has been confirmed by the Court of Appeal in the aforementioned case of North Colombo Regional Transport Board (2016) as well.

In order for a conviction, for a charge of failure to avoid an accident under MTA and it to become relevant in a civil action for compensation for negligent driving, the conviction must be on the same items as complained of, by the Plaintiff, which constitute the negligent driving. If the driver has not admitted or was not found guilty of the acts of negligence complained of, then such conviction cannot be made use of to prove his negligence.

As pointed out earlier in this study, there are instances where police join additional charges along with the drunk driving charge. In most of such occasions, they incorporate the charge of reckless/negligent driving. If such a charge is levelled

against an accused, the burden lies on the prosecution to prove that charge as well.

It is worthy to consider the decree of M.V.L. Perera v M.D.G. Perera (1957) with regard to negligent/reckless driving. "A charge under section 151 (l) of the MTA, for failing to take such action as may be necessary to avoid an accident should not be thoughtlessly appended to each and every charge of negligent or reckless driving. In a prosecution under that section, the burden is on the complainant to show what action was reasonably appropriate in the circumstances and to prove that the accused failed to take that action" (M.V.L. Perera v M.D.G. Perera, 1957).

Contributory Negligence is also one of the salient areas that need to focus on when discussing about negligent driving. In the case of North Colombo Regional Transport Board v Aparekkage Wasantha Pushpakumara Perea (2016), the Court of Appeal discussed about the concept of contributory negligence and elaborated that "if a person possesses a driving license, it establishes the fact that he is competent in driving that kind of vehicle, but not having a driving license does not necessarily mean that he cannot drive that type of vehicle. It may be an offence under the law to drive a vehicle on the road without a driving license, but whether it was the cause for the accident is matter that has to be proved separately. Not having a driving license alone does not prove the negligence" (North Colombo Regional Transport Board v Aparekkage Wasantha Pushpakumara Perea, 2016).

As per the case Daniel v Cooray (1941), "in cases where the defendant pleads contributory negligence, the inquiry resolves itself in an elucidation of the question as to which party, by the exercise of ordinary care, had the last opportunity of preventing the occurrence.

As aforementioned, the MT Act, by an amendment to the section 151 (1), the legislature replaced the wording "under the influence of alcohol" to "after consumed alcohol or drug". Prior to the said amendment, the prosecution had to prove that the accused driver had impaired his ability of coordination and orientation due to the influence of alcohol. Seneviratne v Jahan (1967) case is an epitome to support this position. "A person cannot be convicted of having driven a motor car on a highway while he was under the influence of alcohol, in breach of section 151 (1) of the MTA, if the evidence does not indicate that, as a result of the alcohol he had consumed, his powers of co-ordination and orientation had been impaired or that his capacity to drive a car had been prejudicially affected" (Seneviratne v Jahan, 1967).

However, after the said amendment, the prosecution need not to prove that the accused was under the influence of alcohol and as at present, what the law requires to prove is that, the accused had driven the motor vehicle consuming alcohol.

It is also crucial to note that, it is this amendment to the MTA, which introduced the norm of "consumed alcohol" for the very first time and till then, the two known concepts in our law were "under the influence of liquor" and "smelling of liquor." However, provisions of section 151 of the MTA does not take cognizance of both the above concepts. This was discussed in the case of Sumanaratne v OIC, Police Station, Borella and another (1991).

Nevertheless, it is the burden of the prosecution to prove that the accused had a minimum concentration of 0.08 grams' alcohol per 100 milliliters of blood. This position was endorsed in the case of Nalinda Kumara v Officer in Charge, Traffic Police, Kandy and Another (2007) as follows:

"Would a mere statement to indicate a person had 'consumed alcohol' be sufficient for this purpose? My answer to this question is clearly in the negative for the reasons which could e derived from the rest of the provisions contained in the section 151 of the Motor Traffic (Amendment) Act.

It is evident that when a person is charged in terms of section 151 of the MT (Amendment) Act for having committed an offence under said section for having consumed alcohol, the prosecution has to prove that the said person had a minimum concentration of 0.08 grams' alcohol per 100 milliliters in his blood. If the prosecution fails to prove such, it would be considered as the prosecution had failed to establish an important ingredient of the offence" (Nalinda Kumara v Officer in Charge, Traffic Police, Kandy and Another, 2007).

Upon careful perusal of the aforementioned laws, it is evident that, the law relating to drunk driving covers a wide area including civil litigation though in this article, more emphasis is given towards criminal offenses.

Further, the defense counsels should also take into their consideration that, since there are many laws, rules, and regulations as to how the charges relating to drunk driving should be framed and how

breathalyzer tests should be carried out, while demanding the standard burden of proof from the prosecution, they should also bring to the Court's attention to assess whether the stipulated procedure had been correctly adhered as it is vital for a fair trial.

Thus, it shall be concluded that, gravity of pleading guilty to a charge of drunk driving is not simple as it seems, and giving such plea without assessing facts of the case and/or legal risks, could bring many unforeseen repercussions to the accused and/or could deprive the opportunity for an accused person to get discharged from such case.

VII. A WAY FORWARD

Whilst analyzing the law relating to drunk driving in Sri Lanka, it is much fruitful to scrutinize laws pertaining to this area in other jurisdictions as well. In Sri Lanka, breath test and blood test are the only two types of tests that are being conducted to assess drunk driving. However, in Great Britain, an additional method is being carried out, which is an urine test of the suspected drunk drivers. Additionally, in United Kingdom, Wales and Northern Ireland, if one has a minimum concentration of 0.107 grams of alcohol per 100 milliliters in his urine, he will be considered as a violator of drunk driving laws. Whereas in Scotland, that amount is 0.067 grams of alcohol per 100 milliliters.

Interestingly, in 2014, the Scottish government enacted 'The Road Traffic Act 1988 (Prescribed Limit) (Scotland) Regulations 2014' to reduce limits of alcohol concentration in breath, urine and blood. Accordingly, other than above-mentioned alcohol concentration in urine, limit of breath test has also been reduced to 0.022 grams of alcohol per 100 milliliters and 0.05 grams of alcohol per 100 milliliters in blood. The Scottish government has enacted this regulation upon considering 74% of positive feedback of the public during the public consultation which was held in 2012 pertaining to the reducing of alcohol limits.

There are thousands of road accidents reported in Sri Lanka per year. Considering those facts, Sri Lankan government could also take measures to strengthen the drunk driving laws and as a first step, they could also focus on reducing the limits of alcohol concentration. Further, the method of urine testing can also be introduced into our law. Increasement of fines and introducing a procedure to confiscate vehicles used by repeated offenders will also be effective in this regard.

Finally, it can be concluded that, the attention of the law makers and jurists of Sri Lanka in this particular field of law is of paramount importance. Moreover, educating and encouraging citizens to abide by prevailing motor traffic laws and improvising the role of police in enforcing motor traffic laws are also vital in order to protect the citizens as well as to maintain the law and order in Sri Lanka.

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The author is an Attorney-at-Law and a Senior Associate at the Sudath Perera Associates, Nawala. He has obtained a LL.B (Honours) degree from the Faculty of Law, University of Colombo, Sri Lanka. He is also serving as a visiting lecturer at the Faculty of Business Studies and Finance, University of Wayamba, Sri Lanka.