NOTES / AANTEKENINGE

PRINCIPLES GOVERNING SENTENCE ON A CHARGE OF DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS

1 Introduction

Section 65 of the National Road Traffic Act 93 of 1996 creates a number of offences relating to drink-driving (all references to statutory provisions which follow refer to this Act). The primary rationale for these provisions is the protection of the public (*R v Bezuidenhout* 1953 2 SA 18 (SR) 19E; *R v Kerr* 1961 4 SA 476 (SR) 478A; and *S v Williamson* 1972 2 SA 140 (N) 144E-F). This note seeks to outline the principles which a court will consider in imposing sentence in respect of the most serious of these offences: driving under the influence of intoxicating liquor or drugs, contained in section 65(1)(a) of the Act. (The note will follow a similar structure to the discussion in Cooper *Motor Law* Volume I (1982) 575-579, and readers seeking references to earlier case law in point are referred to this discussion.)

The penalty prescribed for a contravention of section 65(1) is a clear indication of the serious view the legislature takes of the offence (*S v Maseko* 1983 4 SA 882 (N) 883F; *S v Baard* 1985 2 PH H85 (C); and *S v Greef; S v James; S v Theron* 2001 1 SACR 214 (T) 215e). The mere act of driving under the influence of alcohol (or a narcotic drug) has been held to amount to dangerous conduct (*S v Van Riet* 1982 2 PH H132 (C)), and thus even where the manner of driving is not in itself dangerous, it constitutes a very serious offence (*R v Hattingh* 1955 2 PH O10 (N)). Given that driving under the influence is a serious offence against society which causes enormous financial loss and horrific suffering and grief (*S v Jacobs* 1986 3 SA 781 (A) 783F-G; *S v Potgieter* 1990 1 SACR 401 (T) 403e; and *S v Brown* 1992 1 SACR 571 (NC) 573h), the interests of the community demand appropriate sanctions for this type of crime (*S v Van Riet supra*). As Kriegler J (as he then was) has explained: the law will not prevent a person drinking himself into a state of extreme inebriation as often as he likes, but if he is drunk or under the influence of alcohol, he is forbidden to drive a vehicle. Thus this is not a crime punishing the act of consuming alcohol, it is a crime punishing the act of driving in circumstances where such driving endangers the general public (*S v Potgieter supra* 403e-f). It is the indifference of the accused to the creation of such danger which seriously aggravates the offence (*S v Caroto* 1981 3 SA 17 (A) 23A-C; and see also *S*

v Oshman 1962 3 SA 643 (O) 645A-C). It has however been held (in *S v Fredericks* 1986 4 SA 1048 (C) 1049E-F, approved in *S v Ludick* 1987 4 SA 197 (NC) 200F-G) that "to damn driving under the influence of liquor as a very serious offence is a generalisation which should not be elevated into a principle to be rigidly applied in every case of a driver who has over-indulged himself", particularly where no harm or damage results (see also *S v Sibeko* 1995 1 SACR 186 (W) 193i-194b).

It should be noted that driving under the influence of an intoxicating substance is regarded as a more serious offence than driving with an excessive concentration of alcohol in the blood. Therefore, as a rule, a lighter sentence will be imposed for a contravention of section 65(2)(a) than for a contravention of section 65(1)(a) (*S v Labuschagne* 1990 1 SACR 313 (E) 322h; and *S v Serabo* 2002 1 SACR 391 (E) 394e). Whilst the legislature has prescribed equivalent parameters for punishment for the two offences, the latter is regarded as more serious in nature (*S v Labuschagne supra* 322j; *S v Fose* 1991 1 SACR 426 (E) 426j; *S v Joubert* 1991 1 SACR 642 (C) 643e-f; *S v Oosthuizen* 1995 1 SACR 371 (T) 373a-e; and *S v Serabo supra*). This view finds support in the following factors: (i) the different weight which has historically attached to the offences, (ii) the fact that unlike a conviction for driving under the influence of alcohol (s 65(1)(a)), a conviction under s 65(2)(a) conviction does not involve proof that the accused was unable to drive competently, and (iii) the concomitant consideration that a person whose driving ability is impaired is a greater danger on the roads than one whose blood-alcohol level merely exceeds the prescribed limits (*S v Oosthuizen supra* 373b-e). It is submitted that, similarly, a contravention of driving with an excessive concentration of alcohol in the breath (s 65(5)) will result in a lesser sentence than a contravention of section 65(1)(a), albeit that the gravity of this offence is evident from the sentence set out in the Act, as well as judicial pronouncements (*S v Wilson* 2001 1 SACR 253 (T) 257h-i).

