IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

REVIEW 18617

In the matter between

THE STATE

V

LLOYD MADHINHA

CORAM: DOLAMO J; THULARE AJ

JUDGMENT DELIVERED 07 DECEMBER 2018

THULARE AJ

[1] *"Application for setting aside of conviction and sentence*

The applicant paid an admission of guilt which was examined in terms of section 57(5) Act 51/1977 on 10/12/2012.

He is now applying that the deemed conviction and sentence be set aside and has submitted an affidavit.

The matter is referred to the Honourable Court as the magistrate is functus officio. The affidavit, AOG Register copy (J114) and the certified copy of docket are attached for ease of reference. The Control Document cannot be attached as it was already destroyed by the Clerk of the Court."

[2] This is how a Memorandum received from the Magistrate, Goodwood, filed with the Registrar of the Division of the High Court, Western Cape, read. The matter, in the style of a review in the ordinary course, was allocated to Andrews AJ as she then was. The remarks of the Judge and the response of the Magistrate are strictly speaking not on point, and are referred to for the purposes of helping further to illuminate and contextualize what in my view is the issue. The remarks which the Judge returned to the Magistrate are as follows:

"1. Mr Madhinha's statement is not clear in relation to the payment of R500-00.

Kindly explain:

(a) Why he regarded the payment as a fine (paragraph 22).

(b) His statement says that he paid the fine in order to secure his release. Did Mr Madhinha think he was paying bail?

(c) What did Mr Madhinha think would happen to the matter after he paid the R500-00?

(i) What was he told would happen to him if he paid the fine?

(ii) Did he expect to go to court?

2. In what language did the police officials communicate with him? Was he able to properly comprehend what was happening from the time of arrest until the time of his release?

3. Copy of receipt is required."

[3] The relevant parts of the response of the Magistrate are in the following terms:

"I am not in a position to personally answer the remarks from the honourable reviewing Judge not having interviewed Mr Madinha personally.

To expedite the matter and with the problems with post being delivered very late and the representative not providing any particulars to contact him, I requested the Clerk Mrs B Court to immediately call Mr Madhinha to respond to the questions posed.
She informs me that she telephonically spoke to him on 20 July 2018 and requested him to come and see me or collect the documents and respond in writing. He indicated that he would report to her and deal with it. He was telephonically called twice more, but did not answer and she left messages to immediately contact me.
Until today he has still not come to Court to collect the papers to respond or to see me to give an explanation to the questions.
She further informs me that he spoke fluent English with an accent on the phone.
If this is not acceptable, kindly provide guidance as to what further steps I need to take to answer the questions posed."

[4] An accused may, without appearing in court, admit guilt in respect of an offence by paying a stipulated fine if the summons or written notice is endorsed to the effect that the fine may be paid [section 57(1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the Act). Upon entry of the essential particulars of such summons or written notice and of any summons or written notice surrendered to the clerk of the court, in the criminal record book for admissions of guilt, the accused shall be deemed to have been convicted and sentenced by the court in respect of the offence in question.

[5] I have doubts as to whether the conviction referred to in section 57(6) of the Act, is a conviction as envisaged in section 271 of the Act. As a consequence, I have doubts as to whether a conviction as envisaged in section 57(6) of the Act is a conviction which the Head of the Criminal Record Centre of the South African Police Service (SAPS) or his or her designate should enter on the criminal record

of a person to appear as that person's previous conviction(s) as envisaged in section 271 of the Act.

[6] The accused was a self-employed vendor who sold grass at a particular spot along Plattekloof road, a public road in Bothasig, Cape Town. On 19 October 2010 at around 10am when he arrived at this spot, he found another vendor, the husband to complainant Portia Vangai, having already set out grass for display to customers just in front of this spot. The husband was absent and only the complainant was overseeing the grass display. An argument ensued between the accused and the complainant as the complainant also claimed their right to sell on that spot. The next day, 20 October 2010, the complainant attended to the Bothasig SAPS and laid a complaint in which she alleged that during that argument, the accused slapped her twice and pushed her.

