IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**YES**

Review number: **R255/2018**

In the matter between:

THE STATE

and

THANDO PETER MTYHOLE

CORAM: JORDAAN, J *et* DAFFUE, J

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 18 OCTOBER 2018

AUTOMATIC REVIEW

I INTRODUCTION

[1] This is an automatic review in accordance with the provisions of s 302 of the Criminal Procedure Act, 51 of 1977 ("the CPA").

[2] On 5 July 2018 the accused, unrepresented at the trial, pleaded guilty to a charge of speeding on the N1 near Bloemfontein on 22 May 2018. He drove a friend's Volvo motor vehicle at a speed in excess of the 120 km/h speed limit, to wit 171 km/h. After questioning by the trial magistrate in terms of s 112(1)(b) of the CPA, he was convicted and sentenced as follows: payment of a fine of R2 500.00, failing which he should serve 12 months' imprisonment. Section 35 of the National Road Traffic Act, 93 of 1996 was not invoked.

II QUESTIONING BY THE TRIAL MAGISTRATE IN TERMS OF SECTION 112(1)(b) OF ACT 51 OF 1977 (THE CPA).

[3] The accused, a 30 year old pharmacist of Mthatha with a B Com degree (according to the record which is doubtful bearing in mind accused's occupation), earning R35 000.00 per month, was informed upon his guilty plea that he would be questioned and should the court not be satisfied that all the elements of the offence are admitted a plea of not guilty would be entered in terms of s 113 of the CPA.

[4] The following questions and answers appear from the record:

"Okay N1 between Glen and Witfontein are within the district of Bloemfontein?... Yes your Worship.

You were driving a Volvo is that so?... Yes your Worship.

Registration number? ... I can't remember what the registration is it was my friend's car.

Is it the same vehicle you were caught driving?.....Yes

Are you aware of the speed limit in the area where you were caught for exceeding speed limit?..... Yes your worship.

What is it? ... It's 120.

At what speed were you driving? … I was driving at 171 your Worship.

Were you the driver of your friend's car? … Yes your Worship.

Were you aware that you exceeded the general speed limit? … Yes your Worship.

Were you aware that such a contravention is not allowed? … Yes your Worship.

Were you also aware that such excessive speed that you were driving at is punishable by law? … Yes your Worship."

[5] The prosecutor confirmed that the information tendered corresponded with the contents of the docket whereupon the accused was convicted.

[6] The accused tendered information from the bar and even suggested that he would be prepared to pay a fine of R2 500.00. Surprisingly, the trial magistrate imposed a lenient sentence, to wit a fine of R2 500.00, alternatively 12 months' imprisonment. The fine is much less than often imposed for similar offences.

The following crucial information was obtained during the sentencing process and upon the very last question put to the accused by the trial magistrate as to whether there was anything that he wished to bring to the court's attention: "No there is nothing your Worship I just want to apologise because that night I was driving from North West because I attended an exam on that day my wife was in labour because she gave birth on the 24th so I had to rush to Umtata to rescue her to the nearest doctor there. So am sorry about that." (*verbatim* quote). Instead of following up questions, the trial court left it there. This is an important aspect that will be dealt with in detail *infra.*

[7] Although the transcribed record does not indicate that an inquiry in terms of s 35 of the National Road Traffic Act was held, the trial magistrate confirmed that it was done. The section, requiring suspension of the accused's driver's licence for six months, was not invoked.

III THE REFERRAL FOR REVIEW

[8] On 28 September 2018 the acting senior magistrate of Bloemfontein sent the record of proceedings and the trial magistrate's accompanying letter to the High Court which documents were received on 10 October 2018. When the letter which is quoted *infra* is read, it will immediately become clear to the reader that the particular magistrates did not consider the crucial answer given by the accused when he proffered information in mitigation.

[9] The High Court received the referral more than three months after the finalisation of the proceedings in the lower court. As we have become used to by now, there was again a delay in transcribing the record. Section 303 of the CPA is peremptory, but systemic delay causes transgression of the section in almost all review matters. Sher AJ, with whom Henney J concurred, referred to this as a "perennial problem" in *S v Jacobs and six similar matters* 2017 (2) SACR 546 (WCC) at para [39]. Sensible proposals were made which included the introduction of an outstanding automatic review list. See paras [45] – [48]. Hopefully that judgment was brought to the attention of relevant decision-makers who are seriously considering systemic delays of this nature which are not in the interest of justice.