2 General

2 1 Factors

It has been held that in determining the appropriate punishment for a contravention of section 65(1)(a) the court should, *inter alia*, have regard to the following factors: (i) the degree of intoxication of the accused; (ii) the extent to which the accused's driving proficiency was affected; (iii) traffic conditions at the relevant time; (iv) the nature of the locality (*ie*, whether it was in a built-up, urban area or in a rural area, on an open road) where the offence was committed; (v) the accused's behaviour in the circumstances; (vi) the type of vehicle driven by the accused; and (vii) the actual harm or danger caused by the accused's driving (see Cooper 575; *S v Mokgwakgwatsa* 1981 1 PH H12 (O); *S v Niewoudt* 1981 1 PH H23 (O); *S v Mackriel* 1985 2 SA 622 (C) 626C-E; and *S v Greef; S v James*; *S v Theron supra* 215g-i). In addition the court should take into account such factors as (viii) whether the accused is a first offender (*S v Mackriel supra* 626D-E; and *S v Greef; S v James; S v Theron supra* 215i); (ix) his age; (see *eg S v*

Mackriel supra 626D; *S v Uglietti* 1985 4 SA 108 (N) 112B; and *S v Greef; S v James; S v Theron supra* 215h-i) and (x) the accused's personal circumstances in general (Cooper 576; *S v Mackriel supra* 626D; and *S v Greef; S v James*; and *S v Theron supra* 215h-i), such as, in the case of an accused with a drinking problem, whether he has ceased imbibing intoxicating liquor, or is receiving treatment, psychiatric or otherwise, in an attempt to deal with the problem (*S v Knoetze* 1990 2 SACR 316 (E) 319g-h). Further, the court should take account of "everything that adversely affects the accused in his person, his occupation or his property" (*Ex parte Minister of Justice: In re R v Berger* 1936 AD 334 339, cited with approval in *R v Mutch* 1948 3 SA 1053 (C) 1055; and *S v Koen* 1967 1 PH H152 (O)). Thus a court should take into account the financial loss, for example, through loss of employment or of pension rights, the accused will suffer if obliged to serve a period of imprisonment (see *R v Mutch supra*; *S v Russell* 1968 3 SA 273 (N); *S v Botha* 1970 4 SA 407 (T); *S v Smullion* 1977 3 SA 1001 (RA); *S v Niewoudt supra*; and Cooper 576 fn 243).

2 2 Consistency in sentencing

It has been identified that there are different schools of thought as regards sentencing drink-driving, with some judges focusing on deterrent and preventative aims and others on reformatory aims (*S v Wilson supra* 258f-i; and *S v Sithole* 2003 1 SACR 326 (SCA) par [6]). The former group of judges, who tend to hand down heavier sentences, find justification for their approach in the gravity ascribed to these offences in decided cases and the media (*S v Boks* 2003 1 SACR 176 (C) par [8]). This difference in approach gives rise to tension.

The need to preserve judicial discretion in sentencing has been jealously guarded, and consequently suggestions of establishing a "norm" in sentencing a particular offence have not always been enthusiastically received (labelled in *R v Salkow* 1949 2 PH O36 (T) as "unjust"; strongly criticised in *S v Labuschagne supra* 315d-f). Rose-Innes J adopted what appears to be the standard approach to the matter amongst judicial officers when he stated (in *S v Mackriel supra* 626A-B) that

> "[S]entencing is *par excellence* a question of discretion in an attempt at a just and moderate approach to the necessary punishment of crime in each particular case."

However, whilst upholding that there is no general rule applicable, the need for a reasonable degree of consistency in sentences imposed by the courts has been stressed in cases such as *S v Langeveldt* (1970 3 SA 438 (C)), approved by the Appellate Division in *S v Roux* (1975 3 SA 190 (A) 197C-E). In the case of *Langeveldt*, the court set the normal sentence for a first offender found guilty of driving under the influence of alcohol at a fine varying from R60 to R200 depending on the circumstances, together with a short prison sentence which was wholly suspended on appropriate conditions. In *S v Mackriel supra* 625D this norm (for a first offence of drunken driving) was amended to a fine varying from R100 to R500 with a

short period of imprisonment suspended on appropriate conditions. In 2002, Jones J in *S v Serabo supra*, once again reformulated the "norm", to a fine within the range of R4000 to R6000, and an alternative prison term of no more than eight months.