[7] The accused was arrested on 27 October 2010. The case was processed and entered into the SAPS registers, which included the taking of accused fingerprints and a docket being opened under Bothasig CAS 178/10/2010. The accused was detained but amongst others handed a written notice (J534) which included an endorsement that he may admit guilt in respect of the offence and that he may pay a stipulated fine of R500-00 in respect thereof without appearing in court. The accused paid the fine, and was released.

[8] Bothasig SAPS surrendered the written notice and the admission of guilt fine to Le Theron, a clerk of the court at the Magistrate's Court Goodwood. She entered the particulars of the written notice in the criminal record book for

admissions of guilt on 16 November 2010. A magistrate examined the documents in terms of section 57(7) of the Act on 23 November 2010 and it did not occur to the magistrate to set aside the conviction and sentence. On the strength of these developments, the SAPS entered in their criminal record system the name of the accused, the date of conviction as 23 November 2010, the charge as assault with date committed as 19 October 2010 and sentence as AOG R500-00.

[9] The grass selling business no longer did well. In early 2018, the accused applied to join Uber, which is a business using smartphone applications and transfer of funds electronically, acting as a middleman between taxi drivers and riders, charging a commission. The driver is the owner of the vehicle. Uber wanted the prospective new driver to provide a police clearance certificate. It is the process of acquiring a police clearance certificate which brought about a revelation to the accused that he had a criminal record. The SAPS informed him that the admission of guilt he paid on the 27 October 2010 was by law a conviction and sentence. He approached an attorney and the Magistrate, Goodwood. He applied for an order to have the conviction and sentence set aside. The accused is now willing to challenge the evidence against him, in order to ward off a conviction and sentence.

[10] The accused in his affidavit now alleged that when he arrived at the police station upon his arrest he was told to pay R500-00 and stop selling in the road and go home. He paid the amount, was asked some questions about himself and told to sign some papers. According to him, the payment was, to quote him verbatim

"akin to my release. I was told that I must pay and go." His grounds for review are set out in the following terms:

"REVIEW

21. I respectfully request that the conviction and sentence, which resulted from my paying an admission of guilt fine, be set aside as it was not in accordance with justice.

22. I believed the only option to be released from custody was to pay a fine immediately and payment was accordingly not made freely and voluntarily; My actions in paying the fine in order to secure my release in custody were reasonable;

23. I was not properly informed of my rights nor were my rights explained to me at any stage of the process which is in violation of my constitutional rights in terms of section 35 of the Constitution Act.

24. I accordingly respectfully pray for an order to set aside the conviction and sentence aside. I have been advised that should the conviction and sentence be set aside, I may still be prosecuted for the offense."

[11 A written notice is a method of securing the attendance of an accused in a magistrate's court – [section 38 read with section 56 of the Act]. The level of court within the hierarchy of courts alone is sufficient to indicate that this method is meant primarily for less serious offences – [section 166 of the Constitution of the Republic of South Africa, (the Constitution)].

[12] Written notice as a method of securing the attendance of accused is issued by a peace officer who on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette - [section 38 read with section 56 of the Act]. A peace officer may endorse the written notice to the effect that the accused may admit guilt in respect of the

offence in question and that he or she may pay the stipulated fine without appearing in court. The peace officer is able to make that endorsement only where they on reasonable grounds believe that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette - [section 56(1) of the Act].

[13] Generally a fine as a nature of punishment that may be imposed upon a person convicted of an offence, which fine is determined without punishment alternative to such fine – [section 276(1)(f) of the Act], is considered for trivial offences only. The fine is generally endorsed on a summons and a written notice for appearance in the district courts within the magistrates' courts. A magistrate in a district court may impose a fine not exceeding the amount determined by the Minister from time to time by notice in the Gazette, save as otherwise specially provided – [section 92(1)(b) of the Magistrates' Courts Act, 1944 – [Act No. 32 of 1944]]. Currently the amount determined by the Minister is R120 000-00. The amounts determined by the Minister in terms of section 56(1) and 57(1)(a) of the Act is currently R10 000-00. R10 000-00 represents 8.33 percent of the limit of jurisdiction for a fine which a district court magistrate may ordinarily impose. A fine only as punishment (in admissions of guilt by payment of a stipulated fine) is intended for trivial offences.

[14] Section 57(6) and (7) of the Act reads as follows:

"(6) An admission of guilt fine paid at a police station or a local authority in terms of subsection (1) and the summons or, as the case may be, the written notice surrendered under subsection

(3), shall, as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection (7), be deemed to have been convicted and sentenced by the court in respect of the offence in question.

(7) The judicial officer presiding at the court in question shall examine the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the admission of guilt fine which has been paid exceeds the amount determined by the magistrate under subsection (5), the said judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the said admission of guilt fine exceeds the said determination be refunded to the accused concerned."

[15] The conviction and sentence of an accused in terms of section 57(6) is *sui generis.* It is not a verdict. It is not even a pronouncement by the clerk of the court. It is an automatic consequence of an administrative act performed by a member of the court's support services. It automatically follows on the clerk of the court performing his or her clerical duties. The administrative duties performed by the clerk of the criminal court referred to in section 57(6) are provided for in the *Department of Justice and Constitutional Development, Justice*

Codified Instructions: Code: Clerks of the Criminal Court, (the Code) in Chapter 6, deals with admission of guilt fines. Paragraph 72 of the Code reads as follows:

"72. Upon receipt of an admission of guilt fine the clerk of the court proceeds as follows:

(a) The copies of the summonses or notices are arranged in sequence of –

(i) The admissions of guilt receipt numbers (J70 or JDAS generated receipt) issued by the clerk of the court; and

(ii) The expenditure receipt number (Z263 or JDAS generated receipt) issued by the clerk of the court to the South African Police Services or other magistrate's offices. The admission of guilt receipt numbers (J70 or JDAS generated receipt) should appear in sequence on each expenditure receipt issued to the SA Police Services.

(b) Each case is allotted a serial number for the current calendar year, starting with the number 1 for that year.

(c) The particulars of each case are entered in sequence of receipt numbers in the appropriate columns of the admission of guilt register (J114).

(d) The fines are entered in the appropriate columns of the admission of guilt register (J114) according to the classification thereof.

(e) The admissions of guilt receipt numbers and, where applicable, the expenditure receipt numbers must in all cases be entered in the appropriate columns of the admission of guilt register (J114).

(f) The certificate in terms of section 57(7) to be signed by the judicial officer must be placed in the last page of the admission of guilt register (J114) for the day.

[16] The performance by the clerk of the criminal court of his or administrative duties results in an automatic conviction and sentence of the accused, pursuant section 57(6) of the Act. The facts of the case, whether the accused admitted or denied some of them, or whether the accused was in fact and in law guilty of the offence were not considered at all in this conviction in terms of section 57(6) of

the Act. In my view, the clerk of the criminal court simply enters on court records what is essentially an agreement between the State and the accused.

[17] In my view, the Legislature has provided the mechanism in section 57 of the Act to provide for settlement of trivial disputes between the State and an accused person where neither party wishes to go through a long trial procedure and both are willing to bring their dispute to a quick end. The issues are set out in the written notice which identifies the accused, the charge and what the accused needs to do to answer it, an endorsement that he may admit guilt and the certificate by the peace officer. In this way the accused and the offence are identified which the State agreed not to pursue in exchange for the agreed payment. It is a documented waiver of the specific offences which the State has or could feasibly have against an accused upon payment of a stipulated amount. It is a waiver by an accused of his right to have his case proved beyond reasonable doubt.

