THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO 464/2001

In the matter between

DUMISANI SITHOLE **Appellant**

and

THE STATE **Respondent**

CORAM: HARMS, CONRADIE JJA et JONES AJA

HEARD: 19 SEPTEMBER 2002

DELIVERED: 30 SEPTEMBER 2002

SUBJECT: Sentence for drunken driving; effect of alcoholism on sentencing.

JUDGMENT

CONRADIE JA

[1] The appellant was convicted on his plea of guilty in the magistrates' court on two charges of having contravened section 122 (1)(a) of the Road Traffic Act 29 of 1989 by driving a vehicle under the influence of intoxicating liquor. He was sentenced to three years' imprisonment on each charge and his driver's licence was cancelled. On appeal to the Natal Provincial Division against the sentence of imprisonment and the cancellation of the licence, the Court declined to interfere with the latter, but set aside the sentence of six years' imprisonment. Instead, it imposed a sentence of four years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977. Its effect is that the appellant must serve at least one sixth of this by way of a custodial sentence and the rest of the period under correctional supervision.

[2] The appellant, with the leave of the court *a quo,* appeals against the sentence.

[3] The appellant's history of aberrant road conduct started in 1987 with a conviction for negligent driving and failure to report an accident within the time allowed. For his first offence of driving under the influence of intoxicating liquor the appellant was in March 1989 sentenced to four months' imprisonment with the option of a fine. If he learned a lesson from this experience, it was not a salutary one. Two years later, in April 1991, he was again convicted. The fine was ten times greater than it had been the first time; moreover, in addition to imprisonment in default of payment of the fine, a year's imprisonment suspended for five years was imposed and the appellant's driver's licence was suspended for two years.

[4] In May 1996 the appellant was convicted once more. The offence appears to have been committed within the period of suspension of the earlier term of imprisonment. His punishment was less severe than it had been on the previous occasion, which can only be explained by the fact that the appellant's previous convictions were not proved. The new suspended sentence of 12 months' imprisonment was so carelessly imposed that no period of suspension was mentioned. This probably worked to the appellant's advantage because on 1 June 1998, three years later, he was drinking and driving again. This transgression, involving a collision, was his

fourth offence of the same sort. On 7 November 1998, and while he was awaiting trial on the previous offence, he committed his fifth.

[5] Although the appellant had not previously been imprisoned for driving under the influence of intoxicating liquor (he had been for fraud), the magistrate was not persuaded that the appellant should have the 'benefit' of a sentence of correctional supervision under section 276(1)(h) of the Criminal Procedure Act, 1977, that is to say one without any custodial element but one which, as the appellant's counsel has contended throughout, would have the merit of being tailored to ensure a supervised program of structured rehabilitation.

[6] The Court *a quo* disagreed with the magistrate's assessment of the appellant's situation. This appeal raises, once again, the tension that tends to arise in cases of this kind between deterrent and preventative (on the one hand) and reformatory aims (on the other) and the endeavour to find a satisfactory balance between the two.

[7] Courts in this country have long acknowledged that alcohol addiction is a disease and that it would be to the benefit of society and of the offender if

the condition can be cured. But it is necessary to make the obvious point that drunken driving is not a disease. One is distressingly familiar with maudlin pleas in mitigation that the drunken driver in the dock is an alcoholic, as if the disease excused the crime. It does not (*S v Fraser* 1987 (2) SA 859 (A) at 864B-D).

[8] Addiction to alcohol is not an excuse for driving under the influence of liquor. In many cases the addiction would be an aggravating feature of the offence. The alcoholic who takes his car to the pub knows when he parks it outside that he will probably not be sober enough to drive it home. He recklessly courts the danger of criminal conduct. His conduct is more reprehensible than that of the person who carelessly has one too many. Drug dependence in general is often characterized by associated criminal conduct. Driving under the influence of liquor is criminal conduct associated with alcoholism. There is no reason why the courts should be more tolerant of that than they are of, say, stealing to support a drug habit.

[9] The need to impose sentences that provide for the rehabilitation of those addicted to alcohol and, for that matter, to other kinds of drugs has frequently been stressed. This is a laudable object of sentencing but not the

only and there is obviously no point in devising a rehabilitative sentence if the offender's rehabilitation prospects are remote. (*Cf S v Fraser (supra)* at 864J – 865A; *S v Noemdoe* 1993 (1) SACR 264 (c) at 273 b – c; *S v Keulder* 1994 (1) SACR 91 (A); *S v Labuschagne* 1995 (2) SACR 200 (W). It is on the question of rehabilitation, mainly, that the paths of the two courts below diverged.

[10] The trial court was skeptical of reports prepared by the probation officer and the correctional supervision officer. Both of them recommended correctional supervision as a sentencing option, but their reports were woolly and poorly researched. On the prospect of rehabilitation the social worker reported that the appellant had once before been admitted to a rehabilitation center, that he had had implants, psychiatric treatment and psychological counseling and that 'nothing had worked.' That was hardly encouraging for someone out to satisfy the court that he was capable of reform; but she did add that 'since the incident (she probably refers to the second of the two) the wife has reported that she has not seen him drunk and also the accused has confirmed that he has not taken any liquor since the accident.' That was rather more encouraging, as far as it went, but its persuasive force was diminished by the failure of the appellant and the observant wife to testify.

[11] The Court *a quo* was more receptive. On the evidence, scanty as it was, it accepted that the appellant had shown a willingness to change. It was, in this regard, assisted by a finding of fact made by the magistrate (which was not challenged in the Court *a quo*, or before us on appeal) that the appellant has abstained from liquor since his convictions on the two charges.
It evidently considered that society's interests and those of the appellant would best be served by a much shorter period of imprisonment followed by a compulsory rehabilitation program. On the evidence, it may have been a little too sanguine of the appellant's rehabilitation prospects, but that is not a misdirection vitiating the exercise of its discretion, particularly since the Court was alive to the fact that the public's interest in reducing the dangers on our roads called for a measure of deterrence.

[12] The thrust of the appellant's argument on appeal was that correctional supervision under section 276(1)(h) – an entirely non-custodial sentence – would have adequately taken account of societal interests. I disagree. A person with the appellant's record cannot expect to escape prison altogether. Too many people die on our roads for that to be an option. Driving under the influence of intoxicating liquor is a serious crime and repeated offences

greatly augment its seriousness, particularly where, as here, one of the offences is committed during the currency of a suspended sentence for the very same kind of offence, and another is committed while awaiting trial on an earlier offence of the same kind.

[13] Nevertheless, the Court *a quo* was correct in concluding that the sentences imposed by the magistrate, at least cumulatively, were too severe. The discretion, which it then exercised in imposing a fresh sentence, cannot be faulted.

[14] The magistrate cancelled the appellant's driver's licence immediately on conviction and before having heard evidence in mitigation of sentence. It was argued that she should not have done this at the time that she did. The appellant's representative at the trial was asked whether he could argue against immediate cancellation of the accused's licence. He replied that he could not. There was no irregularity; even if there were, it would be hard to extract from it the smallest bit of prejudice.

The appeal is dismissed.

J H CONRADIE
JUDGE OF APPEAL

HARMS JA)
JONES AJA) CONCUR