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G.P.-S.103675—1954-5—1,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

([redacted] Division).
([redacted] Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

MARCUS SHEV *Appellant,*

versus

MARIO SURIAN *Respondent.*

Appellant's Attorney Webber + Son
Prokureur vir Appellant

Respondent's Attorney J. M. Levy (Dbn)
Prokureur vir Respondent

Appellant's Advocate J. S. Haring
Advokaat vir Appellant

Respondent's Advocate
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op Tuesday, 23rd Sept, 1958.

(DCL)

1.4.6.9.10 (A)

7.45 – 12.30 } CHV
2.15 – 4.45 }

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION.)

Record

In the matter between:

MARCUS SHEV .....Appellant.

and

MARIO SURIAN .....Respondent.

Coram: Schreiner, A.C.J., De Beer, Malan, JJ.A., Hall et Price, A.JJ.A..

Heard: September 23rd, 1958. Delivered: September 30th, 1958.

J U D G M E N T.

HALL, A.J.A.:-

The appellant in this case sued the respondent in the Durban and Coast Local Division for the sum of £10,122-9-6 as damages for assault and that Court (Jansen, J.) gave absolution from the instance with costs. It is against this judgment that the present appeal is brought.

The appellant is the owner of a shop in Durban and he engaged the respondent, who is a builder, to take up the wooden floor in the shop and to replace it by a concrete one. After he had removed the flooring boards the respondent took them to his house and the appellant

disputed...../2

disputed his right to do so. It was afterwards agreed that the appellant should go to the respondent's house and take back the planks he required. On the morning of the 17th February, 1956, he went there in his motor car, taking a native boy named Mtembu with him. He took two planks, tied them to the car and carried them back to his shop. He went back to the respondent's house and took two more planks and the respondent's wife then objected. She telephoned the respondent and told the appellant that she had done so and that the respondent was coming immediately. As he did not come she sent her servant Miriam to fetch him. While the appellant was still talking to her outside the gate of respondent's house he received an injury to his head which rendered him unconscious. The respondent had just arrived on the scene in a jeep station wagon and this happened within an exceedingly short time after his arrival. The appellant's head was bleeding and, with his wife's help, the respondent put him into the station wagon and took him to the Addington Hospital. The respondent stayed in the Hospital for about three hours until he was told by Mrs.Shev that he should go home.

In his...../3

In his declaration the appellant averred that the respondent had assaulted him by hitting him on the head with some instrument, causing him to fall down and had then struck him repeatedly in the face with his fist and kidked him in the back. The respondent denied these allegations and raised the defence that the appellant had fallen and that his injuries were due to his fall.

The appellant said in evidence that he was still talking to the respondent's wife outside the house when he felt a blow on the back of his head and he lost consciousness. He said that he did not slip or fall. He recovered consciousness in hospital. He had a cut on the head, a bruise surrounding the right eye and bruises on his body. He did not see the respondent arrive or at the time when he received the injury.

The only other person who was called by the appellant to testify as to what occurred when the respondent arrived at his house was his native employee, Mtembu, who had accompanied him in his car to the respondent's house. Mtembu said that the latter got out of his car, went straight to the appellant, carrying a small black instrument in his

hand...../4

hand and struck him with it on the back of the head. Whilst the appellant was falling, he struck him with his left fist in the eye. The appellant fell to the ground on his right side and the respondent then kicked him. The respondent then tried to lift the appellant but his head hung down and blood from the wound at the back of his head was running down the road. He ran to the appellant's shop which was about 500 yards away to tell another native what had happened and, when he returned to the scene of the assault, the appellant had been taken away.

The respondent was charged before a magistrate with assaulting the appellant and the case was heard on the 17th April, 1956. Both Mtembu and the respondent gave evidence and the latter was found guilty and fined £20. The record of these proceedings formed an exhibit in the case in the Court a quo and, as that Court attached considerable weight to the evidence which was given, it will be referred to again later.

The respondent stated that, when he arrived at his house, the appellant was talking to his wife. When he came near to the appellant, the latter stepped backwards

wards from...../5

from the pavement and fell in the street amongst some stones which were lying there. He attributed the appellant's fall to a piece of timber in his hand and stones lying on the ground. He fell right on his back. He denied that he hit the appellant on the head and that he had had anything in his hand. He picked the appellant up and found that the back of his head was bleeding. He got some water and poured it over his face and then raised him to a standing position. With his wife's assistance he then helped him into his, respondent's, car. His wife wiped the appellant's face and the back of his head and gave him some water to drink and he took him to the hospital. He stayed in the hospital for about three hours. The doctor asked him whether he would take the appellant home, but his wife arrived and told him to go, so he left.

The respondent's wife gave similar evidence regarding the appellant's fall. She said that the appellant and she herself were in the yard but went out of the gate onto the pavement when they heard the respondent's car approaching. When the appellant saw the respondent he stepped backwards, slipped off the kerb and fell on his back amongst some stones lying in the street.

She denied...../6

She denied that the respondent struck or attacked the appellant in any way. Anna Gigleo, the respondent's mother-in-law, said that she returned from the market in her son's car and went to the respondent's place of business. The respondent took over the car, the servant girl Miriam got into it and he drove them to his house. The appellant was outside the house and, when he saw the respondent, he stepped backwards and fell. She denied that the respondent hit the appellant or assaulted him in any manner. The native girl, Miriam, who had left the respondent's employ about a year previous to the hearing of the case, said that, when she arrived at the respondent's house, the appellant and her 'Missis' were standing at the gate. The respondent went towards the appellant and the latter stepped backwards and fell on the ground amongst some stones onto his back. She said that the respondent did not hit him.

The learned Judge in the Court a quo said that it must be accepted that Mtembu and the defendant's three witnesses were present when the appellant was injured and the result was that two mutually destructive stories had

been told...../7

been told. As the onus was on the appellant, the Court could only find in his favour if it was satisfied that, on the balance of probabilities, Mtembu's version was true and that of respondent and his three witnesses was false.

With regards to Mtembu's evidence, the learned Judge stated that in giving his evidence, which was interpreted from Zulu, his manner was impressive and he appeared to be frank, unhesitating and certain. Despite this there were factors which reflected unfavourably upon his evidence. He then proceeded to point out that there were very serious conflicts between the evidence which Mtembu had given in that Court and that which he gave at the hearing of the assault charge in the magistrate's court. When his evidence in the latter Court was put to him he denied that he had ever made the conflicting statements with the same certainty and lack of hesitation which he had previously displayed in giving his evidence. The learned Judge said that this detracted from the good impression which he had made and went to show that his certainty and lack of hesitation did not guarantee the truth of his testimony. Again, he was just as certain that Miriam had not arrived on the scene

with the...../8

with the respondent in the jeep when it was clear that she had.

Regarding the evidence of the defendant, his wife and his mother-in-law, the learned Judge said that, perhaps because it was given in Italian and interpreted, nothing significant appeared from their demeanour and no adverse inference was to be drawn from the way in which they gave evidence. He went on to find that it was improbable that the respondent and his witnesses conspired to suppress the truth and to substitute for it a lie, and that it could not be excluded, as a reasonable probability that "Mtembu did not fully observe the events at the crucial moment and that he may unconsciously be drawing upon his imagination". His conclusion was that, on the evidence before the Court, the probabilities that no assault such as Mtembu alleges took place were very strong. In conclusion he stated that he was not satisfied that the appellant had shown, on a balance of probability, that Mtembu's story was true and that the respondent's story and that of his witnesses was false.

Mr.Henning, who appeared for the appellant, said that the learned Judge ought to have accepted Mtembu's

evidence...../9

evidence, that it was convincing and inherently true, and that he gave a straightforward and coherent account of the assault. The only grounds advanced for the criticism of it, he argued, were the variance between the evidence he gave in the Supreme Court and that which he gave in the magistrate's court. The learned Judge has pointed out the differences in Mtembu's evidence on the two occasions and there is therefore no need for me to set them out in detail. I am of opinion, however, that they are such important differences that the learned Judge was fully justified in expressing a doubt as to the correctness of his evidence. Nor is the statement correct that these differences and certain possibilities are the only grounds for criticism advanced by the Court, for the learned Judge drew an adverse conclusion from Mtembu's statement that Miriam was not present when the appellant was injured and the certainty with which he persisted in alleging a fact which was proved to be wrong. The learned Judge's finding that Mtembu must have drawn upon his imagination implies that he did not accept his story, and his reasons for not doing so do not appear to me to be without foundation.

The next point...../10

The next point raised by Mr.Henning is that the appellant corroborated Mtembu. This corroboration consists solely in the appellant's statement that he felt a "bang" at the back of his head and knew nothing more; he never slipped and he never fell, and that, in the finding by the Court a finding that the possibility that the appellant suffered from a degree of retrograde amnesia was not justified. A specialist neurologist, Dr.Cheetham, who had examined the respondent on quite a number of occasions, gave evidence on the appellant's behalf and, upon cross-examination, he was asked how the appellant could be expected to act in answering questions in the witness box. His reply contains the following statement:-

> " He might filliin gaps or give evidence which did not
> " exist in trying to remember; he might come across with
> " statements which he thought were true but which he was
> " desperately trying to make up or searching in the back
> " of his mind for, but which he was not quite certain of:
> " he might give evidence which was not altogether
> " accurate in terms of considered memory, not in any way
> " deliberately but 'because he was trying to help'...."

Whether, or not, the condition so described may rightly be called "a degree of retrograde amnesia", it appears to me that the learned Judge's statement to the

effect...../11

effect that it is doubtful whether the appellant's evidence can constitute corroboration of Mtembu's evidence to any appreciable degree is, in my opinion, supported by the evidence and justified.

Counsel's next contention was that the respondent was annoyed by the appellant's conduct in taking back the flooring boards and so had a motive to assault him and he was untruthful in denying it.

Both the appellant and the respondent stated that it had been agreed that the former could get the flooring boards back. The appellant stated that he was told that he would have to fetch them, while the appellant says that he offered to take back such of the planks as the former selected as sound. There does not appear to have been any annoyance once that arrangement had been made. When Mrs.Surian telephoned her husband and told him that some one was taking boards away, he did not, although he was only five hundred yards away, react as a man who was annoyed might have been expected to act and go straight to his home. He waited until Miriam came there and then only did he take the jeep and go to his house. When he got there

he found...../12.

he found the appellant and his wife in conversation and it does not appear that anything was taking place which would be likely to arouse his anger and provoke him to launch an vicious attack upon the appellant. There does not appear to me to be any justification for the allegation that the respondent was untruthful in denying that he was annoyed.

The next argument which Mr.Henning put forward was that the suggestion that the respondent fell over backwards and struck the back of his head on the ground was most improbable and that the account given by the witnesses for the defence as to how it happened was incredible. In support of this argument, counsel pointed out a number of minor differences in the evidence of the four people who testified as to how the appellant fell. It is clear that the same argument was advanced in the Court a quo and that it received careful consideration from the learned Judge. After taking into account these differences, he found that the pavement on which the appellant was standing was a narrow one, that it had a kerb and that there were stones of some size in the street adjoining the pavement. He found, moreover, that it was by no means improbable that the appellant stepped backwards, as all these witnesses said that he did, and that the kerb and the stones may well

have...../13

have contributed to his fall. The whole matter must have occurred in a very small space of time and the recollection of details of matters which happens very quickly must necessarily vary according to the perceptive powers of the individuals who witness them. It appears to me that there was nothing inherently improbable in the story which the respondent and his witnesses told, and that there is no substance in the contention that that story is incredible.

There were several other matters to which Mr. Henning attached importance as being quite inconsistent with the story told by the defence witnesses. The one which I will deal with first is his argument that the fact that the appellant's face was bruised was, in itself, corroboration of Mtembu's story. Mrs. Shev said that, when she went to the hospital to see her husband, there seemed to be a very slight swelling on the right side of his face and later there was a slight bruise there. Mtembu's story was of a twofold nature for, in the Magistrate's court, he said that the respondent hit the appellant in the face when the latter was lying on the ground, while in the Court a quo he said that, while

the appellant...../14

the appellant was in the act of falling as a result of the respondent's having struck him a blow on the back of the head, the respondent struck him in the face. This story on the face of it is, by reason of its being inherently inconsistent, is quite unacceptable, and, as the learned Judge remarks, the possibility that a minor injury could have been sustained in the course of the appellant's fall cannot be excluded. I agree with this conclusion.

Counsel next sought to find corroboration for Mtembu's evidence in the fact that he ran from the place where his master had been hurt to go and tell another native what he had witnessed. Mtembu said that he did not go to his master's assiatance because he was afraid and he thought that the respondent would kill him. When he gave evidence in the magistrate's court, he said that he got out of the car and went to the complainant. He said, too, that the respondent and his wife carried the appellant to the respondent's car and that it was after this had occurred that he ran to report the matter to another of the appellant's employees. His explanation in the Court a quo was that he ran to tell someone else because he had got such a shock, presumably, by reason of the fact that he thought

his master...../15

his master was dead. To me it appears that Mtembu's conduct is ~~no more~~ hardly an indication of his having seen that his master had been injured by a blow than it is that he had been injured by a fall, and that ^ affords no corroboration of his evidence.

The next matter from which appellant's counsel sought to infer that the respondent assaulted the appellant is the fact that ~~he~~ remained in the hospital for about three hours after he had taken the appellant there. His explanation was that he thought it his duty to stand by and, if it was necessary, to take ~~him~~ the appellant home. He remained sitting next to the appellant and talking to him. He said that he stayed until Mrs.Shev came and that she was objectionable to him and told him to go home. He left the hospital feeling annoyed and disgusted, seeing that he had helped her husband in the way he had done. Mrs.Henning seeks to deduce from the mere fact that the respondent remained in the hospital that he acted as only a guilty man would. If he was guilty of assaulting the appellant, it could ^ hardly be expected ^ that he should have waited until the latter had ^ recovered consciousness and, by doing so, have

laid himself...../16

laid himself open to the reproaches which he could well expect the appellant to heap upon his head. In my opinion the reason which the respondent gave for staying with the appellant does not appear to be unacceptable and that a deduction of guilt from the fact that he did so is not justified.

Another contention put forward by counsel is that the guilt of the respondent may be inferred from the fact that he and his witnesses were untruthful regarding the quantity of blood from the appellant's head which was left at the spot where he fell. This is, apparently, based entirely upon the evidence of Mtembu who said that, while the appellant was on the ground, the blood from the back of his head was running along the road. There is no corroboration of this statement and the defence witnesses all stated that there was not much blood on the ground. It seems to me that the stream of blood running down the street may well be another figment of Mtembu's imagination and that it is quite possible that the much smaller quantity described by the defence witnesses is more correct.

