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Alcohol as a Sentencing Factor



A Survey of
Attitudes of Judicial Officers.



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DISCLAIMER

The views expressed in this monograph are the views of the individual authors and do not represent any official views of the Judicial Commission of New South Wales, nor are they necessarily shared by the members of the staff of the Commission. Whilst all reasonable care has been taken in the preparation of this publication, no liability is assumed for any errors or omissions.

INTRODUCTION

In June 1993 the Australian Institute of Criminology approached the Judicial Commission of New South Wales with a view to conducting an examination of the attitude of judicial officers to the sentencing of persons who were intoxicated at the time of the offence. This project was to be part of a much wider enquiry into the legal approaches to alcohol related violence, a project commissioned by the Commonwealth Department of Health, Housing, Local Government and Community Services (now Human Services and Health).

It was decided that the most appropriate means of examining judicial attitudes towards these issues was to design and conduct a survey of judicial officers. This monograph therefore contains a summary of the findings of that survey.

It was not intended to look at the level of the sentence that judicial officers would have imposed in particular cases, but rather to examine the approach that sentencers take on issues about alcohol as a sentencing factor. For this reason, judicial officers were not asked to indicate what sort of sentence they would impose in a particular case. Rather, through a series of hypothetical cases, they were asked to assess what weight they would give to the alcohol factor (amongst other traditional sentencing factors). Of particular interest was their response as to whether, in light of the facts described in each case, alcohol was to be regarded as a mitigating, aggravating or neutral consideration in their decision-making.

Part 1

ALCOHOL AND SENTENCING PRINCIPLE

Before embarking upon a description and review of the responses to the survey, it is useful to consider the impact of alcohol on crime in general and on sentencing in particular. First we will comment on some aspects of the prevalence of alcohol in crime, and then proceed to review some cases dealing with the general principles of sentencing.

1.1 Alcohol and crime

There are no statistics indicating what proportion of offenders coming before the criminal courts claim to have been affected by alcohol at the time of their offending. Nevertheless a significant proportion of the work performed by judges and magistrates in New South Wales involves a consideration of the extent to which offenders are affected by alcohol. Alcohol can impact on the commission of a crime in two ways. First, it may be an element of the offence itself. For example, in the Local Courts of New South Wales, drink-driving offences occupy about 30 per cent of all court appearances.¹ Secondly, the offender may have committed an offence which does not contain intoxication as an integral part of the offence, but is nevertheless committed while the offender is affected by alcohol.

Hence, it is commonplace for the offender's legal representative to argue that his or her client should be treated leniently on the basis that the offender acted under the influence of alcohol at the time of the offence. Sometimes the plea in mitigation is coupled with other submissions such as a submission that the offence was 'out of character', or that the offender has recognised that he or she has a drinking problem and is already taking steps, or is prepared to take steps, to undergo some form of program or treatment regime for their alcohol problem. There are however no statistics on the frequency with which such submissions are raised, nor statistics on the rate of their success.

There is ample evidence that alcohol is a serious problem for offenders who receive custodial sentences. The New South Wales Department of Corrective Services surveyed 175 prison inmates who were released in June 1992 from correctional centres across the State. The survey was intended to provide information about the drug and alcohol backgrounds of these offenders. It found that about 67 per cent of the sample admitted to being under the influence of a drug at the time of their most serious offence. This was broken down to 34 per cent who consumed alcohol only, 23 per cent who consumed drugs only, and a further 10 per cent who consumed alcohol and other drugs.

The survey also found that 67 per cent of those who were under the influence of alcohol at the time of their most serious offence had drunk very heavily. "Very heavily" was defined as "having consumed more than 12 standard drinks prior to committing their crimes". The majority of those who were convicted of assault as their most serious offence also

¹ Based on information provided from the Sentencing Information System which is operated by the Judicial Commission of NSW to provide computerised legal and sentencing information to judicial officers.

reported that they were under the influence of alcohol at the time of offending. This supports the view that there is a strong association between drinking and violent offending.

When the sample of offenders surveyed were asked whether they had experienced drug problems in the past, 74 per cent replied in the affirmative. Alcohol was cited as the main problem by 36 per cent of these offenders, followed by 20 per cent who said they had a combined alcohol and drugs problem and finally by 18 per cent who said they had a problem with drugs alone.²

It is probably true to say that there is a general community perception that there is a strong correlation between alcohol and offending. The admissions made by prisoners as to their level of intoxication at the time of the commission of their offences support the validity of this perception.

1.2 Alcohol and the question of criminal responsibility

It should be noted that at law, the intoxication of the accused may be raised in answer to a criminal charge. The burden of proof is on the Crown to establish all the elements of the offence, including voluntariness, and to show that the requisite *mens rea* was present. Intoxication can be used as a factual rebuttal of these ingredients. In deciding on these issues, a jury is entitled to examine the state of intoxication of the offender.³

Glanville Williams has observed that

A person who is charged with theft of an umbrella may give evidence that he is an absent-minded professor and did not think what he was doing, or that he was drunk; the evidence may help him to an acquittal, but what gets him off is not the fact that he is a professor or was drunk, or both, but that the jury or magistrate are not sure he intended to steal.⁴

In practice, there is little scope for such argument because the level of intoxication required must be such that the accused failed to form the requisite intent. The mere fact that an accused cannot remember or acted "out of character" does not necessarily mean that he was not acting voluntarily.

The state of intoxication of the offender may also mean that the prosecution may be more inclined to accept a plea of guilty to, or otherwise prosecute the offender for, a less serious charge than the objective circumstances of the offence may initially suggest. Where the Crown decides to prosecute a more serious charge in circumstances where there is evidence of intoxication, a jury nevertheless may be more inclined to return a lesser alternative verdict on the basis that it is not satisfied beyond reasonable doubt that the offender possessed the requisite mental element (*mens rea*) required for the more serious offence.

² Maria Kevin, *Drug and Alcohol Exit Survey: Part 1: Drug and alcohol background of inmates Research Publication No. 26*, Department of Corrective Services, December 1992, at p iv.

³ see *O'Connor* (1979-80) 29 ALR 449

⁴ G Williams, *Textbook of Criminal Law*, 1983, 2nd Ed, Steven & Sons, London at p 468

1.3 Alcohol and sentencing

It has been said repeatedly that the courts will not regard drug addiction as an excuse, or even a mitigating factor, in assessing the appropriate penalty in relation to serious crime.⁵ It has been held that whatever sympathy the courts may feel for a person who is subject to a compulsive and expensive habit, it cannot be made an excuse for crime and that the community has to be protected against criminal action, whatever the motivation of that action.⁶ As Hunt J observed in *Coleman*⁷

The degree of deliberation shown by an offender is usually a matter to be taken into account; such intoxication would therefore be relevant in determining the degree of deliberation involved in the offender's breach of the law. In some circumstances, it may aggravate the crime because of the recklessness with which the offender became intoxicated; in other circumstances, it may mitigate the crime because the offender has by reason of that intoxication acted out of character. (I have not intended by those examples to limit the extent to which intoxication may be taken into account; see, generally, *Sewell and Walsh* (1981)29 SASR 12 at 14-15; 5 A Crim R 204 at 207).

The tension between the community's interests and those of the offender is highlighted in cases where the offender faces the very real prospect of receiving a custodial sentence. The sentencing judge or magistrate must decide whether, in the light of the objective seriousness of the offence, the offender should be sentenced to a term of imprisonment or whether the subjective features of the case are sufficient to "swing the balance" in favour of a non-custodial disposition. In the latter case, the sentencing court will not impose a sentence of imprisonment, provided that the offender agrees to submit to some form of treatment or counselling. Often the form of disposal involves a recognisance⁸ or bond.

It is increasingly recognised that caution needs to be exercised when imposing a condition in a recognisance which places an obligation on an offender to abstain from consuming intoxicating liquor. Such a condition may be far too onerous and unreasonable for some alcoholic offenders. Yet if offered the choice between a prison sentence and a recognisance, offenders are likely to agree to terms which they may not be able to meet. In these circumstances they are being "set up to fail." Thus in South Australia, a condition in a bond requiring the offender to abstain from drinking alcohol for three years has been declared invalid on the basis that it was an unreasonable and unrealistic condition.⁹

Where a custodial sentence is not warranted because the offence is not sufficiently serious, the fact that an offender is an alcoholic or drug addict who may derive some benefit from being held in custody in order to undergo treatment is not *per se* a sufficient

⁵ *Spiero* (1979) 22 SASR 543

⁶ *Kain* (1984) 38 SASR 309

⁷ (1990) 47 A Crim R 306 at 327

⁸ A bond or recognisance is a voluntary undertaking between the offender and the court whereby the offender, in lieu of a sentence, agrees to comply with certain specified conditions imposed by the court.

⁹ *Baddock v Steel* (1973) 5 SASR 71. On the topic of ordering treatment as a condition of a recognisance, see Richard Fox, *The Compulsion of Voluntary Treatment*, (1992) 16 Crim L R 37

ground for imposing a sentence of imprisonment. Nor is it a ground for increasing an otherwise appropriate term of imprisonment.¹⁰ The Australian courts have firmly rejected the English approach, as exemplified in the case of *Moylan*¹¹, that within the limits of a proper sentence for the offence "it may be perfectly proper to increase the sentence in order to enable a cure to be undertaken whilst the accused is in prison". Similarly, Australian courts have held that it is not appropriate to send alcoholics to prison for drunkenness in order to give them a chance to "dry out".¹²

A further principle of considerable importance is the recognition that the courts are not to use their sentencing powers to remove from society people who have not committed serious offences, yet who may represent a nuisance or who are socially inconvenient. That principle is best illustrated by reference to the English decision of *Clarke*¹³, where a sentence of 18 months imprisonment had been imposed for breaking a flower pot worth two pounds. Lawton LJ said,

Her Majesty's Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should Her Majesty's judges use their powers to dispose of those who are socially inconvenient.

In the case of chronic alcoholism, the solutions may lie beyond the criminal law and it may be more appropriate to use social services or offer constructive treatment in the form of detoxification centres or drop-in centres, rather than utilise more severe social control measures.¹⁴

1.4 Alcohol and mental health

It is not unusual in cases involving violence to find that the offender has a disposition to violent or aggressive behaviour when under the influence of intoxicating liquor. It would appear that the fact that the offender is aware that he behaves abnormally (violently) when under the influence of alcohol and that such behaviour is deliberately induced and further, that such behaviour is not out of character, all serve to prevent or limit the extent to which alcohol may be taken into account as a mitigating factor. In upholding a life sentence in *Veen No (2)*, the High Court was not prepared to reduce the sentence on account of the offender's mental illness, nor on account of his intoxication at the time of the offence, nor on a combination of these factors. The offender's prior history of violence and concerns about community protection overrode any leniency that might have been afforded to the offender in the circumstances of this particular case.

In *Powell*¹⁵, the Court of Criminal Appeal examined the case of an offender who acted under the influence of alcohol while suffering from an unrecognised and untreated medical condition. Hunt CJ at CL observed -

¹⁰ *Veen (No 1)* (1977) 143 CLR 458 and also *Veen (No 2)*(1988) 164 CLR 465; 62 ALJR 224

¹¹ (1970) 1 QB 143

¹² See for example, *Nash v Whitford* (1972) 2 SASR 333; *Gollan v Samuels* (1973) 6 SASR 452

¹³ (1975) 61 Crim App R 320 at 323

¹⁴ Andrew Ashworth, *Sentencing and Penal Policy*, Weidenfeld and Nicolson, London, 1983 at p 17

¹⁵ unreported, NSW CCA 23 March 1993 This was a rape case where the offender was said to suffer from what was described as a cryptic temporal lobe disorder, which, when under the influence of alcohol, made the applicant even more uninhibited (or more out of control) than a normal person. The

It has been submitted that the judge failed to take into account the principle that general deterrence plays little part in the case of an offender suffering from a mental disorder or disability: **Regina v Martin John Letteri** (CCA, 18 March 1992, unreported) at 14. ... I see no basis for a reduction upon any such basis in this case. the applicant's control over himself was abnormal only when he became intoxicated. According to the histories taken, such intoxication was not out of character for the applicant. It was a condition which on the face of it was quite deliberately induced, and often. The applicant could hardly have been unaware of the consequences to himself, even if he was unaware... as to the reason why those consequences were greater for him than for the normal person.

1.5 Aboriginal and Torres Strait Islander offenders

Alcohol is known to present serious health, social and criminal justice problems for Aboriginal and Torres Strait Islander communities. While the same sentencing principles apply irrespective of the offender's identity or membership of an ethnic or racial group, the sentencing court should take into account facts which exist only by reason of his membership of such a group.¹⁶

In *Fernando*¹⁷ Wood J discussed the relationship between violence, aboriginality, alcohol consumption and sentencing and made the following useful observations -

- Aboriginality does not necessarily mitigate punishment, but is relevant to explain the offence and the offender's circumstances.
- The lure of alcohol and violence in aboriginal communities requires more subtle remedies than imprisonment. The imposition of heavy terms of imprisonment has not been shown to be an effective deterrent in discouraging alcohol abuse or violence in aboriginal societies. But serious violence by drunken persons must not be regarded lightly.
- Drunkenness reflecting the socio-economic circumstances and environment in which the offender grew up should operate in mitigation. The objective seriousness of the crime, related to its local setting, and the subjective circumstances, must be realistically assessed. Yet for an aboriginal from a deprived or disadvantaged background, with little experience of European ways, a lengthy gaol term may be too harsh, amongst a prison population with little understanding of his culture, society or personality.

While the punishment must fit the crime, full weight must be given to rehabilitation and the public interest in the avoidance of recidivism. However the considerations of community protection, as illustrated in *Veen (No 2)*, may in some circumstances diminish the application of such mitigating factors. In *Williams*, Hunt CJ at CL discussed the treatment of Aboriginal offenders and clearly distinguished cases where crime is committed which is related to socio-economic status and race arising from the

symptoms were similar to epileptic attacks, resulting from abnormal electrical activity in the brain. He was also charged in respect of a vicious and unprovoked attack upon a woman in a public lavatory and sentenced for assault occasioning actual bodily harm.

¹⁶ *Neal* (1982) 149 CLR 305, per Brennan J at p 326

¹⁷ *Fernando* (Stanley Edward) SC Bathurst 13 Mar 1992, per Wood J.

aboriginality of the offender such as offensive behaviour (through drunkenness), assaulting police and resisting arrest, from what can be called "white, middle-class crimes" as aggravated sexual assault or property offences.

1.6 Alcohol and driving

The presence of alcohol functions as an element of the indictable offence of culpable driving (driving under the influence), contrary to s.52A(1)(e) of the Crimes Act 1900. In addition, there are a number of summary driving offences where having a prescribed concentration of alcohol or being under the influence of alcohol is an element of the offence. As a general rule in driving cases, the greater the level of intoxication involved, the more seriously is the offence regarded by the courts.

When an offender is sentenced in relation to an offence of culpable driving (drive manner dangerous), evidence of the ingestion of alcohol to such a degree as is likely to affect ability to control a motor vehicle is relevant and admissible as one of the surrounding circumstances against which the quality of driving, charged as driving in a manner dangerous to the public, is to be judged.¹⁸ In relation to a charge of culpable driving (driving under the influence), previous drink-driving offences may be relevant to show that the present culpable driving was not an uncharacteristic aberration, but rather demonstrated a continuing disobedience of the law in relation to drink-driving. Subsequent offences may be relevant to show that, notwithstanding the horrific consequences, the offenders had continued to drink and drive, and that consequently, prospects of rehabilitation may not be good.¹⁹

Youth is a generally a mitigating factor on sentence. However, while the courts are reluctant to send young persons to gaol, a licence to drive may be obtained at 17 years of age. If young people drive after excessive drinking and at high speed, no reason can be found to differentiate in penalty between them and older drivers.²⁰ The Court of Criminal Appeal has emphasised that young persons who kill while driving under the influence of alcohol can expect extremely severe deterrent sentences.²¹ Even so, that Court has expressly declined to say that a custodial sentence for culpable driving causing death is appropriate in every case.²²

1.7 The role of judicial officers

In summary, it is the sentencer's duty to determine the appropriate penalty by reference to all the relevant circumstances of the offence and also by reference to the background of the offender. In order to fulfil this duty, a judicial officer is vested with a discretion to tailor the sentence to both the offender and the offence. However, this discretion must be exercised judicially.²³ The fact that the offender was affected by alcohol may be a subjective feature or a part of the objective facts of the case itself or both and

¹⁸ *Norris* NSW CCA 13 Oct 1989, per Badgery-Parker J at p 6-7

¹⁹ *Scicluna* NSW CCA 19 Sep 1991, per Hunt J at p 4

²⁰ *Hallacoglu* (1992) 63 A Crim R 287, per Hunt CJ at CL

²¹ *Harris (Troy Andrew)* NSW CCA 27 Oct 1992, per McInerney J at 3, also *MacIntyre* (1988) 38 A Crim R 135 per Lee CJ at 139

²² *Hallacoglu* (1992) 63 A Crim R 287, per Hunt CJ at CL

²³ *Rushby* (1977) 1 NSWLR 594 per Street CJ

consequently such intoxication has the capacity to be either a matter of aggravation or mitigation on sentence. As a general rule, the previous character and conduct, and probable future life and conduct of the individual offender and the effect of sentence on these are said to be subsidiary to the primary considerations of community protection and commensurate punishment.²⁴

Although both counsel have an important role in assisting the court, the proper exercise of the sentencing discretion is the responsibility of the judicial officer. The Crown has a duty to provide an adequate presentation of the facts, to provide an appropriate reference to any relevant sentencing principles and to assist the court to avoid appealable errors.²⁵ The duty of counsel for the defence is to address the plea in mitigation of sentence and draw to the attention of the court any factors which may weigh in the offender's favour. This includes ensuring that information pertinent to sentencing is accurate and reliable. In particular, counsel for the defence is duty bound to challenge unwarranted assertions in pre-sentence, criminal antecedent or other reports, particularly where they are disputed by the offender.²⁶ The level of intoxication of an offender (both at the time of the offence and generally) may be such an issue. Ultimately, it is the sentencing court which must form its own view of the facts and decide how the offender is to be dealt with.²⁷

It is in the light of these considerations that this study focusses on the way in which judicial officers deal with offenders who were intoxicated at the time of the offence. As we stated earlier, it is not the aim of this project to look at the kind or quantum of the sentence that judicial officers would be minded to impose but rather to examine the view that sentencers take to alcohol as a sentencing factor. As sentencing discretion is governed by the general sentencing principles outlined above, this study is more than simply a study of judicial attitude, it seeks to examine the level of consistency among judicial officers in their approach to issues that arise in relation to alcohol in sentencing.

²⁴ *Radich* (1954) NZLR 86

²⁵ *Tait and Bartley* (1979) 24 ALR 473 at p 477.

²⁶ see Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 1985, at pp 43-45.

²⁷ *Webb* [1971] VR 147 at 152

Part 2

THE JUDICIAL OFFICERS' SURVEY

2.1 Introduction

During July and August 1993, a survey Questionnaire was developed and then distributed to District Court judges and magistrates in New South Wales. The survey sought to gauge the views of Judicial Officers in relation to the weight they would give to certain factual circumstances relevant to the sentencing of violent offenders.

2.2 Some aims of the study

The general aim of the survey was to explore and report upon the perceptions or attitude of judicial officers towards the sentencing of offenders who were affected by alcohol when they committed their offences. Amongst other things, the survey sought to determine whether (if at all) and if so to what extent and in what circumstances, courts would be inclined to mitigate punishment on account of the offender's intoxication at the time of the offence. In addition, the survey sought to determine whether courts would be inclined to regard the influence of alcohol upon the offender's behaviour as a mitigating or aggravating factor and thus, by implication, tend to lead them to set a more lenient or more severe penalty than they might otherwise impose, or alternatively, whether they would be inclined to regard the element of intoxication as a neutral factor which would go neither to increase nor reduce the otherwise appropriate sentence.

2.3 Developing the questionnaire

In pursuing this research it was decided that, rather than posing a series of general questions which were not tied to specific fact situations, the most appropriate approach would be the use of a small number of fictitious cases which would approximate the kinds of practical decisions that judicial officers are commonly called upon to make during their sentencing deliberations. This approach would avoid the criticism that the questions could not be answered because insufficient information had been provided to the respondents.

Furthermore, it was felt that judges and magistrates were accustomed to determining actual cases and that it would be better to present them with several detailed case studies which they could analyse in depth. Three hypothetical cases were prepared, each concerning a common type of violent offence. In each case, the offender was said to have committed the offence while under the influence of alcohol: a serious assault arising out of a pub brawl, a serious 'domestic violence' assault, and an armed robbery. The reader was then asked to indicate the weight they would give to a number of relevant sentencing factors.

Initially, a draft of the Questionnaire was presented to a small number of senior judicial officers to examine and evaluate its appropriateness. Thereafter some further refining and a number of minor amendments were made to the Questionnaire before it was ready for general distribution.

A copy of the survey Questionnaire is set out in Appendix A. The analysis of the results is contained in Appendix B.

2.4 Methodology

The Questionnaire, consisting essentially of three fictitious cases, contained a mix of the kind of factual circumstances that are commonly taken into account in the sentencing process. As in an actual case, 'intoxication at the time of the offence' was just one of a number of other sentencing variables that the respondents were asked to consider. By asking a series of questions relating to other commonly occurring sentencing variables it was possible to avoid placing undue emphasis on the element of intoxication, and so, it was considered that a more realistic response to the questions could be obtained.

The subjects of the survey (the respondents) were District Court judges and Local Court magistrates from New South Wales. Magistrate from the Childrens court were also included and counted as members of the Local Court magistracy.

Note however that magistrates were asked to express their views in relation to the armed robbery case even though such cases are beyond their sentencing jurisdiction. Their views were canvassed on the basis that their general attitudes would be informative and provide insight into how they view the alcohol factor in the sentencing of serious violent offences.

To evaluate the degree of influence that alcohol would be likely to have on a sentence, the respondents were asked to circle the most appropriate answer in a seven point scale comprising the following numerical values; -3, -2, -1, 0, +1, +2, +3. The '0' or centre point, stood for neutral weight for the purposes of sentencing. The '-3' stood for a highly mitigating factor, and '+3' stood for a highly aggravating factor.²⁸

In addition to the 47 questions directly related to the three cases, there were a number of general questions which gave the respondents an opportunity to add their qualitative observations or qualifications to their answers. A small number of supplementary questions on such variables as age, jurisdiction and court were also included.

2.5 Response

In all, questionnaires were given to 126 magistrates and 56 judges of the District Court - a total population of 182 judicial officers. From these, a total of 120 forms were returned. However two respondents who returned questionnaires omitted to answer most of the questions and in most instances there was a total of 117 responses recorded for each question.

Thus, based on the figure of 117, the overall response rate for all judicial officers was 64.3%. For magistrates the response rate was 63.5% (ie 80 magistrates out of 126 returned answers to the questions) and for judges, the response rate was 66.1% (ie 37 judges out of 56 returned answers to the questions).

²⁸ For further details in relation to the weightings see the second page of Appendix A.

As these figures show, an excellent response rate of just under two out of every three judicial officers was obtained overall. Furthermore while magistrate respondents outnumbered judges by a ratio of two to one,²⁹ when their respective total populations were compared, the proportion of judges and the proportion of magistrates who responded from their groups was closely matched.

Most of the respondents spent the majority of their time in the criminal jurisdiction. Overall, and in round figures, 80 per cent of respondents reported that they spent more than two thirds of their time in the criminal jurisdiction, although a higher proportion of magistrates (88%) than judges (65%) fell into this category. Very few respondents (judges, 11%, magistrates 4%) stated that they spent less than one third of their time in the criminal jurisdiction.³⁰

The majority of respondents (judges 75% and magistrates 62%) had spent 10 years or less on the bench and judges (56% over 60 years of age) tended to be older than magistrates (7% over 60 years of age).³¹

2.6 Responses to questions on alcohol

In order to fully understand the following analysis it is desirable that the three hypothetical cases should be read and comprehended. As indicated above, the Questionnaire containing the facts of the three cases is set out in Appendix A. For convenience, a shortened version of the facts is also provided in this analysis.

Our analysis is restricted to the questions relevant to the element of alcoholic intoxication. The responses to all the questions contained in the survey are summarised, *per seriatim*, in Appendix B.

Our first enquiry is to consider the extent to which respondents, all judicial officers practising in the criminal jurisdiction of New South Wales, regarded the offender's intoxication at the time of the offence as aggravating, mitigating or neutral. Related to this enquiry are a number of sub-questions which can also be investigated by examining the data. These include:-

1. whether there is any general consensus among respondents in their approach to the sentencing of offenders who committed their violent offences while intoxicated?
2. whether the type of crime affects the way in which alcohol is perceived by judicial officers as a mitigating, neutral or aggravating factor for the purposes of sentencing?
3. whether as a group, judges compared to magistrates are inclined to be more lenient (give more weight to) the fact that the offender was affected by alcohol at the time of offending when sentencing violent offenders?

²⁹ See answer to question 48 in Appendix B

³⁰ Question 49 in Appendix B at p 29

³¹ Questions 50 and 51 in Appendix B at p 30

In order to provide answers to these questions it is necessary to focus on the responses to questions on intoxication as set out in the Questionnaire. As indicated above, the responses to these Questionnaires have already been analysed in Appendix B and accordingly it is not proposed to replicate that analysis here. Instead we proceed by re-examining the data and presenting them in a different way. In particular we proceed by presenting a number of comparative tables and figures which summarise the responses relating to the principal questions dealing with the weightings, in terms of the scale of aggravation and mitigation provided in the Questionnaire, that judicial officers were asked to provide on the issue of intoxication.

The analysis therefore proceeds by reference to the following questions 3, 12, 20, 27, 30, 31, 37, and 38. The brief facts of each case, followed by the relevant questions are set out hereunder. It is important to appreciate that the responses should be interpreted in the context of the more comprehensive case descriptions and the actual questions contained in Appendix A.

Case No 1 Pub Brawl

Peter Smith had been at home baby-sitting his ten year old sister. He knew his mates would be at a pub. At about 9 p.m. he decided to join them and left his sister locked in the house. His mates were intoxicated when he arrived at the pub and he also soon became intoxicated. He was known to become argumentative and aggressive when drunk. When one of his mates made a crude joke about his sister, Smith broke the top off a 'stubbie' bottle and attacked him. As a result Smith lacerated his mate's cheek, before he could be restrained by others.

Case No 2 Domestic Violence Assault

The victim, Debbie Tanner, had obtained an Apprehended Violence Order against her husband, John. There was a history of domestic violence. He was required to leave the matrimonial home and not contact her for twelve months. About three months later, the offender, who had been drinking, entered the victim's home in her absence, with the intention of talking to her. When she arrived home she found him drinking her scotch. An altercation ensued and he violently assaulted her. The offender was affected by alcohol at the time of the offence. He left the scene when interrupted by a neighbour.

Case No 3 Armed Robbery

Adams, Barton and Collins meet regularly in a pub. One evening at the pub Barton informed his companions that McDonalds collected a lot of money on Friday nights. Adams suggested staging an armed hold-up with an unloaded shotgun and a replica handgun. At first Collins and Barton refused to participate in the plan. Adams and Barton were drinking beer. Collins was not drinking alcohol because he was taking prescription drugs and knew that only a small amount of alcohol would lead him to become intoxicated. When Adams and Barton had consumed sufficient alcohol to place them over the legal limit for driving, they each bought a round of drinks. On these occasions they ordered orange juices 'spiked' with vodka for Collins. Collins drank these without being aware of their alcoholic content. Collins also became inebriated. The subject of the robbery was raised again and was agreed to, with Collins driving the getaway car. At one stage Collins hesitated but after drinking some whisky decided to proceed with the plan. All three were intoxicated when they carried out their plan.

KEY TO QUESTIONS IN SUMMARY TABLES 1 TO 3 AND FIGURES 1 TO 3 INCLUSIVE

Pub brawl

Q3. The offender acted under the influence of alcohol

The offender joined his mates in a pub when they were already intoxicated. Within a short period he too became intoxicated, and following an insult about his sister, the offender broke a stubbie bear bottle and slashed the victim's face with it.

Domestic Violence

Q12. The offender acted under the influence of alcohol

When the victim arrived home she found the offender inside the house, very drunk and drinking her Scotch. He became agitated before assaulting her.

Armed Robbery

Q20. Adams acted under the influence of alcohol

The offenders had been drinking alcohol. Adams and the other participants were all under the influence of alcohol when they planned and carried out the robbery.

Q27. Barton required 'Dutch Courage' to proceed

Barton had expressed doubts about carrying out the robbery. Adams produced a bottle of whisky from which Barton drank a couple of nips and then said, 'Right, I feel fine, I can do anything'.

Q30. Barton acted under the influence of alcohol

The offenders had been drinking alcohol in a pub to a point where they were over the legal limit for driving before undertaking the robbery.

Q31. Barton was an alcoholic and was affected by alcohol

Barton was a chronic alcoholic. His first marriage had failed because of his drinking problems. As stated above, Barton was under the influence of alcohol at the time of the robbery.

Q37. Collins was affected by alcohol and drugs

Collins was not drinking alcohol because he was taking prescription drugs after a motor vehicle accident and his doctor had advised him that the drugs would enhance the effect of alcohol. Without his knowledge or consent, his companions put vodka in his orange juice. As a result his intoxication was exacerbated by the medication.

Q38. Collins' consumption of alcohol was involuntary

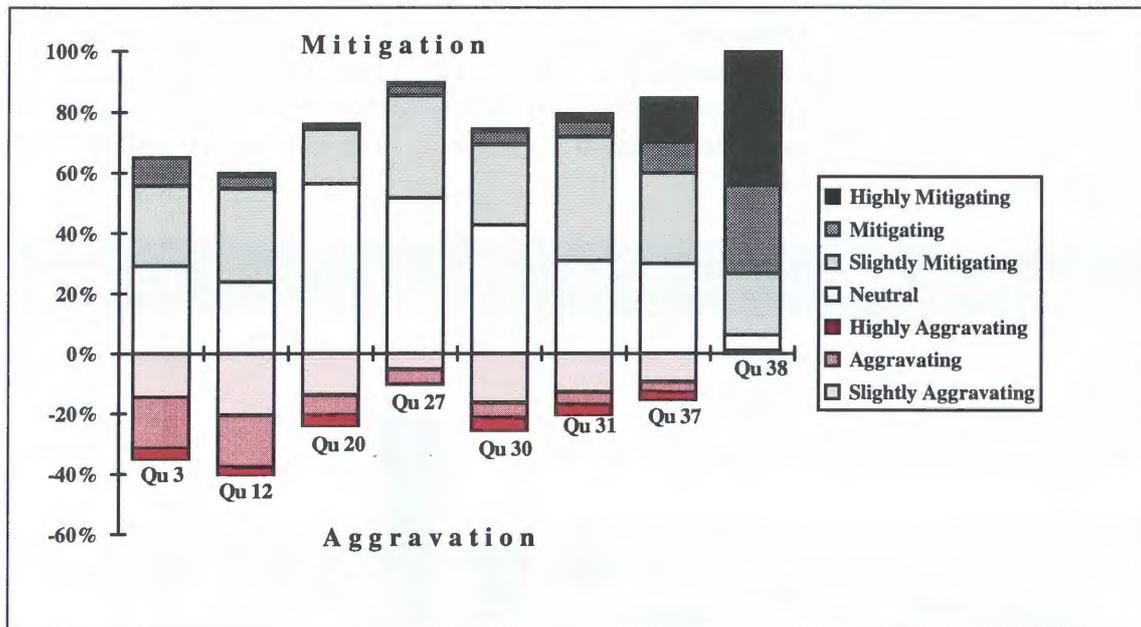
As mentioned above, Collins was not aware that his companions had 'spiked' the orange juice he was drinking.

Summary Table 1 presents a breakdown of the total responses, expressed as a percentage, of the weightings given by respondents (ie both judges and magistrates) for each of the selected questions. This is followed by Figure 1 which presents the same information graphically ie the further the bars fall below the baseline the greater are the responses in the aggravating categories. Conversely the higher above the baseline the higher the proportion of respondents who selected neutral or one of the mitigating categories. Each bar represents 100 per cent of the (usually 117) responses for that question.

Summary Table 1: Comparative weightings of mitigation and aggravation for selected questions - Total

	Qu3	Qu12	Qu20	Qu27	Qu30	Qu31	Qu37	Qu38
	%	%	%	%	%	%	%	%
Highly Mitigating	-	.9	.9	.9	.9	2.6	14.5	44.4
Mitigating	9.4	4.3	.9	3.4	4.3	5.1	10.3	29.1
Slightly Mitigating	26.5	30.8	17.9	33.6	26.5	41.0	29.9	20.5
Neutral	29.1	23.9	56.4	51.7	42.7	30.8	29.9	5.1
Slightly Aggravating	14.5	20.5	13.7	5.2	16.2	12.8	9.4	-
Aggravating	17.1	17.1	6.8	5.2	5.1	4.3	3.4	-
Highly Aggravating	3.4	2.6	3.4	-	4.3	3.4	2.6	.9
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Figure 1: Comparative weightings of mitigation and aggravation for selected questions - Total



These data show that *in most instances* the majority of judicial officers tend to regard intoxication by alcohol at the time of the offence as either a neutral factor or as a slightly mitigating factor. Another way of looking at the data presented in Figure 1 is to say that overall, a smaller proportion of judicial officers regarded intoxication of the offender as falling into one of the categories of aggravation rather than into one of the categories of mitigation. This finding accords with the analysis of the case law presented earlier. Of particular interest however are the answers to questions 3, 12 and 20 where, ignoring the neutral responses, the proportion of respondents selecting a mitigating category was broadly equal to respondents selecting an aggravating category.

With regard to question 12, slightly more respondents selected an aggravating category than a mitigating or neutral category. Furthermore, those who selected an aggravating category tended to select a higher level (ie aggravating and highly aggravating) than their counterparts who selected a mitigating category. Clearly a substantial proportion of respondents indicated that intoxication at the time of the offence in the circumstances of the domestic assault presented to them was an aggravating circumstance.

Similarly, with respect to question 3, the proportion of respondents selecting an aggravating category was high, suggesting that just as many judicial officers regarded the presence of alcohol involvement in pub brawls as aggravating as they did mitigating. Indeed the rather broad distribution of near equal responses in the three major categories (neutral, aggravating and mitigating) for these questions appears to reflect the tension between considerations of community protection and the need to be take into account the subjective features of the offender.

Of all the responses relating to intoxication, Question 38 stands out. This question concerned Collins, the offender whose drink had been 'spiked' with the result that he had become intoxicated involuntarily. As Figure 1 reveals, nearly all responses were in the

mitigating categories with only about 5 per cent regarding this as a neutral consideration. It is interesting to note that this question also scored the highest (44%) for respondent selecting 'highly mitigating'. There was also a relatively high response rate in the mitigating categories for Questions 31 and 37. The second lowest response in the aggravating categories was for Question 27, where the offender Barton had paused to drink alcohol in order to summon up the courage to proceed with the plan to commit the armed robbery. This question, like Question 20 had very high levels of responses in the neutral category.

Figure 2: Comparative weightings of mitigation and aggravation for selected questions - Non-neutral responses

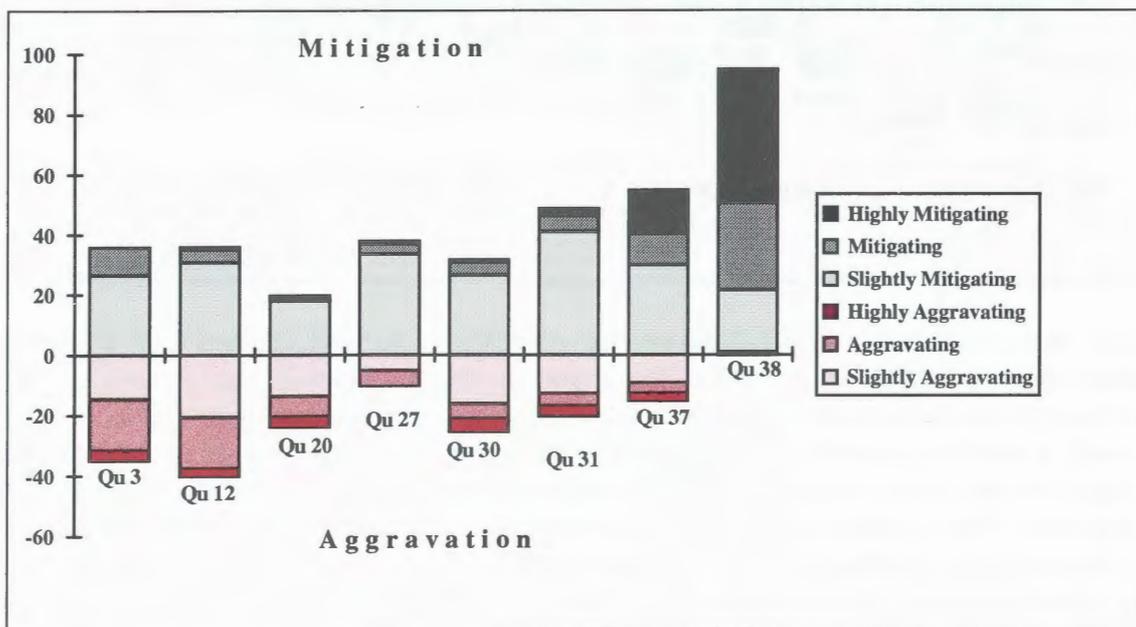


Figure 2 presents a graphic breakdown of the non-neutral total responses, expressed as a percentage, of the weightings given by respondents (ie both judges and magistrates) for each of the selected questions ie the further the bars fall below the baseline the greater are the responses in either the aggravating categories. Conversely the higher above the baseline the higher the proportion of respondents who one of the mitigating categories. The size of each bar represents the percentage of responses which were non-neutral response or responses that deviated from the neutral line.

This graph reinforces the impression gained from Figure 1 in relation to the answers to questions 3, 12 and 20. Figure 2 clearly shows the proportion of respondents selecting a mitigating category was broadly equal to respondents selecting an aggravating category.

It also shows clearly that in relation to Question 38 that the vast majority of responding selected a mitigating factor.

2.7 Comparing responses of Judges and Magistrates

A glance at the data in Appendix C (Summary Table A and Figure A presents the responses of judges only, to the same questions set out in Summary Table 1 and Figure 1; Summary Table B and Figure B presents the responses for magistrates only) suggest that there is a high degree of uniformity in the overall pattern of responses in the two groups.

While there appears to be a high degree of consistency in relation to the spread of responses for both judges and magistrates, it is interesting that judges were prepared to mitigate more often, and to a greater degree, than their counterparts. Conversely, the magistrates appeared more likely to select an aggravating category than were the judges. However, apart from this general difference between the two groups, the overall response patterns of both groups was surprisingly similar and consistent.

2.8 Intoxication of the victim

In addition to asking respondents to rank their responses in terms of the 7 point scale of mitigation/aggravation, some further questions were asked in relation to their attitudes on intoxication. In the following question it was sought to see whether and to what extent the fact that the victim of the domestic violence assault was also intoxicated at the time of the offence would impact on the seriousness with which the court viewed the offence.

Q15. Variation to facts in Case 2

The respondents were asked to assume that Debbie Tanner (the victim of the domestic violence assault), was also affected by alcohol and was uncharacteristically abusive before the assault took place. She had told the offender that he was a 'mummies boy' and 'lousy in bed'. Respondents were then asked to give their opinion as to whether this would diminish the seriousness of the assault and so lead to a less severe sentence or make no difference to the seriousness of the offence.

The responses to this question were split in the ratio 2 to 3. For every two respondents who felt that intoxication of the victim would diminish the seriousness of the assault, three respondents answered that it would make no difference.

2.9 Adequacy of rehabilitation resources

When courts impose a sentence with a view to promoting the rehabilitation of the offender they are often concerned to see whether there are appropriate facilities or programs to which the offender can be directed. The following question was included in the Questionnaire:

Q46. Adequacy of rehabilitation resources for alcoholic offenders

Respondents were asked if there were a sufficient range and number of rehabilitation resources or programs available for treating alcoholic offenders in their area? A choice of 'yes', 'no' or 'don't know' was given.

The respondents were split in their views; only one out of three judicial officers replied 'yes' to this question. One in four respondents answered 'don't know' and 40 per cent of them indicated by their answers that there was not a sufficient range of rehabilitation resources or programs available for alcoholic offenders. A very high proportion of judges (45%) indicated that they did not know the answer to this question. This in part may be due to the fact that judges deal in more serious crime, and perhaps more importantly, due to the fact that magistrates deal with substantially more cases, including alcohol related offences which may make the issues of alcoholism and rehabilitation a daily issue for the Local Courts. The most common response was that there was not a sufficient range and number of alcohol rehabilitation programs in the community.

2.10 Should intoxicated offenders be sentenced differently?

A global question was inserted into the Questionnaire in order to ascertain whether respondents had a general philosophy or approach to the problem of how to sentence intoxicated offenders.

Q47. As a general principle should alcoholic offenders be treated differently?

Respondents were asked if they thought that an offender who commits violent offences (other than driving offences) while intoxicated by alcohol should be sentenced differently from an offender who was not affected by alcohol? The choices given were: 'more leniently than'; 'in the same way as'; 'more severely than'; and 'don't know'.

About six out of ten respondents selected the option "same way", suggesting that unless there are other circumstances apart from mere intoxication many judicial officers will, as a general principle, give no weight in the sentencing decision to the fact of intoxication *per se*. About 1 in 4 respondents reported that they would treat offenders who were affected by alcohol at the time of their offending "more leniently than" those who were not intoxicated. However a typical response which exemplifies the cautious approach taken by some of those who answered in this way was given by one judicial respondent. That respondent commented as follows:-

Whilst I have circled 1 above [referring to 'more leniently than'] as a 'general rule' I should make it clear that I do not approach any matter on the basis that leniency will be given to intoxicated offenders. Rather than 'general rule', leniency in my experience does arise more often than not from the particular circumstances and the degree of leniency varies according to the circumstances.

Only one judge reported he or she would treat an inebriated offender more severely. However one out of eight magistrates answered that they would treat such an offender "more severely". One magistrate explained that he or she would answer in this way, particularly where the offender was aware of his or her problem and "had failed to work on it". This same respondent added:-

Alcohol plays as much as and probably more than 90% of the crimes dealt with by me. Over 20 years as a practitioner and judicial officer I have seen nothing to change this percentage.

Again the majority of respondents who answered this question appear to be reflecting the general principle that alcohol is an explanation rather than an excuse for crime, and unless there are other factors present (whether mitigating or aggravating) the mere presence of alcohol will not affect the sentence.

The broader conclusions that can be drawn from this survey are discussed in the conclusion of this study.

2.11 Interviews with other participants in the criminal justice system

In order to develop a broader understanding of the exercise of judicial discretion in this area, a number of participants in the sentencing process were identified and interviewed. The groups of people interviewed were -

- Public Defenders
- Crown Prosecutors (State)
- Legal Aid Solicitors
- Solicitors from the Office of the Director of Public Prosecutions (State)
- Police Prosecutors

The common feature of these interviewees is that they appear regularly in sentencing matters in either the District or Local Court on behalf of either the prosecution or the defence. It was sought to explore their collective experience of the judiciary to gain an appreciation of the approach that such officers are perceived to take in relation to these issues. The views expressed in these interviews should not be taken or expected to be taken as representing of the views of their organisations.

The interviews were structured by use of a general questionnaire which was used to focus and lead discussion. A copy of the interview questionnaire is set out in Appendix D.

In summary, the interviewees seemed to be in agreement with the following propositions -

- that the presence of alcohol is explanatory rather than mitigating,
- that in general alcohol abuse was more "acceptable" than illicit drug abuse
- that judicial officers, particularly magistrates, were more sympathetic of alcohol affected offenders, rather than offenders who were under the influence of other drugs. (The interviewees were also of the opinion that this view held by judicial officers reflected general community attitudes.)
- that judges and magistrates deal with each case on its own facts

Several police prosecutors indicated that in their view alcohol was an aggravating factor and was no excuse for crime. They acknowledged that alcohol was sometimes a mitigating factor in practice before magistrates, but suggested that it ought not to be.

Practitioners who regularly appeared for the offender indicated that in their experience alcohol was generally a mitigating factor, but they drew a distinction between young alcohol affected offenders who commit violent crimes and "out of control" middle-aged alcoholic men.

Part 3

CONCLUSIONS

This study commenced with a discussion of the main principles that apply to the sentencing of violent offenders who commit offences while under the influence of alcohol. As a general rule, courts will not regard drug addiction as an excuse, or even a mitigating factor, in assessing the appropriate penalty in relation to serious crime. The judicial officers in the survey were quick to stress that decisions on sentencing need to take into account all the circumstances of the case.

In summary, the common law principles of sentencing indicate that intoxication is to be taken into account-

- for determining the degree of deliberation involved in the offender's breach of the law;
- for determining whether by reason of that intoxication the offender acted out of character; and
- for determining whether it aggravates the crime because of the recklessness with which the offender became intoxicated.

Alcohol intoxication, like other circumstances, cannot be considered in isolation. Whatever sympathy the courts may feel for a person who is subject to a compulsive and expensive habit, it cannot simply be made an excuse for crime.

The survey of judicial officers sought to gauge their views in relation to certain sentencing factors. The survey consisted chiefly of questions concerning three hypothetical cases:- a serious assault arising out of a pub brawl, a serious 'domestic violence' assault, and an armed robbery committed in company. Each case contained circumstances involving offenders who were intoxicated at the time of offending and a series of questions relating to those circumstances were prepared and distributed to judicial officers throughout New South Wales.

An examination of the data suggested that most judicial officers regarded intoxication at the time of the offence as either a neutral or slightly mitigating circumstance. However the extent of this response depended on the facts and circumstances portrayed in each case. The interviews with general practitioners reveals a similar perception about the role of alcohol in sentencing.

Of particular interest were the answers to questions relating to the assault in the pub and the domestic assault case. In both these there was a relatively low response in the neutral category and the proportion of respondents choosing a mitigating category was broadly equal to respondents selecting an aggravating category. These two questions scored more highly in the aggravating categories than the questions on intoxicated offenders in the armed robbery case. This suggests that the impact on sentence of the element of intoxication may vary in accordance with the type of crime under consideration. However the rather broad distribution of near equal responses in the three major categories (neutral,

aggravating and mitigating) is indicative of a tension in the application of sentencing principle.

Of all the responses relating to intoxication, Question 38 stands out. This question related to the case of the armed robber Collins, who became drunk involuntarily after the co-offenders had secretly spiked his drink. In this situation nearly all responses were in the mitigating categories with only about 5 per cent of respondents regarding this as a neutral consideration. It is interesting to note that this question also scored the highest (44% of all respondents) for those selecting the category "highly mitigating".

Responses by judges were then compared with those of magistrates, first by examining the responses for all the relevant questions where weightings were requested. These data showed that there was a high degree of consistency in the overall pattern of responses for the two groups. Overall it appeared that judges were prepared to mitigate more often, and to a greater degree, than magistrates. Conversely, the magistrates appeared more likely to select an aggravating category than were the judges.

It can be speculated that an explanation for this difference (between judges and magistrates) is that magistrates deal on a daily basis with offences that involve alcohol such as drink-driving cases, domestic assault cases and pub brawls. This may explain why they appear to be less sympathetic to such offenders than judges. Magistrates see many more offenders and may be more aware of the general effect of alcohol on the community at large. Judges, whose decisions more often and more severely affects the liberty of the individual offender before the court, may be more inclined to look for reasons to mitigate punishment.

Apart from this general difference between the two groups, there was nonetheless a strong degree of similarity and consistency in the overall response patterns. In the domestic violence case, respondents were asked whether intoxication of the victim would diminish the seriousness with which they would view the offence. For every two respondents who felt that intoxication of the victim would diminish the seriousness of the assault, three respondents answered that it would make no difference.

The respondents were then asked if there were a sufficient range and number of rehabilitation resources or programs available for treating alcoholic offenders in their area. Only one out of three judicial officers replied "yes" to this question, one in four respondents answered "don't know" and 40 per cent of them indicated by their answers that there was not a sufficient range of rehabilitation resources or programs available for alcoholic offenders. This outcome suggests that there may be a need for this information to be made more widely available.

A general question sought to discover whether judicial officers had a general policy in their approach to sentencing offenders who were drunk at the time of offending. The majority of answers to this question appears to reflect the general principle that alcohol is an explanation rather than an excuse for crime, and unless there are other factors present (whether mitigating or aggravating) the mere presence of alcohol will not affect the sentence.

Ultimately the study reveals also the importance of treating each case on its own merits and possibly, in view of the range and complexity of possible circumstances that can arise in a particular case, the difficulty of devising any satisfactory formula that would direct how judicial officers should exercise their sentencing discretions in relation to intoxication.

In light of the differences in attitudes revealed in the survey, some consideration should be given to the desirability of developing a more consistent approach as to whether intoxication of the victim at the time of the offence should generally be regarded as a mitigating, aggravating or neutral factor in evaluating the seriousness of an offence.

The survey also revealed that some judicial officers were concerned that they did not know enough about the services available in the community to assist offenders with alcohol problems. In addition, several respondents felt that there was some need for more specific programs directed at alcoholism. It is the view of the authors that these issues could usefully be incorporated into the Judicial Commission's judicial education program and could thereby assist the courts in achieving greater consistency in approach to the sentencing of intoxicated offenders.

APPENDIX A

**SURVEY OF FACTORS IN SENTENCING OF
VIOLENT OFFENDERS**

PLEASE READ THIS BEFORE COMMENCING THE SURVEY

This survey is strictly confidential and anonymous.

Please **DO NOT PUT** your name on this questionnaire.

This survey is being conducted by the Australian Institute of Criminology and the NSW Judicial Commission on behalf of the Drugs of Dependence Branch, Commonwealth Department of Health, Housing, Local Government and Community Services. It is an important part of a larger study concerning current legal approaches to alcohol related violence. The aim of the survey is to canvas opinions of judges and magistrates in NSW concerning the impact of various aggravating and mitigating factors on the sentences awarded to violent offenders. The main area of interest is the relevance of alcohol consumption as a sentencing factor.

In addition to its being made available to the Judicial Commission, analysis of the survey results will be incorporated into a report that will be used for a National Symposium on Alcohol Misuse and Violence to be held in December 1993. It is intended that the research reports and proceedings from the symposium will be made publicly available.

The questionnaire can be completed quickly, as in the main it involves circling the most appropriate responses to the questions asked. There are three hypothetical cases with associated questions and then some concluding questions. The cases are designed to contain sufficient information to permit a realistic judgment to be made of the relative merits of different aggravating and mitigating factors. Ample room has been left for you to comment, as there is certain to be some qualifications or further observations you may wish to make.

As indicated above, this survey is completely anonymous. No analysis will be undertaken which identifies individual sentencers. We are interested in looking at general perceptions and overall trends on the subject matter canvassed in the questions.

Unless otherwise directed, please attempt to answer all the questions, even if the cases do not fall into your jurisdiction.

DATE FOR COMPLETION AND RETURN

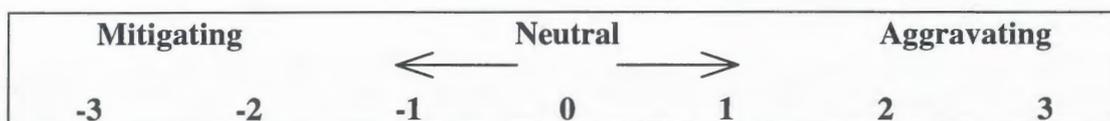
When you have completed the questionnaire, please return it in the envelope provided to the Judicial Commission by Wednesday 4 August, 1993.

TO ASSIST YOU WITH RESPONDING TO THE QUESTIONS:

This questionnaire consists mainly of three hypothetical cases. Please read them carefully before considering each of the factors listed below them. The factors have been selected from the cases because they may be relevant to the sentencing of offenders contained in them.

Please assess each factor in accordance with whether you would regard it as an aggravating factor, a mitigating factor or a neutral (or irrelevant) factor which would neither aggravate nor mitigate the sentence.

If you decide that the factor should be regarded as either aggravating or mitigating then you should determine the weight to be given to that factor on a three point scale:



You will be asked to *circle* the number that best represents your view.

- If no weight is to be given to the factor then 0 should be circled.
- If the factor is somewhat or slightly mitigating or somewhat or slightly aggravating, then -1 or 1 respectively, should be circled.
- If the factor is strongly mitigating or strongly aggravating, then -2 or 2, respectively, should be circled.
- Finally, if it is felt that the factor is very strongly mitigating or very strongly aggravating, then -3 or 3, respectively, should be circled.

If you feel you do not have sufficient information to enable you to respond to any of the factors listed, please indicate this by not circling a response at all for that particular factor.

CASE 1: PUB BRAWL

Peter Smith was at home, as his mother had asked him to baby-sit his younger sister Kylie, aged 10. It was Saturday night, and he knew all his friends would be enjoying themselves at the pub. By 9 pm he could tolerate his baby-sitting obligation no longer, as he really needed the company of his mates. He decided that Kylie was capable of looking after herself without getting into trouble. He also resented his mother's insistence that he stay with Kylie. He told Kylie that "Mum will be home by about 11pm". He further told Kylie "not to cause any trouble" and he left the house, locking the doors securely behind him.

On arrival at the pub, Smith's mates were already distinctly intoxicated and boisterous. He joined them, had a few drinks and by 10 pm was in a similarly intoxicated state. Smith was always argumentative when drunk and had been known to "lash out".

Bill, one of Smith's drunken mates, then made a crude joke about his sister Kylie. Through his alcoholic haze, Smith then "saw red". He broke the top off his stubbie bottle and attacked Bill. Before he was brought under control by his friends and other patrons, he had lacerated Bill's cheek. Bill required 11 stitches to his face at the local hospital. There would be some very slight residual scarring, but otherwise no permanent damage.

Smith was arrested almost immediately. He struggled with the arresting police officers and then ranted and raved in a loud and incoherent manner en route to the police station. The following morning he was contrite, but somewhat sullen.

In the past Smith had been ejected from several bars, and had been convicted for assaulting a police officer. That officer had been attempting to get Smith to return home before he injured somebody. The assault was serious and Smith was sentenced to a term of Community Service which he completed without incident over a period of six months.

He subsequently presented at court and pleaded guilty before a magistrate to one count of assault occasioning actual bodily harm.

Smith was 19 years old at the time of the offence, had left school about 18 months ago, but was unemployed and receiving social security benefits. He had a tendency to become violent when intoxicated, but was previously regarded as being of good character.

He was sentenced to a fixed term of imprisonment of 6 months.

- Having read the details of this case, would you now consider each of the following factors which may be relevant to the sentencing of the offender. Please indicate whether you consider each factor to be a mitigating factor, an aggravating factor, or a neutral (or irrelevant) factor which would neither aggravate nor mitigate the sentence?
- Indicate the weight you would give by circling the appropriate number in the scale provided. For example, for a highly mitigating factor, circle -3; for a neutral factor, circle 0; and for a strongly aggravating factor, circle 3.

		Mitigating			Neutral		Aggravating	
					←	→		
		-3	-2	-1	0	1	2	3
1a)	Extent of victim's injury	-3	-2	-1	0	1	2	3
1b)	Smith's youth (aged 19 years)	-3	-2	-1	0	1	2	3
1c)	Smith acted under the influence of alcohol	-3	-2	-1	0	1	2	3
1d)	Smith's previous conviction	-3	-2	-1	0	1	2	3
1e)	"Provocation" by Smith's mate	-3	-2	-1	0	1	2	3
1f)	Smith's guilty plea	-3	-2	-1	0	1	2	3

CASE 2: DOMESTIC VIOLENCE

Debbie Tanner had recently separated from her husband John. They had been married for three years. There were no children of the marriage. Debbie was aged 23 at the time of separation, and John was aged 26. John had been violent and abusive toward her from early on in their relationship, before they were married. Debbie believed that she loved him, and thought that perhaps in some way she was responsible for the violence. As the marriage progressed, the violence became more severe and more frequent, as did his level of drinking. He was often drunk, and she had also begun to drink relatively large quantities of port in the evenings.

One day John had threatened to kill her with the carving knife, and she then realised that the situation had become serious. While this incident was not reported to the authorities, her friends advised her to see domestic violence advocacy workers, who in turn advised her to apply for an Apprehended Violence Order. In due course an Order was obtained. It required John Tanner to leave the matrimonial home, and not contact Debbie for the term of the Order (twelve months).

Some three months later, Debbie returned home from work one day to find John inside her house. He was very drunk and was drinking her scotch. Although he had intended only to talk with Debbie, he became agitated and then with considerable force, pushed her into the door jamb. She screamed with pain. A moment later, Jack Wilson, the neighbour, who had come over to lend Debbie his lawn mower, opened the front door and saw John Tanner punching Debbie with both fists. When Tanner saw Wilson he desisted immediately, muttered something like "take that you bitch", brushed passed Wilson and left the scene. Wilson assisted Debbie to a chair and phoned for an ambulance and called the police.

As a result of the attack, Debbie suffered a depressed fracture of the skull, a fractured rib and bruising to various parts of her body, including a black eye.

John Tanner was charged both with malicious infliction of grievous bodily harm (section 35(b) of the Crimes Act 1900) and breach of the Apprehended Violence Order. He pleaded guilty to the charges, and said he was very sorry for his behaviour, and publicly apologised to Debbie.

John Tanner was regarded as a peaceful man by his friends and work colleagues, though his wife and his immediate neighbours knew differently. He had a secure job as an accountant, and enjoyed playing sport and watching football. He had no priors. He gave evidence that he had been abused as a child but had never disclosed or discussed that dark secret, even with his wife. He said that he did not mean to be violent in his own matrimonial home, but somehow at times he did not seem able to help himself, particularly when he had been drinking.

He was sentenced to 12 months imprisonment to be served by way of periodic detention for the assault, and fined \$2,000 for the breach of the AVO.

- Having read the details of this case, would you now consider in turn each of the following factors which may be relevant to the sentencing of the offender. Please indicate whether you consider each factor to be a mitigating factor, an aggravating factor, or a neutral (or irrelevant) factor which would neither aggravate nor mitigate the sentence?
- Indicate the weight you would give by circling the appropriate number in the scale provided. For example, for a highly mitigating factor, circle -3; for a neutral factor, circle 0; and for a strongly aggravating factor, circle 3.

		Mitigating		Neutral			Aggravating	
				←		→		
2a)	Tanner's lack of a criminal record	-3	-2	-1	0	1	2	3
2b)	Tanner's violent childhood	-3	-2	-1	0	1	2	3
2c)	Assault was not premeditated	-3	-2	-1	0	1	2	3
2d)	Degree of injury of Debbie	-3	-2	-1	0	1	2	3
2e)	Tanner's history of domestic violence	-3	-2	-1	0	1	2	3
2f)	Tanner acted under the influence of alcohol	-3	-2	-1	0	1	2	3
2g)	Tanner's general respectability	-3	-2	-1	0	1	2	3
2h)	Tanner's guilty plea & remorse	-3	-2	-1	0	1	2	3

Now, assume that Debbie was also under the influence of intoxicating liquor when she arrived home and as a result was uncharacteristically abusive towards John prior to his violent assault. She told him that he was a "mummies boy" and "lousy in bed".

In your opinion would this additional circumstance tend to:

- (1) diminish the seriousness of the assault and therefore invite a less severe sentence, or
- (2) make no difference to your assessment of the seriousness of the offence and the appropriateness of the sentence.

(Please circle appropriate number)

CASE 3: ARMED ROBBERY

Adams, Barton and Collins meet regularly at the pub on Friday nights. One such night, Barton (a former employee of McDonalds Restaurant) told his companions that McDonalds makes a lot of money on Friday nights. Adams said that he had an old sawn-off shotgun and a replica hand-gun at home, and that they could easily stage an armed holdup. Collins said that he would not be interested, as the risk of being caught was too great and that, in any event, he was concerned that someone could be hurt. In response, Adams said that Collins could drive the getaway car and would not need to enter McDonalds at all. He then assured both Barton and Collins that nobody would get hurt because the shotgun would not be loaded. Adams was outvoted and, at this stage of the evening 6 pm, it was decided to give away the idea of committing a robbery.

The conversation then shifted to other matters. Adams and Barton were drinking beer. Collins was drinking orange juice. Indeed Collins had no intention of consuming alcohol that night because he was recovering from a neck injury caused by a recent motor vehicle accident and his doctor had warned him of the adverse effects of alcohol and the drugs he was taking. Only a small quantity of alcohol would lead to intoxication. By 9 pm, both Adams and Barton had consumed sufficient alcohol to take them over the legal limit for driving. When Adams bought the next round, Adams ordered a "vodka and orange" for Collins, without informing him. Collins drank the juice without realising that it contained alcohol. Ten minutes later, Barton bought the next round of drinks. He also "spiked" Collins' drink with vodka. By 10 pm all three were showing the signs of intoxication.

At this stage the subject of the robbery was raised again. This time, fortified by the alcohol they had consumed, they decided to implement their plan. Collins agreed to drive the get-away car and they left the pub in Collin's car and headed for Adams' place. There they assembled the shotgun and the replica hand-gun. Adams and Barton donned overalls and put the firearms in a carry bag together with two balaclavas. Collins watched and waited.

Again Barton began to express doubts about continuing with the planned robbery. He began to worry about the possible consequences. Adams however reassured him that nothing would go wrong, and produced a bottle of whisky and said, "Here, drink this. You'll be OK." Barton drank a couple of nips and then said "Right, I feel fine, I can do anything" and was ready to continue with the plan. Collins remained mute and simply went along with the majority.

At 10.45 pm, they arrived at McDonalds. Adams armed himself with the unloaded sawn-off shotgun and Barton took hold of the replica pistol. They waited until some customers had left McDonalds before Adams and Barton ran into the restaurant wearing the balaclavas and brandishing their weapons. Collins waited outside in the driver's seat with the engine running.

While Barton stood by the doorway, Adams quickly jumped the counter and ordered the three junior staff members to lie face down on the floor. He then ordered the store manager to open all the tills and put the money in the bag which Adams handed to him. Adams then ordered the manager to open the safe. When this was done, a bundle of notes was put into the bag and the offenders fled.

A witness recorded the number-plate of Collins' car as it sped away. At Adams' house, the stolen money (about \$4,500) was divided equally between the three offenders. They all then slept at Adams' house, where they were arrested the following morning.

Barton and Collins co-operated fully with the police, pleaded guilty to armed robbery in company and appeared remorseful for what they had done. Adams at first sought to plead not guilty but changed his mind at the last possible moment when he could see the case against him was too strong.

The Pre-sentence and Antecedents Reports disclosed the following information:

Adams, aged 39, had spent nearly half his life in juvenile institutions and prison. He came from a disadvantaged background, and had numerous convictions for armed robbery. He was also on parole for a robbery committed four years previously. At the time of the offence, he was living in a de facto relationship and had two children aged 3 and 10. He was unemployed.

Barton, aged 28, was a chronic alcoholic. At age 22 years he had received a bond for trafficking in marijuana which had expired without incident. At age 25 he pleaded guilty to possessing a small quantity of heroin, for which he had received a community service order. However he was not a drug addict and he had not been sentenced to a term of imprisonment previously. He had been divorced two years ago, his marriage having failed as a result of his drinking problems. He had no permanent occupation but was working as a builders labourer. His pre-sentence report was favourable in the sense that it stated that he had good prospects for rehabilitation provided his alcoholism was brought under control.

Collins, aged 21, was a clerk in the Public Service, and married with one child. At the time of sentencing his wife was six months pregnant. He had no prior convictions and appeared to be a person of otherwise good character. He had been on sick leave as a result of being involved in a motor vehicle accident, and was taking prescription drugs which significantly enhanced the intoxicating effects of alcohol. Although he consumed a comparatively small amount of alcohol he would have been significantly intoxicated and his judgment impaired at the time of the offence.

- Turning first to **Adams**. In your opinion, would you say that each of the following factors would count as a mitigating circumstance, an aggravating circumstance, or a neutral/irrelevant factor.
- Indicate the weight you would give by circling the appropriate number in the scale provided. For example, for a highly mitigating factor, circle -3; for a neutral factor, circle 0; and for a strongly aggravating factor, circle 3.

		Mitigating		Neutral			Aggravating	
				←	→	→		
3a)	Adams was the instigator	-3	-2	-1	0	1	2	3
3b)	Adams was disguised	-3	-2	-1	0	1	2	3
3c)	Adams' weapon was not loaded	-3	-2	-1	0	1	2	3
3d)	The offence was premeditated	-3	-2	-1	0	1	2	3
3e)	Adams acted under the influence of alcohol	-3	-2	-1	0	1	2	3
3f)	Adams was the oldest (aged 39 years)	-3	-2	-1	0	1	2	3
3g)	Adams was on parole	-3	-2	-1	0	1	2	3
3h)	Adams had a bad criminal record	-3	-2	-1	0	1	2	3
3i)	Adams had poor prospects of rehabilitation	-3	-2	-1	0	1	2	3
3j)	Adams' late plea of guilty	-3	-2	-1	0	1	2	3

- Now looking at the sentencing of **Barton**, would you say that each of the following factors would be a mitigating circumstance, an aggravating circumstance or a neutral/irrelevant factor which would neither aggravate nor mitigate the sentence?

		Mitigating		Neutral			Aggravating	
				←	→			
4a)	Barton played a lesser role than Adams	-3	-2	-1	0	1	2	3
4b)	Barton required "Dutch Courage" to proceed	-3	-2	-1	0	1	2	3
4c)	Barton carried a <u>replica</u> firearm	-3	-2	-1	0	1	2	3
4d)	The offence was premeditated	-3	-2	-1	0	1	2	3
4e)	Barton acted under the influence of alcohol	-3	-2	-1	0	1	2	3
4f)	Barton was an alcoholic <i>and</i> affected by alcohol	-3	-2	-1	0	1	2	3
4g)	Barton had no prior imprisonment	-3	-2	-1	0	1	2	3
4h)	Barton had prospects for rehabilitation	-3	-2	-1	0	1	2	3

- Finally, with respect to the sentencing of **Collins**, would you say that each of the following factors would be a mitigating circumstance, an aggravating circumstance or a neutral/irrelevant factor which would neither aggravate nor mitigate the sentence?

		Mitigating		Neutral \longleftrightarrow			Aggravating	
		-3	-2	-1	0	1	2	3
5a)	Collins played a minor role	-3	-2	-1	0	1	2	3
5b)	Collins was easily led	-3	-2	-1	0	1	2	3
5c)	The offence was premeditated	-3	-2	-1	0	1	2	3
5d)	Collins was affected by alcohol & drugs	-3	-2	-1	0	1	2	3
5e)	Collins consumption of alcohol was involuntary	-3	-2	-1	0	1	2	3
5f)	Collins' intoxication was exacerbated by medication	-3	-2	-1	0	1	2	3
5g)	Collins was the youngest (20 years)	-3	-2	-1	0	1	2	3
5h)	Collins had no prior convictions	-3	-2	-1	0	1	2	3
5i)	Collins cooperated fully & pleaded guilty	-3	-2	-1	0	1	2	3
5j)	Collins was remorseful	-3	-2	-1	0	1	2	3
5k)	Collins had good rehabilitation prospects	-3	-2	-1	0	1	2	3
5l)	Collins acted out of character	-3	-2	-1	0	1	2	3

We would appreciate your views on the availability of rehabilitation programs for alcoholic offenders.

Suppose that you were sentencing an adult offender who pleaded guilty to an offence involving violence but it was not sufficiently serious to warrant a custodial penalty. If you decided the offender needed help for a serious drinking problem, what sentencing option(s) might you be inclined to select in order to assist the offender in overcoming that drinking problem? What conditions might you be inclined to impose in such a case? (Please specify)

In your view, are there a sufficient range and number of rehabilitation resources or programs available for treating alcoholic offenders in your area? (Please circle one number below)

- | | |
|------------|---|
| Yes | 1 |
| No | 2 |
| Don't Know | 3 |

Do you have any general comments on the range, availability or nature of programs for alcoholic offenders?

As a general rule, for the purposes of sentencing, do you think that offenders who commit violent offences (other than driving offences), while under the influence of intoxicating liquor should be treated:

- more leniently than 1
- in the same way as 2
- more severely than 3
- don't know 4

a person who commits a similar offence but is not intoxicated? If none of the above, please state your view.

Is there any other general comment you would like to add concerning alcohol as a factor in the sentencing of offenders who commit violent offences?

For statistical purposes we would like to know a few things about you; this information will not be used to identify any particular sentencer. Please indicate your response by circling one of the following numbers:

(1) Whether you are a judge or magistrate of the

- Supreme Court 1
- District Court 2
- Local Court 3

(2) Approximately what proportion of your time is spent in the criminal jurisdiction?

- | | |
|--|---|
| Less than one third of the time | 1 |
| Between one third and two thirds of the time | 2 |
| Over two thirds of the time | 3 |

(3) How long have you been on the bench? (Please provide nearest whole number in years):

(.....years)

(4) What age category do you belong to?

- | | |
|--------------------|---|
| Less than 50 years | 1 |
| 51-60 years | 2 |
| Over 60 years | 3 |

THAT COMPLETES THE QUESTIONNAIRE.

YOUR PARTICIPATION IN THIS SURVEY IS VERY MUCH APPRECIATED.

REMINDER: PLEASE RETURN THIS SURVEY TO THE JUDICIAL COMMISSION NO LATER THAN 4 AUGUST 1993 IN THE ENVELOPE PROVIDED.

If you would like further information please contact:

Donna Spears, Research Director, Judicial Commission of NSW

APPENDIX B

RESULTS OF SURVEY

In the following series of questions respondents were asked to rate on a scale, -3 to 3, whether the factors described in the cases should be treated as mitigating, neutral or aggravating:

Case 1: Pub Brawl

Peter Smith had been at home baby-sitting his ten year old sister. He knew his mates would be at a pub. At about 9 p.m. he decided to join them and left his sister locked in the house. His mates were intoxicated when he arrived at the pub and he also soon became intoxicated. He was known to become argumentative and aggressive when drunk. When one of his mates made a crude joke about his sister Smith broke the top off a 'stubbie' bottle and attacked him, In the result Smith lacerated his mate's cheek, before he could be restrained by others.

1. The extent of the victim's injury

The victim had been assaulted with a broken beer bottle after he made a crude joke about the offender's sister. The victim received lacerations to his face requiring eleven stitches. There was no permanent damage apart from some very slight scaring.

	District Court		Local Court		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	-	-	-	-
Mitigating	2	5.4	-	-	2	1.7
Slightly Mitigating	-	-	3	3.8	3	2.6
Neutral	-	-	1	1.3	1	.9
Slightly Aggravating	9	24.3	13	16.3	22	18.8
Aggravating	21	56.8	33	41.3	54	46.2
Highly Aggravating	5	13.5	30	37.5	35	29.9
Total	37	100.0	80	100.0	117*	100.0

*Three respondents did not complete this question.

Over nine out of ten respondents regarded injury to the victim as falling into the aggravating categories. The most common response was 'Aggravating' (46.2%) followed by 'Highly Aggravating' (29.9%). However, as their second most common choice, District Court judges selected 'Slightly Aggravating' (24.3%) while magistrates selected 'Highly Aggravating' (37.5%). This difference may be explained by the fact that judges generally deal with the more serious criminal cases and may therefore have a higher threshold for assessing the seriousness of an injury.

2. The offender's youth

The offender was nineteen years old at the time of the offence.

	District Court		Local Court		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	1	2.7	6	7.5	7	6.0
Mitigating	19	51.4	21	26.3	40	34.2
Slightly Mitigating	15	40.5	40	50.0	55	47.0
Neutral	2	5.4	11	13.8	13	11.1
Slightly Aggravating	-	-	1	1.3	1	.9
Aggravating	-	-	1	1.3	1	.9
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over three quarters of the respondents regarded the offender's youth as either a 'Slightly Mitigating' (47%) or 'Mitigating' (34.2%) factor. Interestingly, judges (51.4%) were more likely than magistrates (26.3%) to select 'Mitigating' rather than 'Slightly Mitigating' as their response to this question.

3. The offender acted under the influence of alcohol

The offender joined his mates in a pub. His mates were already intoxicated and he became intoxicated prior to assaulting the victim with a broken stubbie bottle.

	District Court		Local Court		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	-	-	-	-
Mitigating	4	10.8	7	8.8	11	9.4
Slightly Mitigating	11	29.7	20	25.0	31	26.5
Neutral	11	29.7	23	28.7	34	29.1
Slightly Aggravating	4	10.8	13	16.3	17	14.5
Aggravating	6	16.2	14	17.5	20	17.1
Highly Aggravating	1	2.7	3	3.8	4	3.4
Total	37	100.0	80	100.0	117*	100.0

*Three respondents did not complete this question.

Respondents were fairly evenly divided on this question. Just over one third of all respondents regarded it either as 'Mitigating' (9.4%) or 'Slightly Mitigating' (26.5%).

About the same proportion regarded the circumstances that the offender was under the influence of alcohol at the time of the offence as 'Slightly Aggravating' (14.5%) or 'Aggravating' (17.5%) but only 3.4% regarded it as 'Highly Aggravating' and no respondents regarded it as 'Highly Mitigating'. Just under one third regarded it as 'Neutral'. There was little difference between the responses of judges and magistrates on this question.

4. The offender's previous conviction

The offender had a previous conviction for assaulting a police officer for which he had previously completed a term of Community Service over a period of six months.

	District Court		Local Court		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	-	-	-	-
Mitigating	1	2.7	1	1.3	2	1.7
Slightly Mitigating	3	8.1	2	2.5	5	4.3
Neutral	5	13.5	9	11.4	14	12.1
Slightly Aggravating	14	37.8	30	38.0	44	37.9
Aggravating	13	35.1	28	35.4	41	35.3
Highly Aggravating	1	2.7	9	11.4	10	8.6
Total	37	100.0	79	100.0	116*	100.0

* Four respondents did not complete this question.

Three quarters of the respondents regarded the fact that the offender had a prior conviction as falling into the aggravating categories. Around about a third saw it as 'Slightly Aggravating' and a third as 'Highly Aggravating'. Magistrates rated this prior conviction more seriously than judges, with 11% of the local courts seeing it as 'Highly Aggravating' whereas only 2.7% of the District court respondents considered it to be so.

5. 'Provocation' by the offender's mate

When under the influence of alcohol the victim had made a crude joke about the offender's ten year old sister. This caused the offender, also intoxicated, to lose his temper and assault the victim with the bottle.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	3	8.1	1	1.3	4	3.4
Mitigating	7	18.9	15	18.8	22	18.8
Slightly Mitigating	24	64.9	41	51.2	65	55.6
Neutral	3	8.1	23	28.7	26	22.2
Slightly Aggravating	-	-	-	-	-	-
Aggravating	-	-	-	-	-	-
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over three quarters of the respondents (77.8%) regarded the provocation by the victim as falling into the mitigating categories; most (55.6%) saw it as 'Slightly Mitigating'. Interestingly, a significant proportion of magistrates (28.7%) regarded the provocation as a 'Neutral' factor whereas only 8.1% of judges responded similarly.

6. The offender's guilty plea

The offender pleaded guilty to assault occasioning actual bodily harm.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	9	24.3	11	13.8	20	17.1
Mitigating	19	51.4	33	41.3	52	44.4
Slightly Mitigating	9	24.3	30	37.5	39	33.3
Neutral	-	-	4	5.0	4	3.4
Slightly Aggravating	-	-	-	-	-	-
Aggravating	-	-	1	1.3	1	.9
Highly Aggravating	-	-	1	1.3	1	.9
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Ninety-five per cent of respondents considered the offender's guilty plea as falling into the mitigating categories. The remaining five per cent were magistrates, 3.4% of whom considered it to have a 'Neutral' effect, one respondent selected 'Aggravating' and another 'Highly Aggravating'.

Case 2: Domestic Violence

The victim had obtained an Appended Violence Order against her husband, the offender. He was required to leave the matrimonial home and not contact her for twelve months. About three months later, the offender who had been drinking entered the victim's home in her absence in order to talk to her. When she arrived home she found him drinking her scotch. An altercation ensued and he violently assaulted her. The offender was affected by alcohol at the time of the offence. He left the scene when interrupted by a neighbour.

7. The offender's criminal record

The offender had no criminal record.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	8	21.6	14	17.5	22	18.8
Mitigating	20	54.1	35	43.8	55	47.0
Slightly Mitigating	8	21.6	26	32.5	34	29.1
Neutral	1	2.7	5	6.3	6	5.1
Slightly Aggravating	-	-	-	-	-	-
Aggravating	-	-	-	-	-	-
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Ninety-five per cent of respondents regarded the fact that the offender did not have a criminal record as falling into the mitigating categories. The most common response was 'Mitigating' (judges 54.1% and magistrates 43.8%). Overall judges tended to regard this factor as more mitigating than magistrates. Very few respondents (5.1%) felt that 'no prior criminal record' was a 'Neutral' factor, and none regarded it as falling into one of the aggravating categories.

8. The offender's violent childhood

The offender had been abused as a child but had never disclosed his 'dark secret' before, even to his wife.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	2	5.4	1	1.3	3	2.6
Mitigating	7	18.9	9	11.3	16	13.7
Slightly Mitigating	16	43.2	45	56.3	61	52.1
Neutral	12	32.4	25	31.3	37	31.6
Slightly Aggravating	-	-	-	-	-	-
Aggravating	-	-	-	-	-	-
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Just under seven out of ten respondents regarded the offender's abuse as a child as falling into the mitigating categories, with the remaining respondents seeing it as 'Neutral'. The most common category selected was 'Slightly Mitigating' although a greater proportion of judges (18.9%) than magistrates (11.3%) selected 'Mitigating' as their response to this question.

9. Assault was not premeditated

The offender had gone to the victim's house to talk to his wife. He had been drinking and when she arrived home he became agitated prior to the assault.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	2	5.6	2	2.5	4	3.4
Mitigating	7	19.4	6	7.5	13	11.2
Slightly Mitigating	19	52.8	33	41.3	52	44.8
Neutral	7	19.4	37	46.3	44	37.9
Slightly Aggravating	-	-	-	-	-	-
Aggravating	1	2.8	2	2.5	3	2.6
Highly Aggravating	-	-	-	-	-	-
Total	36	100.0	80	100.0	116*	100.0

* Four respondents did not complete this question.

Almost six out of ten respondents found the fact that the assault was not premeditated as falling into the mitigating categories. The remainder found it to be a 'Neutral' factor, apart from 2.6 per cent who saw it as 'Aggravating'. Interestingly, most judges selected 'Slightly Mitigating' (52.8%), with an even split between 'Neutral' (19.4%) and 'Mitigating' (19.4%) as the second most frequent choice, whereas most magistrates selected 'Neutral' (46.3%) followed by 'Slightly Mitigating' (41.3%).

10. Degree of injury to the victim

As a result of the assault the victim suffered a depressed fracture of the skull, a fractured rib and bruising to various parts of her body, including a black eye.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	1	1.3	1	.9
Mitigating	1	2.7	-	-	1	.9
Slightly Mitigating	-	-	-	-	-	-
Neutral	-	-	-	-	-	-
Slightly Aggravating	2	5.4	4	5.0	6	5.1
Aggravating	18	48.6	24	30.0	42	35.9
Highly Aggravating	16	43.2	51	63.7	67	57.3
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Ninety-eight per cent of the respondents found the extent of the victim's injury fell into the aggravating categories, although overall over half of the respondents regarded injury to the victim as 'Highly Aggravating'. Judges tended to give this factor slightly less weight (i.e. 'Aggravating' (48.6%) rather than 'Highly Aggravating' (43.2%)) than magistrates (i.e. 'Aggravating' (30.0%), 'Highly Aggravating' (63.9%)).

11. The offender's history of domestic violence

The offender's behaviour had been violent towards the victim from early in their relationship and had progressively become more severe and frequent. An Apprehended Violence Order had been obtained against the offender when he had threatened to kill the victim.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	1	2.7	1	1.3	2	1.7
Mitigating	1	2.7	-	-	1	.9
Slightly Mitigating	-	-	2	2.5	2	1.7
Neutral	3	8.1	6	7.5	9	7.7
Slightly Aggravating	11	29.7	16	20.0	27	23.1
Aggravating	13	35.1	35	43.8	48	41.0
Highly Aggravating	8	21.6	20	25.0	28	23.9
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Almost nine out of ten respondents (88%) regarded the offender's history of domestic violence as falling into the aggravating categories. To a slight extent magistrates regarded this factor as more aggravating than judges. Eight per cent saw it as a neutral factor, while 4 per cent found it to be a mitigating factor.

12. The offender was acting under the influence of alcohol

When the victim arrived home she found the offender inside the house, very drunk and drinking her Scotch. He became agitated before assaulting her.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	1	1.3	1	.9
Mitigating	3	8.1	2	2.5	5	4.3
Slightly Mitigating	13	35.1	23	28.7	36	30.8
Neutral	7	18.9	21	26.3	28	23.9
Slightly Aggravating	5	13.5	19	23.8	24	20.5
Aggravating	8	21.6	12	15.0	20	17.1
Highly Aggravating	1	2.7	2	2.5	3	2.6
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

The response to this question was quite varied and it is difficult to discern a clear pattern. Almost the same proportion of respondents regarded it as falling into the mitigating categories (36%) as the aggravating categories (40.2%), with 23.9% seeing it as 'Neutral'. 'Slightly Mitigating' was the most frequent response overall (30.8%).

13. The offender's general respectability

The offender was regarded as a peaceful man by his friends and colleagues. He had a secure job as an accountant and enjoyed sport.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	1	2.7	2	2.5	3	2.6
Mitigating	11	29.7	6	7.5	17	14.5
Slightly Mitigating	13	35.1	30	37.5	43	36.8
Neutral	12	32.4	41	51.2	53	45.3
Slightly Aggravating	-	-	-	-	-	-
Aggravating	-	-	-	-	-	-
Highly Aggravating	-	-	1	1.3	1	.9
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over half (53.9%) of the respondents found the offender's respectability to be in the mitigating categories. The remainder considered that it was a 'Neutral' factor, except for one magistrate who felt it was a 'Highly Aggravating' factor.

14. The offender's guilty plea and remorse

The offender pleaded guilty to charges of malicious infliction of grievous bodily harm and of breaching an Apprehended Violence Order. He said he was sorry for his behaviour and publicly apologised to the victim.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	9	24.3	12	15.0	21	17.9
Mitigating	20	54.1	32	40.0	52	44.4
Slightly Mitigating	7	18.9	32	40.0	39	33.3
Neutral	-	-	2	2.5	2	1.7
Slightly Aggravating	-	-	2	2.5	2	1.7
Aggravating	1	2.7	-	-	1	.9
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over ninety-five per cent of the respondents found the offender's guilty plea and remorse fell in the mitigating categories. On balance judges tended to give more weight to the mitigating effect of this factor than did magistrates.. Two local court respondents (1.7%) regarded this factor as 'Neutral' while two others saw it as 'Slightly Aggravating'.

15. Variation to facts in Case 2.

The respondents were then asked to assume that the victim was also affected by alcohol and was uncharacteristically abusive to the offender before the assault took place. They were then asked to give their opinion as to whether this would diminish the seriousness of the assault and so lead to a less severe sentence or make no difference to the seriousness of the offence.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Diminish seriousness	24	66.7	21	28.4	45	40.9
Make no difference	12	33.3	53	71.6	65	59.1
Total	36	100.0	74	100.0	110*	100.0

* Ten respondents did not complete this question.

On average, six out of ten respondents felt that this factor made no difference to the seriousness of the offence and four out of ten felt that it did diminish the seriousness of the offence. Here, however there is a clear difference between the views expressed by judges and the views expressed by the magistrates. Whereas two out of three judges felt

that the above circumstances did diminish the seriousness of the assault and so justify the imposition of a less severe sentence, approximately seven out of ten magistrates thought that this should make no difference.

Case 3: Armed Robbery

Adams, Barton and Collins meet regularly in a pub. One evening at the pub Barton informed his companions that McDonalds collected a lot of money on Friday nights. Adams suggested staging an armed hold-up with an unloaded shotgun and a replica handgun. At first Collins and Barton refused to participate in the plan. Adams and Barton were drinking beer. Collins was not drinking alcohol because he was taking prescription drugs and knew that only a small amount of alcohol would lead him to become intoxicated. When Adams and Barton had consumed sufficient alcohol to place them over the legal limit for driving, they each bought a round of drinks. On these occasions they ordered orange juices 'spiked' with vodka for Collins. Collins drank these without being aware of their alcoholic content. Collins also became inebriated. The subject of the robbery was raised again and was agreed to, with Collins driving the getaway car. All three were intoxicated when they carried out their plan.

16. Adams was the instigator

Adams had suggested the robbery and had had to persuade his companions to take part in it.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	1	1.3	1	.9
Mitigating	-	-	-	-	-	-
Slightly Mitigating	-	-	1	1.3	1	.9
Neutral	-	-	-	-	-	-
Slightly Aggravating	2	5.6	6	7.5	8	6.9
Aggravating	14	38.9	27	33.8	41	35.3
Highly Aggravating	20	55.6	45	56.3	65	56.0
Total	36	100.0	80	100.0	116*	100.0

* Four respondents did not complete this question.

Nearly all (98.2%) of the respondents regarded the factor of being the instigator fell within the aggravating categories, with over half of the respondents (56%) selecting 'Highly Aggravating'. The response patterns for both judges and magistrates were remarkably similar.

17. Adams was disguised

Adams and Barton, who entered the restaurant, were wearing balaclavas and overalls.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	-	-	-	-
Mitigating	-	-	-	-	-	-
Slightly Mitigating	1	2.7	2	2.5	3	2.6
Neutral	5	13.5	15	19.0	20	17.2
Slightly Aggravating	14	37.8	13	16.5	27	23.3
Aggravating	9	24.3	25	31.6	34	29.3
Highly Aggravating	8	21.6	24	30.4	32	27.6
Total	37	100.0	79	100.0	116*	100.0

* Four respondents did not complete this question.

About eight out of ten respondents (80.2%) regarded the use of disguise as falling into the aggravating categories. The most common response was 'Aggravating' (29.3%). This was followed closely by 'Highly Aggravating' (27.6%) and 'Slightly Aggravating' (23.3%). In general, magistrates tended to rate the use of the disguises as a more aggravating factor than did judges. Many of the latter (37.8%) thought that this factor was only 'Slightly Aggravating'.

18. Adams' weapon was not loaded

Adams was carrying a sawn off shotgun. He threatened staff with it, but it was not loaded.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	2	2.5	2	1.7
Mitigating	5	13.5	7	8.8	12	10.3
Slightly Mitigating	13	35.1	19	23.8	32	27.4
Neutral	16	43.2	31	38.8	47	40.2
Slightly Aggravating	-	-	4	5.0	4	3.4
Aggravating	3	8.1	13	16.3	16	13.7
Highly Aggravating	-	-	4	5.0	4	3.4
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

The most common response to the circumstance that the weapon was not loaded was 'Neutral' with four out of ten respondents (40.2%) regarding it as such. Approximately another four out of ten (39.4%) saw this factor as falling into the mitigating categories, with 'Slightly Mitigating' (27.4%) as the most frequent of these responses.

19. The offence was premeditated

The group planned the robbery while in a pub. They then went to Adams' place where Adams and Barton donned overalls and put the firearms into a carry bag with two balaclavas before proceeding to the scene of the crime.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	1	2.7	1	1.3	2	1.7
Mitigating	-	-	1	1.3	1	.9
Slightly Mitigating	-	-	-	-	-	-
Neutral	-	-	2	2.5	2	1.7
Slightly Aggravating	7	18.9	9	11.3	16	13.7
Aggravating	11	29.7	36	45.0	47	40.2
Highly Aggravating	18	48.6	31	38.8	49	41.9
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Approximately ninety-six per cent of the respondents regarded the premeditation of the offence as falling into the aggravating categories. The most common response was 'Highly Aggravating' (41.9%) but this was closely followed by 'Aggravating' (40.2%). The most common response for judges was 'Highly Aggravating' (48.6%) while magistrates selected 'Aggravating' (45.0%) in response to this question.

20. Adams acted under the influence of alcohol

The offenders had been drinking alcohol. They were all under the influence of alcohol when they planned and carried out the robbery.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	1	1.3	1	.9
Mitigating	-	-	1	1.3	1	.9
Slightly Mitigating	6	16.2	15	18.8	21	17.9
Neutral	24	64.9	42	52.5	66	56.4
Slightly Aggravating	4	10.8	12	15.0	16	13.7
Aggravating	2	5.4	6	7.5	8	6.8
Highly Aggravating	1	2.7	3	3.8	4	3.4
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over half of the respondents (56.4%) regarded the presence of alcohol as having a 'Neutral' influence on sentencing with most of the balance of the other responses in the 'Slightly Mitigating' (17.9%) and 'Slightly Aggravating' (13.7%) categories.

21. Adams was the oldest member of the group

Adams was 39 years old, Barton was 28 and Collins 21.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	1	1.3	1	.9
Mitigating	1	2.7	-	-	1	.9
Slightly Mitigating	-	-	1	1.3	1	.9
Neutral	13	35.1	40	50.0	53	45.3
Slightly Aggravating	15	40.5	26	32.5	41	35.0
Aggravating	5	13.5	10	12.5	15	12.8
Highly Aggravating	3	8.1	2	2.5	5	4.3
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

More than half (52.1%) of the respondents found the fact that this offender was the oldest to fall into the aggravating categories, although 35% of respondents regarded it as

'Slightly Aggravating' only. The most common response was 'Neutral' (45.3% of the responses).

22. Adams was on parole

Adams was on parole for a robbery committed four years previously.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	1	2.7	-	-	1	.9
Mitigating	-	-	-	-	-	-
Slightly Mitigating	-	-	2	2.5	2	1.7
Neutral	-	-	-	-	-	-
Slightly Aggravating	3	8.1	7	8.8	10	8.5
Aggravating	13	35.1	24	30.0	37	31.6
Highly Aggravating	20	54.1	47	58.8	67	57.3
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Nearly all (97.4%) respondents found the circumstance that the offender was on parole at the time of the offence was a factor which fell into the aggravating categories. 'Highly Aggravating' was the most common response (57.3%), followed by 'Aggravating' (31.6%). The overall responses by judges and magistrates were fairly consistent on this question.

23. Adams had a bad criminal record

Apart from being on parole at the time of the robbery, Adams had numerous convictions for armed robbery.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	1	2.7	-	-	1	.9
Mitigating	-	-	1	1.3	1	.9
Slightly Mitigating	-	-	-	-	-	-
Neutral	5	13.5	5	6.3	10	8.5
Slightly Aggravating	3	8.1	8	10.0	11	9.4
Aggravating	13	35.1	27	33.8	40	34.2
Highly Aggravating	15	40.5	39	48.8	54	46.2
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Nine out of ten respondents (89.8%) regarded Adams' bad criminal record as falling into the aggravating categories. 'Highly Aggravating' was the most common response (46.2%), followed by 'Aggravating' (34.2%). Again, there was general consistency in the response by judges and magistrates on this question.

24. Adams had poor prospects of rehabilitation

Adams had spent nearly half his life in juvenile institutions and prison. He came from a disadvantaged background. He was unemployed.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	-	-	-	-
Mitigating	-	-	2	2.5	2	1.7
Slightly Mitigating	1	2.7	1	1.3	2	1.7
Neutral	21	56.8	34	42.5	55	47.0
Slightly Aggravating	6	16.2	12	15.0	18	15.4
Aggravating	5	13.5	15	18.8	20	17.1
Highly Aggravating	4	10.8	16	20.0	20	17.1
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Nearly half (47%) of all respondents thought Adams' poor prospect for rehabilitation was a 'Neutral' factor. Judges (56.8%) more so than magistrates (42.5%) selected 'Neutral'. Most of the balance of the responses were spread across the three aggravating categories.

25. Adams' late plea of guilty

At first Adams sought to plead not guilty but changed his mind at the last possible moment because of the strong case against him; Barton and Collins had cooperated fully with the police.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	1	1.3	1	.9
Mitigating	4	10.8	2	2.5	6	5.1
Slightly Mitigating	19	51.4	25	31.3	44	37.6
Neutral	10	27.0	27	33.8	37	31.6
Slightly Aggravating	4	10.8	13	16.3	17	14.5
Aggravating	-	-	9	11.3	9	7.7
Highly Aggravating	-	-	3	3.8	3	2.6
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over four out of ten of the respondents considered Adams' plea of guilty to be in the mitigating categories. The most common response was 'Slightly Mitigating' (37.6%), although judges (51.4%) were more likely than magistrates (31.3%) to select this category. Thirty-two per cent of all respondents regarded it as a 'Neutral' factor. Twenty-five per cent of the respondents regarded it as in the aggravating categories; most of these respondents were magistrates.

26. Barton played a lesser role than Adams

Adams was the instigator of the plan and supplied the weapons and disguises. When the robbery was taking place Barton stood by the doorway while Adams jumped the counter, ordered the junior staff members to lie on the floor and the manager to open the tills and put the money in a bag.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	2	2.5	2	1.7
Mitigating	7	20.0	5	6.3	12	10.4
Slightly Mitigating	18	51.4	34	42.5	52	45.2
Neutral	7	20.0	24	30.0	31	27.0
Slightly Aggravating	2	5.7	2	2.5	4	3.5
Aggravating	1	2.9	12	15.0	13	11.3
Highly Aggravating	-	-	1	1.3	1	.9
Total	35	100.0	80	100.0	115*	100.0

* Five respondents did not complete this question.

Over half of the respondents (57.3%) regarded Barton's lesser role as falling into the mitigating categories. The most common response was 'Slightly Mitigating' (45.2%). A significant proportion of respondents indicated a 'Neutral' response (judges 20% and magistrates 30%). The magistrates' responses covered the full spectrum with a surprisingly high result (18.8%) in the aggravating categories.

27. Barton required Dutch Courage' to proceed

Barton had expressed doubts about carrying out the robbery. Adams produced a bottle of whisky from which Barton drank a couple of nips and then said, 'Right, I feel fine, I can do anything'.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	1	1.3	1	.9
Mitigating	1	2.8	3	3.8	4	3.4
Slightly Mitigating	14	38.9	25	31.3	39	33.6
Neutral	18	50.0	42	52.5	60	51.7
Slightly Aggravating	3	8.3	3	3.8	6	5.2
Aggravating	-	-	6	7.5	6	5.2
Highly Aggravating	-	-	-	-	-	-
Total	36	100.0	80	100.0	116*	100.0

* Four respondents did not complete this question.

Just over half (51.7%) of the respondents regarded Barton's need for 'Dutch Courage' as a 'Neutral' factor. A further one out of three respondents (33.6%) regarded this factor as 'Slightly Mitigating'. Overall, judges and magistrates were reasonably consistent in their responses in answer to this question.

28. Barton carried a replica firearm

The hand-gun Barton was using was a replica firearm, so there was no possibility of shooting anybody with it.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	1	1.3	1	.9
Mitigating	4	10.8	1	1.3	5	4.3
Slightly Mitigating	9	24.3	11	13.8	20	17.1
Neutral	10	27.0	33	41.3	43	36.8
Slightly Aggravating	6	16.2	9	11.3	15	12.8
Aggravating	8	21.6	15	18.8	23	19.7
Highly Aggravating	-	-	10	12.5	10	8.5
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

The most common response to this question was 'Neutral' (36.8%). Forty-one per cent of respondents found this factor to be in the aggravating categories and 22.3 per cent found it to be in the mitigating categories. Many more magistrates found the use of a replica firearm to be an aggravating factor than did judges. Note, however, that there is a degree of ambiguity in this question. If, for example, respondents were asked whether they regarded the use of a replica firearm in preference to a real and loaded firearm as a mitigating factor, they would be less likely to select one of the aggravating categories. On the other hand, if they viewed the offence in comparison to the presentation of no weapon at all, they would then in all probability select one of the aggravating categories.

29. The offence was premeditated

The group planned the robbery while in a pub. They then went to Adams' place where Adams and Barton donned overalls and put the firearms into a carry bag with two balaclavas before proceeding to the scene of the crime.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	1	2.7	-	-	1	.9
Mitigating	-	-	1	1.3	1	.9
Slightly Mitigating	-	-	-	-	-	-
Neutral	2	5.4	4	5.0	6	5.1
Slightly Aggravating	7	18.9	13	16.3	20	17.1
Aggravating	17	45.9	35	43.8	52	44.4
Highly Aggravating	10	27.0	27	33.8	37	31.6
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Nine out of ten respondents regarded the circumstance that the offence was premeditated as falling into the aggravating categories.. The most common response was 'Aggravating' (44.4%) followed by 'Highly Aggravating' (31.6%). Responses by judges and magistrates were reasonably consistent.

30. Barton acted under the influence of alcohol

The offenders had been drinking alcohol in a pub to a point where they were over the legal limit for driving before undertaking the robbery. Barton had an additional drink of whisky just before the robbery.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	1	1.3	1	.9
Mitigating	2	5.4	3	3.8	5	4.3
Slightly Mitigating	11	29.7	20	25.0	31	26.5
Neutral	16	43.2	34	42.5	50	42.7
Slightly Aggravating	5	13.5	14	17.5	19	16.2
Aggravating	1	2.7	5	6.3	6	5.1
Highly Aggravating	2	5.4	3	3.8	5	4.3
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Approximately four out of ten respondents regarded Barton's being under the influence of alcohol at the time of the offence as a 'Neutral' factor. 'Slightly Mitigating' (26.5%) was the next most frequent response, followed by 'Slightly Aggravating' (16.2%). Once again, judges and magistrates were reasonably consistent in their answers to this question.

31. Barton was an alcoholic and was affected by alcohol

Barton was a chronic alcoholic. His first marriage had failed because of his drinking problems. As stated above, Barton was under the influence of alcohol at the time of the robbery.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	-	-	3	3.8	3	2.6
Mitigating	5	13.5	1	1.3	6	5.1
Slightly Mitigating	16	43.2	32	40.0	48	41.0
Neutral	11	29.7	25	31.3	36	30.8
Slightly Aggravating	4	10.8	11	13.8	15	12.8
Aggravating	-	-	5	6.3	5	4.3
Highly Aggravating	1	2.7	3	3.8	4	3.4
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Almost half of the respondents regarded Barton's being an alcoholic and affected by alcohol at the time of the offence as falling into the mitigating categories. The most common response was 'Slightly Mitigating' (41%). This was followed by 'Neutral' (30.8%). In all, 20.5 per cent of the respondents found this fell into the aggravating categories, although most of these responses were by magistrates.

32. Barton had no prior imprisonment

Barton had received a bond for trafficking in marijuana which had expired without incident. He had also received a Community Service Order for possessing a small quantity of heroin. He had not been sentenced to a term of imprisonment previously.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	5	13.5	9	11.3	14	12.0
Mitigating	12	32.4	16	20.0	28	23.9
Slightly Mitigating	18	48.6	41	51.2	59	50.4
Neutral	2	5.4	13	16.3	15	12.8
Slightly Aggravating	-	-	-	-	-	-
Aggravating	-	-	1	1.3	1	.9
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over eight out of ten respondents regarded the circumstance that Barton had no prior imprisonment as falling into the mitigating categories. The most common response was 'Slightly Mitigating' (50.4%). Unlike judges (5.4%) a significant proportion of magistrates (16.3%) felt that this circumstance was a 'Neutral' consideration.

33. Barton had good prospects for rehabilitation

His pre-sentence report stated that he had good prospects for rehabilitation provided his alcoholism was brought under control. He had no permanent occupation but was working as a builder's labourer.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	5	13.5	5	6.3	10	8.5
Mitigating	20	54.1	36	45.0	56	47.9
Slightly Mitigating	11	29.7	33	41.3	44	37.6
Neutral	1	2.7	4	5.0	5	4.3
Slightly Aggravating	-	-	1	1.3	1	.9
Aggravating	-	-	1	1.3	1	.9
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over nine out of ten respondents (94%) regarded Barton's good prospects of rehabilitation as falling into the mitigating categories. Most regarded it as 'Mitigating' (47.9%), followed by 'Slightly Mitigating' (37.6%).

34. Collins played a minor role

Collins drove the getaway car and stayed in the car while the robbery was taking place.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	2	5.6	8	10.0	10	8.6
Mitigating	16	44.4	27	33.8	43	37.1
Slightly Mitigating	13	36.1	33	41.3	46	39.7
Neutral	5	13.9	3	3.8	8	6.9
Slightly Aggravating	-	-	5	6.3	5	4.3
Aggravating	-	-	3	3.8	3	2.6
Highly Aggravating	-	-	1	1.3	1	.9
Total	36	100.0	80	100.0	116*	100.0

* Four respondents did not complete this question.

Over eight out of ten respondents (85.4%) considered that Collins' minor role fell into the mitigating categories. The most common response was 'Slightly Mitigating' (39.7%), followed closely by 'Mitigating' (37.1%). Nearly eight per cent of the respondents, all magistrates, regarded this factor as 'Aggravating'.

35. Collins was easily led

At first Collins said he was not interested in taking part in the robbery. It was suggested he drive the getaway car and after having his drinks 'spiked' he agreed. Collins watched and waited while Adams and Barton made preparations for the robbery and simply went along with the majority.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	1	2.7	3	3.8	4	3.4
Mitigating	8	21.6	15	18.8	23	19.7
Slightly Mitigating	20	54.1	36	45.0	56	47.9
Neutral	8	21.6	20	25.0	28	23.9
Slightly Aggravating	-	-	6	7.5	6	5.1
Aggravating	-	-	-	-	-	-
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

About seven out of ten respondents (71%) regarded Collins' being easily led as falling into the mitigating categories. The most common response was 'Slightly Mitigating' (47.9%). 'Neutral' was the next most common response (23.9%). While most judges selected 'Slightly Mitigating' (54.1%), there was an equal proportion of responses in the 'Neutral' (21.6%) and 'Mitigating' (21.6%) categories. The responses of magistrates were slightly more broadly spread across the range of options provided to them.

36. The offence was premeditated

The group planned the robbery while in a pub. They then went to Adams' place where Adams and Barton donned overalls and put the firearms into a carry bag with two balaclavas.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	1	2.8	-	-	1	.9
Mitigating	1	2.8	-	-	1	.9
Slightly Mitigating	1	2.8	-	-	1	.9
Neutral	2	5.6	6	7.5	8	6.9
Slightly Aggravating	13	36.1	28	35.0	41	35.3
Aggravating	9	25.0	26	32.5	35	30.2
Highly Aggravating	9	25.0	20	25.0	29	25.0
Total	36	100.0	80	100.0	116*	100.0

* Four respondents did not complete this question.

Nine out of ten respondents (90.5%) regarded premeditation as falling into the aggravating categories. The most common response was 'Slightly Aggravating' (35.3%), although substantial responses for both judges and magistrates were spread across the other two aggravating categories.

37. Collins was affected by alcohol and drugs

Collins was not drinking alcohol because he had been prescribed drugs after a motor vehicle accident and his doctor had advised him that the drugs would enhance the effect of alcohol. Without his knowledge or consent, his companions put vodka in his orange juice. As a result he was intoxicated.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	7	18.9	10	12.5	17	14.5
Mitigating	6	16.2	6	7.5	12	10.3
Slightly Mitigating	9	24.3	26	32.5	35	29.9
Neutral	11	29.7	24	30.0	35	29.9
Slightly Aggravating	3	8.1	8	10.0	11	9.4
Aggravating	1	2.7	3	3.8	4	3.4
Highly Aggravating	-	-	3	3.8	3	2.6
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over half of the respondents (54.7%) regarded the circumstance that Collins was affected by alcohol as falling into the mitigating categories. 'Neutral' and 'Slightly Mitigating' were the most common responses (29.9% each). Judges tended to be slightly more lenient than magistrates in response to this question.

38. Collins' consumption of alcohol was involuntary

As mentioned above, Collins was not aware that his companions had 'spiked' the orange juice he was drinking.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	20	54.1	32	40.0	52	44.4
Mitigating	8	21.6	26	32.5	34	29.1
Slightly Mitigating	8	21.6	16	20.0	24	20.5
Neutral	1	2.7	5	6.3	6	5.1
Slightly Aggravating	-	-	-	-	-	-
Aggravating	-	-	-	-	-	-
Highly Aggravating	-	-	1	1.3	1	.9
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over nine out of ten respondents (94%) regarded this factor as falling into the mitigating categories. The most common response was 'Highly Mitigating' (44.4%) with 54.1% of judges, compared with 40% of magistrates, selecting this option..

39. Collins' intoxication was exacerbated by medication

Collins had only two glasses of orange juice to which vodka had been added without his knowledge or consent. The drugs enhanced the intoxicating effects of the alcohol.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	16	43.2	16	20.0	32	27.4
Mitigating	8	21.6	25	31.3	33	28.2
Slightly Mitigating	9	24.3	26	32.5	35	29.9
Neutral	4	10.8	11	13.8	15	12.8
Slightly Aggravating	-	-	-	-	-	-
Aggravating	-	-	1	1.3	1	.9
Highly Aggravating	-	-	1	1.3	1	.9
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over eight out of ten of the respondents (85.5%) felt that Collins' intoxication, as exacerbated by medication fell into the mitigating categories. The most common response was 'Slightly Mitigating' (29.9%) but this was closely followed by 'Mitigating' (28.2%) and 'Highly Mitigating' (27.4%). Significantly, 43.2% of judges selected 'Highly Mitigating', whereas only 20% of magistrates selected this option.

40. Collins was the youngest

Collins was 21 years of age, Adams was 39 years old and Barton was 28 years old.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	6	16.2	5	6.3	11	9.4
Mitigating	15	40.5	14	17.5	29	24.8
Slightly Mitigating	14	37.8	46	57.5	60	51.3
Neutral	1	2.7	15	18.8	16	13.7
Slightly Aggravating	-	-	-	-	-	-
Aggravating	1	2.7	-	-	1	.9
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over eight out of ten of respondents (85.5%) regarded Collins' youth as falling into the mitigating categories. The most common response was 'Slightly Mitigating' (51.3%), although once again judges appeared to be more lenient than magistrates by selecting 'Highly Mitigating' and 'Mitigating' in preference to 'Slightly Mitigating' and 'Neutral'.

41. Collins had no prior convictions

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	15	40.5	39	48.8	54	46.2
Mitigating	15	40.5	31	38.8	46	39.3
Slightly Mitigating	6	16.2	8	10.0	14	12.0
Neutral	-	-	2	2.5	2	1.7
Slightly Aggravating	-	-	-	-	-	-
Aggravating	1	2.7	-	-	1	.9
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Almost all of the respondents (97.5%) regarded the fact that Collins had no prior convictions as falling into the mitigating categories. The most common response was 'Highly Mitigating' (46.2%) followed by 'Mitigating' (39.3%). The pattern of responses for judges and magistrates was fairly similar.

42. Collins cooperated fully and pleaded guilty

Collins cooperated fully with the police, pleaded guilty to armed robbery in company and appeared remorseful.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	20	54.1	32	40.0	52	44.4
Mitigating	15	40.5	38	47.5	53	45.3
Slightly Mitigating	1	2.7	9	11.3	10	8.5
Neutral	1	2.7	-	-	1	.9
Slightly Aggravating	-	-	-	-	-	-
Aggravating	-	-	1	1.3	1	.9
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Almost all of the respondents (98.2%) regarded Collins' plea of guilty and full cooperation as a 'Highly Mitigating' (44.4%) or 'Mitigating' (45.3%) circumstance. Judges selected 'Highly Mitigating' (54.1%) as their preferred choice, while magistrates selected 'Mitigating' (47.5%) most often in response to this question.

43. Collins appeared remorseful

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	13	35.1	20	25.0	33	28.2
Mitigating	17	45.9	38	47.5	55	47.0
Slightly Mitigating	6	16.2	21	26.3	27	23.1
Neutral	1	2.7	-	-	1	.9
Slightly Aggravating	-	-	1	1.3	1	.9
Aggravating	-	-	-	-	-	-
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Nearly all of the respondents (98.3%) regarded Collins' remorse as falling into the mitigating categories. The most common response was 'Mitigating' (47%), followed by 'Highly Mitigating' (28.2%).

44. Collins had good prospects for rehabilitation

Collins was a clerk in the Public Service, was married and had no prior convictions.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	21	56.8	29	36.3	50	42.7
Mitigating	11	29.7	36	45.0	47	40.2
Slightly Mitigating	5	13.5	13	16.3	18	15.4
Neutral	-	-	2	2.5	2	1.7
Slightly Aggravating	-	-	-	-	-	-
Aggravating	-	-	-	-	-	-
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Nearly all of the respondents felt that Collins' good prospect for rehabilitation fell into the mitigating categories. Overall the most common response was 'Highly Mitigating' (42.7%), although 56.8% of judges selected this category.

45. Collins acted out of character

Collins appeared to be a person of otherwise good character.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Highly Mitigating	16	43.2	19	23.8	35	29.9
Mitigating	12	32.4	33	41.3	45	38.5
Slightly Mitigating	8	21.6	24	30.0	32	27.4
Neutral	1	2.7	4	5.0	5	4.3
Slightly Aggravating	-	-	-	-	-	-
Aggravating	-	-	-	-	-	-
Highly Aggravating	-	-	-	-	-	-
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Over nine out of ten respondents (95.8%) considered 'acting out of character' fell into the mitigating categories. Once again more judges (43.2%) than magistrates (23.8%) selected 'Highly Mitigating' as their response to this question.

46. Adequacy of rehabilitation resources for alcoholic offenders

Respondents were asked if there were a sufficient range and number of rehabilitation resources or programs available for treating alcoholic offenders in their area? A choice of 'yes', 'no' or 'don't know' was given.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Yes	9	24.3	31	38.8	40	34.2
No	11	29.7	36	45.0	47	40.2
Don't know	17	45.9	13	16.3	30	25.6
Total	37	100.0	80	100.0	117*	100.0

* Three respondents did not complete this question.

Although the response to this question shows that a large proportion of respondents (particularly judges) indicated that they did not know whether there were sufficient rehabilitation resources or programs available for the treatment of alcoholic offenders in their area, it is quite clear that a significant proportion (overall 40.2%) felt that there were inadequacies here. Indeed more respondents answered 'No' to this question than 'Yes' (judges: 24.3%; magistrates: 38.8%), suggesting very firmly that many judicial officers are not satisfied with the rehabilitation services provided.

47. Respondents were asked if they thought that an offender who commits violent offences while intoxicated by alcohol should be sentenced differently from an offender who was not affected by alcohol? The choices given were: 'more leniently than'; 'in the same way as'; 'more severely than'; and 'don't know'.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
More Leniently	7	26.9	21	29.6	28	28.9
Same Way	18	69.2	39	54.9	57	58.8
More Severely	1	3.8	9	12.7	10	10.3
Don't Know	-	-	2	2.8	2	2.1
Total	26	100.0	71	100.0	97*	100.0

* Twenty-three respondents did not complete this question.

The most common response to this question was 'In the Same Way' (58.8%). It is clear that judges (69.2%) felt more strongly than magistrates (54.9%) that offenders affected by alcohol should not be sentenced more leniently or more severely than an offender who was not so affected. However, over one out of every four respondents (28.9%) felt that such offenders should be sentenced more leniently. About one out of eight magistrates (12.7%) felt that violent offenders who were intoxicated at the time of their offence should be sentenced more severely.

48. Respondents were asked to advise whether they were a judge or magistrate of the Supreme Court, District Court, Local Court. However, no Supreme Court justices were surveyed and therefore only the responses of two groups of judicial officers can be compared.

District Courts		Local Courts		Total of District and Local Courts	
n	%	n	%	n	%
37	31.4	81	68.6	118*	100.0

* Two respondents did not complete this question.

Magistrates outnumbered judges by a ratio of two to one. Thus totals contained in the tables presented in this report must be interpreted in the knowledge that they are strongly weighted in favour of the responses presented by magistrates.

49. Respondents were asked to advise whether they spent less than one third of their time; between one third and two thirds of their time; or over two thirds of their time in the criminal jurisdiction.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Less than one third	4	10.8	3	3.7	7	5.9
One third to two thirds	9	24.3	7	8.6	16	13.6
More than two thirds	24	64.9	71	87.7	95	80.5
Total	37	100.0	81	100.0	118*	100.0

* Two respondents did not complete this question.

This table shows that the majority (overall 80.5%) of respondents surveyed spent more than two-thirds of their time in the criminal jurisdiction. Magistrates spent a greater proportion of their time than judges in the criminal jurisdiction.

50. Respondents were asked to advise the number of years they had been on the bench.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Up to 5 years	15	40.5	23	28.4	38	32.2
6 to 10 years	13	35.1	27	33.3	40	33.9
11 to 15 years	7	18.9	11	13.6	18	15.3
16 to 20 years	2	5.4	10	12.3	12	10.2
21 to 25 years	-	-	10	12.3	10	8.5
Total	37	100.0	81	100.0	118*	100.0

* Two respondents did not complete this question.

51. The respondents were asked to nominate in which age category they belonged.

	District Courts		Local Courts		Total of District and Local Courts	
	n	%	n	%	n	%
Less than 50	4	11.1	40	49.4	44	37.6
50 to 60	12	33.3	35	43.2	47	40.2
Over 60	20	55.6	6	7.4	26	22.2
Total	36	100.0	81	100.0	117*	100.0

* Three respondents did not complete this question.