[18] This settlement mechanism of trivial criminal offences should meet the statutory requirements, especially that every term and process is to be in writing, specifying with precision or reasonable ascertainment the identity of the accused, the offence, the explanation of constitutional rights and the amount payable. Its purpose is to ensure that minor offences and disputes between the State and accused are concluded without the need for either side to resort to a full trial process. In a settlement, the strength of the case of either side is never tested. The section does not require the accused to set out the facts which he admits and on which his admission of guilt is based. The section does not envisage

unequivocal admission of guilt. The admission of guilt is not the one envisaged in section 217 of the Act.

[19] An admission of guilt in terms of section 57 differs from an unequivocal admission of guilt made in terms of section 217 of the Act. Unlike section 217 the admission of guilt made in terms of section 57 does not amount to an equivocal admission of guilt, primarily for two reasons. It is not required:

(a) That the facts relating to the commission of the offence upon which the admission is based be set out.

(b) Once to made to a peace officer, it is not required that it be confirmed and reduced to writing in the presence of a magistrate or a peace officer [Section 217 (1) (a) of the Act].

It is for these reasons, in my view, that the Legislature introduced the judicial oversight of such agreements by magistrates as a statutory requirement, in section 57(7).

[20] Once entered into the admission of guilt register, the next steps for the clerk of the court are set out as follows in paragraph 73 of the Code:

"Handling of documents

73. (a) As soon as the cases have been entered in the admission of guilt register (J114) the clerk of the court draws the control documents of the summonses or written notices from the clerk of the court dealing with processes where it is kept.

(b) The clerk of the court signs for it and enters the admission of guilt reference number as well as the amount paid in the control document register (J78).

(c) The documents of each case are then arranged in the sequence of control document, followed by the summons or written notice received from the accused and any other documents.

(d) The admission of guilt cases and the admission of guilt register (J114) are then immediately submitted to the responsible judicial officer to examine the documents."

[21] "Examine", the word used in both section 57(7) as well as the Code is a verb which ordinarily refers to a concept of thorough inspection by a person over the work of someone. The person doing the inspection is a person other than the original source, and the purpose is to determine the nature or condition of something. The *Concise Oxford English Dictionary,* tenth edition, Oxford University Press, 2002 defines "examine" as "inspect closely to determine the nature or condition of". The Act read with the Code envisages a close and thorough scrutiny of the documents by a judicial officer.

[22] This examination is part of the judicial audit and oversight of court processes which would not otherwise come to the attention of the judiciary, but which have the status of an order of a court. It is ordinarily performed in chambers. As a unit of judicial quality assurance, it is part of the greater judicial administration, which is that area of judicial office which is relatively unknown to those who measure judicial output in the magistrates' courts only in respect of the physical hours sat in an open courtroom.

[23] Where it appears to a magistrate doing this quality assurance and the examination over the work of another magistrate, and it appears to the magistrate that a conviction or sentence is not in accordance with justice, the magistrate seeks the comments of his colleague who convicted and sentenced, in writing, and submits the matter to the High Court, with a Memorandum requesting a Judge of the High Court to specially review the proceedings either in

terms of section 302 or section 304(4) of the Act. It is only a Judge of the High Court who has the authority to set aside the proceedings before a magistrate where it appears that the proceedings were not in accordance with justice. The procedure in a section 57(7) examination of the documents submitted to a magistrate upon which a conviction and sentence was obtained is different. The subsection gives the magistrate doing the examination the authority to set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course.

[24] The nature of an examination is to detect any problems with the documents presented to the judicial officer in respect of an accused. On 23 October 2010 during that inspection, it did not appear to the magistrate that the conviction and sentence of the accused by operation of law on 16 October 2010 was not in accordance with justice. The magistrate formulated an opinion about the documents and formed a view about them, but clearly the opinion formed was not and could not be based on the facts of the case.

[25] It was primarily an idea about the guilt of the accused, made without conscious thought and on the basis of little evidence, upon consideration of the documents. For all intents and purposes, it was an impression and could not be a verdict on the question whether the accused was in fact and in law guilty. It was not a decision on the issue of fact in the criminal case against the accused. The magistrate could not pronounce that the evidence proved the commission of the offence charged, did not find the accused guilty and did not sentence him on 23 October 2010.