It seems clear that whilst it is in the interests of consistency that there is a particular range or level of sentences, to which limits sentences should as far as possible conform, the benefits of comparison are limited, and ultimately each case should be dealt with on its own facts (*S v Fraser* 1987 2 SA 859 (A) 863C-D; and *S v Sibeko supra* 189b-c).

2 3 Evidence of danger

The extent to which the accused was an actual or potential danger to other road-users is required to be assessed. The failure to lead such evidence and/or the trial court's failure to make a correct assessment of such evidence may result in the court on appeal interfering with the sentence imposed by the trial court (*S v Niewoudt supra*; and see too *S v De Lange* 1991 2 SACR 696 (T) 699h-i).

2 4 Medical evidence

Though on occasion the importance of medical evidence in assessing intoxication has been emphasised (see *eg S v Moses* 1976 2 PH H129 (C); and *S v Fredericks supra* 1049G-H), this aspect ought not to be exaggerated. A medical doctor may well be in a better position than a lay witness to determine the degree of the accused's intoxication. Such evidence may be deemed necessary in order to conclude that the accused's behaviour was due to intoxication, and not, for example, the effects of shock following an accident (see *R v Van der Nest* 1947 2 PH O31 (N)). However, it may be that the evidence of a lay witness provides the court with a clear picture of the accused's state, thus enabling it to make an assessment without the aid of medical evidence (see *R v Brorson* 1949 2 SA 819 (T) 821; and *R v Ismail* 1951 1 SA 370 (T)).

2 5 Blameworthiness

Since the purpose of section 65(1)(a) is not to punish a person for being under the influence but rather for driving a vehicle while in such a state, once an accused becomes aware that her faculties are impaired she should not continue to drive. Ignorance that intoxicating liquor would enhance the effect of drugs taken by an accused may, however, be a mitigating factor (*R v Amos* 1970 1 SA 115 (RA) 117A and F; and *R v Bersin* 1970 1 SA 729 (R)). On the other hand, where medicine has been used by the accused for some time, it is likely that the court will hold that the accused must have had some idea of its effect on her (as in *S v Chimbwanda* 1981 4 SA 336 (ZAD) 341D-E).

For an accused to drive a vehicle knowing he is under the influence to such an extent that he is unable to exercise proper control over it is an aggravating circumstance (*S v Jacobs* 1968 4 SA 691 (O) 698A; *S v Van Breda* 1974 4 SA 376 (O) 380; and *R v Amos supra* 117H). An accused who, prior to becoming intoxicated, intended to drive a vehicle after she had imbibed, cannot rely on her self-induced state of automatism as a mitigatory factor (*S v Kelder* 1967 2 SA 644 (T) 647H; and see further *S v Russell supra* 277A). Even so, if an accused had not intended driving after imbibing, automatism due to intoxication may be a mitigatory factor depending on the circumstances of the case (*S v Kelder supra* 647-648). In this regard, it may be considered whether she should have reasonably foreseen the possibility of her driving after she had imbibed (*cf S v Fouché* 1973 3 SA 308 (NC) 314A-C).

2 6 Vehicles other than motor vehicles

Driving a vehicle other than a motor vehicle whilst under the influence of alcohol has generally been regarded as deserving of a lesser punishment than where a motor vehicle has been driven in this condition. Thus accused who have driven a bicycle (*S v Simon* 1977 2 PH H179 (E); and *S v Mokoena* 1983 2 PH H209 (O)) or a donkey cart (*S v Steenkamp* 1977 1 PH H91 (O)) under the influence of intoxicating liquor have received lesser sentences, apparently since such vehicles are far less likely to cause serious damage or injury than motor vehicles.

2 7 Alcoholics

Courts have had regard to the modern tendency to treat alcoholics as sick persons in need of medical care in dealing with an alcoholic convicted of contravening section 65(1)(a) (*S v Leach* 1968 3 SA 389 (T) 389H; *S v Green* 1975 (2) PH H171 (C)). Accordingly, where possible, courts seek to impose a sentence which would aid in the accused's rehabilitation and act as a deterrent (see *S v Lampbrecht* 1970 3 SA 141 (T) 148D-G; and *S v Green supra*). A court could possibly consider invoking the provisions of the Prevention and Treatment of Drug Dependency Act (20 of 1992) or imposing a period of imprisonment suspended on stringent conditions with regard to treatment (see *S v Green supra*; *S Niewoudt supra*; and *S v Fourie* 1981 2 PH H171 (O)). However, the fact that the accused is an alcoholic does not in itself provide an escape from imprisonment (*S v Fraser supra* 864D-E). As Conradie JA stated in *S v Sithole* (*supra* par [7]-[8]), drunken driving is not a disease, and addiction to alcohol, far from being an excuse, may be an aggravating factor where the alcoholic knows that when he goes drinking he will probably not be sober enough to drive home. In order for a rehabilitative sentence to be imposed, it must be established that the accused "is willing to receive and will co-operate in treatment for his condition and may benefit therefrom" (*S v Fraser supra* 864D). Where the offender's rehabilitation prospects are remote, there is little point in devising a rehabilitative sentence (*S v Sithole supra* par [9]). The courts have on occasion considered

periodical imprisonment to be an appropriate form of punishment (*S v Nagel* 1970 2 SA 483 (T); and *S v Van Dyk* 1970 4 SA 508 (N)), whilst in other cases, where aggravating circumstances have been present and the interests of the community as a whole required this, unsuspended sentences of imprisonment have been imposed on alcoholics (*eg S v Schonknecht* 1972 1 PH H67 (E); and *S v Van Breda supra*).

2 8 Previous convictions

Whilst a previous conviction is an aggravating circumstance (*S v Caroto supra* 23A-B; and *S v Sithole* par [12]), the fact that an accused has a previous conviction does not require a court to impose an unsuspended sentence of imprisonment. Instead, the decision whether a sentence of imprisonment is appropriate for a second offence will depend upon the circumstances of each case (*S v Lampbrecht supra* 147-8; *S v Smith* 1971 4 SA 419 (T) 421B; see further *S v Van den Berg* 1983 1 PH H96 (O); *S v Munro* 1983 2 PH H138 (C); *S v Greyvenstein* 1983 2 PH H177 (O); and *S v Wentzel* 1990 1 SACR 222 (C)). In the case of second or persistent offenders the court should consider whether periodical imprisonment is an appropriate punishment (*S v Kent* 1981 3 SA 23 (A) 28F; and *S v Jantjies* 1983 1 PH H42 (NC)). Where a prison sentence is deemed inappropriate, a fine together with a suspended period of imprisonment conjoined with the cancellation (*R v De Barros* 1946 CPD 830; *S v Sinclair* 1963 1 SA 558 (C); and see too *R v Amod* 1955 2 PH H205 (N)) or suspension of the accused's driver's licence for a substantial period may be an appropriate penalty (*S v Niewoudt supra*). The use of imaginative sentencing options (such as periodical imprisonment, correctional supervision, suspended prison sentences conditional upon the rendering of community service, or an additional suspended fine) when dealing with a second offender may be inhibited by courts routinely imposing lengthy periods of suspended imprisonment in addition to fines for driving under the influence (*S v Smeda; S v Thwaites; S v Afrika* 1993 2 SACR 198 (C) 199c-g). This group of offenders are rarely hardened criminals, and consequently a short period of imprisonment will usually suffice in order to achieve the purposes of punishment. Lengthy incarceration should be limited to "exceptionally bad cases and persistent offenders who have already experienced shorter terms of imprisonment" (*S v Smeda; S v Thwaites; S v Afrika supra* 200b-c).

3 Forms of punishment

3 1 Imprisonment

The usual penalty for a contravention of section 65(1)(a) for a first offence is a fine (in default, a period of imprisonment) and, in addition, a period of imprisonment suspended for a specified period on appropriate conditions (*S v Williams* 1977 1 PH H86 (C); and *S v Mackriel supra* 625A-D). A sentence of imprisonment without the option of a fine will as a rule not be imposed on a first offender unless there are aggravating circumstances present (*S v*

Ndlovu 1986 1 PH H72 (A); and *S v Esbach* 1989 1 PH H36 (C)) such as excessive speed, damage to property or person, or danger to others (*S v Venter* 1963 2 PH O54 (E)). However, in the light of the prevalence of the offence, the view has on occasion been expressed by the courts that more severe sentences are required (see *eg S v Mututu* 1972 2 PH H(S) 79 (RA); *S v Maposa* 1973 1 SA 546 (RA); and *S v Roux supra* 197C-D).

