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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES
Of Interest to other Judges:	YES
Circulate to Magistrates:	YES

Case No.: R254/2018

In the review between:-

THE STATE

and

ENOC PHUZI

CORAM: MUSI, AJP et NAIDOO, J et REINDERS, J

HEARD ON: 3 DECEMBER 2018

JUDGMENT BY: MUSI, AJP

DELIVERED ON: 28 DECEMBER 2018

Summary; *Section 59(4) of the National Road Traffic Act, 93 of 1996 does not create strict liability. Mens rea in the form of dolus or culpa is an element of the offence.*

- [1] This matter was sent on automatic review by the magistrate, Bloemfontein. She convicted the accused of contravening section 59(4)(a) of the National Road Traffic Act 93 of 1996 (NRTA) (exceeding the general speed limit) and sentenced him as follows: R1500 or 12 months' imprisonment. The magistrate, however, requested that the conviction and sentence be set aside because her questioning of the accused, in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977,¹ did not comply with the guidelines set out in **S v Mohlolo Khambule (Khambule)**.²
- [2] After **Khambule, S v Thando Peter Mtyhole (Mtyhole)**³ was delivered wherein some of the holdings and findings in **Khambule** were criticised and rejected. In both matters the accused was charged with exceeding the general speed limit. The different views espoused in the judgments led to confusion and uncertainty. Many magistrates sent matters on special review because they did not know which judgment to follow. The problems and confusion thus became a veiled opportunity for us to reconsider the nature of the offence of exceeding the general speed limit.
- [3] We requested the Free State Society of Advocates to nominate one its members to act as an *amicus curiae*. They nominated Mr Pieterse and the State was represented by Mr Strauss. They both argued that **Mtyhole** is correct and that **Khambule** is wrong. We thank them for their efforts.
- [4] The major difference in the two matters revolves around what questions an accused should be asked in terms of section 112(1)(b) or what admissions

¹ Section 112(1)(b) reads as follows:

"(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

...

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence."

² Unreported judgment review case number R177/2018 Free State High Court: Bloemfontein delivered on 16 August 2018.

³ Unreported judgment review case number R255/2018 Free State High Court: Bloemfontein delivered on 18 October 2018.

should be contained in a section 112(2) statement. In **Khambule** the learned judge said the following:

“In the statement the accused did not admit that the operator, in other words, the traffic officer concerned, was duly authorised or competent to operate the speed capture device. That was the second defect. Above all of these the accused did not admit in his statement that he knew that it was unlawful for him to travel at the alleged excessive speed or that he knew that traveling at such a speed was a traffic transgression punishable by law. This was the third defect in his written statement.

As regards the merits or rather conviction, it follows from the above that that requisite criminal intent was not established. This is so because the accused did not admit that he was aware, before he was pulled over by traffic officer, that he was traveling at an excessive speed and that he knew doing so rendered him liable to prosecution. Apart from this lack of subjective knowledge, the accused averred that the approximate speed at which he was traveling was shown to him. By itself, that tended to suggest that, before then, he did not know that he was exceeding the speed limit of 100 kmph. As a matter of fact, he did not admit that he knew such general speed limit applied to the particular zone of the public road. Such prior knowledge was relevant to criminal intent more so because he was traveling on a highway or a road where the maximum is generally 120 kmph.

In the absence of clear and explicit admissions by the accused that he knew the speed limit applicable to the particular zone of the freeway; that he knew that he was driving at a speed in excess of the speed limit and that he knew that by exceeding the speed limit was committing a traffic offence punishable by law, the elements of criminal intent and unlawfulness were amiss to sustain the conviction.”

[5] In **Mtyhole**, the court analysed the statement in **Khambule** found that the conclusion that “criminal intent and unlawfulness were amiss to sustain a conviction” is clearly wrong. It found that the traffic officer’s competence to operate the speed measuring device “is not one of the essential elements of the offense of speeding”. It came to the following conclusion:

“It follows from the comments made *supra* that I respectfully do not agree with the reasoning of the court in Khambule and the conclusion arrived at. A formalistic approach should not be countenanced. It would place an unnecessary extra burden on our lower courts to request accused persons to place more evidence before the court than necessary in order to convict. Accused persons, admitting that they travelled too

fast and pleading guilty as a result, accept that traffic officers are duly authorised to act as such, properly trained to execute their duties and that the speed capturing devices were functioning properly. That is why they are prepared to plead guilty. However, it is highly likely that upon questioning by the trial court in respect of matters beyond their knowledge, accused persons may not be prepared to make formal admissions in this regard, causing pleas of not guilty to be recorded in terms of s113 and an unnecessary wasting of court time and resources.”

