

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 30 of 1984

In the matter between:

SHIMANE NKETSANG

vs.

THE STATE

Appellant in person
Mr. T. T. Tafila for the State

J U D G M E N T

CORAM: Baron, JA
Amissah, JA
Van Winsen, JA

VAN WINSEN JA

Appellant was convicted in the Magistrates' Court, Serowe of contravening section 235 of the Penal Code, Cap 08:01, in that he together with a co-accused, did grievous harm to Baitsi Nketsang by hitting him on his mouth and breaking his right jaw and for this crime he was sentenced to 5 years imprisonment. He appealed against conviction and sentence to the High Court. The Court dismissed his appeal on the merits and refused to interfere with the sentence of 5 years imprisonment save that, having pointed out that section 235 of the Code required the imposition upon an offender convicted under that section of strokes, added 6 strokes with the light cane to his sentence. He appealed to the Chief Justice

for leave to prosecute a further appeal to this Court and was afforded such leave relative only to sentence.

The Magistrate clearly misdirected himself in regard to sentence in that he failed to have regard to the fact that he was required to impose strokes as part of his sentence. There is no certainty as to what term of imprisonment would have been imposed by the Magistrate had he had regard to the requirement of section 235 in regard to the imposition of corporal punishment. In view of this irregularity the sentence, either in the original form or as amended on appeal, cannot stand. This Court is accordingly seized with the duty of imposing an appropriate sentence.

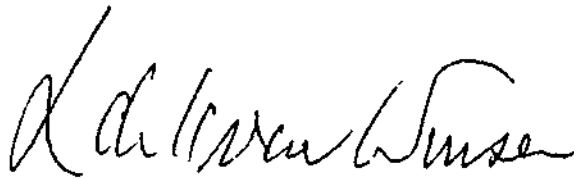
From the evidence adduced before the Magistrate it would appear that a dispute arose between Baitsi Nketsang on the one hand and appellant and his co-accused - siblings all - on the other about an allegation concerning the supposed theft of meat by two latter persons. This took place on a Saturday and appellant was alleged on that occasion to have strangled the complainant. An uncle of the parties intervened and stopped the fracas. On the next day the complainant was visiting a certain house when he was waylaid by appellant/ and his co-accused and appellant/ hit him on the jaw with an iron bar which necessitated medical treatment in hospital under anaesthetic. The operation done on his jaw involved the placing of iron supporters under the jaw and a month's stay in hospital.

At the end of the State's case in the Magistrate's Court and after ample evidence had been adduced to establish appellant's guilt in respect of the offence with which he was charged appellant chose not to give evidence or to make a statement nor did he call evidence. It appears from the record that the appellant is a man of 28 years of age and has a clean record. According to the trial Magistrate cases involving assaults are prevalent in Botswana.

Bearing the above factors relevant to the determination of an appropriate sentence in mind and being of the opinion that the assault must be regarded as a serious one I consider that the appellant's action merits a severe sentence.

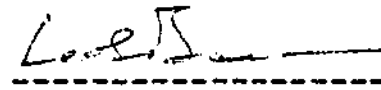
The appeal as to sentence is accordingly allowed, the amended sentence is set aside and the following substituted therefor:-

4 years imprisonment, 2 years of which is suspended for three years on condition that during the period of suspension appellant is not convicted of a crime involving greivous harm. In addition appellant is to receive 4 strokes with a light cane after being certified medically fit to receive them.

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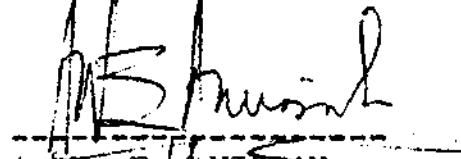
L. de VAN WINSEN
Judge of Appeal

I agree



L. S. BARON
Judge of Appeal

I agree



A. N. E. AMISSAH
Judge of Appeal