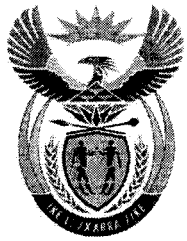

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

High Court Case No.: A237/2011
Lower Court Case No.: GSH (4) 02/08
DOV Reference: 9/2/5/1 – 134/11

In the matter between

SHAUN RHODES Appellant

and

THE STATE Respondent

Appeal heard on:	12 August 2011
Coram:	Dlodlo, J et Cloete, AJ
Judgment delivered:	12 August 2011

JUDGMENT

CLOETE, AJ

INTRODUCTION

[1] On 22 August 2010 the Appellant (who was 30 years old at the time and, who, along with his two co-accused, had pleaded not guilty) was convicted in the Parow Regional Court of theft of a motor vehicle. On 20 September 2010 he was sentenced to

7 years direct imprisonment.

[2] On 8 November 2010 the court *a quo* dismissed the Appellant's application for leave to appeal against both his conviction and sentence, whereafter the Appellant successfully petitioned this court, which on 3 May 2011 granted him leave to appeal.

BACKGROUND

[3] It is common cause that the motor vehicle, a Toyota Corolla (*"the vehicle"*) was the property of Mr Gerald La Vigre and that it had been stolen on 29 September 2007.

[4] It is also common cause that the Appellant (along with his co-accused who were acquitted on the same charge) were found in possession of the vehicle by the police on 2 October 2007. The Appellant's co-accused were Ms Carol Williams (accused no. 1 in the trial, *"Williams"*) and Mr Achmat Beukes (accused no. 3 in the trial, *"Beukes"*). The Appellant was accused no. 2 in the trial.

[5] Williams (the Appellant's girlfriend) admitted that she was a passenger in the vehicle, having been given a lift. In her plea explanation she stated that she did not steal the vehicle, nor did she know at the time that the vehicle had been stolen. Williams exercised her right not to testify at the trial.

[6] The Appellant's defence was essentially that he had borrowed the vehicle from Beukes to transport Williams to a day hospital. He did not steal the vehicle, nor did he know that it had been stolen. He admitted that he was sitting in the driver's seat of the vehicle when he (along with Williams and Beukes) were apprehended by the police.

[7] Beukes claimed that whilst on his way to collect a key to his residence he came across Williams and the Appellant who were sitting inside the vehicle. The Appellant asked him to assist him in starting the vehicle by pushing it. As he put down the bag which he was carrying so that he could assist the Appellant he was confronted by the police. He did not steal the vehicle, nor did he know that it had been stolen.

[8] The State called two witnesses, Constable Jonathan Baxter (*"Baxter"*) and Inspector Ivan Andries (*"Andries"*).

[9] Baxter testified that on the afternoon of the incident he and Andries were on patrol travelling in their police van when they spotted the rear of the stationery (stolen) vehicle. He noticed three people sitting inside. The Appellant was sitting in the driver's seat, bending forward towards the driver's door, attempting to loosen something under the dashboard. Williams was sitting in the rear passenger seat. He and Andries asked the three what they were doing. Williams informed him that she had obtained a lift from Beukes. The other two did not respond. Baxter noticed that the numbers on the front and rear number plates of the vehicle differed from each other. He reported this together with the engine and chassis numbers and obtained confirmation that the vehicle had been reported as stolen.

[10] Baxter's evidence was further that a group of people started to assemble near to the vehicle. Baxter intended arresting Beukes (whom he recognised) in light of the information given to him by Williams, who had also by that stage advised that Beukes had been driving the vehicle. Initially Baxter did not testify as to where Beukes was

seated in the vehicle when he and Andries spotted it, but later stated that Beukes was sitting in the passenger seat (although he did not specify which one). Baxter had not mentioned that Beukes was sitting in the vehicle in the previous police statement made by him.

[11] Baxter testified that he escorted Beukes to the police van and Williams and the Appellant then slipped away into the crowd which had gathered. Baxter did not see a key in the ignition, although the ignition *"het reg gelyk"*. Baxter himself then started the vehicle by using a knife. He observed damage to the windscreen (which was cracked), the headlights and the bumper. Baxter's testimony was further that after his arrest Beukes informed the police of the addresses of Williams and the Appellant, who were in turn arrested together later that evening in Delft.