[26] Referring to a conviction as envisaged in section 271 of the Act, in my view, in *Director of Public Prosecutions, Limpopo v Mokgotho* (068/2017) [2017] ZASCA 159 (24 November 2017) Petse JA said at paragraph 18:

"[18] It is apposite at this stage to make general observations with regard to the correct approach to the evaluation of evidence in a criminal trial. It is trite that an accused can only be convicted if the evidence establishes his guilt beyond reasonable doubt. And as Nugent J observed in Van der Meyden (at 450 a-b):

'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'"

[27] In *S v Smullion (Sullivan)* 1977 (3) SA 1001 at 1004D-E Lewis JP said:

"However, Mr. De Bourbon, in a forceful argument, pointed out that in relation to sentence the phrase "previous conviction" has come to be understood in a particular way. See, e.g., R v Matlala, 1927 T.P.D. 411; R. v Butelezi, 1960 (1) SA 659 (N) at p. 600E-H, and the authorities there referred to and in particular Gardiner and Lansdown, 6th ed., vol. I, p. 433. The effect of these authorities is that in relation to sentence a conviction is not a previous conviction unless the offender was brought to court and convicted and sentenced for the offence before the current offence was committed." (My emphasis)

[28] A conviction in terms of section 57(6) does not follow only if the evidence establishes the guilt of an accused beyond reasonable doubt. Not all the evidence, especially the facts setting out what happened upon which the accused admits

guilt, account for the accused's conviction. The accused is never brought before court and convicted. Papers in relation to court are surrendered to the clerk of the criminal court and the particulars from those documents are entered into court records and he is convicted.

[29] The meaning and effect of a previous conviction as referred to in section 271 was given as follows by Holmes in *R v Zonele and Others* 1959 (3) SA 319 (AD) at 330C-D:

"A previous conviction may be described as one which occurred before the offence under trial. Generally speaking, previous convictions aggravate an offence because they tend to show that the accused has not been deterred, by his previous punishments, from committing the crime under consideration in a given case."

[30] The previous convictions envisaged in section 271 of the Act have serious consequences for an accused, especially seen against the background of their effect as set out in *R v Zonele supra.* In my view this cannot be prior conduct and the manner in which an accused thought he or she behaved towards others seen against his or her own view of the accepted norms of society, generally without having obtained legal advice. A finding on such past conduct and the pronouncement of the conviction, because of its serious implications, in my view, should only follow where the evidence has established the guilt of the accused beyond reasonable doubt. In a criminal matter, in my view, the only competent authority to make a pronouncement with such dire consequences should be a judicial authority, which is vested in the courts – [section 165(1) of the Constitution]. A conviction referred to in section 57(6) of the Act is not such a conviction.

[31] An admission of guilt register (J114) referred to in section 57(6) is different from a criminal record book (J546), which is a register used for criminal matters which are ordinarily heard in the magistrates' courts. The criminal record book is provided for in the Code in Part IV paragraph 268 which reads as follows:

"PART IV- THE CRIMINAL RECORD BOOK

Purpose of Criminal Record Book (J546)

268. The criminal record book (J546) is kept in respect of every court and furnishes a daily account of the result of all the cases in that specific court. The criminal record book (J546) also serves as a control mechanism in respect of the issuing of committal warrants (SAP 69), warrants for detention (J7) and all orders made by the judicial officer."

[32] The closing and disposal instructions of both the admission of guilt register as compared to a criminal record book, in my view is not without significance. Paragraph 15(a) in Part IV- Closing and Disposal of Records, under General reads as follows:

"Court records

15. See Annexure A, C and E for the classes of court records which may be disposed of. Attention is also directed to the following:

(a) Only completed criminal record books must be transferred to the archives depots after a period of ten years from the date of the last entry therein. Pages must not be removed from the record books in order to meet the period."