[10] The transcribed record – not even a full seven pages - would have been meaningless, was it not for the hand-written corrections made by the trial magistrate.

[11] The relevant part of the trial magistrate's letter reads as follows:

> "1…
>
> 2…
>
> 3…
>
> 4. I received the transcribed record on the 24th September 2018.
>
> 5. The conviction followed accused's guilty plea on the 5th July 2018.
>
> 6. It is my respectful submission that the conviction be set aside as the questioning on (sic) the accused by the trial magistrate fell short

of the criteria used in S v Mohlolo Khambule (FS), Review number: R177/2018.

7. It is my respectful submission that accused did not admit that the operator/the traffic officer concerned was duly authorized to / competent to operate the speed capture device.
8. It is my respectful submission that the accused did not admit that he was aware, before he was pulled over by the traffic officer, that he was travelling at an excessive speed.
9. It is my respectful submission that the transcribed record does not show that after the conviction a S35 inquiry was conducted, however, the handwritten notes of the trial magistrate indicate that an inquiry was conducted."

IV THE PURPOSE OF REVIEWS

[12] Review procedure in terms of s 302 of the CPA is aimed at ensuring the validity and fairness of the convictions and sentences in certain categories of our lower courts, for example *in casu,* the sentence imposed by the trial magistrate who has held the rank of magistrate for a few months only, and thus less than seven years, brought the proceedings within the ambit of automatic review in terms of s 302(1)(a)(i).

[13] The review court "has only to certify that the proceedings were in accordance with justice, and not necessarily in accordance with law." See Du Toit *et al, Commentary on the Criminal Procedure Act,* service 60 at 30-9 with reference to *S v Cedars* 2010 (1) SACR 75 (GNP) at 77 and authorities relied upon. The question to be answered in each case is whether there was real and substantial justice, not necessarily in accordance with strict law and even if a rule of

criminal procedure may not have been observed. See also: *S v Nteleki* 2009 (2) SACR 323 (OPD) at para [7].

V QUESTIONING IN TERMS OF SECTION 112(1)(b) OF ACT 51/1977

[14] Section 112(1)(b) of the CPA reads as follows:

> "(T)he presiding... magistrate shall... question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty, and may, *if satisfied that the accused is guilty of the offence to which he has pleaded guilty*, convict the accused on his plea of guilty of that offence and impose any competent sentence...." (emphasis added)

[15] In *S v Naidoo* 1989 (2) SA 114 (AD) at 121F the correct approach to questioning in terms of s 112(1)(b) was recorded as follows:

> "I would merely observe that it is well settled that the section was designed to protect an accused from the consequences of an unjustified plea of guilty, and that in conformity with the object of the Legislature our courts have correctly applied the section with care and circumspection, and on the basis that where an accused's responses to the questioning suggest a possible defence or leave room for a reasonable explanation **other than** the accused's guilt, a plea of not guilty should be entered and the matter clarified by evidence." (emphasis added)

[16] Du Toit *et al, Commentary on the Criminal Procedure Act,* service 60 at 17-9 also confirm that the subsection was designed to protect accused persons - uneducated and undefended accused in particular – "from the consequences of an ill-considered plea of guilty." Therefore, as the authors state at 17-15, the "ambit of the questioning is at all times determined by the fact that s 112(1)(b) provides the necessary machinery to test a plea of guilty." The court's questioning has as its aim to obtain a factual basis by the accused supporting the plea of guilty, *i.e.* to show that all the elements of the offence have been admitted. Kruger A, *Hiemstra's Criminal Procedure*, issue 9 at 17-3 puts it as follows: "The purpose of the questioning is twofold: first, to determine whether the accused admits the allegations in the charge sheet upon which there was a guilty plea (and one may add as the author states further on, the admissions must be made freely, consciously and reliably): and, secondly, to enable the court to conclude for itself whether the accused is, in fact, guilty." A mere regurgitation of the allegations in the charge is insufficient.

