IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: AR55/08

In the matter between

Bhekizazi Cyprian Phoswa	**First Appellant**
Mlamuli Happyboy Phoswa	**Second Appellant**
Bongani Bennedict Phoswa	**Third Appellant**
Sizwe Taza Wiseman Phoswa	**Fourth Appellant**

and

The State	**Respondent**

JUDGMENT

Delivered on: 23 September 2010

STEYN J

[1] The appellants were charged with assault with the intent to do grievous bodily harm. They were, however, convicted on a count of assault and sentenced to a fine of R2000 (two thousand rand) or three (3) months' imprisonment, half of which was conditionally suspended for a period of five (5) years.

[2] The appellants now appeal against their conviction after leave was granted by the Court *a quo*.

[3] On 11 November 2008 the matter was set down for hearing but due to an incomplete record that was submitted to the Court, the following order was made:

> *"1. The matter be and is hereby referred to the Magistrate to act in terms of* R v Nortje *1950 (4) SA 725 (E) and* S v Leslie *2000 (1) SACR 347 (W).*
>
> *2. That the Magistrate be and is hereby directed to reconstruct in accordance with those cases. In addition the court directs that the Magistrate reconstruct in a coherent manner, rather than the manner it is done, which makes no sense."*

[4] In perusing the file and reading the record, it became abundantly clear to me that the learned Magistrate failed to comply with the order issued on 11 November 2009. I instructed the Registrar to enquire from the learned Magistrate, whether there are any reasons for her non-compliance. On the same day, 24 August 2010, I was informed by my registrar that the leaned Magistrate is in her office and has requested to see me and tender some explanation. I was astound by the conduct of the Magistrate and without entering into any conversation with her I informed

her that her conduct was not appropriate and that she should respond in writing to the query raised.

On 25 August, the day before the matter was to be heard, the following was conveyed to me in writing:

> *"I confirm the following:*
>
> - *That pursuant to the order of the High Court dated 11/11/2008, the record was reconstructed on 15/6/2009.*
>
> - *At the time of reconstruction on 15/6/2009, the Appellants, the Interpreter and the Prosecutor who had dealt with the case were present. These are the parties whose attendance was secured and the Clerk of Court said she had no contact details for the other parties to the original proceedings.*
>
> - *After recording of the reconstruction proceedings on 15/6/2009, the record had to be transcribed and was sent to Snellers for that purpose.*
>
> *It appears from the letter addressed to yourselves by the Clerk of the Court that the record was returned from Snellers and forwarded to your offices on 30/3/2010.*
>
> *The record was forwarded to yourselves without me having had the sight of it. I last saw the record when it was forwarded to Snellers for corrections in February 2010.*
>
> *I confirm the following:*
>
> - *Prior to reconstruction, the transcribed record commence with cross examination of the state witnesses by accused number 3. All the proceedings prior to that stage were not transcribed as they were contained on the missing tapes (refer to page 2 of the record).*
>
> - *I have noted that the record now contains further*

pages numbered from 2A to 3T. I confirm that these pages contain the proceedings of the 15th of June 2009 when the record was reconstructed.

When reconstruction was done I was reflecting the content of my notes insofar as they reflect on the proceedings prior to the cross-examination of the state witness by accused number 3. This is the portion relating to the missing cassettes A and B it comes before the information reflected on page 2 of the record.

At time of reconstruction, I reflected my notes and the appellants as well as the prosecutor gave their comments as reflected on these reconstructed pages (2B to page 3T of the reconstructed record).

Therefore the pages 2A (from paragraph 20) to [page 3P (paragraph 20) is the reconstructed portion relating to the proceedings prior to 18/9/2006 (prior page 2 of the original record).

I hereby certify that my notes are reflected on the reconstructed record, are to the best of my abilities, a true reflection of the proceedings that took place before me.

I further confirm the following:

- *The original record prior to reconstruction (page 35 after paragraph 20) indicates that cassette E is missing. The missing information is now reflected on pages 3R (from paragraph 5 to page 3S paragraph 10).*

I certify that the reconstructed information contained in those paragraphs is a true reflection of what transpired before me when the proceedings took place.

I apologise for the inconvenience. If I had had sight of the record prior to it being forwarded to your office I would have attended to all necessities and shortcomings and also ensure that the record as a whole is transcribed in a coherent manner."

[5] It is disturbing that an order was given on 11 November 2008 and that it took the learned Magistrate and the Clerk of the Court, 16 months to comply with the order. What is even

more disconcerting is the 'reconstructed' record which shows a clear disregard of the authorities referred to by the court. The record in its current state is still not coherent. Counsel acting for the respondent had to concede that the state of the record leaves much to be desired.

[6] It is evident from the proceedings at the time of the re-construction that the first appellant required a perusal of the case docket, since the statement of the complainant was in issue. Despite this request the case docket was never obtained nor perused by any of the parties, when the record was reconstructed.

[7] I find the case of *S v Zondi*[1] apposite where the court placed reliance on *Leslie*:[2]

> *"[M]ethods of doing so and various sources were suggested in* S v Leslie (supra) *and, since in attempting to reconstruct the record the appellant was mindful of that decision, it is appropriate to have regard to it in evaluating such attempt and the adequacy and acceptability of the reconstruction. For that purpose the following* dicta *in the judgment regarding the formal acceptability of an appeal record, statements made to the police as a source of information as to the evidence given, the bearing of the grounds of appeal on the adequacy of the record, the magistrate and*

1 2003 (2) SACR 227 (W).
2 2000 (1) SACR 347 (W).

prosecutor as sources of reconstruction, and the involvement of an appellant in the reconstruction of the record, are presently relevant:

> *'6 The appeal really ought simply to be struck off the roll. The affidavits obtained by Bracks were not put before the court in typed form. It is the duty of appellant's attorney at least to ensure that the record, original or reconstructed, is put before the Court in typed form. There is not explanation for the failure in that respect. Only poor photostatic reproductions of the manuscript affidavits of the State witnesses which were taken by the police and by Ms Brack were in the record. . . . However, if the appeal is struck off merely for that reason, the problem which has become apparent in this case will be postponed but not resolved. The solution is dilatory but the substantial problem has to be faced at some time or another. Accordingly the judgment rests upon other considerations. It must, however, not be inferred that the appellant needs to attend only to typing and indexing.'*

At 351f-h.

> *'9.3 Information on what was testified (or said) during the trial, can be obtained and should be sought from every source which can contribute. The exclusion in some reported decisions of the prosecutor as a possible witness about how the accused had pleaded, may be open to question. That need not be decided. But subject to that possible exception, the decisions refer not only to the magistrate but, for example, to an interpreter, a prosecutor, and a guardian of the accused who was present in court.'"*[3]

(My emphasis)

[8] The usefulness of secondary evidence at the time of reconstruction has been eloquently stated by Flemming DJP in *Leslie*:

3 *Supra* at 245d-j.

> *"[L]ogically, once it is common cause between the State and the defence that there had been no question of deviation from the statement to the police, the statement itself has a measure of reliability as to what the witness did say in court. He may have said more and he may have explained some of it but what is written in the statement conveys what was in fact testified. Accordingly, eventually the Court hearing this appeal may be prepared to rely upon the police statements contained in Ms Brack's reconstruction. Until the appellant tenders some proof that evidence was given in conflict with the police statement, the evidence of the State witness that his evidence was in accordance with his preceding police statement is a form of secondary evidence which goes to prove what the evidence of the State witness was."*[4]

(My emphasis)

[9] The reliability of the learned Magistrate's notes is another serious concern. She stated on a previous occasion, when the first appellant objected to a further postponement of the matter on the basis of undue delay as follows:

> *"[T]hat is not the only reason why I want to postpone this matter again for judgment. Of* (sic) *course I've started dealing with the judgment in this matter, writing the judgment knowing very well that the accused still needs to address me, to give me their address because on the last occasion they did not address me but as this is the* (sic) *old matter, I still have to listen to the cassettes also so that I can be able to hear the whole evidence as this is now the old matter. I cannot rely on my notes only. So I need to set time for myself to listen to the cassettes and then deliver the judgment."*[5]

(My emphasis)

[10] It is apparent from the aforesaid statement that the learned

4 At 354e-g.
5 See record at page 40.

Magistrate found her notes to be not sufficiently reliable to write the judgment after a long period of time. At the time of the reconstruction she found it to be sufficiently reliable, as a primary source of the reconstruction.

[11] On the day when the appeal was argued the appellants were surprised that the learned Magistrate confirmed the correctness of the proceedings, since they never received the reconstructed part, nor were they given an opportunity to confirm or disagree with the record as reconstructed.[6]

[12] The record, even though reconstructed, is confusing and not coherent. Counsel for the respondent, Ms Naidu, conceded that it is impossible to analyse the evidence in the state it is and hence this court cannot be convinced that the learned Magistrate was not misdirected when she considered the facts and made her findings.

[13] In my view the record as reconstructed by the parties, remains inadequate for proper consideration of the appeal. The appellants had suffered prejudice in the delay of their appeal,

6 See *S v Zenzile* 2009 (2) SACR 407 (WCC) at 416a-d.

so no further postponement would be allowed. The respondent in any event has not applied for any further postponement. It needs to be noted that the application for leave to appeal was lodged on 9 January 2007. Much time has passed.

[14] The appellants are entitled to a result. The inadequacy of the record should count in their favour since no proper appraisal of the evidence could be exercised.

[15] Accordingly, the appeal succeeds and the conviction of all the appellants and the sentences are hereby set aside.

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Steyn, J

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Gcaba, AJ: I agree.

Steyn, J: It is so ordered.

Date of Hearing:	26 August 2010
Date of Judgment:	23 September 2010
Counsel for the appellants:	In person
Instructed by:	In person
Counsel for the respondent:	Adv Naidu
Instructed by:	Director of Public Prosecutions, Durban