[33] On the other hand, in the Code under List of Records in Offices of Magistrates for the Disposal of which Authority has been obtained, Archives Annexure (C), Form J 114, the admission of guilt register also sometimes referred to as the Loose-leaf admission of guilt record book, the disposal period is given as D3. The

order of preservation and disposal of records of magistrates' courts in the Code explains the symbols as "D- Destroy, after expiration the number of years indicated, e.g. D.2.". The admission of guilt register is disposed of after 3 years. The case record of admission of guilt in terms of section 57 of the Act is a D1, which means it is disposed after one year of the date of finalization. This explains why the documents in respect of the accused could not be found at the Magistrates' Court Goodwood.

[34] A previous conviction, which follows a verdict after court proceedings before a magistrate and entered into a criminal record book (J546), is never destroyed. It is kept at a magistrates' court for ten years and thereafter it is transferred to National Archives for permanent preservation. The documents received by the clerk from the SAPS following a written notice in which a fine is stipulated and paid, and entered into an admission of guilt register are destroyed after one year, and the admission of guilt register also called the loose-leaf admission of guilt record book (J114), is destroyed after 3 years. The record of a conviction by a court following proof of the charge beyond reasonable doubt is permanent. The record of a conviction by of entry of particulars into a register has a limited life.

[35] The provisions of section 57A of the Act makes the distinction between a prosecution geared towards a section 271 conviction and that leading towards a section 57(6) conviction clearer. For purposes of this judgment, I deem it necessary to only refer to subsections (1), (3) and (4) of section 57A:

"57A Admission of guilt and payment of fine after appearing in court

(1) If an accused who is alleged to have committed an offence has appeared in court and is-

(a) In custody awaiting trial on that charge and not on another more serious charge;

(b) Released on bail under section 59 or 60; or

(c) Released on warning under section 72,

The public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, hand to the accused a written notice, or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of section 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again. …

(3) The public prosecutor shall endorse the charge-sheet to the effect that a notice contemplated in this section has been issued and he or she or the peace officer, as the case may be, shall forthwith forward a duplicate original of the notice to the clerk of the court which has jurisdiction.

(4) The provisions of sections 55, 56(2) and (4) and 57 (2) to (7z0, inclusive, shall apply mutatis mutandi to the relevant written notice handed or delivered to an accused under subsection (1) as if, in respect of section 57, such notice were the written notice contemplated in that section and as if the fine stipulated I such written notice were also the admission of guilt fine contemplated in that section."

[36] An accused referred to in section 57A would have been entered in the criminal record book (J546). He would have appeared before a magistrate and would have been facing the imminent putting of the charge to him or her to which he or she would have to enter a plea, which would entitle him or her to a verdict which might lead to a conviction as envisaged in section 271 and have a criminal record entered under his name. An opportunity is then provided by section 57A, because of the trivial nature of the offence, for him to opt out of

such a permanent criminal record at the instance of and with the public prosecutor, and admit guilt in terms of section 57 of the Act and have a conviction which does not carry such lifetime and serious consequences of a section 271 conviction.

[37] The issue that the court dealt with in *S v Parsons* 2013 (1) SACR 38 (WCC) in a review of a section 57(6) conviction of the accused, was the accused alleging that it was not explained to him that he would receive a criminal record. The gist of the judgment of the learned Judges seems to me to be founded on the acceptance, without deciding the question that a section 57(6) conviction was a conviction as envisaged in section 271, worthy of being entered as a permanent record of previous convictions of the accused. In *S v Tong* 2013(1) SACR 346 (WCC) the court also dealt with a section 57(6) conviction where the accused was also surprised after 3 years to learn that he had a criminal record. My reading of the judgment is that the court also accepted, without deciding, that a conviction envisaged in section 57(6) was a previous conviction envisaged in section 271 and as such a previous conviction to be entered on the criminal record.