[12] During cross-examination and when confronted by his earlier statement, Baxter conceded that he might not have arrested Beukes on the day of the incident and it might well only have been Williams and the Appellant who had been arrested (later that evening). He also conceded that if that were the case, Beukes could not have furnished him with the addresses of Williams and the Appellant, and that Williams' instructions that it was in fact she and the Appellant who had given Baxter their addresses could be correct.

[13] Baxter denied that Williams was sitting in the front passenger seat of the vehicle with her head resting against the seat (which she contended was the case). He was unable to confirm or deny her instructions to her legal representative that the reason why she and the Appellant were sitting in the vehicle was that they were waiting for

Beukes to arrive to hand the vehicle back to him. Similarly, he could not confirm or deny Williams' instructions that she had never before met Beukes, and that she and the Appellant had already been to the day hospital by the time they were apprehended by the police. Baxter however confirmed that he had found prescription medication on the (front) console of the vehicle, which accorded with Williams' instructions. However, inasmuch as Williams did not testify, no weight should be attached to this part of the evidence other than to the admissions made by Baxter.

[14] The Appellant denied that he had been attempting to loosen anything under the dashboard and claimed that he had merely been sitting in the driver's seat, waiting for Beukes. In cross-examination Baxter confirmed that the Appellant was not found in possession of any tools, nor did he (Baxter) observe any damage to the dashboard itself. He denied the Appellant's version that the keys had indeed been in the ignition of the vehicle.

[15] Baxter denied that the Appellant had told him that the vehicle belonged to Beukes, but conceded that the Appellant might have told Andries. Baxter later changed his testimony by volunteering under cross-examination that *"they"* (it appears that he was referring to Williams and the Appellant) had told him that Beukes was the driver of the vehicle and that there was no key in the vehicle.

[16] Baxter denied the Appellant's version that Beukes was outside the vehicle when he and Andries arrived and was adamant that all three had been spotted inside, with Williams sitting in the rear passenger seat. He stated that *"ek kan onthou hoe sy met haar kop teen die sitplek geleun het"*. He attempted to excuse his earlier denial that

Williams had been resting her head against the seat on the basis that what he had meant was that she had been doing so whilst sitting in the rear and not the front passenger seat. It was not put to him that he should then explain how the medication which Williams had been prescribed had been found on the front console of the vehicle.

[17] Baxter was unable to deny the Appellant's version that (after he had identified Beukes to the police as the "owner" of the vehicle), he and Williams left the scene as they were under the impression that there was no reason for them to wait.

[18] In response to Beukes' claim that he was requested by the Appellant to assist in starting the vehicle by pushing it, Baxter stated that when he and Andries arrived at the scene no-one was attempting to *"kickstart"* the vehicle. He also denied that Beukes was in possession of a bag as alleged by him.

[19] Baxter eventually conceded that he was not certain of the truth of any of the evidence given by him: *"So basies vandag al die inligting wat u vandag vir die hof gee is nie met sekerheid nie, dit is nou wat u vir die hof sê, korrek so Meneer ? – Ja"*.

[20] Andries confirmed Baxter's testimony that when they approached the vehicle there were three people sitting inside, whom he identified as the Appellant, Williams and Beukes. The Appellant was sitting in the driver's seat and Williams and Beukes were each sitting in a passenger seat, although he could no longer recall whether they were sitting in the front or rear passenger seats, stating that it could have been either. Andries could also not recall what the three were doing inside the vehicle at the time.

[21] He confirmed that the Appellant informed him that the vehicle belonged to Beukes and that he had borrowed the vehicle from Beukes (who was a mechanic) in order to transport Williams to the day hospital. Andries testified that the Appellant and Williams later left the scene (where the crowd had assembled) although *"ek weet nie hoe dit gebeur het nie"*. He went to look for them but could not find them. He returned to find that Baxter had arrested Beukes who was now in the police van.

[22] Contrary to the testimony of Baxter, Andries claimed that the vehicle was then towed away by a breakdown service. He later attempted to clarify this by stating that utilising a breakdown service for this purpose was standard procedure, but ultimately conceded that he could not confirm whether the vehicle had been towed away or not.