[6] In my view the differences in the two judgments are partially caused by the fact that the nature of the offence and its elements were not properly considered by my learned colleagues.

[7] Section 59(4)(a) of the NRTA reads as follows:

“No person shall drive a vehicle on a public road at a speed in excess of –
 (a) the general speed limit which in terms of subsection (1) applies in respect of that road;...”

[8] Subsection 1 of section 59 provides as follows:

“(1) The general speed limit in respect of –
 (a) every public road or section thereof, other than a freeway, situated within an urban area;⁴
 (b) every public road or section thereof, other than a freeway, situated outside an urban area;⁵ and
 (c) every freeway,⁶
 shall be as prescribed.”

[9] Section 59(4)(a) does not expressly contain or exclude fault as a requirement for the offence. The mere act of driving a motor vehicle on a public road in excess of speed limit seems to be an offence. The general principle of our law is that a conviction cannot be sustained if fault has not been proven. In **S v Coetzee**⁷ it was said that:

⁴ Prescribed by regulation 292(a) as 60 km/h.

⁵ Prescribed by regulation 292(b) as 100 km/h.

⁶ Prescribed by regulation 292(c) as 120 km/h.

⁷ *S v Coetzee and Others* 1997 (3) SA 527 (CC).

“...The general principle of our common law is that criminal liability arises only where there has been unlawful conduct and blameworthiness or fault (the *actus reus* and *mens rea*). This principle is ordinarily expressed in the Latin maxims *actus non facit reum nisi mens sit rea* and *nulla poena sine culpa*. At common law, the fault requirement is generally met by proof of intent (*dolus*) in one of its recognised forms, and, in rare circumstances, and the objective requirement of negligence (*culpa*)...As Kentridge AJ has mentioned in para [94] of his judgment, the requirement of fault or culpability is an important part of criminal liability in our law. This requirement is not an incidental aspect of our law related to crime and punishment, it lies at its heart. The state’s right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment...”⁸

[10] Furthermore O’Regan J comprehensively surveyed the legal position in most common law countries and concluded that:

“The striking degree of correspondence between different legal systems in relation to an element of fault in order to establish criminal liability reflects a fundamental principle of democratic societies: as a general rule people who are not at fault should not be deprived of their freedom by the State. This rule is the corollary of another rule which the same comparative exercise illustrates: when a person has committed an unlawful act intentionally or negligently, the State may punish them. Deprivation of liberty, without established culpability, is a breach of this established rule. Where culpability is established, and the conduct is legitimately deemed unlawful, then no such breach arises.”⁹

[11] In **Democratic Alliance v African National Congress**¹⁰ (DA v ANC) Cameron J said the following:

“...Strict criminal liability is therefore not easily countenanced. There is thus an interpretive presumption that a penal prohibition includes a requirement of fault. It will be read to do so unless there are ‘clear and convincing indications to the contrary’.”¹¹

⁸ Ibid para [162].

⁹ Ibid para [176].

¹⁰ *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC).

¹¹ Ibid para [154]. See also *Minister of Justice and Constitutional Development and Another v Masingili and Others* Case CCT 44/13 [2013] ZACC 41; 2014 (1) BCLR 101 (CC); 2014 (1) SACR 437 (CC) paras [36] to [41].

- [12] In **Scagell and Others v Attorney-General, Western Cape, and Others**¹² the principle was stated thus:

“... It has long been recognized by our courts that, unless there are clear and convincing indications to the contrary in a statute, the prosecution will be required to prove the necessary *mens rea* on the part of the accused person.”¹³

- [13] There is no indication in section 59(4) that faultless, strict or absolute criminal liability would be sufficient to sustain a criminal conviction. Hence the provision must be read to require fault. What form of fault?