[38] I am in agreement with what appears in the unreported judgment, *S v Houtzamer* (B7968969/08) [2015] ZAWCHC 25 (10 March 2015) where the view is expressed that a review court should not enquire into the merits of the charge and that the accused should be entitled to relief if he or she can establish that he paid the admission of guilt fine in ignorance and wishes to defend himself in court. It is for that reason that I am unable to pursue the trajectory set out by the remarks of the first reviewing Judge in this matter.

[39] It is against this background that I hold the view that the section 304(4) review is the appropriate way to bring a review of the proceedings where the magistrate did not set aside the conviction and sentence in terms of section 57(7) of the Act after examination. Section 304(4) reads as follows:

"304 Procedure on review

(1) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 of this section."

The accused, although not expressly stated, denied having assaulted the complainant. The conviction and sentence in terms of section 57(6) of the Act is deemed to be a conviction and sentence of the magistrate's court. In my view, the accused had placed sufficient material before the court to set the proceedings aside and allow, should the State still be inclined to prosecute, to have the accused's guilt be proved beyond reasonable doubt in a court of law.

[40] The SAPS Standing Order (G) 341 issued under Consolidation Notice 15/1999 provides as follows in 3(3)(b):

3 Securing the attendance of an accused at the trial by other means than arrest

…

(3) A member, even though authorised by law, should normally refrain from arresting a person if –

(b) the member believes on reasonable grounds that a magistrate's court, on convicting such person of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Government Gazette, … , in which event such member may hand to the accused a written notice (J534) as a method of securing his or her attendance in the magistrate's court in accordance with s 56 of the Criminal Procedure Act, 1977."

[41] Where a police officer desires to secure the attendance of an accused through handing such accused a written notice instead of effecting an arrest, in my view, in lieu of an arrest, it is not unfair of the police official to ask such an accused to accompany them to the police station where the prescribed documents are secured, in order to complete them and hand them to an accused. In my view such a request would not ordinarily amount to an unlawful limitation of an accused's freedom – [*Isaacs v Minister van Wet en Orde* 1996(1) SACR 314 (A) at 320i].

[42] In this matter, once at the police station, instead of simply issuing a written notice (J534), the police official went further. A docket was opened and the accused was detained. The inescapable impression is that the detention of the accused and the threat of continued custody, whilst the police officer was well aware that the Standing Order enjoined him to refrain from arresting the accused, had as its objective putting pressure on the accused to admit guilt and pay the stipulated fine.

[43] In my view, the time has arrived for the National Commissioner of Police (Commissioner) in the interests of the citizens and residents of this country, the

integrity of the committed members of the SAPS, the reputation of the section 57 procedure and that of the administration of justice in general, to require a member of the SAPS who detains an accused in a matter where a written notice (J534) would have been appropriate and is in fact used after an initial detention, in writing to record such detention and their reasons, and to submit such monthly returns to the Commissioner for his consideration and intervention. The reasons must show why such arrest was necessary and unavoidable before the written notice was handed to an accused. In this way, the Commissioner will be able to know the extent of the problem and will be able to intervene. The Commissioner will also be in a position to advise the Minister of Police in devising policy to address the criticism that the SAPS use arrest and detention to force vulnerable members of society who fear being locked up, to admit guilt on petty crimes using arrest and the threat of continued detention.

[44] For these reasons, I find that the conviction of the accused in terms of section 57(6) of the Criminal Procedure Act, 1977 was not a conviction as envisaged in section 271 of the Act. A conviction and sentence following an entry into the admission of guilt record book by the clerk of the criminal court in the magistrates' court is not a conviction whose record is permanent. It was not a conviction and sentence to be entered in the Criminal Record System by the South African Police Services. I further find that if the facts alleged by the accused are proved at trial, they stand as a valid answer to the charge against him. It appears to me that the proceedings were not in accordance with justice.

I would make the following order:

1. The conviction and sentence of the accused in terms of section 57(6) of the Criminal Procedure Act is set aside.
2. A copy of this order is to be served on the Minister of Police for his attention.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

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MJ DOLAMO

JUDGE OF THE HIGH COURT