address within 24 hours of his arrival. He will have to report to the police station at Newcastle three times a day between the hours 07:00 and 09:00 and 12:00 and 14:00 and 17:00 and 19:00. He will have to surrender his passport and any travel documents to the Registrar. He will not be entitled to make any contract with any witnesses identified in the prosecution against him. If the Minister decides that he is to be surrendered to Namibia, he will make himself available for such surrender within 48 hours and if the Minister has not made his decision whether to surrender him or not within four months of the date of the order, the order will effectively expire. The bail is subject to the condition that the applicant will not resume again his hunger fast or threaten to do so. If any one of these many stringent conditions are breached in any way, the South African Police shall be entitled immediately to arrest the applicant and to hold him in custody.

What I have been doing is to summarise in a general way the fact of the order and the conditions which I am making. The particular and precise terms thereof appear in writing in terms of the draft prepared by counsel. I have only made the following changes to the draft prepared by counsel:

In para 1.4 the word 'skriftelik' in the third last line has been deleted; in para 1.8 in the third last line after the word 'word' there are inserted the following words '(deur die Minister van Justisie van Suid-Afrika)'; in para 1.10 for 'ses maande' I have substituted 'vier maande' and I have deleted para 3.

What I want to make clear is that the order I make is the written order as amended by me. What I said orally was merely a summary of that order but this is the formal order.

I therefore release the applicant on bail of R1 000 subject to the conditions detailed in the document marked 'konsep bevel'.

Applicant's Attorneys: *Joubert & Cornelius*. Respondent's Attorney: *State Attorney*.

S v MAKUA

TRANSVAAL PROVINCIAL DIVISION

GOLDSTEIN J and MAHOMED J

1992 November 3

Traffic offences—*Driving with an excessive concentration of alcohol in the blood—Contravention of s 122(2)*(a) *of Road Traffic Act 29 of 1989—Sentence—Importance of evidence as to manner of accused's driving of vehicle and traffic conditions reiterated.*

Traffic offences—*Driving with an excessive concentration of alcohol in the blood—Contravention of s 122(2)*(a) *of Road Traffic Act 29 of 1989—Sentence—Magistrate correctly holding that appellant to be discouraged from driving whilst under the influence of liquor or while concentration of alcohol in blood exceeding prescribed limit—Magistrate doing so by imposing fine and imprisonment suspended for five years on condition that appellant did not drive a motor vehicle on a public road—Court on appeal finding it preferable to achieve same end by suspending imprisonment on condition that appellant not convicted of contravening s 122 of Act and by cancelling his driver's licence—Such sentence providing incentives for appellant to make sure he did not again drive in circumstances which might endanger others without punishing him where he is able to drive soberly and lawfully, and also compelling him to re-apply for new driver's licence should he wish to drive again.*

The Court, in an appeal against a sentence imposed by a magistrate on the appellant's conviction of driving a motor vehicle while the concentration of alcohol in his blood was not less than 0,08 grams per 100 millilitres in contravention of s 122(2)*(a)* of the Road Traffic Act 29 of 1989, reiterated the importance, for purposes of assessing an appropriate sentence, of evidence as to the accused's actual driving of the motor vehicle and of the location of the road upon which he had been driving and the traffic conditions thereon.

The *dictum* in *S v Sinclair* 1963 (1) SA 558 (C) at 560A–D applied.

Where the court holds that the accused needs to be discouraged from driving a motor vehicle while he is under the influence of liquor or whilst the concentration of alcohol in his blood is not less than 0,08 grams per 100 millilitres (the court *a quo* having correctly so held in the case of the appellant *in casu*), it is not necessary to impose a sentence of imprisonment (in addition to a fine) suspended for five years on condition that the accused does not drive a motor vehicle again on any public road during the five year period, thereby preventing the accused from driving at all. The objective of the court can rationally and sensibly be furthered by other mechanisms. Firstly, it can be done by suspending the operation of the prison sentence on the condition that the accused does not during the period of suspension drive a motor vehicle whilst under the influence of liquor or whilst the concentration of alcohol in his blood exceeds the statutory minimum. Secondly, it can be achieved by the mechanism of cancelling his driver's licence and compelling him to re-apply for a new licence and to satisfy the licence authorities that he should be issued with such a licence. Both of these mechanisms would provide formidable incentives for the appellant to make sure that he does not again drive a motor vehicle in circumstances which might endanger others without punishing in the circumstances where he is able to drive a motor vehicle perfectly soberly and lawfully.