- [14] Offence creating provisions which require fault in the form of *dolus*, in any of its manifestations, normally contain words such as wilfully, intentionally, knowingly or with intent. Provisions that require fault in the form of negligence will normally contain words such as negligently and without reasonable care. Section 57(12) of the NRTA contains words which clearly indicate that fault in the form of *dolus* or *culpa* is a requirement for the offence. It, *inter alia*, states that no person shall wilfully or negligently damage any road traffic sign.

- [15] The text of section 59(4) is equivocal. In **DA v ANC** the factors to consider in determining whether strict liability was contemplated is set out as follows:

“Where the text is equivocal, the provision’s scope and object, the extent of the punishment it imposes, and the ease with which the provision may be evaded if culpability were, or were not, required become particularly prominent.”¹⁴

- [16] In some jurisdictions exceeding the speed limit is deemed to be a regulatory offence that attracts absolute criminal liability. In **Aron v Grant**¹⁵ the Supreme Court of Victoria Appeal Division reasoned as follows about the offence of exceeding the speed limit:

¹² *Scagell and Others v Attorney-General, Western Cape, and Others* 1997 (2) SA 368 (CC).

¹³ *Ibid* para [33].

¹⁴ See footnote 10 para [156]

¹⁵ *Aron v Grant* [1991] 1 VR 321.

“Speeding motor cars have become dreadful engines of destruction. The cost to the community in terms of death and injury and economic loss has been enormous. I would expect a provision of this kind to require drivers to keep within the applicable speed limit at their peril. If the defence of honest and reasonable belief were applicable, then mistakes could be of two kinds. There could be a mistake of fact, the fact bearing on whether one was in a speed zone, and there could be a mistake of fact as to the speed at which the vehicle was travelling. I think that the intention here is that motorists shall at their peril be aware of the applicable speed limit, and shall then at their peril so govern their speed as to keep within it. I do not think that they can be heard to say, except in mitigation, that a badly parked pantechicon obscured a speed restriction sign from their view, or that a power failure at night led them to believe that there was no provision for street lighting along the road, or that they believed their faulty speedometer to be working properly, as in *Hearn v McCann* (1982) 29 SASR 448, or that for any other reason they believed they were not breaking the speed limit. Human ingenuity and human nature being what they are, I should not expect the law to recognise mistake as a defence to a charge of this kind. That defence was rejected by Zelling J. in the speeding case to which Mr Monteith very properly referred us, *Hearn v McCann*.

A conviction for speeding carries no stigma; perhaps it should, but it does not. This summary offence carries a maximum penalty of only \$500. Licence cancellation and suspension are dealt with by s28 of the Road Safety Act 1986. A licence cancellation or suspension may bear heavily on the defendant, but in the overall scheme of things, a licence cancellation or suspension, irksome though it may be, may be regarded as towards the bottom end of the scale of criminal punishment.”

- [17] This conclusion could easily have been reached if one considers the factors mentioned in **DA v ANC**, which may, in turn, lead one to conclude that fault is not a requirement for a contravention of section 59. Speeding of motor vehicles on public roads contribute to the maiming and killing of many people. It is a major contributor to negligent and reckless driving of motor vehicles. The sentiments expressed in **Aron v Grant** about the effects of the offence are also applicable to motorists of this country. If one was not aware of the fact that, that matter was decided in New Zealand one would be forgiven for thinking that the case refers to the South African situation.

- [18] The State therefore has an interest and a duty to ensure that speedsters are arrested and prosecuted and that the prosecution should not be delayed or

undermined by all sorts of fanciful and disingenuous defences. The bottom line, however, is that faultless criminal liability cannot be countenanced for exceeding the speed limit because of the risk of imprisonment.

[19] The punishment for exceeding the speed limit may on one hand be a spot fine and on the other hand imprisonment for three years. In terms of section 89(3), any person convicted of contravening section 59(4) shall be liable to a fine or to imprisonment for a period not exceeding three years. In some instances, the offender is arrested, appears in court and may be sentenced to imprisonment. This typically happens when the offender has been convicted of driving in excess of 30 km/h over the prescribed general speed limit in an urban area or in excess of 40 km/h over the prescribed general speed limit outside an urban area or on a freeway.¹⁶ Imprisonment always attracts stigma and humiliation. A criminal record ensues in cases where the accused is convicted which may have a bearing on the offender's employment or obtaining a visa to visit some countries.