Appellant's counsel took this matter somewhat

further...../17

further. Mrs. Giglio admitted that she had washed the blood in the street away and this, counsel argued, was done with the intention of destroying evidence. Mrs.Surian said that her mother-in-law had done this because she knew that in her, Mrs.Surian's, delicate state of health, the sight of blood was distressing to her. Mrs.Giglio gave as her reason for doing it that she was afraid that children in the street might dirty themselves in it. I agree that these explanations, and more especially that given by Mrs. Giglio, are unconvincing. It is common cause that the appellant suffered an injury on the back of his head and that there was blood from that injury at the spot where he had fallen in the street. I cannot see that the fact that there was blood in the street could be evidence that the wound from which the blood had come was caused through a blow and not through a fall. In any case, while this action may be somewhat suspicious it does not appear to me to be necessarily due to a sense of guilt and, for this reason, counsel's contention that the removal of the blood was done with the object of destroying evidence does not seem to me to have any substance.

The last of counsel's contentions with which it is necessary to deal is that the respondent's explanations of

his conduct when he was prosecuted in the magistrate's court were unconvincing and suggested that he was not innocent. As I have stated previously, the record of those proceedings forms part of the records in this appeal. From it appears that the respondent had mistaken the date of the hearing, a warrant had been issued for his arrest and he was fined for dontempt of court. When the case came up for trial he appeared in person. He gave evidence on his own behalf and called no witnesses. According to the record his evidence was given and recorded in English. The respondent is an Italian who has been in South Africa for about five years. He appeared in person in this Court and filed a written argument, but the Acting Chief Justice had occasion to ask him a number of questions. It was difficult to understand his replies and it was apparent that his knowledge of English was limited.

When he was asked in cross-examination why he acted as he did he said that he had had no previous experience of a criminal court, he knew that he was not guilty and he thought that he had merely to come to Court and give an explanation. He did not consult a lawyer and he did nothing more about the

matter...../19

matter/ after he had been fined because he did not know what to do. When asked why he did not bring his witnesses with him he gave some stupid replies. He took Miriam to the court, but she got lost in the precincts of the court and he was unable to find her when he wanted to call her.

The account which the respondent gave of what happened at the magistrate's court seems to me to be consistent with his being of an ignorant and bewildered man who found himself in a position of which he had no previous experience. He may have regarded himself as innocent and, in his ignorance, thought that his explanation would be accepted. The fact that he understood and spoke English badly might have added to the donfusion of his mind. He may have acted stupidly in failing to get legal assistance, but I feel that to seek to infer his guilt from conduct of this kind is not justified.

I have already stated that the learned Judge concluded his judgment by saying that he was not satisfied that Mtembu's story was true and that of the respondent and his witnesses was false. I am of opinion that the appellant has not succeeded in showing that that finding is wrong and the appeal is consequently dismissed with costs.

O.D. Hall

SCHREINER, A.C.J., concur.
DE BEER, J.A.,

29.9.1958

IN THE SUPREME COURT OF SOUTH AFRICA.

Record,

(APPELLATE DIVISION)

In the matter between :

MARCUS SHEV — Appellant

&

MARIO SURIAN — Respondent

CORAM : Schreiner A.C.J., de Beer, Malan JJ.A., Hall et Price A.JJ.A.

Heard : 23/9/58 Delivered : 30.9.58

J U D G M E N T

MALAN, J.A. :- This dispute comes before us on appeal from a decision of Jansen J., in the Durban and Coast Local Division. The appellant, the plaintiff in the Court below, instituted action against the respondent for damages which, he alleges, he sustained as a result of an aggravated assault upon him by the respondent. After evidence had been heard the learned Judge granted absolution from the instance with costs.

It is common cause that on the 17th of February, 1956, the appellant received injuries outside the premises of the respondent at Stamford Hill Road, Durban, but there is an irreconcilable conflict in the evidence for the respective

parties as to the manner in which the injuries were caused. The case for the appellant was that the respondent deliberately and wilfully struck him on the back of the head with some instrument, not positively identified, as a result whereof he fell, whereas the respondent attributes the injuries to an accidental fall which resulted in the back of the appellant's head striking either the surface of the road or concrete stones or broken bricks lying thereon.

The circumstances which led up to the presence of the appellant at the respondent's premises are that the appellant had engaged the respondent to remove a wooden floor of a shop belonging to the former and to lay a cement floor in place thereof. The boards forming the floor were dislodged by the respondent and removed by him to his premises and a dispute arose whether he was entitled to do so. It appears that the respondent conceded the appellant's claim to the boards but did not consent to their removal. On the morning of the day in question the latter proceeded to the respondent's premises on two occasions for the purpose of removing some of them. On the first occasion he removed two boards but, when he returned on the secons occasion for the same purpose, he was requested by the respondent's wife not to do so and when he did not desist she

telephoned to the respondent and thereafter sent the witness Miriam, a native girl in the respondent's employ, to call him at his place of work which was about 500 yards distant. He arrived in a jeep accompanied by his mother-in-law, Anna Giglio, and Miriam.

Up to this stage there is no substantial conflict in the evidence but what occurred immediately thereafter is, in almost all essentials, strenuously contested and the subject of diametrically opposed versions.

In the course of dissecting the respective versions and testing the credibility of the witnesses it will be necessary to refer to the evidence in criminal proceedings in the Magistrate's Court, Durban, in which the respondent was charged with assault and sentenced to pay a fine of £20 or, in the alternative, to undergo imprisonment with compulsory labour for 20 days.

It will be convenient to deal with the respective versions of the incidents which occurred immediately prior to, and directly connected with, the alleged assault. The appellant's evidence is to the effect that after he had removed two planks from the respondent's premises he returned for two more but as he and his servant, Mtembu, were in the act of taking the boards out of the yard they were stopped by the

respondent's wife who telephoned to the respondent. In spite of her objection they nevertheless took two more boards, wrapped sacking round them, placed them in position on the car apparently in readiness to depart, with Mtembu sitting in the car holding the boards. The appellant was under the impression that the respondent's wife was attempting to detain him until the arrival of her husband by holding him in conversation. He had, however, agreed to wait and was still talking to her when he "felt a bang" at the back of his head. He lost consciousness and only recovered consciousness in hospital.

He is corroborated by Mtembu who stated that on the second visit to the respondent's premises the appellant and he removed two boards from the yard, wrapped them in sacking and tied them to the handles on the outside of the car. He got into the back of the car and held the boards by the sacking. He confirms the appellant's conversation with the respondent's wife and proceeds to state that as they were in conversation the respondent arrived. Immediately upon his arrival the respondent went straight up to the appellant and he struck him on the back of the head with "a small black instrument" which he had in his hand but which he (Mtembu) was unable to identify

with precision. The appellant gave no indication that he was aware of the arrival or approach of the respondent until the blow was struck. Upon receiving the blow he staggered and as he was in the act of falling the respondent struck him "in the eyes" with his left fist and kicked him on the left side after he had fallen.

The respondent himself gave evidence and called three witnesses to support him, viz., his wife, his mother-in-law, and his native servant, Miriam.

The respondent, after preliminary evidence concerning his dealings and dispute with the appellant, states that on the day in question he received a telephone call from his wife requesting him to proceed to his home but as he did not do so Miriam came to call him and he proceeded home in his jeep accompanied by his mother-in-law and Miriam. On arrival he saw the appellant speaking to his wife. As he was approaching the appellant the latter, who was at that time facing him, "started to move back. I told "him to stop as I wanted to have the pleasure of speaking "to them. Before speaking to him I first of all wanted "to speak to my wife. I had not a chance to speak to my "wife because the accident took place first and he fell on "the floor."

For the proper application of the discrepancies it will be desirable to quote verbatim certain portions of the evidence of the respondent and his witnesses.

The following is an extract from the respondent's evidence :-

" What caused him to fall ?..... A piece of timber on his right side.

But what caused him to fall ?..... I attribute his fall to the stones and a piece of timber that was lying on the ground. (The witness corrected himself saying the timber was not on the floor but was in the plaintiff's hand).

Could you say what caused his fall ?..... In stepping back he must have tripped over the stones that caused him to fall.

Is there an electric light standard on the pavement ?..... Yes.

And is there an anchor which goes into the ground there ?..... Yes.

Is the anchor in the street or on the pavement ? .....It is on the pavement.

When he fell was he anywhere near this anchor ?.... Yes, he was very near to it. "

The respondent's wife states that on the second occasion she attempted to prevent the appellant from removing the boards but he insisted on doing so, that she thereupon telephoned her husband, returned to the appellant and again warned him that he had no right to enter the yard and

that he should stop. She continues :-

" Mr. Shev spoke to me in an excited way, gesticulating and as I was in the family way I was annoyed and frightened. The reason why I sent the native girl to fetch my husband was because I was frightened of the plaintiff who would not stop removing the timber and started to speak to me in an excited way.

What did you do with the native ?..... I sent the native girl to my husband, to bring my husband at once. "

~~The respondent is wife~~

While the native girl was on her way she and the appellant stood outside in the yard until her husband's car arrived. She drew the appellant's attention to his arrival to which he replied : "Yes, I hear it." She continues :

"Mr. Shev and I went to the gate and when he came outside "the gate on the pavement my husband arrived in the car. "When Mr. Shev saw my husband alight from the car he stepped "back and that was the time when he fell in the street.

" How did he fall ?.... He fell on his back.

" Where did he fall, in the street or on the pavement ?...

" In the street. He slipped from the curb. "

Counsel was apparently not satisfied with her evidence as to what caused the fall because at the end of the examination-in-chief he returned to this point and introduced

the electric standard which she stated "was supported by two "supports and they are anchored in the pavement."

According to her the appellant was standing very near to the anchor and she estimated the distance at one or two feet.

In cross-examination she amplified her evidence considerably and stated that as they were coming through the gate the appellant was carrying a piece of timber which she described as "more or less square" but, in reply to a leading question from the learned Judge, agreed that it was about the same length as a table in Court which was estimated to be eight feet. She said that he picked up the piece of timber when the engine of the car was heard but she was not sure, although he was not holding it when they were talking in the yard.

She stated further that he was carrying this piece of wood until he fell and she believed that it fell on the pavement. The further cross-examination is recorded as follows :-

" Did he fall as he was stepping off the pavement into the street or not ?..... As soon as he saw my husband he slipped from the pavement and fell into the street.

It was as he was leaving the pavement to get on to the street that he fell ?..... Yes.

So he was going forward ?.... No, he walked backwards and fell.

Was he going backwards ?.... He stepped backwards.

Did he step backwards on the pavement ?... Yes, and stepping backwards he fell.

" Was he then on the pavement ?.....He was in the street and he fell from the pavement into the street.

How, if he was stepping from the pavement into the street, was he going backwards ?..... When he saw my husband he retreated.

He stepped backwards into the street..... Yes. "

And again :

" Had your husband got out of the car yet ?.....At the same moment that we passed through the gate my husband jumped from the car. Mr. Shev saw my husband jumping down from the car and he stepped back and fell.

You described on Friday that he had his back to the road when he fell off the pavement ?.... Yes.

Is that correct ?..... Yes, he was standing with his back to the road. "

Finally she was questioned by the learned Judge which is recorded as follows :-

" When Mr. Shev came out of the gate did he still have the plank in his hand ?..... Yes.

The plank was about eight feet in length ?.... It was the size of the table here.

Where did he hold the plank ?.... He held it in the right hand.

What part of the plank did he actually hold ?.... In the middle.

At what stage did the plank fall on the ground ? .....He leaned the plank against the wall holding it with his right hand.

And then ?..... After he saw my husband he stepped back and the plank fell to the ground.

" Was that in front of him ?..... When he fell the plank was half on the pavement and half in the road."

Anna Giglio, the respondent's mother-in-law stated that on her arrival she saw the appellant talking to her daughter on the pavement near the gate. The examination-in-chief continues :-

" Where were Mr. Shev and your daughter ?.....
On the pavement near the gate.

What did you exactly see after that ?.... As soon as Mr. Shev observed my son, the defendant, he just fell over.

Where did he fall?..... He fell from the pavement on to the road. "

During cross-examination when she was asked to explain what caused the appellant to fall she said that "there were "a lot of stones behind him and that was one of the reasons." At a later stage, however, she repeatedly said that she could give no explanation why he should have fallen and in reply to repeated questioning on the same point replied variously : "As soon as he saw us he stepped back and fell." "It happened "so suddenly. He (i.e. the respondent) did not say anything. "As soon as we arrived he fell. I was surprised..... I "have never seen anything like it in my life."

The last witness called on this point was Miriam. She

stated that on the arrival of the respondent and as the latter approached, the appellant was standing next to a telegraph pole facing the former. He then stepped back on to the road and continued going back after stepping off the pavement. She continued

" So he was going backward when he got on to the road ?..... Yes, he still went further back and all of a sudden he went over backwards and struck his head on the ground ?...Yes.

Did he not try and stop himself from falling backwards on his head ?..... I just saw him falling straight backwards.

Did you not see if he made any attempt to stop himself from falling backwards?..... I did not see him make any attempt. "

She attributed his fall to the stones or small pieces of broken brick on the raod. She is definite that he did not fall as he stepped off the pavement but that he stepped off, stood for a while and then fell. Further she did not see him carrying a board.

This evidence for the respondent was thus designed to show that the appellant had stepped back and that in stepping he had stumbled on the stones or had tripped over the wire connecting the electricity standard with the anchor or the board interfered with his backward movement and he thus lost his balance and fell backward.

The learned Judge relying upon the evidence of the

respondent's witnesses came to the conclusion that while standing talking to the respondent's wife "he may very well, in "turning away from her, have stepped back, or suddenly becoming "aware of the approach of the defendant, was startled because "he had not noticed the defendant sooner as a result of being "deaf, and then have stepped back. "

This proposition is in conflict with the evidence of the very witnesses upon whom the learned Judge relies. So far from any witness suggesting that the appellant might have turned away the evidence for the respondent is in complete accord that as the respondent arrived the appellant stood facing him. The view, that he may not have been aware of the respondent's arriva is in direct conflict with that of his wife who stated that she heard the respondent arrive, directed the appellant's attentio thereto and that they thereupon left the road and ~~they~~ went on to the pavement obviously with the object of meeting him. I venture to suggest that there is no solid foundation for the learned Judge's assumption and that the balance of probabilities appears to be against such view. On the respondent's evidence the appellant stood facing the respondent as he arrived. In such a position he would have not his back but his side towards the road on which he fell. As on their evidence the

respondent's manner of approach gave no indication of any aggressive intention, it is difficult to understand why he should have stepped back at all. The respondent's arrival was expected and the appellant was, in actual fact waiting for him. If he had feared the respondent he would not have waited and, indeed, if the wife's evidence is accepted he became aware of the approach of the car and went through the gate to meet him.

The learned Judge then proceeds to deal with the cause of the fall and accepted as his major premise the probability that he stepped back, proceeds "that it is not at all difficult "to find that he could have fallen in the circumstances. The "kerb, the stones, the stay are all factors creating a risk of "falling." The learned Judge appears to have had regard only to the existence of those obstructions and has unfortunately not dealt with the extent to which one or more of those obstructions may in actual fact have been instrumental in causing the appellant to fall.

Although the learned Judge only casually alludes to the carrying of the board and/thus must be presumed not to have regarded it as a probable cause of the fall, I nevertheless propose dealing with the point not only in order to eliminate such a contingency but also to show that the point reflects adversely upon the veracity of

respondent and his wife and I shall dispose of it forthwith.

The suggestion that he was carrying a board is, in my opinion, in the highest degree improbable. There was no cross-examination of the appellant or Mtembu on it. Moreover, at the time when the appellant fell the boards which they intended to remove had been tied to the car in readiness for their departure and Mtembu was sitting in the car waiting. Why should the appellant at that stage be carrying a board at all ? The evidence of the respondent's wife that he had picked it up after he had been made aware of the approach of the respondent's car and before they left the road is most improbable. An additional criticism is that she did not mention ~~it~~ in her evidence-in-chief that the appellant was carrying a board. She made the statement during cross-examination after the weekend adjournment of the Court. If true, both the mother-inlaw and Miriam would have seen it. The latter says definitely that she did not see it and the former does not suggest that she did.

We are thus left with the evidence of the respondent and a reference to an extract of his evidence quoted above ~~appears~~ that he in the first instance attributed the fall to the piece of timber on his right side then to the stones and

"a piece of timber lying on the ground" which he immediately corrected by saying that the timber was not on the floor but in the plaintiff's hand. It must have been evident that his counsel was not satisfied with his reply and ~~repeated~~ the same question was repeated whereupon he reverted to his first answer that the appellant must have been tripped by the stones.

The introduction of the board was no doubt done with the additional object of bringing his evidence into line with his evidence at the criminal proceedings where he stated that he saw the appellant come out of his gate with a piece of wood and that coming down from the pavement, he fell, a statement which is, moreover, not entirely in harmony with his evidence in the present case.

An attempt by the respondent's counsel to establish that the fall had been caused by the stay holding the electricity pole proved equally abortive. By putting leading questions to the respondent he was able to extract from him that there was an electricity pole which is held in position by an anchor. The result of considerable questioning was barren and the desired answer that the stay had caused the fall proved as elusive as ever. The evidence of the other two witnesses is equally unsatisfactory on this point.

The nearest approximation to a definite foundation

upon which to build this vital aspect of the case was the presence of small concrete stones or broken bricks.

It should be observed that all the witnesses for the respondent were in a most favourable position to see exactly what occurred. They were within a few feet of the scene and were obviously aware that trouble might be expected between the appellant and the respondent because, if the respondent's wife is truthful as to what moved her to summon her husband, she must have conveyed her anxiety to him. It is, therefore, certain that they would have concentrated earnestly on the anticipated developments and their attention thus firmly and anxiously directed to every movement. In spite thereof, their evidence is not only vague and unsatisfactory but serious inconsistencies are found on most of the material points and their evidence, describing the stepping backward and the stumbling over the stones, brings one no nearer to a satisfactory solution of the problem.

On one point, however, they are unanimous and that is the suddenness of the fall. It is, in my opinion, ~~and it is~~ this very piece of evidence which corroborates the story of the appellant and Mtembu because it goes to show that unconsciousness supervened before the back of the respond-

ent's head had struck the road. In circumstances as described by them the natural law of self-preservation would instinctively have dictated instantaneous action to protect the more sensitive and vulnerable parts of the body and thus either to avert the impending danger or at least to counter-act the severity of the threatened injury. It is significant that the evidence of the respondent's witnesses is silent as to any movement of the arms or legs or any form of attempt made by the appellant to recover his lost balance or to protect himself against almost certain injury. Although Miriam mentions that he stepped backwards a few paces the fall as described by them is more consistent with the view that he fell as though stunned by a blow than as a result of loss of balance. There is a further significant feature to be found in the injury to the appellant's eye. The injury excludes all reasonable probability that it could have been caused in an accidantal fall as described by the respondent's witnesses. The suggestion to Dr. Armstrong that the infliction of the injury found at the back of the appellant's head could have caused the injury to the eye was dismissed by him in polite but unmistakable language. Indeed, without any special knowledge of anatomy, application of ordinary, common-sense knowledge of the human head leads unhesitatingly to the same conclusion.

The injury was confined to a laceration of the scalp and there is no suggestion of any fracture of the skull of of any other injury which could have transmitted shock to the eye. The only reasonable explanation of the injury is, therefore, to be found in the evidence of Ltembu, the rejection of whose evidence will be discussed at a later stage.

There are other serious criticisms which may with justification be levelled at the evidence of the respondent's witnesses and, in doing so, I am making every allowance for the possibility of honest and excusable error, especially in view of the time which elapsed between the happening of events and the trial in the Supreme Court. I pass over ~~their~~ the discrepancies in their evidence describing what occurred immediately after the appellant had fallen because there must obviously have been considerable excitement on either version and their observations thus rendered ~~in~~less accurate. There can, however, be no romm for the suggestion that this portion of their evidence affords ground for preferring their evidence on contraversial points.

I shall deal with the respondent's evidence first and in the ~~fore~~front ~~part~~ thereof I wish to deal with ~~his~~ statements made by him and ~~but~~ with his conduct immediately after the occurrence.

On the respondent's evidence he removed the appellant to hospital, arriving there before 12 o'clock midday and did not leave until three o'clock. He was only fifteen minutes' drive from his home and yet he remained in constant attendance there and presumably was prepared to forego his midday meal. He left only after the appellant's wife had peremptorily ~~advised~~ told him to leave. His statement that he stayed there because the appellant had nobody to stay with him is, in my opinion, a palpable and deliberate untruth. It is idle to suggest that he would have been allowed to stay with the appellant while x-ray photographs were taken or his wounds dressed. If any such thought had ~~actuated~~ moved him in remaining why did he not inform the appellant's wife of the injury by telephone ? He, his wife and his mother-in-law all knew where she was to be found and yet they took no steps to inform her. His explanation of this failure is that he was certain that other people would inform her. He could hardly have been under the impression for three hours and his excuse is unacceptable. This fact reflects not only seriously upon the veracity and honesty of the respondent but affords strong support for the contention that the fall was not accidental. It is difficult to reconcile such conduct with his professed innocence.

It is suggested, however, that, overwhelmed by shock and sympathy for an unfortunate who had through misadventure

sustained serious injury, he had in true Christian spirit - that highly commendable and noble virtue unfortunately so rarely encountered in these materalistic days - self-lessly devoted himself to alleviating his distress by sitting at his bedside and talking to him. There is however also the less charitable but the more realistic and probable interpretation of his conduct, namely, that his professed compassion towards his antagonist had its roots in fear of the consequences of his own act and not in any nobility of spirit.

The next instance, which also shakes one's faith in the respondent, is his evidence in regard to the calling of Miriam as a witness in the criminal proceedings. He states that he had her available as a witness while evidence was being led. It is not by any means improbable that Miriam was not present at the Magistrate's Court at all but on the assumption that she was there, we find the magistrate and the appellant in direct conflict as to what occurred in Court. The respondent states that he went out of court to look for Miriam and upon his return told the magistrate that he had no witnesses. The matter was pursued and the further questioning recorded as follows :-

" Did the magistrate let you go out of Court while the Court was sitting to see if the girl was outside ? ..... Yes.

And did he not tell you you could wait and see if the girl could be found ?..... No.

You are sure of that ?.... I am positive.

It is strange that the magistrate made no note of the fact that you had a witness, are you sure that you told him ?..... The magistrate asked me had I some witnesses and I said I would like to go and see if there was one outside. "

The Magistrate's version is as follows :-

" Is there any note on your record with regard to defence witnesses - at the end of the accused's evidence as recorded ?..... Yes, "Accused said 'There are no witnesses'".

What does that mean ?..... That he has been asked if he had any witnesses to call and he says he did not have any witnesses.

If he told you he had a witness outside would you have allowed him to call that witness ?..... Yes, definitely.

And if he went outside and said the witness was not there would you have recorded that fact ?..... Most probably I would have given him the opportunity for an adjournment to call that witness. It is clearly explained to an accused when he is not represented that he has a right to call witnesses and if they are not available at Court he could have an adjournment to have them called.

The defendant has suggested that after he gave his evidence he said he had a witness who was outside. He was allowed to go out and find the witness but could

" not find the witness. He came back and informed the Court accordingly. Would you say it is highly improbable that you would have made such a record of that fact ?..... I would have recorded it and at the same time explained to him if his witnesses are not here he could get the opportunity of calling any witness by means of a subpoena.

I suggest it is highly improbable that if it happened, as he says it happened, that he had no witnesses to call ?..... Yes.

RE-EXAMINATION BY MR. PRETORIUS : Has it ever occurred in your experience when an accused has said he has no witnesses and it transpires that there were witnesses ?..... We have had cases where accused has said he had no witnesses and later applied to the Supreme Court to call witnesses. As he said he did not know he could call them I made a special point of telling him that he had the right to call witnesses and he would be given an opportunity to call them to give evidence. "

It is impossible to come to any other conclusion ~~except~~ Kan that the appellant was deliberately untruthful on this point.

In addition his conduct in regard to and his attitude towards, the criminal proceedings is very strange and he is in conflict with his own witnesses on several material aspects.

He states that he did not take Miriam to Court but allowed her to find her own way there which is most

improbable. She states that she was taken there by the respondent and that she waited outside the Court while the proceedings were in progress. He states that he was unable to find her because she was in the basement of the Court, when she was required, however, he states that he did not see Miriam at Court that day before the conclusion of the proceedings, from which it follows his only source of information as to her whereabouts must have been Miriam herself, who not only states that she was outside the Court but also that she did not know why she was not called. If the reason for not calling her was the respondent's inability to find her, she would obviously have been questioned by him and would thus have ascertained why she was not called.

The whole attitude of the respondent towards the criminal proceedings is inexplicable if his evidence is true. If the fall were accidental he had ready at hand three witnesses to refute the charge but he failed to call. The absurdity of the respondent's explanation of his omission to do so appears from the following extract of his evidence :-

" You know it is important if you are blamed about something and you have a witness who can say you had nothing to do with it ?..... I know. I was satisfied I had witnesses who could prove I was innocent.

But you did not take any of these witnesses with you to Court ?..... I did hot bring them myself but I asked them to come.

" The one witness was your wife, the other was your mother-in-law and the other was the native girl working for you, why could you not bring them to Court ?..... (No reply).

You say you asked them to come to Court ?.... Yes.

And your wife and your mother-in-law say you never asked them, how can you explain that ?..... I did not ask them because they were not witnesses.

Were they not there when this happened ?... Yes, they were present.

If so were they not witnesses ?.... They were witnesses. At the Court case there were witnesses whom I wanted to come but they did not come.

Who were they ?..... The other native woman. "

The introduction of "the other native woman" is the high-water mark of the facility with which he indulged ~~xx is~~ pure invention on the spur of the moment in an attempt to extricate himself when caught at a palpable untruth. I have correlated his evidence on this point and have studied it with meticulous care and I am satisfied beyond the show of a shadow that no such person existed. There are other passages to the same effect but the following extract from the record sets the matter entirely at rest :-

" Why did you not call your mother-in-law as a witness ?..... Because I had other witnesses.

Who are these other witnesses whom you had in mind in the criminal case ?... A native girl.

What happened to her ?.... After she left my house I could not find her anymore.

" Did she work for you ?..... She worked for a person who stayed with me at the time.

What did she know of the incident in which the plaintiff was injured ?..... She knew everything what happened.

Why has the Court not heard of thie witness before ?.....Because I could not find her. "

It has been suggested that the other native woman was Miriam, I unhesitatingly reject any such explanation. The native woman who left his house and whom he could not find later was not Miriam because the latter had been continuously in his employment and was certainly not missing at any stage. There is, moreover, not the slightest suggestion that Miriam had ever worked for a person who stayed with him at the time.

No feasible explanation has been given by the respondent why he did not call witnesses at the criminal trial.

A further proof of the unreliability of the respondent is to be found in the answer given by Mtembu in reply to a question put to him by the respondent at the criminal trial which is recorded as follows :- "I deny that when you arrived complainant was already on the ground injured. "

Instances of unsatisfactory features in the respondent's evidence may be multiplied. There is, for example, his disingenuous skirmishing when asked whether a policeman called on him and his ultimate tardy admission thereof, crowned by the

statement he could not remember what the policeman had said. His evidence as to the quantity of blood on the ground lacked candour. I have read through his evidence with scruplous care and the impression which it made upon me was that it was characterised right through by an atmosphere of evasiveness and lack of candour.

The material for testing the veracity of the other witnesses for the respondent is not as abundant as in his case but if the cedar falls, the pines cannot survive.

I shall deal firstly with his wife's evidence. I have already referred to the improbability of her evidence that the appellant left the road carrying a plank when they went out through the gate after having become aware of the respondent's arrival. Her statement that the appellant stepped back and fell when he saw the respondent alight from the cab is in conflict with the evidence of Miriam and respondent and her efforts to minimize the quantity of blood on the road renders her evidence suspect. It is also grossly improbable that if her evidence is true that he was carrying the board until he fell that he would have been walking backwards. The latter portion of her evidence seems designed to support the respondent's evidence on the point. Her description of the manner in which the fall occurred does not satisfactorily explain the cause of it and her introduction, during cross-examination of the board as one

of the causes of the fall lends colour to the suggestion that her evidence must be approached with circumspection.

~~Miriam's description of the manner the appellant is open to~~ the same criticisms as the evidence of the otherwitnesses and is ~~in essentials~~ in conflits with it.

The evidence of Anna Giglio, the mother-in-law, need only be read to be rejected. Her evidence on what led up to the fall as quoted above destroys itself. She was extremely agitated by the appellant's injury and even began to cry when he fell. Her conduct in washing off blood was significant and her explanation that she did so because "there were children playing around and they could have dirtied themselves" is positively ludicrous when it is borne in mind that she herself described the quantity on the road as "very little" and "It was only a drop."

It has been suggested that no purpose would have served by removing the blood because the tell-tale evidence of the wound remained. I am of opinion that this suggestion has little substance. If the question had been calmly and dispassionately reasoned out in the comfort and quiet of the proverbial arm-chair the ~~time~~ true value of removing the blood may have become apparent but it is not by any means improbable that persons in a lesser state of agitation may act in precisely the same way.

The respondent's wife stated that her mother removed the blood because she was pregnant and thought that the sight of blood might upset her. The suggestion is too ridiculous to merit serious consideration. If blood upset her she could have stayed away from the spot until all trace of the few drops had disappeared.

There is consequently no reasonable explanation of the mother-in-law's conduct and I venture to suggest that it will not be doing the mother-in-law an injustice to come to the conclusion that her manifestation of deep emotion and concern for the unfortunate was engendered by anxiety for her son-in-law by reason of the predicament in which he found himself.

There are other points in respect of which her evidence bears the impression of unreliability and untruthfulness.

Typical of some of her evidence is her profession of ignorance in regard to the criminal case and the visit of the police. When she was cross-examined as to the reason why she was ignorant of so important a matter directly affecting her son-in-law, she stated on two occasions that she was not interested in those matters and that she was only interested in the appellant's condition and health. A great deal of time was taken in an endeavour to obtain direct answers to questions and

the following are some of the answers given by her : "I only knew there was something in the Court but I did not know that he was convicted or not"..... "He told me that he went to Court because Mr. Shev came to his ~~road~~ yard"..... "Did you ever find out what happened to the case ? - No. I never asked about it"..... "I cannot remember. I was not interested."

In regard to her presence at the hearing in the Supreme Court she denied that the respondent had asked her to attend or that she knew that she would be called as a witness. When asked why she had been waiting for two or three days her reply was that "she was interested to hear the result of the case."

I am not prepared to attach the slightest importance to a witness of this description.

Miriam's evidence is open to the same general criticisms as the evidence of the other witnesses. She is, in addition, the only witness who testifies to the appellant stepping back some paces before falling. Her statement that he stood in the road before he fell is improbable.

This Court has unfortunately not had the benefit of the learned Judge's approach and reasoning on several points of outstanding importance which I have hereinbefore discussed. This may be due to the fact that an interval of

six months elapsed between the conclusion of the trial and the delivery of judgment and it is not improbable that the various points may not have been as fresh and prominently present to the mind of the learned Judge when he prepared his reasons, a circumstance which may very easily have misled him. On the facts set out above ~~As at present advised~~ I can see no convincing answer to ~~them~~ the criticisms mentioned and I am clearly of the opinion, firstly, that the stay and plank should definitely be eliminated as the sole or even contributory cause of the fall and, secondly, that when regard is had to the manner in which and the suddenness with which the appellant is alleged to have fallen, the kerb and the stones, taken either singly or jointly, together with the unsatisfactory nature of the evidence for the respondent, do not, in my opinion, furnish a probable explanation of the cause of the fall.

The learned Judge thereupon proceeds to deal with the argument that it was extremely likely that the respondent had arrived in an angry frame of mind and thus in a mood for doing violence. The learned Judge rejects this contention and holds that the mere fact that the appellant had earlier removed planks would not have roused undue resentment and he seems to lay special emphasis on the scene which met the respondent on his arrival. He expressed himself as follows : "The scene that met his eyes on "arrival does not seem to be such as to provoke an ordinary man "unduly." The learned Judge appears to have overlooked a very

important fact which may very well have incensed the respondent. His wife was pregnant and had sent urgent messages to the respondent and had urged him to come immediately. According to her she was afraid of the appellant and it is highly probable that she communicated her fear to the respondent. It is true that he did not go when he was communicated with by telephone but his conveyance was not available. It was probably expected as his mother-in-law had already arrived in it when Miriam reached him. These circumstances in addition to his dispute with the appellant which had reached their legal advisers, and the removal of some boards without his consent, would clearly not have left him cold. The degree to which his ire had been roused would depend upon his temperamental disposition which varies with the individual. His statement that he was supremely polite and that on his arrival he asked the appellant to stop as "he wishes to have the pleasure of speaking to him" does not ring true and his magnanimous assumption of the roll of a cooing dove seems out of place. It should, moreover, be borne in mind that the other witnesses denied that he had spoken to him. The point is at best only slightly in favour of the respondent and undue weight should not be given to it. It is merely a circumstance which goes into the melting pot with the other probabilities.

Finally, the learned Judge lays considerable stress upon the improbability that the respondent and his witnesses would have conspired to fabricate the evidence. In rejecting the evidence of Mtembu he expresses himself as follows :

"Which is the more probable ? That Mtembu's evidence is "false or that defendant and his three witnesses fabricated "the story of the cause of the injury to the plaintiff, and suppressed the truth, one must go so far as to say that "that defendant, his wife and his mother-in-law conspired "to do so and also induced Miriam Mapnini to do so. If "this were the case it is rather strange that the parties "to this conspiracy did not agree as to what caused the "plaintiff to step back and fall. From their evidence "it is clear that each was merely drawing an inference and "was not certain as to what caused the fall."

In my view this is not the proper way to approach the problem. The probability of conspiracy is, in suitable cases, obviously of importance in resolving a conflict of evidence. In using the improbability of parties having conspired to fabricate evidence, such evidence must first be considered in the light of all the circumstances and guidance may be afforded, inter alia by (1) the status of the parties, (2) the existence or absence of motive, (3) the degree of including any advantage or gain which may be expected to accrue from their testimony.

the accuracy of the evidence , (4) whether the evidence testified to was derived from independent sources or from the same source, (5) whether, if inaccuracies exist, they are serious or not, (6) whether they are attributable to honest mistake due either to faulty memory or observation, (7) or to deliberate and wilful mis-statements and last but not least, the risk of detection. ~~advantage or gain that may be expected to accrue from their testimony~~.

Having determined these preliminary points the judicial officer should, thereupon, determine to what extent the presence or absence of the likelihood of conspiracy is an additional weight to be placed in the scales. The only reason which the learned Judge gives is that the evidence of the witnesses was not harmonious in account for the appellant's fall and that those discrepancies discount all suggestion of a conspiracy. I am unable to agree with this reasoning because, if taken to its logical conclusion, the more serious the conflict in the evidence the greater would be the improbability of conspiracy. If it were proper to apply such a test the whole object of exposing false conspiracy by cross-examination would be defeated.

The learned Judge in using the discrepancies to come to the conclusion that there was no conspiracy is begging the question and seems to lose sight of the contention that such ~~discrepancies~~ serious divergencies

in the evidence in the circumstances

ought not to have existed and that their existence should be used against the respondent and his witnesses and not as proof of their infallibility.

Unless special circumstances ~~exist~~ are present it may ~~not~~ not only be quite unnecessary, but even dangerous to base the solution of a question, where the truth lies in a civil dispute, upon the determination whether or not a conspiracy exist~~ed~~s. The plaintiff in a civil action is called upon to show that there is a balance of probability exists in his favour and ~~is only~~ he is primarily concerned with that question and not necessarily with the question whether the evidence had its origin in conspiracy or not. It will be difficult to conceive of any case, in which the giving of false evidence ~~adduced, which~~ is not the result of some degree of collaboration, in some form or other, directed at producing untruthful evidence. In almost every case therefore, the question would have to be investigated and determined.

I am of opinion that the learned Judge was in error in holding that Mtembu's evidence could only be accepted if it was clear that the respondent and his witnesses had conspired to give false evidence. The probability of the truth of the version of the appellant and Mtembu goes hand in hand with the strength and weakness of the respondent's case and <u>vice versa</u>. The proper and only test is whether their evidence or that of the

appellant and Mtembu was the more probable.

If the question of conspiracy ~~is,~~ in the present case, is to be regarded as the appropriate test the respondent's case gains nothing by its application. Indeed, the reverse appears to be the case.

There is, in the forefront, the question of motive and there was the strongest possible motive for having at his disposal evidence ~~available~~ in support of his own. Even on the assumption that he was, as he tried to indicate, supremely confident of the outcome of the criminal proceedings, his unfounded optimism must have been rudely shattered by his conviction. He was faced with a claim of over £10,000 which, if successful, would almost inevitably have spelt irreparable ruin for him and the temptation to extricate himself from his predicament must have been very real, indeed, and it is not an unwarranted suggestion that his thoughts would at least have turned in the direction of this avenue of escape. He had at his disposal two members of the family and a native girl, and the risk of detection would have been remote. The evidence of the parties has a common basis, namely, the admitted infliction of injury and the case is, therefore, one which readily lends itself to variations without the necessity for elaborate preliminary preparation. If by conspiracy the learned Judge intends to convey that it is un-

likely that the respondent sat in solemn conclave and methodically worked out the course which their evidence ~~had to~~ should take, I am in whole-hearted agreement with ~~that~~ him that such a probability is remote. The respondent and the members of his family were comparatively recent arrivals in this country and, on their own evidence, not acquainted with the Courts of law or the procedure therein and the degree of preparation which would be regarded by them as sufficient to prove effective must be left to conjecture. It is at any rate clear that a layman does not analyse the pros and cons of a dispute with the same meticulous care and nicety as persons engaged in, and versed in such matters. There was admittedly discussion of the matter in the family and to this extent there was collaboration between them but it goes no further.

However that may be, what is sauce for the goose is sauce for the gander and if the test of the probability of conspiracy is applied to the evidence for the appellant, the latter's case loses nothing by comparison and the features, with which I now proceed to deal, have an equally important bearing upon the question whether the learned Judge was entitled to reject the evidence for the appellant.

If there ~~was~~ were a conspiracy it must obviously not only have been initiated by Mtembu but he must in addition have

conceived the intention of fabricating evidence almost immediately after the injury to the appellant. In my opinion his conduct immediately after the occurrence disposes of such a suggestion. On the picture painted by the respondent and his witnesses the appellant had been beset by pure misfortune in sustaining the injury and they had then exhibited the greatest solicitude for his condition and bestowed the tenderest care upon him and yet Mtembu deserts his master when he thought him to be in extremis and seeks the assistance of another native. What could have prevailed upon him to leave the friendly although ~~but~~ tense atmosphere in which the respondent and his wife ministered to his unfortunate master ? What could have been gained thereof ?

He has been criticised because although he professed to have been in great fear of receiving injury himself, he nevertheless approached his master when the latter was lying on the ground and that he did not rush off immediately. In the circumstances the point has no real signifance. No cross-examination was directed to the point but it is quite conceivable that he went up to his master as he fell and a full realisation of the position only dawned upon him thereafter. In any event there is no suggestion that there he ~~unduly~~ unduly delayed in going to the native, George Kumene.

Then there is an entire absence of motive on the part of

Ntembu. Why should he fabricate evidence against the respondent ? That he must have determined to concoct his story before 3 o'clock that afternoon is clear. It is common cause that the respondent or his witnesses did not inform the appellant's wife of her husband's misfortune and it can admit of no doubt that her informant was Ntembu. That he must have told her a story which incensed her against the respondent because is indisputable immediately upon her arrival at the hospital, she abruptly, and rudely ordered him to leave. It is inconceivable that she would have done so if she had received information that the respondent had showered kindness upon her husband in his distress.

The matter does not rest there. It involves the probability that the first leg of the conspiracy must have been created by the appellants wife and Ntembu who thereupon, must have formed the intention of indulging in a heartless, almost monstrous, fabrication implicating her husband's benefactor.

Further, it follows that, having set this scheme in motion her husband was thereafter unduced to collaborate. The suggestion is absurd on the face of it.

Ntenbu has further been criticised by reason of a conflict between his evidence at the criminal proceedings and in the Court below and in assessing the truthfulness of his

testimony this must quite clearly have considerable weight. In mitigation it may be urged that some seventeen months had elapsed between the dates of the respective trials and he may have been genuinely mistaken. The fact that he stated in the Magistrate's Court that the respondent had struck the appellant on his eye when he lay on the ground and in the Court below that it was done while the appellant was in the act of falling is, in my opinion, not serious. It is quite reasonably explicable on the basis of faulty recollection or re-construction. The important feature common to both pieces of evidence is that he witnessed the infliction of injury upon the appellant's eye. At the worst against Mtembu/and the appellant's case it is merely one of many points to which weight must be given.

The learned Judge was most favourably impressed by his demeanour. He states :- "Mtembu gave his evidence in Zulu "which was interpreted to the Court. His manner was impressive "- he appeared to be frank, unhesitating and certain. But "despite this, there are certain factors that reflect unfavour- "ably upon his evidence." The learned Judge then quotes from the declaration as it stood before its amendment in Court and which contained material not testified to by Mtembu either in the Magistrate's or in the Court below and seems to suggest that

responsibility for all the information contained in the declaration before amendment might be laid at the door of Mtembu. As it was clear that the information was pbtained from both Mtembu and one George Kunene who was not called, Mtembu can not be taken to task for statements which have not been proved to emanate from him.

In finally dealing with Mtembu's credibility after he had considered the question of the existence of a conspiracy on the part of the respondent's witnesses the learned Judge expresses himself as follows :

" On the other hand it is difficult to see why Mtembu should lie about what he had seen. He certainly had less motive to lie than the Defendant. But I feel that it cannot be excluded as a reasonable possibility that Mtembu did not fully observe the events at the crucial moment and that he may unconsciously be drawing upon his imagination. He certainly was upset at the time because he fled from the scene - a scene sufficiently upsetting in view of the crying of Defendant's mother-in-law, the Plaintiff's position and state on the ground and a certain amount of blood. "

And again :

" Mtembu went back to the scene afterwards and found George Kunene there. George Kunene made a report to him. The probabilities are that that report was to the effect of an assault observed by him (a most remarkable fact considering the time at which he arrived on the scene). The nature of that alleged assault may very well have been as set out in that part of the Declaration upon which

" Plaintiff does not now rely. On the evidence before the Court the probabilities that no such assault took place are very strong. "

The clear interpretation of these extracts is, in my opinion, that Mtembu was an honest witness but mistaken. I venture to suggest that it is most improbable that Kunene's report could have fired the imagination of Mtembu. Mtembu, and not Kunene was the eye-witness of the occurrence and why his own visual observation should have given way to a description by Kunene of an incident which he, to the knowledge of Mtembu, could not have witnessed is not clear to me. In my opinion this ground for the rejection of the evidence of Mtembu cannot be sustained.

Finally the learned Judge comes to the conclusion that there is no corroboration of Mtembu's version to be found in the appellant's evidence. He placed no reliance thereon by reason of the possibility that the appellant might have been suffering from some degree of retrograde amnesia and for this he relies upon the medical evidence. I have read this evidence with care and the interpretation which I place upon it is that the matter is left entirely in the air. The doctors were not acquainted with the appellant's mental condition prior to the time of his injury and their opinion which was based upon pure speculation and was stated in very guarded language. It must further be remembered

that there is no evidence of any fracture of the skull or injury to the brain and there was no prolonged period of unconsciousness. A far safer guide is to test his evidence in the light of events the occurrence of which is not in serious dispute. He described all material incidents in a perfectly rational manner and in considerable detail. The view that he filled in gaps with the assistance of Mtembu is in my opinion not well-founded because he testified to a large number of facts of which Mtembu was ignorant and there is, moreover, not a shread of evidence to justify such a view and no cross-examination was directed to the point. In addition such a view would at once brand the appellant as a dishonest witness and that he was a party to conspiracy or at least improper collaboration with Mtembu to support his case. The learned Judge quotes the appellant as having said that he did not fall. He had the following piece of evidence in mind :-

" It is suggested, Mr. Shev, that you tripped and fell and struck your head on the pavement ?.... I never slipped and I never fell. "

The appellant wished to convey no more than that he did not slip or fall in the manner suggested by counsel and the learned Judge, in my opinion, erred in using it as a reflection upon his reliability.

I am of opinion that the learned Judge fell into error in placing no reliance upon the appellant's evidence.

I have not lost sight of the fact that this Court must not lightly interfere with a finding of fact of a Court of first instance but for the reasons stated I am of opinion that the judgment should not be sustained.

There remains the question of damages. The trial court will clearly be in a far better position to come to a conclusion on the ~~question~~ quantum to be awarded and, in my opinion, the following order should be made.

The appeal is allowed with costs ~~and~~ and the matter is referred back to the Court a quo ~~is directed to assess~~ for the assessment of the amount of ~~the~~ damages sustained.

A. Chaskalson

Price AJA concurs