Appeal from a sentence imposed in a magistrate's court. The facts appear from the reasons for judgment.

A J J van Zyl for the appellant.

S le Roux for the State.

Mahomed J: The appellant was found guilty in the magistrate's court at Middelburg on a charge of contravening s 122(2)*(a)* of the Road Traffic Act 29 of 1989 by driving a vehicle on a public road while the concentration of alcohol in his

blood was not less than 0,08 grams per 100 millilitres. The evidence before the court *a quo* clearly established the guilt of the appellant. The alcohol concentration in his blood was found to be 0,33 grams per 100 millilitres and the appellant admitted that he had been driving the vehicle on a public road at the relevant time. He appeals only against his sentence.

The sentence imposed by the magistrate was a fine of R1 000 plus imprisonment for two years. The imprisonment was suspended for five years on the condition that the appellant did not drive a motor vehicle again on any public road in the country during the five year period. In terms of s 55(1)(*b*) of Act 29 of 1989 his licence was also cancelled.

The facts of mitigation advanced on behalf of the appellant and accepted by the magistrate disclosed that the appellant was a 74-year old pensioner. He had no previous convictions. He was married with five minor children. His pension was R325 per month. His wife did not work. He had R800 in his possession to pay a fine immediately. Any additional fine would be paid from his pension at the end of the month. He had drunk twelve 750 millilitre cans of beer on the relevant day.

In the notice of appeal filed on behalf of the appellant it was contended, *inter alia*, that the conditions attached to the sentence of imprisonment were

'too harsh for a first offender of the appellant's calibre who needs the licence to augment his income as a fruit and vegetable vendor to maintain his children'.

There was, however, no evidence before the magistrate that the appellant operated as a fruit and vegetable vendor or that he needed to drive a motor vehicle for this purpose. We especially called for a transcript of the submissions on behalf of the appellant by his attorney in the court *a quo* and we are satisfied that no submission to this effect was made to the magistrate. In the result the magistrate cannot be blamed in any way whatever for failing to take into account the alleged need of the appellant to drive a motor vehicle in order to operate effectively as a vendor of fruit and vegetables.

The issue which nevertheless needs to be addressed is whether his sentence of two years' imprisonment suspended for five years on the condition that the appellant does not drive a motor vehicle at all during the five year period of suspension is justified by the evidence. In ordering this condition the magistrate concluded that one third of the appellant's blood consisted of alcohol. This is not a conclusion justified by the evidence. The evidence was simply that the alcohol concentration in his blood was 0,33 grams per 100 millilitres. To say that this constitutes a third of his total blood content is in my view a major misdirection.

The magistrate also concluded that before the appellant began drinking he knew very well that he was going to drive the vehicle and the consequences were foreseeable. Again there is no evidence to support this. Moreover, there is no evidence that the appellant's judgment or driving skills were in fact so severely impaired that he could not drive the motor vehicle properly or that he did so in a manner which constituted a visible danger to others. The appellant was apparently confronted by the police not because they observed anything unsatisfactory in the manner of his driving but because the police suspected that he might be driving a stolen motor vehicle. The similarity of the appearance of the appellant's motor vehicle with ordinary police vehicles had caused the police to suspect that perhaps the appellant had been driving a stolen motor vehicle and this was the reason why he was stopped.

In a prosecution such as the present the remarks of the Court in the case of *S v Sinclair* 1963 (1) SA 558 (C) at 560A–D are to be borne in mind. In that case it was said by the Court as follows:

'When one looks at the record before us we find that the investigation as to the actual driving of the car and the place where it was driven, apart from the fact that it was a public road, leaves much to be desired. The magistrate was simply told that the car zig-zagged over the road, that it was then stopped and the appellant got out. Whether this was in a busy thoroughfare at the time is not stated; whether it was a lane carrying traffic in only one direction was not stated; whether the zig-zagging was a danger to other users of the road is not stated; nor is it stated for what distance this car was seen to travel on the public road or the extent to which it deviated from a straight course. Unless those aspects are properly investigated and unless from an investigation of those aspects it should appear that the appellant was in fact a danger to other users of the road or, as stated by the magistrate, it indicates a wilful disregard of other users of a public road, I feel that the magistrate should not regard it as a reason for imposing a severe sentence.'