[20] Exceeding the speed limit is not a minor regulatory offence. It attracts heavy sentences. In **S v Pelser**¹⁷ it was correctly said, with reference to exceeding the general speed limit, that:

“Dit gaan hier om ‘n strafregtelike misdaad wat swaar vonnisse trek en moet as sodanig in ‘n ernstige lig beskou word. Die erns van die misdaad verg dan dat die strafregtelike prosesvereistes streng nagekom moet word.”¹⁸

[21] The successful prosecution of this offence will be seriously undermined if fault in the form of intent only is required. It will render section 59(4) ineffective. It might even encourage speedsters to deliberately contravene the section because escaping liability will be very easy. Public confidence in law enforcement will also be undermined because the perception might

¹⁶ See section 35(1) of the NRTA.

¹⁷ *S v Pelser* 1974 (4) SA 400 (T)

¹⁸ *Ibid* at 402C; “This is a criminal offense that attracts heavy sentences and must be regarded as serious. The seriousness of the crime requires that the criminal procedural requirements be strictly adhered to.” (My translation.)

inadvertently be created that there is a law that is very difficult to successfully prosecute.

[22] I say this because an accused person may for example say that he or she did not check the motor vehicle's speedometer because his mind was elsewhere or that he or she was talking to a passenger and had not realised that he or she was exceeding the speed limit. Knowledge, as the proposed questioning in **Khambule** suggests, requires conscious attention to the fact that the driver knew that he or she was exceeding the speed limit. It will be nigh impossible for the prosecution to prove such knowledge, because as the adage goes, his or her knowledge like the state of his or her digestion would be patent only to himself or herself. This will generate countless number of trials in the Lower Courts and appeals in the High Courts because most accused would plead not guilty secure in the knowledge that the State would have great difficulty in securing a conviction.

[23] In my view, fault in the form of negligence might address the problems that intent as the only requirement will create. The test for negligence was enunciated as follows in **Kruger v Coetzee**:¹⁹

“For the purposes of liability *culpa* arises if-

- (a) a *diligens paterfamilias* in the position of the defendant-
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.”²⁰

[24] The State would have to prove that the accused exceeded the speed limit as a result of his or her negligence. This would entail proving that a *diligens paterfamilias* in the position of the driver would foresee the reasonable possibility that driving a motor vehicle might lead to him or her exceeding the speed limit. This may require consideration of the particular driver's

¹⁹ *Kruger v Coetzee* 1966 (2) SA 428 (A).

²⁰ *Ibid* at 430E.

experience, knowledge and capacities.²¹ When that is established, the State would further have to prove that a reasonable person in the position of the driver would have guarded against exceeding the speed limit and that the accused failed to do so, which resulted in him or her exceeding the speed limit. All these elements of the test must be proved beyond a reasonable doubt.

[25] When it comes to intention, the State will have to prove that exceeding the speed limit is what the driver desired or that he or she actually foresaw the risk of exceeding the speed limit but recklessly reconciled himself or herself with the risk materialising. Obvious examples of drivers who would be convicted of intentionally exceeding the speed limit are for example: two drivers who agree to race against each other on a public road and exceeding the speed limit while doing so, or a driver who had acquired a new car exceeding the speed limit because he or she wanted to test whether it can reach 200km/h.

[26] The State would be able to secure more convictions based on negligence or intent. The deterrent effect of the offence would be maintained and it would not be easy for offenders to escape the reach of section 59(4). The net must be cast as wide as possible. The lowest form of blameworthiness is therefore required to ensure that most speedsters are successfully prosecuted and sentenced. If negligence or intent is required, the offence would straddle the entire fault spectrum from negligence to direct intent.

[27] In **S v Skele**²² the elements of exceeding the speed limit were set out as follows:

“Die pleging van die betrokke misdryf sou slegs bewys wees as die getuienis bewys dat:

- (a) op 'n pad;
- (b) met 'n brandstof aangedrewe voertuig;
- (c) die voorgeskrewe spoedgrens oorskry is.

²¹ See Whiting R: Negligence, Fault and Criminal Liability 1991 108 SALJ 431 for an in-depth discussion of negligence. *S v Humphreys* 2013 (2) SACR 1 (SCA).

²² *S v Skele* 1974 (4) SA 386 (T).

