Judgment No. S.C. 206/98
Crim. Appeal No. 118/98

DUDZAI BOMBA v THE STATE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & SANDURA JA
HARARE, OCTOBER 5, 1998

C K Hungwe, for the appellant

P Kwenda, for the respondent

SANDURA JA: The appellant was charged in the High Court with attempted murder, the allegation being that on 6 October 1991 he unlawfully splashed a dangerous acid over the face, chest and arms of a man called Douglas and tried to pour the same acid into the man's mouth with the intention of killing him. He pleaded not guilty and alleged that he was incorrectly identified as the perpetrator of the offence. He was, however, convicted and sentenced to twenty years' imprisonment with labour. He appealed against both conviction and sentence, but after hearing counsel's submissions we dismissed the appeal in its entirety and indicated that our reasons would be given in due course. I now set them out:

At the appellant's trial most of the facts were either common cause or not disputed by the appellant. The only issue was whether it was the appellant who committed the criminal act. In setting out the facts which were either common cause or not disputed, I shall call the man who committed the criminal act "X".

At the relevant time, the complainant ("Douglas") lived with his wife ("Constance") and his brother ("Biggie") at 5 Mazari Street, New Mabvuku Township, Harare ("the residence"). Douglas needed some cement for certain building operations at the residence, but there was a general shortage of cement in the country.

When X became aware that Douglas needed some cement he visited him at the residence on three different days between 7 and 8 am. On the first occasion he said that he was Brother Mike, a member of the Roman Catholic Church. On each occasion the visit was on a Sunday and he was not at the residence for a long time because he said that he was on his way to church. However, on each occasion he spoke to Douglas for twenty to thirty minutes and was seen by Constance and Biggie. He informed Douglas that he had some bags of cement for sale. On the first two occasions Douglas informed him that he did not have enough money to buy the cement.

However, on the third occasion Douglas informed X that he had raised the money and wanted to purchase ten bags of cement. That was on 6 October 1991, the day when the offence was committed. X then indicated that the cement would be delivered to the residence by a vehicle belonging to his brother's employer and that the delivery charge was $40. The two men then agreed to meet again at about 5 pm on that day at the Eastlea Shopping Centre in Harare to conclude the sale.

At about 5 pm Douglas, accompanied by his nephew Joseph, arrived at the Shopping Centre. After a while, X arrived in the company of another man. No

formal introductions were made and no names were mentioned. However, the four men then left the Shopping Centre and walked to the intersection of George Silundika Avenue and Fifth Street.

At the intersection, X left the other three men, indicating to them that he was going to a place nearby to ascertain whether the vehicle which was to deliver the cement had arrived. He returned to them after a short while and informed them that his brother's employer, whose vehicle was to be used in the delivery of the cement, was not present and that the vehicle itself had not yet arrived. In the circumstances, he informed them that it was necessary to wait until about 6 pm. The four men then left the intersection and walked to Africa Unity Square where they spent some time before returning to the intersection at about 6.30 pm.

X again left the other three men at the intersection and went away for a while. When he returned he told them that the man whom he had been looking for had arrived, but warned them that the man did not want to deal with many people. He then suggested that Joseph should remain at the intersection whilst he and the other two went to collect the cement. The men agreed.

After leaving Joseph at the intersection, X, Douglas and the other man turned into a sanitary lane. As they walked, X's colleague was in front whilst X and Douglas were behind. Suddenly, X grabbed Douglas by the neck, X's colleague felled Douglas, and X then produced a brown 750 millilitre bottle containing a liquid which he immediately splashed over Douglas's face, causing him excruciating pain. X and his companion tried to pour the liquid into Douglas's mouth but Douglas

successfully resisted their actions. However, they succeeded in stealing his wristwatch and the sum of $40. Douglas had taken with him the sum of $40 because X had informed him that that would be the charge for the delivery of the cement to the residence. He did not take more money with him because he intended paying for the cement after it had been delivered to the residence.

Whilst Joseph waited at the intersection, he heard a man crying but it did not occur to him that that was Douglas. He later saw a crowd not far away from the intersection and when he went there to investigate what had happened he was prevented from getting close to the scene by a security guard. However, an ambulance then arrived at the scene and drove away shortly thereafter.

At about 9 pm Joseph left the intersection and returned to the residence where he made a report to Constance.

On the following day it was discovered that Douglas had been badly injured and had been detained at Parirenyatwa Hospital. He was detained there from 6 October 1991 to 5 May 1992. He was attended to by a number of medical specialists but nothing could be done about his sight. He is now completely blind.

Some time before 29 April 1992, Constance visited her husband, Douglas, at the hospital. After leaving the hospital, she was on a bus when she saw X walking along the road in the company of a woman and a young man. She asked the bus driver to stop the bus so that she and the other passengers on the bus could apprehend X. Unfortunately, the bus driver refused to do so. However, when he

later stopped at the next bus stop, Constance got off the bus and looked for X but could not find him.

Subsequently, on 29 April 1992, Constance was at the Market Square bus terminus waiting for a bus to New Mabvuku after visiting Douglas at the hospital. She saw the appellant and immediately caused his arrest. She said she was with Biggie at the time, but that was disputed by the appellant. However, it was common cause that she told the policemen that the appellant was the man who had committed the offence.

All these facts were not in dispute at the trial. The sole issue was whether the appellant was the man whom I have called X, i.e. the man who committed the offence.