(See also the case of *S v Lambrecht; S v Van Rensburg; S v Van der Hoven; S v Geyser* 1970 (3) SA 141 (T) at 146H–147A.)

The magistrate correctly held that the appellant needed to be discouraged from driving a motor vehicle while he is under the influence of liquor or whilst the concentration of alcohol in his blood is not less than 0,08 grams per 100 millilitres. But why was it necessary to prevent the appellant from driving the vehicle at all in order to achieve this objective? Such an objective can rationally and sensibly be furthered by other mechanisms. Firstly, it can be done by suspending the operation of the prison sentence on the condition that the appellant does not during the period of suspension drive a motor vehicle whilst under the influence of liquor or whilst the alcohol concentration in his blood exceeds the statutory minimum referred to in Act 29 of 1989.

Secondly, it can be achieved by the mechanism of cancelling the appellant's driving licence and compelling him to re-apply for a new licence and to satisfy the licence authorities that he should be issued with such a licence.

Both of these mechanisms would provide formidable incentives for the appellant to make sure that he does not again drive a motor vehicle in circumstances which might endanger others without punishing him in the circumstances where he is able to drive a motor vehicle perfectly soberly and lawfully.

I am therefore satisfied that both a suspended term of imprisonment and a cancellation of the appellant's driving licence is perfectly justified. I am for the reasons discussed not satisfied with the conditions of suspension imposed by the magistrate. Nor am I satisfied with the period of two years' imprisonment imposed by the magistrate. It is a sentence which is strikingly disparate from the sentence I would have imposed as a trial Judge on a first offender on the facts accepted as common cause in the present case.

It is true that the whole of the imprisonment was and is to be suspended but that does not relieve the court of the duty to ensure that the substantive term of imprisonment is justified by the circumstances of the case. I refer in this regard to the case of *S v Setnoboko* 1981 (3) SA 553 (O) at 554 where the headnote reads as follows:

'In a determination of what is an appropriate sentence in a particular case and whether a portion of the sentence should be suspended, it would be wrong to look at part of the sentence only as though the suspended portion does not have to be served. Of the suspended portion it can only be said that it does not *necessarily* have to be served. It remains, however, part of the sentence of the court and, indeed, a part which will possibly have to be served. The need for careful consideration of the sentence which, as a whole, is appropriate cannot be relaxed merely because there is a possibility that the suspended portion of the sentence will eventually not have any real effect in the sense that it will not have to be served. It remains important to bear in mind throughout that the full sentence imposed might have to be served in the end and accordingly the period of the suspended punishment should be carefully considered in the context of

the unsuspended punishment. The unfairness of too long a term of imprisonment which is imposed on the first offence obviously does not fade into nothingness because the accused himself is to blame for the breach of the condition of suspension.'

In the result I would make the following order:

1. The conviction of the appellant is confirmed.
2. The sentence imposed by the magistrate is set aside and substituted by the following:
   (*a*) The accused is sentenced to pay a fine of R1 000.
   (*b*) In addition to the fine the accused is sentenced to six months' imprisonment, the whole of which is suspended for five years on the condition that the accused is not convicted of contravening s 122 of the Road Traffic Act 29 of 1989, or any statutory substitution thereof, committed during the period of suspension.
   (*c*) In terms of s 55(1)(*b*) of Act 29 of 1989 the accused's driving licence is cancelled.

Goldstein J concurred.

Appellant's Attorney: *Mike Mphela*, Groblersdal.

S v BHEMBE

TRANSVAALSE PROVINSIALE AFDELING

J J STRYDOM R en VAN DIJKHORST R

1992 November 24

***Vonnis**—Boete—Alternatief tot gevangenisstraf—Uitgangspunt dat, omdat 'n boete oorweeg word, gevangenisstraf noodwendig nie gepas nie, nie altyd geldig nie—Dikwels gevalle waar gevangenisstraf wel gepas sou wees maar hof bereid sou wees om 'n boete op te lê, mits dit 'n stywe boete is—Maar boete moet nie tot onder perk van 'n realistiese vonnis afgeskaal word om voorsiening te maak vir beskuldigde se betaalvermoë—Realistiese boetevonnis moet egter nie daarom oorboord gegooi word nie—Prakties en billik om aan beskuldigde keuse van boete te laat eerder as om direkte gevangenisstraf op te lê.*

***Diefstal**—Vonnis—Diefstal van motorvoertuigwiel ter waarde van R300—Beskuldigde, 'n eerste oortreder, 27 jaar oud, getroud met twee kinders, en het inkomste van R350 per maand—As verhoorafwagtende in hegtenis vir meer as twee-en-'n-half maande—Vonnis van nege maande gevangenisstraf—Beskuldigde moes opsie om boete te betaal gegee word—Vonnis verander na een van boete van R600 of ses maande gevangenisstraf.*

Die uitgangspunt in *S v Ncobo; S v Zwelibhangile; S v Dlamini* 1988 (3) SA 954 (N) dat, omdat 'n boete as straf oorweeg word, gevangenisstraf noodwendig nie 'n gepaste straf is nie, is nie altyd in die praktyk geldig nie. Daar kom dikwels gevalle voor waar gevangenisstraf wél 'n gepaste straf sou wees maar die hof uit simpatie met die beskuldigde bereid sou wees om 'n boete op te lê—mits dit 'n stywe boete is. Om in dié gevalle te vereis dat die boete afgeskaal word tot die vlak van die (ongeverifieerde) inkomste wat die beskuldigde opgee sal in die praktyk daartoe lei dat die hof dan liewer direkte gevangenisstraf oplê. Daar moet, in die afskaling van boetes ten einde voorsiening te maak vir die betaalvermoë van 'n beskuldigde, nie gedaal word onder die perk van 'n realistiese vonnis nie. Dit beteken egter nie dat 'n realistiese boetevonnis as vonnis-opsie oorboord gegooi moet word bloot omdat die beskuldigde dit nie onmiddellik of as uitstelboete kan bybring nie. By wanbetaling van die boete is die straf gevangenisstraf. Dit sou in ieder geval die alternatief wees waar algehele opskorting onvanpas sou wees. In sommige omstandighede kan dit prakties en billiker teenoor die beskuldigde wees om aan hom die keuse van 'n boete te laat eerder as om hom direkte gevangenisstraf op te lê. Die moontlikheid bestaan altyd dat van sy familie of vriende die boete kan bybring (al is dit slegs gedeeltelik nadat hy 'n deel van die gevangenisstraf uitgedien het).

Die beskuldigde, 'n eerste oortreder wat 27 jaar oud was, en getroud met twee kinders, is deur 'n landdros aan die diefstal van 'n motorvoertuigwiel ter waarde van R300 skuldig bevind en gevonnis tot nege maande gevangenisstraf. Dit het geblyk dat die beskuldigde R350 per maand verdien het. Die beskuldigde was ook in hegtenis as 'n verhoorafwagtende vir meer as twee-en-'n-half maande. As gevolg van sekere mistastings, het die landdros tot die gevolgtrekking gekom dat die beskuldigde nie 'n boete sou kon betaal nie. Op hersiening is bevind dat die landdros 'n boetevonnis behoort te oorweeg het. Die vonnis is tersyde gestel en vervang met 'n vonnis van 'n boete van R600 of ses maande gevangenisstraf.

***Sentence**—Fine—Alternative to imprisonment—Premise that, because a fine is being considered, imprisonment necessarily not appropriate is not always valid—Cases often occur where imprisonment indeed appropriate but court prepared to impose a fine, provided it is a heavy fine—But fine should not be scaled down below level of a realistic sentence in order to make provision for accused's ability to pay—Realistic sentence of a fine should however not be discarded for that reason—Practical and fair to leave choice whether to pay fine to accused rather than to impose direct imprisonment.*

***Theft**—Sentence—Theft of wheel of motor vehicle valued at R300—Accused a first offender, 27 years old, married with two children and earning R350 per month—In custody for more than two-and-a-half months as awaiting trial prisoner—Sentence of nine months' imprisonment imposed—Accused should have been given option of a fine—Sentence altered to one of fine of R600 or six months' imprisonment.*

The premise stated in *S v Ncobo; S v Zwelibhangile; S v Dlamini* 1988 (3) SA