Om element (c) te bewys moet daar getuienis wees wat die hof bo enige redelike twyfel tevrede stel dat die apparaat wat gebruik was om die spoed te bepaal betroubaar is, en die spoed korrek bepaal en geregistreer het. Sien *S. v Lucas*, 1968 (2) SA 592 (OK) te bl. 594E - F (re gatsometer); *S. v Motaung*, 1972 (4) SA 687 (O) te bl. 688E - G (re velomat); *S. v Currin*, 1961 (4) SA 393 (O) (re patrolmaster); *S. v Du Plessis*, 1966 (1) SA 607 (K) te bl. 609A - D (re gatsometer); *S. v Dawson*, 1966 (1) SA 259 (N) te bl. 267A - C (re gatsometer); *S. v Wiesner*, 1971 (2) SA 445 (O) te bl. 446D - G (radarapparaat).

En om hieraan te voldoen sou die getuienis tenminste moet aantoon dat die betrokke apparaat:

- (i) betroubaar vir daardie doel is;
- (ii) korrek opgestel was;
- (iii) voor en na die spoedlokval getoets was en behoorlik en korrek funksioneer het; *S. v Margolis*, 1964 (4) SA 579 (T);
- (iv) die geregistreeerde spoedlesing die van die betrokke motorvoertuig was en die voorgeskrewe spoedgrens oorskry is.”²³

[28] The definition in **Skele** does not contain fault as an element of the offence. **Skele** was decided before our constitutional democracy. In light of what I said above, fault is a requirement of the offence. The elements of the offence created by section 59(4) are therefore that the accused unlawfully and intentionally or negligently drove a motor vehicle on a public road in excess of the prescribed general speed limit.

[29] In order to prove that the speed limit was exceeded the State would have to prove that the speed measuring device was reliable for the purpose; that it determined and registered the speed accurately and that it was properly set up in accordance with the manufacturer’s specifications. It is axiomatic that a properly trained person would be able to set up the device in accordance with the manufacturer’s specifications.

²³ *Ibid* at 387A; “The commission of the offense concerned would only be proved if the evidence proves that:

- (a) on a road;
- (b) with a fuel-propelled vehicle;
- (c) the prescribed speed limit has been exceeded.

To prove element (c) there must be evidence that the court is satisfied without any reasonable doubt that the device used to determine the speed is reliable and correctly determined and registered the speed...

And to comply with this, the evidence should at least indicate that the device concerned:

- (i) is reliable for that purpose;
- (ii) was correctly set up;
- (iii) was tested before and after the emergency run and operated properly and correctly; *S. v Margolis*, 1964 (4) SA 579 (T);
- (iv) the recorded speed reading was that of the motor vehicle concerned and the prescribed speed limit was exceeded.” My translation.

[30] The court cannot take judicial notice of the fact that the person who operated the device is trained to do so. The court can also not take judicial notice of the fact that all traffic officers are trained to set up speed measuring devices. Likewise, it cannot take judicial notice of the fact the speed measuring device functioned properly. In **S v Hengst**²⁴ it was said:

“I think I have dealt fully - perhaps too fully - with the principles relating to judicial notice as determined in the cases but the significance of such survey is to satisfy me beyond doubt that no South African court, in the absence of legislative authority, is entitled to take judicial notice of proper and adequate functioning of a speed-testing device such as a gatsometer or a speed guard. There must be admissible and sufficient evidence of the actual commission of the offence - in this instance that the appellant exceeded the statutory speed limit of 60 km/h, which, in turn, requires sufficient evidence to show that the apparatus, whereby the speed of the vehicle involved was established, was effective and in proper working order at the relevant time.”²⁵

[31] I now return to **Khambule** and **Mtyhole**. The Court in **Khambule** was correct in holding that fault was an element of the offence. Though, in my view, it unduly limited the scope and reach of the offence by requiring fault in the form of *dolus* only. The questioning proposed in **Khambule** is as a direct result of its holding that intent must be proved by the State. My holding that *culpa* is sufficient, means that I must part ways with the extensive requirements set out in **Khambule**. I agree with **Khambule** that the competence of the traffic officer to set up and operate the speed measuring device must be admitted in order to prove that the speed was measured in accordance with the manufacturer’s specifications.