The punitive effect of a cancellation or suspension of the driver's licence of the accused should be taken into account in determining an appropriate sentence for a contravention of section 65(1)(a) (*S v Parkin* 1981 1 PH H13 (O); *S v Young* 1981 1 PH H53 (O); and *S v Solomon* 1983 2 PH H196 (C)). Cancellation or suspension of a driver's licence is a severe penalty which may be used instead of an unsuspended sentence of imprisonment to punish the accused, whilst concomitantly serving as protection for the public (*S v Maseko* 1972 3 SA 348 (T) 351C-F).

3 2 Periodical imprisonment

When imprisonment is considered to be an appropriate punishment the court should consider whether periodical imprisonment should be imposed (*S v Rabbets* 1974 1 SA 320 (C) 322C). In *S v Human* (1990 1 SACR 85 (NC) 90b-91d), Buys J set out a number of guidelines adopted by courts in deciding whether to impose uninterrupted or periodical imprisonment (set out below in amended form):

1. The intoxicated driver is not a criminal in the usual sense of the word (*S v Nagel supra* 484B), making the determination of punishment of this category of offender more difficult than, for example, crimes of dishonesty or violence.

2. Courts encourage the imposition of periodical imprisonment, and such a sentence is appropriate for "many if not most cases of driving while under the influence of liquor" (*S v Bhadloo* 1971 1 SA 53 (N) 54, approved by the Appellate Division in *S v Erwee* 1982 3 SA 1057 (A) 1065D; and *S v Jacobs* (1986) *supra* 784E-I), subject to the limitation set out in par 9 below. Periodical imprisonment is particularly suitable for first offenders (*S v Uglietti supra* 111E; *S v Esbach supra*, although where conduct is sufficiently reprehensible, uninterrupted imprisonment may be the only appropriate punishment – see *S v Maseko* 1983 4 SA 882 (N) 884B-E), and is also a useful punishment for second offenders (*S v Kent supra* 28F-G; and *S v Ludick supra* 201D).

3. Periodical imprisonment results in less family and financial disruption (*S v Botha supra* 409G-H; *S v Nagel supra* 484; *S v Letha* 1980 1 PH H72 (O); *S v Jantjies supra*; and *S v Jacobs* (1986) *supra* 785B).

4. Periodical imprisonment thus has the advantage that the accused does not have to lose his employment, but is indeed able to keep it (*S v Bhadloo supra* 55A). This form of punishment is consequently appropriate where, while serving his sentence, the accused would be able to continue with his work and support his dependants (*S v Bothma*

supra 267D-E; *S v Lampbrecht supra* 147B; *Botha supra* 409F-G; *S v Jantjies supra*; *S v Uglietti supra*; and *S v Jacobs* (1986) *supra* 785B). It is therefore not intended for convicted persons who are not in regular employment, nor should it be imposed in the case of an accused who, if he had the money to pay a fine, would not be sentenced to imprisonment (*S v Singh* 1963 4 SA 271 (N)).

5 Periodical imprisonment is less conspicuous and therefore less destructive of the accused's self-respect (*S v Botha supra* 409G-H).

6 Periodical imprisonment is and remains a punishment, is extremely inconvenient for an accused and is a constant reminder to her of her misdeed and the consequences thereof should she repeat the offence (*S v Botha supra* 409G-H; *S v Nagel supra* 484D-E; *S v Bhadloo supra* 55A; *S v Jantjies supra*; and *S v Jacobs* (1986) *supra* 785C).

7 Whilst the accused's personal circumstances are of primary importance in considering periodical imprisonment, other factors such as the degree of the accused's intoxication, the manner in which he drove the vehicle, whether he was involved in a collision, whether there was damage to property or injury to persons, previous convictions, as well as the interests of the community, should all be taken into account.

8 Only when periodical imprisonment is considered to be too lenient should uninterrupted imprisonment be considered (*S v Botha supra* 410A).