[17] It is not the court's function to eliminate all possible conceivable defences or as the full bench in *S v Phundula* 1978 (4) SA855 (TPD) put it: "Dit word stellig nie van die landdros verwag om alle denkbare verwere te ondersoek en uit te skakel nie." (It is not expected of the magistrate to investigate and exclude all conceivable defences. (my translation)) In one of the three appeals before it, the court found that the magistrate should have asked further questions in terms of s 112(1)(b) to establish whether the appellant had the necessary intent to steal. It appeared from the summary provided by the prosecutor that the accused made a

collision with a vehicle allegedly stolen by him, that the vehicle overturned causing the accused to be hospitalised and that he informed the police after handing him over that he did not want to live any longer. The full bench held that further questioning might have resulted in the appellant not admitting intent to steal. His aim appeared to be to commit suicide. In *S v Tshumi* and others 1978 (1) SA 128 (NPD) the accused, who was convicted upon his guilty plea to a charge of culpable homicide, responded to a question by the trial court that the deceased had been the original aggressor. Although this raised the question whether he acted in self-defence, the matter was not taken any further by the trial court. It is not surprising that the review court set aside the conviction and sentence. In *S v W* 1994 (2) SACR 777 (N) the accused pleaded guilty on a charge of theft of a motor vehicle. According to their answers during questioning they took the complainant's vehicle, but abandoned it next to a highway. In the absence of further questioning to establish their intent to deprive the owner permanently of the benefits of his vehicle, the review court found that they had not admitted all the elements of theft. I provided the three examples in order to show that if responses by an accused during questioning suggest a possible defence or a reasonable explanation other than his/her guilt, a plea of not guilty in terms of s 113 must be entered.

[18] It is important to emphasise that the court must be satisfied that the allegations in the charge are admitted, *in casu* that on 22 May 2018 the accused unlawfully and intentionally drove the particular motor vehicle on a public road at a speed of 171 km/h which is in excess of the speed limit of 120 km/h applicable to the particular

road. In acting as such the trial magistrate should have obtained the factual basis on which the accused pleaded guilty to test the correctness thereof. It is not for the trial court to extract information or to search for possible defences indicating that the accused mistakenly pleaded guilty, for example that the driver fled for his life as he was chased by robbers or that he is a German citizen who thought that no speed limit applied to our national roads as is the case on the German Autobahn. However, if it appears from the questioning that the accused may have a valid defence, no conviction should follow and a not guilty plea should be entered. This would be the case where the accused indicates during questioning, to give just two examples, that he exceeded the speed limit whilst fleeing from robbers, or he, being a medical doctor, was transporting a patient who suffered from a life-threatening injury to the nearest hospital for emergency treatment in order to save his/her life.

VI ***S v MOHLOLO KHAMBULE*** **– THE JUDGMENT RELIED UPON**

[19] On 16 August 2018, after finalisation of the proceedings in the lower court in this matter, the Free State High Court judgment, *S v Mohlolo Khambule*, review number R177/2018, was delivered. It is as yet unreported, and not even published on the Saflii website. I shall deal fully with the judgment as it has particular consequences for trial magistrates. In that case a medical doctor pleaded guilty for speeding. According to the charge sheet he

was travelling at a speed of 153 km/h in a 100 km/h zone on the N8 near Bloemfontein.

[20] The accused was represented by a legal representative who prepared a written statement for the accused in terms of s 112(2) of the CPA. The statement was signed by the accused and read into the record.

[21] Dr Khambule stated *inter alia* the following:

> "I accept that I drove fast and exceeded the prescribed speed limit in a 100kmph zone, and plead guilty thereto. I admit that I was travelling at a speed of approximately 153 kmph, after being shown the reading as was displayed on the speed measuring equipment operated by the traffic official. I have perused all the documentation in relation to the aforementioned equipment and confirm that it was in working order. I am remorseful of my actions, and I humbly ask the honourable Court to take into consideration that I am remorseful, when passing down a sentence."

[22] Clearly, Dr Khambule is familiar with the specific road. It is a road that he had been travelling every day of his working life whilst resident in Mandela View, situated next to the N8 to the east of Bloemfontein, a fact of which judicial cognisance can be taken. He works at the Universitas hospital in Bloemfontein and the specific day he was on his way to Pelonomi hospital. It is uncertain who his legal representative was, but it appears *ex facie* the statement that Dr Khambule must have been represented by an experienced criminal law lawyer conversant in

English. The detailed statement is proof that the doctor wanted to plead guilty, that he indeed pleaded guilty and that he admitted all the elements of the offence put to him. There cannot be any doubt that he knew it was against the laws of this country to drive a motor vehicle at a speed in excess of the speed limit on a particular public road. Although he stated that he had to attend a meeting of doctors to discuss the improvement of health care at the Pelenomi hospital to avoid future deaths, there was no intention to rely on the defence of necessity and thus absence of unlawfulness. The position would have been different if the information was tendered by an unrepresented accused during questioning in terms of s 112(1)(b). In such a case the trial magistrate would be under a duty to make further enquiries before deciding upon the guilt of the accused.

[23] The acting senior magistrate of Bloemfontein sent the matter to the High Court as a special review in terms of s 304(4) of the CPA. The review court set aside the conviction and sentence and remitted the matter to be heard by the same magistrate. In so doing a professional person who obviously wanted to get rid of pending proceedings against him, employed another professional, a qualified lawyer, to represent him, certainly at some cost, in the hope of quickly finalising the case, failed in his attempt to obtain finality. Now, the case is back at square one. I would be surprised if the doctor pleads not guilty this time around. Whatever he does, it will cost him time and money.

[24] The review court in *Khambule* relied on three reasons why the conviction should be set aside. Firstly, Dr Khambule's use of the word "approximately" as if the speed capturing device would show a reading of "approximately 153 km/h". The doctor stated that he drove fast and admitted that he exceeded the 100 km/h speed limit, before referring to "approximately". I do not believe that this word could be regarded as any indication of a lack of *mens rea,* especially bearing in mind the statement as a whole and the circumstances under which it was prepared. Fact of the matter is that Dr Khambule was driving one and a half times the prevailing speed limit and it could never be submitted that he was unaware of speeding.

[25] The second and third problems detected by the review court were about facts not alleged and thus not admitted in the statement, whilst according to the review court should have been part of the statement. The second alleged defect was the failure to admit "that the operator, the traffic officer concerned, was duly authorised or competent to operate the speed capture device." In my view this is not one of the essential elements of the offence of speeding. Sometimes speeding offenders try their luck in our courts by eliciting evidence in cross-examination that the traffic officer did not have the required knowledge to operate the particular device and/or that there are other deficiencies in the state's case. Clearly, the doctor did not want to embark on such a process and merely wanted to accept responsibility for his offence.

[26] Finally, the review court found that the doctor failed to admit "that he knew that it was unlawful for him to travel at the alleged excessive speed or that he knew that travelling at such a speed was a traffic transgression punishable by law." If the doctor did not know this, he should never have qualified for a motor vehicle licence in the first place. Surely, an educated person would never convince a court in this country that he is or was unaware of the meaning and intent of traffic signs and the consequences of speeding and/or exceeding prevailing speed limits. It must also be emphasised that the doctor, whilst legally represented, did not rely on the defence of necessity and the facts presented by him do not support such a contention. It might have been a totally different situation if the accused was an uneducated, illiterate and unlicensed foreigner who had never before driven a motor vehicle on a South African road.

[27] In *Khambule* the review court incorrectly found at para [11] that the doctor did not state that he knew what speed limit (100 km/h) applied where he was caught and "that he knew that by exceeding the speed limit he was committing a traffic offence punishable by law." The doctor expressly accepted that he "exceeded the prescribed speed limit in a 100 kmph zone." He did not say that he was unaware of the speed limit at the time; to the contrary he stated that he exceeded the speed limit of 100 km/h. The only necessary and logical conclusion to arrive at is that the doctor as licensed motor vehicle driver also knew that it was unlawful to exceed the speed limit. The review court's conclusion that "criminal intent and unlawfulness were amiss to sustain a conviction" is clearly wrong and we

are at liberty to refrain from following it. *Khambule* is clearly distinguishable from *S v Samuels* 2016 (2) SACR 298 (WCC) for two reasons. Firstly, Dr Khambule was represented by a legal representative and secondly, the indigent accused in *Samuels,* a single mother with four children, pleaded guilty to a charge of contempt of court in that she transgressed a court order by not evacuating certain premises, but made it clear that "…ek het nêrens gehad om heen te gaan nie. Daarom het ek nie gegaan nie." (I had nowhere to go and therefore I did not go. (my translation)) Ms Samuels' non-compliance with the court order was not wilful and *mala fide* or unreasonable and a plea of not guilty should have been entered. The review court found as such and the conviction and sentence were set aside.

[28] 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. Such 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 s 113 and an unnecessary wasting of court time and resources.

VII EVALUATION OF THE MATTER *IN CASU*

[29] The accused is not uneducated. He is a pharmacist with the required degree. He is an intelligent person. He is earning a salary of R35 000.00 per month. He was not represented by a legal representative and therefore the matter was sent to the High Court as an automatic review in terms of s 302. The trial magistrate was appointed to the rank of magistrate on 1 February 2018 only.

[30] I quoted the questioning by the trial magistrate *supra* and it will not be repeated. The accused was aware of the 120 km/h speed limit on the N1. He admitted that he had exceeded the speed limit by travelling at 171 km/h, that his contravention "is not allowed" and that his driving at such an excessive speed is punishable by law. He drove at nearly one and a half times the prevailing speed limit and of necessity must have known that he exceeded the general speed limit. He went further than Dr Khambule by admitting that he committed a punishable offence.

[31] The trial magistrate, supported by the acting senior magistrate, submitted in paragraph 6 of the letter quoted *supra* that, based on *Khambule,* this court should set aside the conviction and sentence for the reasons mentioned in paragraphs 7 and 8 of the

letter. I indicated *supra* that it is not expected of a presiding officer to seek admissions from an accused to the effect that the traffic officer was duly authorised to act and/or competent to operate the speed capturing device. Obviously it would have been a totally different matter if the accused mentioned that the person who had pulled him off the road was in private clothes, and/or intoxicated, and/or the speed capturing device indicated a speed of 171km/h, but he was travelling at a mere 130 km/h.

[32] I do not agree that the accused did not admit that he was aware, prior to being pulled off, that he was travelling at an excessive speed as mentioned in paragraph 9 of the letter. He indicated at page 2, line 15 of the record that he was aware that he exceeded the general speed limit. He did not say that he became aware of the transgression only after being pulled off, or that he believed that he was driving within the speed limit at the time.

[33] The accused intended to plead guilty, did in fact do so and admitted all the allegations in the charge. There can be no doubt about this. However, the trial court failed to request the accused to provide a factual basis for his plea of guilty, for example under what circumstances did he travel the particular day and why did he travel at an excessive speed. If a factual basis was requested, the accused would probably have given the answer he gave in mitigation of sentence, *i.e.* that he was on his way to Mthatha, having been informed that his wife was in labour and that he needed to get her to a doctor urgently. It is not disputed that the

wife gave birth just over a day after accused was caught speeding. In any event, when the trial court was informed accordingly, she either should have asked further questions to establish whether there was really an absence of unlawfulness, or entered a plea of not guilty in terms of s 113. The conclusions arrived at in *S v W, S v Tshumi, S v Samuels* and *S v Phundula supra,* based on the facts of those cases, are appropriate *in casu* as well.

[34] The review court must ensure that justice is done, both to the accused and the state and it is in the interests of justice that litigation should come to finality. See again para [7] of *Nteleki supra.* In para [8] of this judgment by Van Zyl J, with whom Van der Merwe J (as he then was) concurred, the learned judge stated "… it is clear that considerable time, effort, inconvenience and expense to both the State and the accused would be involved in bringing the accused before court again." In the circumstances of that case the review court decided to confirm the conviction and sentence although an incompetent sentence was imposed. Notwithstanding the aforesaid considerations the matter should be remitted to the Magistrate's Court for a *de novo* hearing. The accused will have to be served with a summons in Mthatha and he will have to travel all the way to Bloemfontein to appear in court again.

VIII <u>CONCLUSIONS</u>

[35] Notwithstanding the accused's intention to plead guilty and his plea of guilty, probably in order to get finality, the proceedings were not in accordance with justice and the conviction and sentence cannot stand. I come to this conclusion based on the facts of this matter although it should be made clear that the finding is not based on the reasoning and conclusion in *Khambule* which I already found to be incorrect.

[36] The trial magistrate's assurance that she conducted an inquiry in terms of s 35(3) of the National Road Traffic Act is worrisome in the absence of any record to that effect. I indicated *supra* that the record is poorly transcribed. It also appears as if something was said by the trial magistrate before the court adjourned which was not recorded. Fact of the matter is that an automatic suspension of the accused's licence for a period of six months had to take effect, unless evidence under oath was presented by the accused to the satisfaction of the court why the suspension shall not take effect. There is no proof of such an inquiry although we were assured that the magistrate's handwritten notes, which do not form part of the record as should have been the case, serve as proof that an inquiry was held. The legislature intended presiding officers to be strict on offenders travelling at excessive speeds as in this case. Therefore an automatic suspension follows upon a conviction, unless a case has been made out for not invoking the suspension. The trial magistrate must ensure in future that proper records are kept and if the transcribed record is incomplete, she has to ensure that it is supplemented and/or edited in order to present a fair reflection of the proceedings.

IX ORDERS

[37]

1) The conviction and sentence are set aside.

2) The matter is remitted to the Magistrate's Court for a *de novo* hearing before the trial magistrate or any other available magistrate.

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J P DAFFUE, J

I concur

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A F JORDAAN , J