[32] In **Mtyhole** it was said that the competence of the traffic officer to operate the speed measuring device “is not one of the essential elements of the offence of speeding”. I disagree. It has always been an integral part of the elements of

²⁴ *S v Hengst* 1975 (2) SA 91 (SWA).

²⁵ *Ibid* at 100D.

the offence. In order to prove the reliability of the speed reading, there must be proof that the device was properly set up and operated.²⁶

- [33] The finding in Mtyhole that “accused persons, admitting that they travelled too fast and pleading guilty as a result, accept that traffic officers are duly authorized to act as such, properly trained to execute their duties and that the speed capturing devices were functioning properly” is unfortunate. The court in Mtyhole does not tell us on what basis the assumption should be made. On what basis can a court assume or presume, without inquiry, that an accused accepts or has knowledge of the training of the traffic officer and the functioning of the speed measuring device?²⁷

- [34] In Carstens²⁸ I said:

“A radar is a measuring instrument. It is, to state the obvious, a machine and machines malfunction if not properly maintained. The precision of the radar is, like most measuring instruments, dependent on how regularly it is calibrated. If it is not calibrated regularly, as per the instructions of its manufacturer, it will malfunction. It is therefore important for the judicial officer to enquire from an unrepresented accused whether s/he admits that the device was functioning properly at the relevant time and whether the calibration certificate was shown to him/her. If it was not shown to him/her, s/he must be asked whether s/he admits that it was calibrated as required.

An accused should also be asked whether s/he admits that the officer who operated the device had been properly trained to do so. It was not done in this matter.”²⁹

²⁶ See *S v Snyman* 2001 (1) SACR 354 (N) at 356 to 357 for the SABS guidelines with regard to a speed measuring device. See also *S v Thysma Carstens* unreported Free State High Court review case no 143/2011 delivered on 25 August 2011.

²⁷ Section 74 of the NRTA is also of no assistance. It provides that “In any prosecution in terms of this Act, the fact that any person purports to act or has purported to act as a traffic officer, an inspector of licences, an examiner of vehicles or an examiner for driving licences, shall be *prima facie* proof of his or her appointment and authority so to act: Provided that this section shall not apply to a prosecution on a charge of impersonation.” The training of a traffic officer to operate a particular speed measuring device is not covered by section 74.

²⁸ *Ibid*. I said that with reference to the guidelines for prosecution with regard to speed and traffic light prosecution prepared by the Technical Committee for Standards and Procedures for Traffic Control and Traffic Control Equipment.

²⁹ *Ibid* at [9] and [10].

- [35] The assumption proposed in **Mtyhole** will defeat the purpose of section 112(1)(b) which is to ascertain first, whether the accused admits all the allegations in the charge and second for the presiding officer to satisfy himself or herself that the accused is guilty of the offense to which he or she has pleaded guilty. The presiding officer can therefore only be satisfied after proper questioning of the accused based on the elements of the crime. An assumption or acceptance in the head of the presiding officer does not meet the requirement of section 112(1)(b). It seems to me to be too presumptuous to make such an assumption.
- [36] I do not share the apprehension or anxiety of the court in **Mtyhole** that “it is highly likely that upon questioning by the trial court in respect of matters beyond the knowledge, accused persons may not be prepared to make formal admissions in this regard, causing pleas of not guilty to be recorded in terms of section 113 and an unnecessary waste of court time and resources”. Unrepresented accused persons admit facts beyond their knowledge, every day, in various crimes in our lower courts. It is not unusual for unrepresented accused persons to admit that a tablet found in their possession was properly packaged, marked, sent and analysed by scientists and found to contain methaqualone or that a blood sample taken from their body was properly preserved, marked, sent and analysed and that the blood alcohol content of the blood sample is correct.
- [37] **Skele**, and the cases cited therein, and the holding in **Carstens** show that the court in **Mtyhole** finds itself in splendid isolation in as far as its assertion that there is no need to ask an accused about the reliability of the speed measuring device or the competence of the traffic officer is concerned.
- [38] It is incumbent on the magistrate to ensure that all admissions are properly and reliably made and recorded. The questioning of the accused must cover all the elements of the offence. It may serve magistrates well to bear in mind what was said in **S v Naidoo**³⁰:

³⁰ *S v Naidoo* 1985 (2) SA 32 (NPD).