[23] Andries agreed that no keys could be located. However, under cross-examination, he explained that what he meant by this was that he had concluded that no keys could be found *"want daar is geen sleutels ingehandig saam met die voertuig nie"*. He conceded that he himself had not searched for the key, nor had he searched the Appellant, Williams or Beukes. He could not say whether Baxter had done so. Andries could not remember whether he had inspected the ignition or any other part of the vehicle. He could not recall whether he saw any medication in the vehicle. He did not know whether the vehicle had been inspected for fingerprints. He stated that it was as a result of information provided by Beukes that the Appellant and Williams were arrested later that evening.

[24] Under cross-examination, Andries remained adamant that Beukes was spotted inside the vehicle and that he had been arrested at the scene. He could not however

satisfactorily explain why in the statement that he made in the early hours of the morning following the incident he had said that Beukes had fled the scene and could not be found. The police records also reflect that Beukes was only arrested two days later on 4 October 2007.

[25] Andries testified that he did not notice any reaction from Beukes when the Appellant pointed him out. He confirmed Baxter's testimony that Beukes did not have a bag with him.

[26] Neither Baxter nor Andries gave any evidence as to whether Beukes had informed them that he was on his way to fetch a key for his residence, nor was this raised with them during cross-examination.

[27] The Appellant testified in his own defence. He stated that at approximately 22h00 on the evening prior to the incident he received a message from Williams to call her. At the time he and Beukes (whom he had known for some time) were sitting in the vehicle (which was in Beukes' possession) close to the latter's home in Elsies River smoking *"'n pyp"*. He described his relationship with Beukes as follows: *"ons het nie saam opgegroei soos in vriende nie. Vir Achmat ken ek, hy is 'n mechanic, hy doen mechanical werk. Hy ry – elke dag ry hy different karre, soos in 'n mechanic, so ek ken hom net as 'n mechanic en ons praat, ons rook saam, but we are not close friends ... ons het gerook saam, ons het pype gerook saam. Ons het gesels met mekaar, maar ons is nie elke dag saam met mekaar nie"*.

[28] The Appellant then called Williams whilst his cell phone was on *"loudspeaker"*

and she told him that she was ill and needed to go to a hospital. Williams had called on him for assistance as it was late in the evening and no-one else was around to help her. The Appellant believed that her illness was serious as she had suffered severely from similar symptoms in the past. Beukes who was sitting next to him overheard the conversation. The Appellant told Williams that he would try to find transport and immediately asked Beukes if he (Beukes) could fetch her, offering to pay him R50.00. Beukes replied that he could not do so (his wife would get upset and he had smoked too much) but the Appellant could borrow the vehicle if he gave him R30.00 and put R20.00 worth of petrol in the vehicle's tank.

[29] The Appellant agreed and thereafter took the vehicle and went to fetch Williams. However she was asleep when he arrived. He accordingly only took her to the Delft Day Hospital early the following morning. It was very busy there and they accordingly drove on to the Elsies River Day Hospital which seemed to be quieter. After they left the day hospital later that day the Appellant drove back to Beukes' home in order to return the vehicle to him. Whilst the Appellant and Williams were sitting in the vehicle waiting for Beukes, the police arrived.

[30] The police asked the Appellant who the vehicle belonged to and he replied that it was Beukes'. He pointed out Beukes where he stood outside next to the driver's door. The police then asked both the Appellant and Williams for their details (including their addresses) which they duly provided. As the police did not engage any further with them, they decided that there was no point in waiting around and left the scene. The Appellant and Williams were arrested later that evening.

[31] The Appellant testified that when he borrowed the vehicle it had a key which bore the name *"Toyota"*. The key had a holder. He returned the vehicle to Beukes with the key which was still in the ignition when the police arrived. While he was explaining to the police that the vehicle belonged to Beukes he climbed out of it. He did not know what happened to the key thereafter. The police did not ask him where the key was. He did not notice either Williams or Beukes fiddling with the ignition, and was unable to say whether any member of the crowd which had assembled had done so either. He was not watching that part of the vehicle as he was facing away from it whilst talking to the police.

[32] Under cross-examination the Appellant stated that he had no reason to believe that the vehicle had been stolen because *"Die feit dat ek hom ken en die feit dat hy 'n mechanic is en hy ry different karre, elke tweede dag ry hy different karre, dit het gemaak dat ek nie nog vra of dit 'n gesteelde kar is nie"*. He also testified that Beukes had not denied that the vehicle was his when he (i.e. the Appellant) identified him as the person to whom it "belonged".

[33] It was put to the Appellant by Beukes' legal representative that whilst he did not dispute that he is a mechanic, Beukes claimed that he would not have lent the Appellant a vehicle which although in his possession did not belong to him. The Appellant replied that although he could not comment on Beukes' intentions or state of mind, Beukes had definitely lent him the vehicle after overhearing his conversation with Williams.

[34] Under cross-examination by the State the Appellant confirmed that he knew or

at least suspected that Beukes was not the owner of the vehicle. He conceded that he (i.e. the Appellant) did not get permission from the owner of the vehicle to use it. He was however clear that he did not know that it had been stolen. In his words *"Soos ek eerstens gesê het, U Edele, alles het vinnig gegaan en is nie te sê ek het nie belang gestel wat die eienaar gaan sê of wat die eienaar gaan dink nie. Al wat deur my mind gegaan het is net dat ek my vrou by die hospital wil kry, dis al"*.

[35] The Appellant confirmed that he had not previously borrowed a vehicle from Beukes, nor had he borrowed anything else from him. When pressed by the State for an explanation as to why in those circumstances Beukes would lend him a vehicle, the Appellant stuck to his version of events and stated that the reason could have been that Beukes had overheard his conversation with Williams and realised that his request for assistance in transporting Williams to hospital was a genuine one.

[36] When tested on his evidence on the trip to the day hospital, the Appellant's unchallenged response was that he had provided documentary proof to his previous legal representative of hospital records evidencing Williams' times of arrival and departure from that hospital. The date of the medication prescribed to Williams coincided therewith.

[37] In response to a question by the presiding magistrate, the Appellant stated that he had not noticed the differing numbers on the front and rear number plates of the vehicle.

[38] Beukes also testified in his own defence. He claimed that he had just been

dropped at his home after attending on a job, was on his way to fetch a key to his residence and was still holding his tool bag when he was asked by the Appellant to assist him in starting the stationery vehicle by pushing it. As he was putting down his bag the police arrived. One of the policemen had searched his tool bag twice before allowing him to leave the scene. He was uncertain of the date of the incident, claiming that it had occurred on 3 October 2007. He confirmed that he was arrested on 4 October 2007.

[39] Beukes stated that he was not in the vehicle when the police arrived. He denied that he had lent the Appellant the vehicle. He denied that he had seen or heard the Appellant pointing him out to the police. He conceded that he and the Appellant knew each other but claimed that he had come to know the Appellant through their respective past illegal activities and had last seen him in 1997. They were not friends. He would accordingly not have lent the Appellant the vehicle but would rather have driven him himself. He denied that Andries had ever been at the scene. He also denied that he and the Appellant had been in each other's company on the previous evening.

[40] Beukes conceded that Williams was not known to him. He thus could not have given the police her address. He also did not know the address of the Appellant.

[41] Beukes' opinion was that the Appellant had asked him to push the vehicle because he saw the police approaching, but conceded that the Appellant had not communicated this to him. He flatly denied that he had ever been in possession of the vehicle. He knew nothing about the prescription medication in the vehicle. He did not look for, nor did he notice, a key to the vehicle. Beukes could not satisfactorily explain

why the Appellant would suddenly have pointed him out as the "owner" of the vehicle in circumstances in which, on Beukes' version, he had last had any contact with the Appellant in 1997. His explanation was merely that *"ek was op verkeerde tyd op verkeerde plek"*.

[42] In evaluating the evidence the presiding magistrate correctly found Baxter and Andries to have been poor witnesses who contradicted themselves and each other and whose recollections were vague and unclear in many respects. He thus concluded that their evidence could not be relied upon.

[43] The magistrate found the Appellant's version to be unconvincing. He found that it was strange and unlikely that Beukes would have lent the vehicle to the Appellant *"en dit nogal om dit te hou tot die volgende dag, oornag in 'n ander plek"* in circumstances in which the vehicle *"nou vol dagga gerook is"*. It would simply have been too risky for Beukes to have done so. He rejected the Appellant's version as to why he and Williams had left the scene without first asking permission from the police. He regarded this as *"hoogs verdag"* and, proceeding from the common cause fact that the Appellant was found inside the vehicle, accepted Beukes' version that he had not lent the vehicle to the Appellant. The magistrate also seems to have concluded that the Appellant's version should be regarded as suspect because Williams had elected not to testify and to confirm his (i.e. the Appellant's) version. He accordingly convicted the Appellant and acquitted Williams and Beukes solely on the basis of his findings on the circumstantial evidence before him.

EVALUATION

[44] In my view the magistrate was wrong in accepting Beukes' version over that of the Appellant's. The Appellant was consistent throughout his evidence that he had borrowed the vehicle from Beukes to transport Williams to the day hospital. His unchallenged evidence as to the hospital records and the prescription medication supported this. The few contradictions in his evidence were minor and related to peripheral issues and not the material facts. In addition at the earliest opportunity the Appellant had given the police an explanation (which was consistent with his later evidence) as to why he was in possession of the vehicle and the circumstances in which it had come to be in his possession.

[45] Further, the magistrate's reasoning that it was strange and unlikely that Beukes would have lent the Appellant the vehicle for a period which extended overnight was flawed. The Appellant's evidence was that the purpose in borrowing the vehicle was to immediately transport Williams to hospital. It was only due to circumstances which later unfolded that the trip was delayed.

[46] In addition the Appellant's version as to why he and Williams left the scene is not implausible when viewed in the context of the evidence as a whole. There were no indications that the pair had fled to avoid arrest and both were easily located thereafter. Indeed it seems probable that the Appellant (and Williams) had provided their details to the police as they claimed, particularly in light of Beukes' concession that he himself had not provided the police with particulars of their whereabouts.

[47] The magistrate was also wrong in finding it suspect that Williams did not testify to support the Appellant's version. She could not have cast any light on the arrangements

made between the Appellant and Beukes pertaining to the vehicle as she was not present when the arrangements were made.

[48] In order to justify a conviction for theft the State must prove beyond a reasonable doubt that the following elements are present:

(a) an act of appropriation whereby the accused deprives the lawful owner or possessor of his property and himself exercises the rights of an owner in respect of the property;

(b) the act of appropriation is unlawful; and

(c) the act of unlawful appropriation is intentional. The intention must relate to the act, the definitional elements of the crime and the unlawfulness. See **C R Snyman** : Criminal Law (5th Edition) at page 492.

[49] It is trite that the evidence must be weighed as a whole in order to establish whether the State has proved its case beyond a reasonable doubt: see *inter alia* **S v Chabalala** 2003 (1) SACR 134 (SCS) at 139i-140a. The accused does not bear an onus. In the words of Zulman JA in **S v V** 2000 (1) SACR 453 (SCA) at 455a-c:

> *"It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true".*

[50] As previously stated the magistrate relied entirely on circumstantial evidence to

convict the Appellant. There was no direct evidence that the Appellant stole the vehicle or that he was in any way involved in its theft. The magistrate convicted the Appellant on the basis that he had been found in possession of the (stolen) vehicle and that his explanation as to how he had come to be in possession of the vehicle should be rejected.

[51] A court cannot convict on circumstantial evidence alone unless *"... on the proved facts, the inference of guilt is not alone a reasonable inference, but is the only reasonable inference":* see **R v Sole** 2004 (2) SACR 599 at 666h-i. The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn: see **R v Blom** 1939 AD 188 at 202-3.

[52] The State has (wisely) conceded that on a proper evaluation of the evidence it has failed to discharge the onus which rested upon it, since the evidence shows that the inference of the Appellant's guilt is not the only reasonable inference that can be drawn, and there is a reasonable possibility that it may be true.

[53] The State however submits that the court *a quo* should instead have convicted the Appellant of contravening s37(1) of the General Law Amendment Act 62 of 1955 (as amended) (*"s37(1)"*) which under s264(1)(b) of the Criminal Procedure Act 51 of 1977 is a competent verdict for theft. S37(1) provides as follows:

> *"Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen goods, other than stock or produce as defined in section 13 of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable*

on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory".

[54] Accordingly an evidentiary burden is placed upon a possessor of stolen property to create a reasonable doubt in the mind of the court as to whether he or she had reasonable cause to believe that the person who disposed of the property was entitled to do so: see **S v Manamela and Others** 2000 (1) SACR 414 (CC) at 438G-H. If the accused does not create such a reasonable doubt, the court will assume that he did not have reasonable cause. The accused is therefore required to furnish evidence as to the reasonableness of his belief. The reasonable cause for the belief must be present at the time when the accused acquires or receives the goods into his possession. If this is the case, the accused does not contravene s37(1) even though he later becomes suspicious or aware of circumstances suggesting that the goods have been stolen: see **Snyman** *supra* at page 529 and **S v Mkhize** 1980 (4) SA 36 (N) at 38H-39B.

[55] The State argues that the Appellant, on his own version, has failed to create a reasonable doubt as to whether he had reasonable cause to believe that Beukes was entitled to "dispose" of the vehicle. The State points out that the Appellant knew that Beukes was a mechanic, that he (i.e. Beukes) drove vehicles which were the property of others, that he knew that the vehicle was not the property of Beukes and that he knew that the owner thereof would not have permitted Beukes to lend the vehicle to others for their use.

[56] Whilst it is correct that the Appellant admitted that he knew or suspected that

Beukes was not the owner of the vehicle he explained that: *"As ek moet in soveel woorde sê, van die eienaar af het ek nie 'n permission gehad nie, maar op daardie stadium sal ek sê die permission wat ek gekry het is van een wat – van Achmat af, omrede of wat hy het die volle reg wat hom te maak met die kar, want die kar was in sy sorg geplaas, so hy moet antwoord kan gee vir die kar"* .

[57] The Appellant clearly did not fully investigate whether Beukes was authorised to "dispose" of the vehicle. However, the law does not require him to do so: *"... if the circumstances in which he receives the goods would satisfy a reasonable man on a balance of probabilities that the goods in question were the property of the person from whom he received them. If he establishes that, he is entitled to an acquittal"*: see **S v Mkhize** *supra* at 38 B-C.

[58] By parity of reasoning, a consideration of whether the Appellant has discharged the evidentiary burden placed upon him in terms of s37(1) extends also to the alternative included therein, namely that he must have received the goods without having reasonable cause for believing that the person from whom he received them *"has been duly authorised by the owner thereof to deal with ..."* the goods. The Appellant's explanation was that, whilst he was aware that Beukes was not the owner of the vehicle, and whilst he (i.e. the Appellant) had not obtained permission from the owner to borrow the vehicle, he accepted in the urgency of the moment that Beukes had the authority to lend him the vehicle in which they were sitting and smoking for what was intended to be a short period. There is no suggestion in his evidence that the Appellant intended to "receive" the vehicle other than for the limited purpose of transporting Williams to hospital, whereafter he would return it to Beukes. This version

is supported by the fact that the police apprehended the Appellant inside the vehicle in close proximity to Beukes' home.

[59] The record of the proceedings in the court *a quo* reflects that the Appellant was not charged with, nor was he informed of, the elements of the offence contained in s37(1). Bearing in mind that when faced with a charge in terms of s37(1) the evidentiary burden is placed on the accused and not the State, I agree with the view expressed by Wynne J in **R v Impey and Another** 1960 (4) SA 556 at 566H-567A that where the State intends to press for a conviction such as theft (in respect of which a conviction under s37(1) is competent as an alternative) *"a specific alternative charge should in all fairness to the accused be added"*. At the very least an appropriate caution should have been furnished to the Appellant, either in the charge sheet or by the presiding magistrate. As pointed out by the learned authors in Milton, Hoctor and Cowling: **South African Criminal Law and Procedure**, Volume 3 (Statutory Offences) at paras J7-8-9, some s37(1) convictions have been set aside by our courts when prejudice resulted from the absence of a caution (see the authorities cited therein at footnote 9).

[60] To my mind, to find that in these particular circumstances the Appellant has failed to discharge the evidentiary burden which rests upon him in terms of s37(1) would be to apply the test of "reasonable cause" in such a manner as would amount to a miscarriage of justice.

[61] It is accordingly my view that the appeal should succeed and I thus propose the following order:

"The appeal against the conviction and sentence are upheld. Both the conviction and sentence are set aside."

CLOETE, AJ

I agree. It is so ordered.

DLODLO, J