CASE NO: 468/93 N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ZUFYR KHAN

and

THE STATE

SMALBERGER, JA

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ZUFYR KHAN Appellant

and

THE STATE Respondent

CORAM: SMALBERGER, STEYN, JJA, et
VAN COLLER, AJA

HEARD: 15 AUGUST 1995

DELIVERED: 24 AUGUST 1995

J U D G M E N T

SMALBERGER, JA:

The appellant was convicted in May 1993 in the Magistrate's Court, Verulam, of assault with intent to do grievous bodily harm.

He was sentenced to a whipping of five strokes in terms of sec 294 of the Criminal Procedure Act 51 of 1977 and, in addition, to three months imprisonment conditionally suspended for five years. His appeal to the Natal Provincial Division against both his conviction and sentence was unsuccessful, but he was granted leave to appeal to this Court. Since then the Constitutional Court has ruled that sec 294 is inconsistent with the Republic of South Africa Constitution Act 200 of 1993 and has ordered that no sentence imposed in terms of that section shall be carried out (S v Williams and Others 1995(7) BCLR 861(CC)).

The main issue on appeal is one of identification. The evidence establishes that at about midday on 27 April 1991 the complainant, Reginald Lee Naidoo, was fishing in a stream near his home. He was accompanied by another youngster named Anil Singh ("Anil"). The two boys were aged 10 and 11 years respectively. A youth standing in an elevated position on an

adjoining bank shouted to them to go away. When they failed to respond he threw a half-brick (sometimes referred to in evidence as a stone) in their direction. The missile struck the complainant on his left eye causing severe injury to, and resultant permanent blindness of, the eye.

The evidence is somewhat inconclusive with regard to whether or not the person responsible for the complainant's injury was alone at the time, but this is a matter of no great moment. The complainant was unable to identify the person concerned; Anil, the only other witness for the State, testified that it was the appellant who had thrown the half-brick. The trial magistrate accepted Anil's evidence despite the appellant's denial under oath that he was the guilty party.

Anil's honesty as a witness was not seriously questioned on appeal, but the reliability of his identification was. The appellant has a friend, Rakesh Nundlall ("Rakesh"), who testified in

circumstances which I shall outline in due course. The evidence reveals that Anil lived in the same general vicinity as Rakesh and the appellant. They were both known to him, Rakesh by name but the appellant only by sight. It is common cause that in his original statement to the police Anil named Rakesh as the person who threw the half-brick that struck the complainant. On the strength of this Rakesh was originally accused as the perpetrator. However, at a later identification parade on which both Rakesh and the appellant were present, Anil pointed out the appellant as the one who had actually thrown the half-brick. It is a matter for comment, and indeed concern, that Anil's statement implicating Rakesh was not, in the light of his contradictory evidence in court, made available to the defence, as its contents may have discredited him completely as a witness. In relation to why he initially mentioned Rakesh, Anil's evidence, when questioned by the trial magistrate, was to the following effect:

"Who's Rakesh? — His friend's name. I didn't know his name.

The accused's friend. What did you tell the police about Rakesh? — He asked me if I saw who threw a stone. I said, yes.

What did the police ask you? — Did you see who threw a stone?

Yes? — I said to him, Rakesh did.

You said Rakesh? — Did.

Rakesh threw the stone? Why did you say that? — Well, I didn't know his name.

Why didn't you tell the police that it was Rakesh's friend that threw the stone, not Rakesh? — I didn't know his name.

So why didn't you say it was Rakesh's friend, you don't know his name? Why did you say Rakesh threw the stone — (No reply).

No answer? — No."

Rakesh did not initially testify at the trial. It was only after reserving judgment that the magistrate, some three days later, on the appointed day for giving judgment, exercised her discretion to call Rakesh as a witness. It appeared that Rakesh had made a written statement to the police on 3 July 1991. In his statement he

claimed that on the day of the incident he was at work the whole day (which was not strictly correct as he had returned home at about midday (lunch time) to collect his lunch which he had left at home). His statement then proceeds as follows:-

> "I returned home the same day at about 19:30. I was approached by my neighbour Zufyr [the appellant]. He stated to me that he had a problem and I told him to tell me.
>
> He told me that during the day, there were a few boys in the drain behind my house.
>
> He requested them to leave but they refused to leave. He then stated that he threw a half-brick into the drain and he heard a scream. He then walked away and began painting my house. Few minutes later he heard someone say the brick fell from heaven."

When giving evidence Rakesh initially omitted any reference to the appellant having mentioned that he threw a half-brick, as recorded in his statement. When confronted with the relevant passage he at first vehemently denied having said what was recorded. It was

only when made to read the whole statement that he eventually agreed with what was recorded in it

With regard to Rakesh's evidence the magistrate in her judgment said the following:

> "The Court wants to place on record at this stage, that it is not at all looking at the evidence of Rakesh. Although the Court called this witness, the Court is not taking any of his evidence into account, because the Court was not exactly satisfied with the manner in which this witness testified. My findings will be based only on the evidence that was tendered to this Court, before today."

In my view the magistrate was correct in not seeking, in the circumstances, to place any reliance on Rakesh's evidence. He was a witness with a possible interest or bias and was clearly discredited on his own evidence. Having at one time been, according to him, falsely accused, it is unlikely that he would have forgotten any admission made by the appellant of his involvement. The fact that he did not initially disclose the admission in evidence,

and even denied its existence, suggests that it was either never made or that he deliberately lied in withholding it. Either way his evidence is not worthy of credence. Nor can any reliance be placed on the contents of his statement. It therefore cannot in any way be corroborative of Anil's evidence.

One is accordingly left only with Anil's evidence and the unexplained discrepancy between his statement and his evidence regarding the identity of the person who threw the half-brick. Anil claims to have known all along that the person concerned was the appellant. If that is so it is inexplicable that he should have referred to him in his statement as Rakesh (rather than Rakesh's friend), something he was at a total loss to explain, as appears from the passage from his evidence quoted above. The magistrate sought to explain this away as follows:

> "There is a possibility that he could have been mistaken about the accused's actual name and he could have thought at that time, that this was actually Rakesh and believed this to be

Rakesh and that is why he furnished the name of Rakesh to the police."

There is no factual foundation for the postulated possibility. It is purely speculative. Anil at no time claimed, or even hinted, that he had originally mistakenly been under the impression that the appellant's name was Rakesh.

The magistrate, in accepting Anil's evidence, also relied heavily on the fact that he had pointed out the appellant on an identification parade. There is no evidence on record with regard to the identification parade, whether it was properly and regularly constituted and conducted, nor were any admissions made in this respect. This detracts from any value it might otherwise have had. In any event, the fact that Anil pointed out the appellant cannot take away the fact that he initially implicated Rakesh, despite both being known to him. If anything, it is indicative of the uncertainty in his mind as to the identity of the perpetrator.

Significantly, both Rakesh and the appellant were in the vicinity at the approximate time of the occurrence. Either could thus have committed the offence.

Bearing in mind that Anil is both a child and a single witness with regard to identification, his evidence must be approached with the requisite caution enjoined by law. His evidence is open to criticism in respects other than those mentioned. But even if one accepts that the conditions for accurate observation were good, and that he was an honest witness, reasonable doubt exists concerning the reliability of his identification of the appellant arising from his initial naming of Rakesh. In the result the State failed to prove the appellant's guilt.

The appeal is allowed and the conviction and sentence are set aside.

J W SMALBERGER
JUDGE OF APPEAL

STEYN, JA )
VAN COLLER, JA) concur