In order to establish its case against the appellant, the State relied upon the evidence of several witnesses:

Firstly, the State relied upon the complainant's evidence. Although when he gave evidence he could not see the appellant due to complete blindness, Douglas was adamant that the man who visited his residence at New Mabvuku on three occasions indicating that he had some cement for sale was the man who committed the offence together with an accomplice. He was certain that the man was the same person whom he met, by arrangement, at the Eastlea Shopping Centre on 6 October 1991, and with whom he walked to the intersection of George Silundika Avenue and Fifth Street and then to Africa Unity Square. In

addition, as an indication that he knew his assailant, he gave a fairly accurate description of the appellant's stature, complexion and general appearance. As a result, the trial court found the complainant to be a credible witness. In my view, it is clear from the record of the proceedings that that conclusion cannot be faulted.

Secondly, the State relied upon the evidence given by Constance, the complainant's wife. She said that she knew the appellant because he had visited her residence on three separate occasions during broad daylight and had spoken to her husband for some time on each of those occasions. On each occasion she clearly saw the appellant. Consequently, she easily recognised him when she saw him walking on the road whilst she was on a bus from Parirenyatwa Hospital. For the same reason, she readily recognised him when she saw him at the Market Square bus terminus on 29 April 1992. She gave evidence on the appellant's appearance and several other features. She was certain that she knew the appellant and that she had not mistaken him for any other person. She was not shaken in cross-examination and was found to be a credible and honest witness by the trial court. In my view, that finding was correct.

Thirdly, the State relied upon Biggie's evidence. He said that he saw the appellant on three separate occasions when the appellant visited Douglas at the residence in New Mabvuku. On each occasion he saw the appellant clearly in broad daylight and could not have forgotten what he looked like. Consequently, when he saw the appellant at the Market Square bus terminus, he recognised him without difficulty and caused his arrest. On that occasion he was in the company of Constance, who also readily recognised the appellant. This witness was not in any

way discredited in cross-examination, and the trial court found him credible. I can find nothing in the record of the proceedings which indicates that that finding was incorrect.

Fourthly, the State called Joseph, whose evidence was as follows: On 6 October 1991 he and Douglas met the appellant and his companion at the Eastlea Shopping Centre shortly after 5 pm and were in the appellant's company from that time up to the time when he was left at the intersection of George Silundika Avenue and Fifth Street at about 6.30 pm. Thereafter, he heard a man crying but did not suspect that it was Douglas.

Subsequently, after the appellant had been arrested, Joseph was taken to the cell at Harare Central Police Station where the appellant and other prisoners were detained. He was asked whether the man whom he and Douglas met at the Eastlea Shopping Centre on 6 October 1991 and who had indicated that he had some cement for sale was amongst the men detained in the cell. In response he identified the appellant as the man in question. No formal identification parade was conducted.

Commenting on Joseph's evidence, the learned trial judge said that the evidence was only significant because it did not stand uncorroborated, and went on to say that if there had been no other corroborative evidence, the evidence would not have been of much significance because of the failure by the police to hold a proper identification parade. I agree with that observation. Nevertheless, it is pertinent to note that on the day in question Joseph was with the appellant for a continuous period of about one-and-a-half hours. During that period, they walked together from the

Eastlea Shopping Centre to the intersection of George Silundika Avenue and Fifth Street. From there they walked to Africa Unity Square, spent some time there and then walked back to the intersection. There was a wonderful opportunity to observe the appellant and get to know his appearance and any special features.

In his evidence the appellant denied that he was the man who committed the offence. He alleged that he had been wrongly identified. However, the learned trial judge was not impressed. He commented on the appellant's failure to protest his innocence as follows:-

> "The accused appears to have completely failed to protest his innocence except during the trial. When he was arrested he did not protest vigorously that he was not the person who had injured the complainant. In his own words, he only attempted to inquire as to where it is alleged he had committed the offence and nothing else. He had ample opportunity to protest his innocence as he accompanied the arresting detail to Harare Central Police Station. There is no evidence that he did. When he was identified by Joseph Makuza at Harare Central Police Station again he did not protest his innocence. …
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> The court viewed his failure to protest his innocence as showing that when confronted by State witnesses he had nothing to say insofar as his involvement and identification were concerned."

In my view, that conclusion was entirely justified.

Counsel for the appellant emphasised the fact that identification evidence ought to be treated with great caution. That is entirely correct. However, I am satisfied that the learned trial judge treated the evidence before him with caution and arrived at the right conclusion. There was overwhelming evidence showing that the appellant was the man who committed the offence. This case is different from the usual case where evidence of identification is relied upon. The most distinguishing

feature is that the witnesses had previously seen the appellant on a number of occasions and knew him.

In my view, this was clearly attempted murder. It was the doctor's evidence that if Douglas had swallowed the acid he could have died. The appellant was, therefore properly convicted.

As far as the sentence is concerned, whilst it is true that twenty years' imprisonment with labour is a severe sentence, I do not think that in this case it is so severe that it induces a sense of shock. This was a premeditated brutal attack with an actual intent to kill. In addition, the appellant intended killing the complainant so that he would not be identified as the person who had committed the robbery. As a result of the appellant's unlawful actions, the complainant endured excruciating pain and was badly injured and blinded permanently. In my view, the appellant did not deserve any leniency. Had he succeeded in killing the complainant, there would have been only one appropriate sentence.

In the circumstances, the appeal against conviction and sentence has no merit.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

N H Franco & Co, appellant's legal practitioners