9 Periodical imprisonment may be regarded as too lenient where there have been similar previous convictions – this is the limitation referred to in par 2 above. Holmes AJA's statement in *S v Kent* (*supra* 28F-G) is notable in this regard:

> "[A] sentence of periodical imprisonment may, depending on the circumstances, be appropriate in respect of a first, or even a second, conviction for driving under the influence of intoxicating liquor. But a third such conviction would, again depending on the circumstances, seem to be a horse of another colour."

In *S v Erwee* (*supra*) the Appellate Division was indeed prepared to make use of periodical imprisonment where the accused had two similar convictions. However, in this case the first conviction was 15 years old (as opposed to *S v Kent supra* where it was the accused's third conviction in four years), and the accused had received treatment on a number of occasions for his drinking problem. Further, in *S v Ludick* (*supra*), where it was the accused's third similar conviction in six years, the court, taking into account the accused's personal circumstances, *inter alia* that he was married with three children to support, chose to further suspend the existing suspended sentence in favour of periodical imprisonment for the maximum period of 2000 hours. In contrast, in *S v Human* (*supra*), the accused had four previous convictions for driving under the influence of alcohol, the most recent two being offences for which he had been sentenced two months prior to commission of the latest offence. The court held (91i-92a) that the accused's personal circumstances were negated by the gravity of the

offence, the previous convictions and the interests of the community, and consequently the sentence of two years' imprisonment was upheld. Similarly, in *S v Knoetze* (*supra*), the court rejected the accused's appeal against a 12 month prison sentence, in favour of a period of periodical imprisonment, where the accused had four previous convictions for offences involving driving under the influence of alcohol, including a previous term of periodical imprisonment (see also *S v Breytenbach* 1988 4 SA 286 (T) 289D).

3 3 Fines

In the imposition of a fine, each case is required to be considered individually, and the fine must both take account of an accused's income or ability to pay and be sufficiently exacting for the accused to feel the "sting" or "bite" thereof (*S v Labuschagne supra* 320a-b; and *S v Serabo supra* 399c). Thus where a fine (or in the alternative, in the case of failure to pay the fine, imprisonment) is imposed as punishment, it is necessary to carefully enquire into the accused's assets and his income, and to diligently investigate his ability to pay the fine. If this is not done, the purpose of the fine – to give the accused an opportunity to avoid imprisonment – is completely thwarted (*S v Radebe* 1981 2 PH H115 (O); *S v Wentzel* 1981 3 SA 441 (A); *S v Baard supra*; *S v Fredericks supra* 1049C-E; *S v Branders* 1990 1 SACR 354 (C); *S v Sibeko supra* 188h-i; *S v Zwane* 1997 1 SACR 326 (W) 328h-330d; *S v Boks supra* par [10]; and see also *S v Mackriel supra* 626G-I). Moreover, this amounts to an abnegation of one of the elementary criteria of punishment: the personal circumstances of the accused (*S v Ntlele* 1993 2 SACR 610 (W) 612e-g). Furthermore, at the discretion of the court, the accused should be afforded an opportunity to pay the fine in installments, in accordance with section 297 of the Criminal Procedure Act, 51 of 1977 (*S v Mokgwakgwatsa supra*; *S v Mosia* 1988 2 SA 730 (T); *S v Branders supra*; *S v Joubert supra* 643j-644a; and *S v Zwane supra* 329d). Where the accused is undefended, it is incumbent upon the judicial officer to inform the accused during the pre-trial procedure that should immediate payment not be possible, the possibility exists to pay the fine off in instalments (*S v Zwane supra* 330a-b). As to the quantum of the fine, it must not be disproportionate (for an example of such a fine, see *S v Smith* 1993 1 SACR 208 (C)). On the other hand, the accused's ability to pay should not be over-emphasized to the extent that the fine is set unrealistically low, thus bringing the administration of justice into disrepute (*S v Ntlele supra* 612c; *S v Zwane supra* 329b-c; and see also *S v Bhembe* 1993 1 SACR 164 (T)). The court should further avoid the trap of "a scoundrel masquerading as a poor man" by requiring documentary or other proof of impecuniosity (*S v Ntlele supra* 612i-j). On occasion a court may impose a fine in circumstances where imprisonment would equally be an appropriate punishment, but where the court displays its sympathy with the accused by imposing a high fine rather than imprisonment (*S v Mokgwakgwatsa supra*; *S v Zwane supra* 329c; and see also *S v Bhembe supra* 167g-168b). In such a case the court would be entitled to impose a swingeing punishment (see *S v Mokgwakgwatsa supra*; and *S v*

George 1993 (unreported) (W)). However the court should not simply presume, without a proper enquiry, that where the accused experiences difficulty in paying the fine, he will be able to supplement his own resources by selling his own assets or borrowing from family or friends (*S v Ntlele supra* 613c-d).