"The purpose of the questioning is to ascertain from the accused what facts concerning the commission of the offence he admits so as to enable the court to decide whether the facts so admitted constitute proof of all the elements of the offence sufficient to establish the accused's guilt. But before it can convict the accused, the court has to be satisfied, on the facts stated by the accused, that the accused is indeed guilty. The court therefore not only has to ascertain whether the admitted facts, if accepted as correct, would establish all the elements of the offence but it also has to pass judgment on the reliability of the admissions. Only if the court is satisfied as to the reliability of the admissions of fact and that they are sufficient to establish all the elements of the offence may the court convict the accused. Where an accused admits facts which are within his personal knowledge, no difficulty ordinarily arises. In such a case the presumption of fact that what an accused admits against himself may be accepted as the truth would operate and, provided the accused makes the admission with full knowledge of its implications, there would be no reason why the court should not be satisfied about its correctness and reliability. Where, however, the accused admits facts of which he has no personal knowledge further considerations arise. In such a case the considerations which have been mentioned earlier on in this judgment such as the sufficiency of the accused's source of knowledge may become of decisive importance."³¹

[39] To sum up:

- (a) fault in the form of intention or negligence is an element of the offence of exceeding the speed limit;
- (b) when an accused is questioned in terms of section 112(1)(b) the magistrate must ascertain whether the accused admits:
 - (i) the recorded speed;
 - (ii) the proper functioning of the speed measuring device; and
 - (iii) the competence of the traffic officer to set up and operate the speed measuring device.

[40] I now turn to the facts of this particular case. The accused pleaded guilty and was questioned in terms of section 112(1)(6). The question and answers were recorded as follows:

"COURT: On the 24th of May 2018 you were within the district of Bloemfontein?

³¹ Ibid at 37F-I.

ACCUSED: Correct.

COURT: (Indistinct)

ACCUSED: Correct your Honour.

COURT: Were you driving at N1?

ACCUSED: Correct your Honour.

COURT: What kind of vehicle were you driving?

ACCUSED: It was a Hyundai vehicle.

COURT: With registration number?

ACCUSED: [...]

COURT: Were you the driver of that vehicle?

ACCUSED: I was the driver of it.

COURT: Were you aware of the speed limit?

ACCUSED: I was aware.

COURT: What was it?

ACCUSED: 120

COURT: What speed were you driving at?

ACCUSED: I was driving at 166 your Worship.

COURT: Is that speed allowed?

ACCUSED: No your Honour.

COURT: So do you agree that your intention was to (indistinct) exceeding the general speed limit?

ACCUSED: Correct your Honour.

COURT: Were you aware that your conduct was unlawful?

ACCUSED: Correct your Honour.

COURT: (indistinct) Where you aware that you were contravening the National Road Traffic Act?

ACCUSED: Yes your worship.

COURT: Were you aware?

ACCUSED: Yes your worship.

COURT: State do you accept the plea?

PROSECUTOR: I accept the plea your Worship.

COURT: Okay sir now that you admitted all the elements of the offence the court is **FINDING YOU GUILTY OF EXCEEDING THE GENERAL SPEED LIMIT. ...**

- [41] The magistrate did not ask the accused why he said that he was driving at 166; presumably 166 km/h. It is not clear whether this was the speedometer reading of his motor vehicle or the reading of a speed measuring device. Nothing was asked about the speed measuring device or whether a traffic

officer, if he was arrested by a traffic officer, informed him about the speed at which he was travelling.

[42] The magistrate could under these circumstances not have been satisfied that the accused properly admitted all the allegations in the charge because there was no proper basis for the admission that he drove at 166 km/h. This might seem to be over pedantic, but as was said in **Pelser**³² the seriousness of the offence demands that the procedural requirements be strictly adhered to.

[43] The proceedings were not in accordance with justice. The conviction and sentence ought to be set aside. I leave it up to the Director of Public Prosecutions to decide whether to re-charge the accused.

[44] I accordingly make the following order:
The conviction and sentence are set aside.

C. J. MUSI, AJP

I concur.

S. NAIDOO, J

I concur.

³² Ibid at 402.

C. REINDERS, J

Appearances:

For the applicants: Adv Pieterse
 Amicus Curiae

For the respondents: Adv Strauss
Instructed by: Director Public Prosecutions
 Bloemfontein