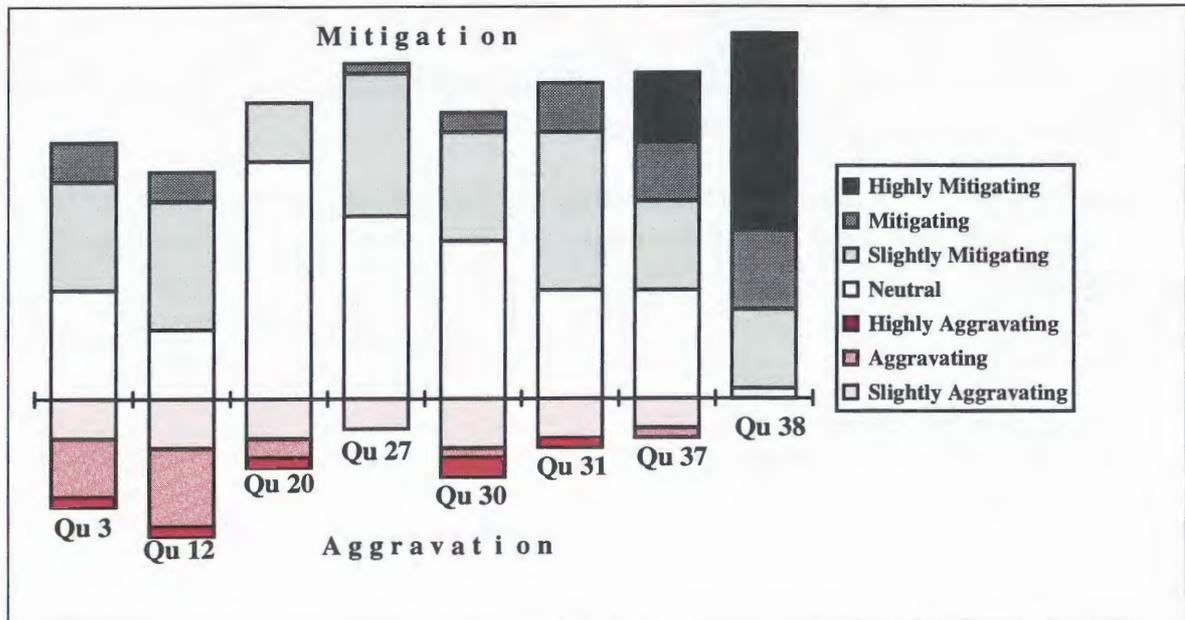
More than half the respondents (55.6%) from the District court were in the 'over 60' age category while just under half of the magistrates (49.4%) were in the 'less than 50' age category.

APPENDIX C

Summary Table A: Comparative weightings of mitigation and aggravation for selected questions - District Court

	Qu3	Qu12	Qu20	Qu27	Qu30	Qu31	Qu37	Qu38
	%	%	%	%	%	%	%	%
Highly Mitigating	-	-	-	-	-	-	18.9	54.1
Mitigating	10.8	8.1	-	2.8	5.4	13.5	16.2	21.6
Slightly Mitigating	29.7	35.1	16.2	38.9	29.7	43.2	24.3	21.6
Neutral	29.7	18.9	64.9	50.0	43.2	29.7	29.7	2.7
Slightly Aggravating	10.8	13.5	10.8	8.3	13.5	10.8	8.1	-
Aggravating	16.2	21.6	5.4	-	2.7	-	2.7	-
Highly Aggravating	2.7	2.7	2.7	-	5.4	2.7	-	-
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

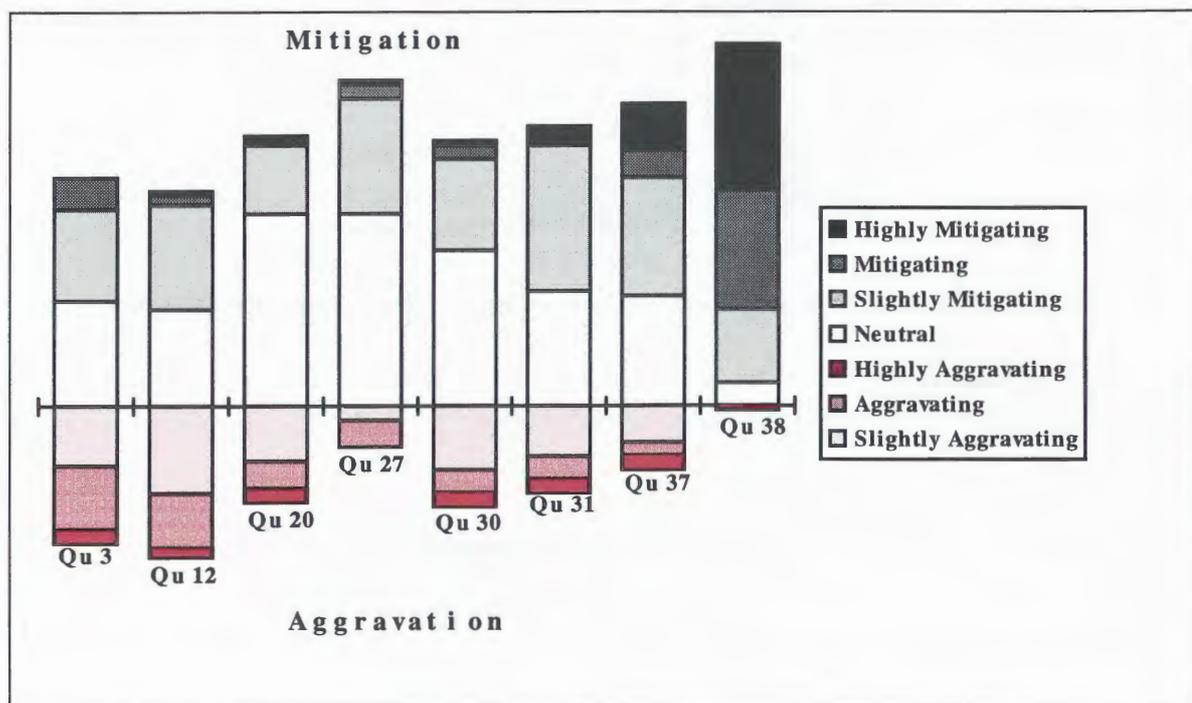
Figure A: Comparative weightings of mitigation and aggravation for selected questions - District Court



Summary Table B: Comparative weightings of mitigation and aggravation for selected questions - Local Courts

	Qu3	Qu12	Qu20	Qu27	Qu30	Qu31	Qu37	Qu38
	%	%	%	%	%	%	%	%
Highly Mitigating	-	1.3	1.3	1.3	1.3	3.8	12.5	40.0
Mitigating	8.8	2.5	1.3	3.8	3.8	1.3	7.5	32.5
Slightly Mitigating	25.0	28.7	18.8	31.3	25.0	40.0	32.5	20.0
Neutral	28.7	26.3	52.5	52.5	42.5	31.3	30.0	6.3
Slightly Aggravating	16.3	23.8	15.0	3.8	17.5	13.8	10.0	-
Aggravating	17.5	15.0	7.5	7.5	6.3	6.3	3.8	-
Highly Aggravating	3.8	2.5	3.8	-	3.8	3.8	3.8	1.3
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

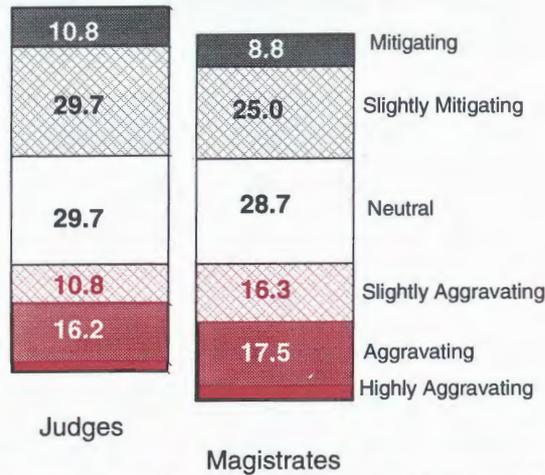
Figure B: Comparative weightings of mitigation and aggravation for selected questions - Local Courts



The following series of histograms compares the responses of judges with those of magistrates for each of the relevant questions. As an aid to understanding them readers should compare the neutral responses and then consider the extent to which the other responses go above (mitigating) and below (aggravating) the neutral responses.

Pub brawl

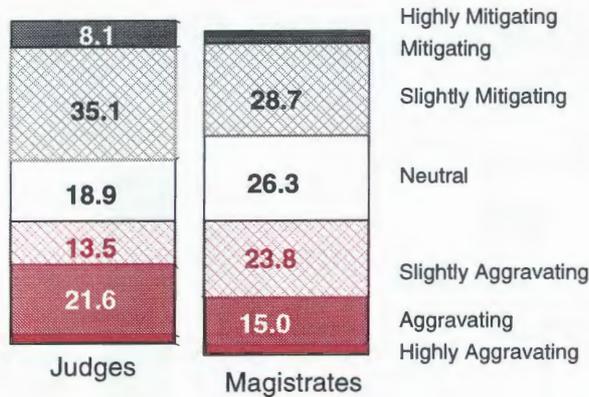
Q3. The offender acted under the influence of alcohol



No significant difference between judges and magistrates was found: likelihood ratio = 0.98 for 5df.

Domestic Violence

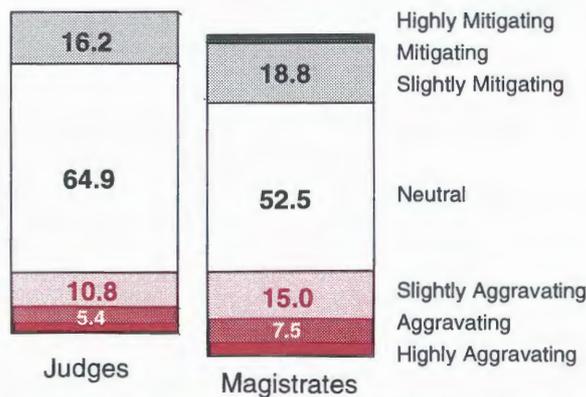
Q12. The offender acted under the influence of alcohol



No significant difference between judges and magistrates was found: likelihood ratio = 5.4 for 6df.

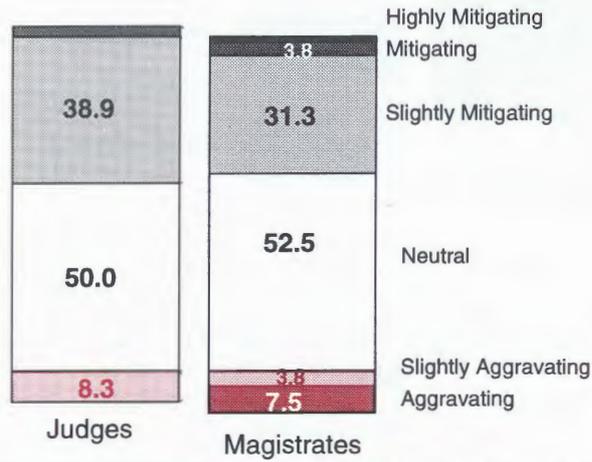
Armed Robbery

Q20. Adams acted under the influence of alcohol



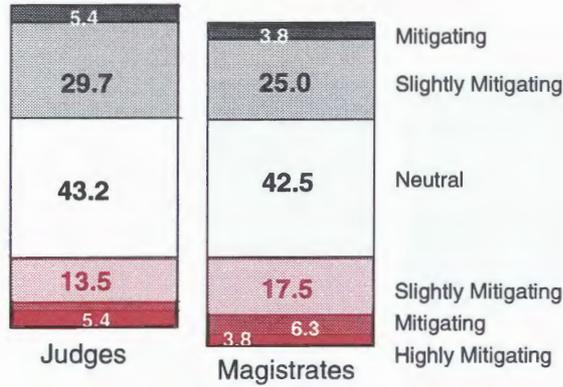
No significant difference between judges and magistrates was found: likelihood ratio = 2.87 for 6df.

Q27. Barton required 'Dutch Courage' to proceed



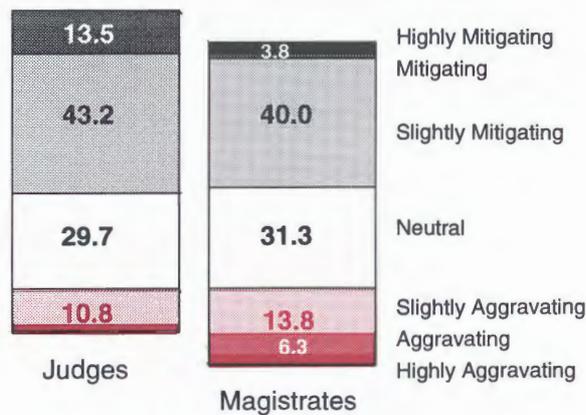
No significant difference between judges and magistrates was found: likelihood ratio = 6.65 for 5df.

Q30. Barton acted under the influence of alcohol



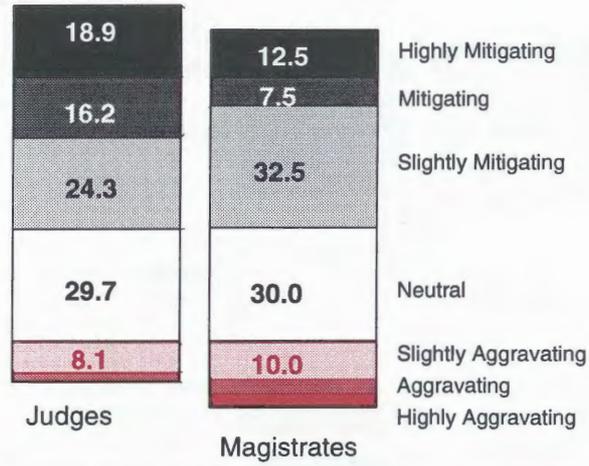
No significant difference between judges and magistrates was found: likelihood ratio = 2.24 for 6df.

Q31. Barton was an alcoholic and was affected by alcohol



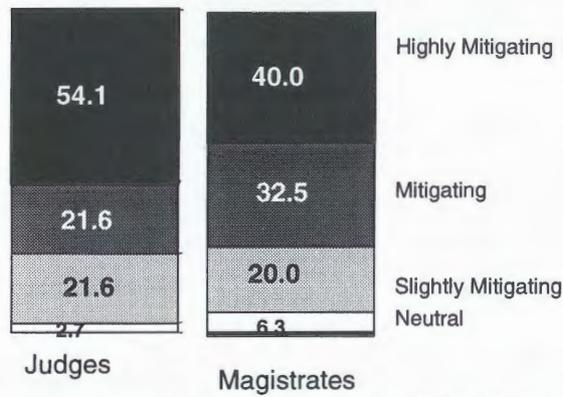
No significant difference between judges and magistrates was found: likelihood ratio = 13.29 for 6df.

Q37. Collins was affected by alcohol and drugs



No significant difference between judges and magistrates was found: likelihood ratio =5.48 for 6df.

Q38. Collins' consumption of alcohol was involuntary



No significant difference between judges and magistrates was found: likelihood ratio =3.66 for 4df.

APPENDIX D

ALCOHOL, SERIOUS OFFENCES AND SENTENCING
QUESTIONS FOR DISCUSSION

1. Alcohol - is it a mitigating, aggravating or neutral factor in sentencing?
-

2. Alcohol and violent offences - how strong is the connection percentage
- types of offences?
- types of offenders?
-

3. What role does alcohol/intoxication have in formation on the issue of formation of criminal intent? (Capacity to form intent - how often is this raised?)

What is your understanding of *R v Coleman*?

4. In your view, does the fact that an accused was intoxicated at the time of commission of the offences charged have any effect in the seriousness of the charge that the Crown would be prepared to accept a plea in relation to?

(Role of victim's family) justification.

5. Where does alcohol fit into the objective factor/subjective features part of the traditional breakdown of the "facts"? Does it fit?

Is it an issue for Crown or defence to raise would you address on this issue?

6. How important a factor is the state of intoxication of the victim for a S.J. or magistrate, when they consider imposing sentence on an offender who was intoxicated?

It is different for, say, assault in pubs over "domestic violence" offences?

7. How commonly in your experience is alcohol found by SJ to be an aggravating factor?
-

8. Alcohol counselling - should it be a condition of recognisance - what is the legitimate extent of the judiciary in this area - setting an offender up for failure or protecting the community?
-

9. What would you regard as the main cases on the role of alcohol in sentencing?
-

10. Do you have any interesting/useful examples of the role of alcohol in sentencing of violent offenders?
-

11. Should the use/influence of alcohol be treated the same as or differently to the use/influence of other drugs?

[For Public Defenders]

Are there cases where you would not emphasise or even mention the level of intoxication of an offender? If so, what sort of cases are they?

12. Is there a need for legislative intervention in this area - i.e. is there a need for law reform?