3 4 Correctional supervision

An accused may be sentenced to a period of correctional supervision, either directly (in terms of s 276A, read with s 276(1)(h) of the Criminal Procedure Act 51 of 1977), or through the conversion of a period of imprisonment into correctional supervision (in terms of s 276A, read with s 276(1)(i) of the Criminal Procedure Act 51 of 1977). Correctional supervision has been described as an especially suitable form of punishment for crimes such as driving under the influence of alcohol where the circumstances are such that a fine would be inadequate, in particular in respect of a second offender (*S v Majodina* 1996 2 SACR 369 (A) 373c-d). Correctional supervision has been deemed an appropriate sentence where the accused had four previous convictions for drink-driving offences (*S v Labuschagne* 1995 2 SACR 200 (W), but see *S v Majodina supra*, where correctional supervision was deemed inappropriate where the accused had a similar number of previous convictions for alcohol-related offences).

The advantages of making use of this form of punishment include that it allows scope for rehabilitation, whilst providing for an appropriately heavy punishment (see *S v Labuschagne* (1995) *supra* 203i-204c). As the Appellate Division stated in *S v E* (1992 2 SACR 625 (A) 633b):

> "What is clear is that correctional supervision is no lenient alternative. It can, depending on the circumstances, involve an exacting regime, even virtual house arrest. Its advantage is that it is geared to punish and rehabilitate the offender within the community, leaving his work and domestic routines intact and without the obvious negative influences of prison. It can also involve specific rehabilitative treatment and community service."

The formulation of the sentence must set out the nature and extent of the correctional supervision. Failure to do so constitutes a handing over of the responsibility of the judicial officer to the officials of the Department of Correctional Services, and is not in accordance with the provisions of section 276(1)(h) of the Criminal Procedure Act (see *S v Croukamp* 1993 1 SACR 439 (T); *S v Somers* 1994 2 SACR 401 (T); and *S v Mouton* 1995 2 SACR 579 (T)).

3 5 Community service

Community service has been identified as a form of punishment which has been underutilized in respect of driving under the influence of alcohol, with the proviso that it must be used for suitable cases (*S v Brown supra* 573g). Since someone who drives a vehicle under the influence of alcohol is not a criminal in the ordinary sense of the word, and thus ought to be kept out of prison in so far as is possible, community service can be productively

employed in this regard. Community service is an especially valuable sentencing option where the incarceration of an accused, particularly a first offender, would be otherwise unavoidable (*S v Van der Westhuizen* 1990 1 SACR 531 (C) 533i). Goldstone J (as he then was) set out the advantages of community service in *S v Khumalo* (1984 4 SA 642 (W) 644H):

> "(a) the offender is kept out of prison, and is thus able to continue to be a productive and useful member of society, and also avoid exposure to the negative consequences of imprisonment;
>
> (b) the offender is able to continue to support his dependants, and so prevent them becoming a drain on more remote members of their family, their friends or the State. Furthermore, the family unit remains intact;
>
> (c) the fact that the offender is to render a community service free of charge during his own free time satisfies society's justifiable demand that an offender be punished; and
>
> (d) the community benefits directly from the work to be performed by the offender."

Community service in a hospital or ambulance service is particularly appropriate for persons who drive under the influence of alcohol, since such persons then encounter the consequences of drink-driving (*S v Brown supra* 573f). The digging of graves as a form of community service was however not approved in *S v Schambriel* (2002 1 SACR 168 (T)). In *S v Brown* (*supra* 574f) it was held that community service was not an appropriate sentence where the appellant had four previous convictions for similar offences. Further, where an accused can be appropriately sentenced to a fine and is thus not in the normal course in danger of imprisonment, community service would only be resorted to in exceptional cases (*S v Van der Westhuizen supra* 533i-j).

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg