

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA (*Northern Cape Division*)

CASE NUMBER: 186 /2006

187/2006

DATE DELIVERED: 26-03-2007

In the case of:

THE STATE

versus

**HENDRICK FARREL
PATRICIA NTHETHE**

CORAM: KGOMO JP ET MOLWANTWA AJ

JUDGMENT ON SPECIAL REVIEW

MOLWANTWA AJ:

1. The two accused appeared in different cases in the Magistrate's Court Upington, and pleaded guilty. They were convicted as charged and sentenced accordingly. They were legally represented. The legal representatives respectively submitted statements in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (*"the Act"*) in which they admitted on behalf of their clients, all the elements of the offences preferred against them.

2. The Senior Magistrate of Upington has sent the proceedings on special review as he was of the view that in respect of the accused Patricia Nthethe the proceedings were not in accordance with justice as *"it appears as if there may be a valid defence available to the*

accused as he indicates that he bit the police officer in an attempt to escape. To escape (what perhaps) the effect of teargas.” He further suggested that “although the accused admits biting the complainant I am satisfied it is clear that the accused could (not) have appreciated the wrongfulness of the act of biting as it is not clear that it was justified to spray the accused with teargas.”

3. In respect of the accused Hendrick Farrel the Magistrate offers the following reason for the submission of this case for special review: *“This matter is being sent on special review due to the fact that the plea submitted in terms of section 112(2) of Act 51/1977 discloses a valid defence to the charge.”*

4. I sent a query to the Magistrate which entails the following:

“Comments are requested from the Senior Magistrate on the following:

This case does not seem to be reviewable in the absence of any explanation why it was placed before me, otherwise it would be an appeal.

In the absence of further reasons why this matter should be treated as a special review, I shall deem this matter to have been finalized and disposed of on 18 May 2006.”

5. The Magistrate has responded and explains in the one case (Hedrick Farrel) that neither the Legal Aid attorney nor the Magistrate concerned picked up that the accused may have had a valid defence to the charges. He ascribes this oversight to the alleged lack of experience on the part of both the

attorney and or the Magistrate. This so-called anomaly was discovered when the Senior Magistrate, a quality assurance officer, checked all cases for quality control purposes. I will return to this aspect later.

6. The office of the Director of Public Prosecutions (“*DPP*”) was approached for a legal opinion. Advocate CG Jansen, a Senior Advocate in the DPP’s office, does not support the Magistrate’s views for the annulment of the convictions. The DPP was also asked to comment on the following question of law:

“Can the High court review and set aside the conviction and sentence of a defended accused on the basis that a Senior Magistrate appointed as a quality assurance officer is of the view that the proceedings are not in accordance with justice.”

7. The material portion of the legal opinion aforementioned is to the following effect.

“16. In the matter of Hendrick Farrell, the accused admitted that he subjectively knew that he was acting wrongfully, by taking the law into his own hands when assaulting the complainant at the time of the incident. He admits that he knew that there were other remedies available to him to redress his seemingly unlawful arrest. He further admitted that his actions were wrong, unlawful and punishable by the law. The admissions made by the accused in his plea of guilty were grounds enough to convict him of assault. Since the accused admitted to

subjective knowledge of the wrongfulness of his actions at the time of the incident, it cannot be correct that there is a possible defence open to the accused as is alleged by the Senior Magistrate, Upington. The accused was furthermore assisted by a legal representative, who consulted with him and compiled a written plea explanation, prior to the trial.

17. *In the matter of Patricia Nthethe, the accused admitted that she knew what the charge against her was when the police tried to arrest her, but that she did not co-operate with the police, since she was drunk. The police used teargas and she bit the complainant in an attempt to escape. She admits that she had no right to bite the complainant and that she acted unlawfully, because she should have co-operated immediately. She admitted she had the subjective intention to bite the complainant and therefore assaulted him. She never alleges that she was justified in her actions by biting the complainant. It is clear that her legal representative consulted with her and compiled a written plea explanation, the contents of which is clear an unambiguous. It cannot be deduced from her plea explanation, that she had a possible defence as the Senior Magistrate, Upington alleges. The inferences sought to be drawn, should be on the facts.*
- 18 *In **S v Salie** 2007(1) SACR 55 (C) the Court also had to decide whether the proceedings were reviewable after deciding the question of locus standi. The Court found that the legal representative assisted the accused and that the basis of the facts admitted by the accused in the plea and sentence agreement, was in accordance with law and justified a conviction on robbery with aggravating circumstances. The learned **Yekiso, J** made the following finding and order on **p62b-c**:*

“The fact that there was uncertainty as regards the presence or otherwise of aggravating circumstances in a matter of a trial of his accomplices is not a basis

to fault the proceedings concluded on the basis of the plea and sentence agreement concluded by the accused and on the basis of sound legal advice”.

It therefore follows in my view that there is no basis to interfere with the manner in which the accused's trial was handled by Mr. Van Zyl.”

I endorse these remarks by the State Counsel.

8. The creation of this category of judicial officers, the quality assurance officers, was an innovative way of trying to *inter alia* ensure that judicial officers in the Magistrate court, especially at entry level, produced quality work. The functions of a quality assurance officer in this regard includes a perusal of all finalized cases to check *inter alia* whether the court record is fully completed e.g. whether the judicial officer has numbered the pages, convicted the accused correctly, imposed a competent sentence, applied the correct and relevant provisions of the legislation dealt with.
9. Importantly, a quality assurance officer must give direction and guidance to officers in connection with judicial work, without interfering with the judicial discretion or independence of individual presiding officers in the cases they have presided over. This is in line with the notion of judicial independence as envisaged in the Constitution. See in this regard section 165 of Act 108 of 1996 of the Constitution of the Republic of South Africa.

10. Although the innovation (quality assurance) is a good one, and has been accepted and encouraged by the High courts in various cases including **S v Nyanga** 2004(1) SACR 198 (CPD); **S v Mashaba** 2004(1) SACR 214 (TPD), it should not be used as a review mechanism outside the parameters of section 302 read with 304 of the Act. It might just lead to endless court proceedings, no finality and create uncertainty. That cannot be in the public interest and those of the administration of justice. To the contrary it might even be to the prejudice of the accused persons who would suffer from anxiety because they cannot find closure.

12. On inquiry as regards whether there are guidelines which a quality assurance officer uses to discharge his/her functions, none could be supplied. I was informed that magistrates holding this title do so based on their experience. I would strongly urge the Magistrates Commission to come up with clear guidelines to quality assurance officers on how to act when an irregularity or inequity has been detected, keeping in mind that in defended cases legal advice accepted by a litigant is binding on him or her. See in this regard the unreported judgment of **Kgomo J** (as he was then), **S v Hugo Van Heerden & 1** case no EVS No 204/99 delivered on 31/3/2000.

13. Looking at the proceedings of these two cases under discussion as a whole I am satisfied that there is no indication that there are considerations of inequity or unfair dealings which could constrain this Court to intervene to prevent a probable failure of justice. See **S v Cedras** 1992(2) SACR 530(C) at 531j-532b.

14. I have discussed this matter with the Judge President, who concurs in this judgment. We are *ad idem* that there is clearly an over-exuberance on the part of some quality assurance

officers who seem to actively seek fault with judgments. In some instances even minor errors which have nothing to do with the substance of the case and do not amount to gross irregularities which affect the fairness of the case, are being sent on special review. Needless to say, most of these cases where it is found that the proceedings are in accordance with justice are returned unaltered. These cases take up a lot of time of the presiding Magistrate to answer queries, of the Judge to whom the review is assigned and the DPP's office where their legal opinion is sought. It is fair to say that the quality assurance officers in trying to ensure that justice is done must keep in mind that they do not possess powers of review. These unwarranted reviews can only exacerbate the workload and the case backlog currently experienced throughout the country.

In the circumstances I make the following order.

ORDER

The request by the Magistrate that the conviction and sentence in cases 186/06 (S v Hedrick Farrel) and 187/06 (S v Patricia Nthethe) be reviewed and set aside in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 is refused. The convictions and sentences are found to be in accordance with justice and are hereby confirmed.

**B C MOLWANTWA
ACTING JUDGE
NORTHERN CAPE DIVISION**

I concur.

**F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION**