

**IN THE COURT OF APPEAL FOR BOTSWANA**  
**HELD AT LOBATSE**

Criminal Appeal No. 7 of 2001  
[High Court Criminal Appeal No. F5 of 1998]

In the matter between:

**DOUGLAS DUBE**

Appellant

And

**THE STATE**

Respondent

Appellant in person

K.N. Sebotho (with him Mrs A.T. Kula) for the Respondent

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**J U D G M E N T**

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CORAM: P.H. TEBBUTT AG. P  
K.R.A. KORSAH J.A.  
N.W. ZIETSMAN J.A.

**ZIETSMAN J.A.**

The appellant was found guilty in the Subordinate Court of the First Class held in the Selebi Phikwe Administrative District on various counts and was sentenced separately in respect of each count. The details of his convictions and sentences can be stated briefly as follows:

On Count 1 he was found guilty of entering Botswana illegally and was sentenced to 9 months imprisonment.

On Count 3 he was convicted of burglary (breaking into and entering the house of Obert Phepisi at night) and was sentenced to 9 years imprisonment.

On Count 4 he was convicted of the theft of property from Obert Phepisi and was sentenced to 3 years imprisonment.

On Count 5 he was convicted of house-breaking (breaking and entering the house of Gladys Lekhora Modise) and was sentenced to 6 years imprisonment and 2 strokes.

On Count 6 he was convicted of the theft of property from Gladys Lekhora Modise and was sentenced to 3 years imprisonment.

On Count 7 he was convicted of the theft of two solar panels from Botswana Telecommunications Corporation and was sentenced to 3 years imprisonment.

The magistrate ordered that the sentences would all run concurrently, and the appellant's effective sentence was therefore a sentence of 9 years imprisonment and 2 strokes.

An appeal by the appellant to the High Court against his convictions and sentences failed but he was given leave to appeal to this Court. His appeal to this Court was against his sentences only. After hearing argument from the appellant and from

Mr. Sebotho (who appeared together with Mrs Kula for the State) we, on the 6<sup>th</sup> July 2001, allowed the appeal to the extent that the sentence on Count 3 was reduced from 9 years imprisonment to 6 years imprisonment, the sentence on Count 5 was reduced from 6 years imprisonment and 2 strokes to 4 years imprisonment, and the sentences on the theft charges ( Counts 4, 6 and 7) were each reduced from 3 years imprisonment to 2 years imprisonment. The sentence on Count 1 ( 9 months imprisonment) was confirmed. We ordered further that the sentences would run concurrently as from 5 October 1997. This order made by us on 6<sup>th</sup> July 2001 resulted in a reduction of the appellant's effective prison sentence from 9 years imprisonment to 6 years imprisonment, and in the deletion altogether of the sentence of 2 strokes imposed in respect of Count 5.

We indicated that the reasons for our order would be furnished later. These are our reasons.

In his helpful and lucid argument Mr. Sebotho conceded the fact that the sentences in respect of Counts 3, 4, 6 and 7 were excessive particularly in view of the fact that the appellant was to be regarded as a first offender. Mr. Sebotho did not make a similar concession in respect of Count 5 and he addressed us in detail on the question whether the imposition of strokes in respect of Count 5 was mandatory. We are indebted to Mr. Sebotho and to Mrs Kula for their assistance and research into this question.

The magistrate was not guilty of any misdirection in respect of sentence, but the sentences of 3 years imprisonment imposed by him in respect of the theft counts (Counts 4, 6 and 7) were the maximum sentences for these offences and we had no difficulty in coming to the conclusion that these sentences were excessive in the circumstances. We also came to the conclusion that the sentences of 9 years imprisonment and 6 years imprisonment in respect of Counts 3 and 5 were excessive. What caused us difficulty was the question whether the imposition of strokes was mandatory in respect of the conviction on Count 5.

It is the view of this Court that the imposition of strokes is generally undesirable where an accused person is sentenced also to a long term of imprisonment. See in this connection the cases of **Basson & another v. The State 1989 BLR 217 at pg 236 B-D** and **Desai & others v. The State 1987 BLR 55**. See also the case of **Brian Sampson v. The State (Court of Appeal, Criminal Appeal No. 30 of 1995)**. Our problem in this case however was whether we could set aside the sentence of strokes in respect of Count 5 in view of the wording of Section 300(1)(a) of the Penal Code [Cap 08:01]. This section provides as follows:

“(1) Any person who -

- (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit therein any offence punishable under this Code with death or with imprisonment for three years or more; or
- (b) .....

is guilty of an offence termed housebreaking and is liable to imprisonment for a term not exceeding 10 years with corporal punishment."

The question we had to determine was whether the imposition of corporal punishment is mandatory where an accused person is convicted of housebreaking in contravention of section 300(1)(a).

This question has been considered by this court on two separate occasions and has resulted in conflicting decisions given by the same Court. In the case of **Petrus and another v. The State 1984 BLR 14** a Full Bench of this Court held that where a section of the Penal Code provided that a person found guilty of committing a specific offence was liable "to imprisonment for ten years, with corporal punishment" the imposition of corporal punishment was mandatory. In the later case of **Re Attorney-General's submission: State v. Dinoko 1989 BLR 619** a Full Bench of this Court came to the opposite conclusion. In each case the section of the Penal Code that had to be interpreted by the Court had been amended. Whereas it was originally provided that a convicted person would be liable to the imprisonment "with or without corporal punishment" the amendment to the section deleted the words "or without" and provided simply that the convicted person would be liable to the imprisonment "with corporal punishment".

In the **Petrus case** the court held that the deletion of the words "or without" when the section was amended indicated a change of intention on the part of the legislature, and an intention to make the imposition of corporal punishment mandatory and no longer discretionary.

The decision in the **Petrus case** was not referred to in the later **Dinoko case** and one must assume that the said decision was not brought to the notice of the judges when the **Dinoko case** was argued before them. In deciding the matter in the **Dinoko case** the Court placed much reliance on the word "liable" in the section. It was held that the word "liable" governs both the imprisonment and the corporal punishment referred to in the section, and that the words "liable to" do not import a sense of compulsion. The Court held therefore that the imposition of corporal punishment was not mandatory in terms of the section.

Mr. **Sebotho** submitted that the reasoning in the **Petrus case** was to be preferred to that in the **Dinoko case**. In the course of his argument he referred to other sections in the Penal Code where the words "with or without corporal punishment" still appear. Examples of such sections are section 143 and section 247. He argued accordingly that where the words "or without" are not included in a section that section should be given a meaning that differs from the meaning given to sections where these words do appear, and that the intention of the legislature is

that corporal punishment is mandatory where the words "or without" do not appear.

The **Dinoko case** came before a Full Bench of this Court as a result of a submittal by the Attorney – General under Section 331 A (1) of the Criminal Procedure and Evidence Act (Cap 08:02). This arose from two conflicting decisions of the Court of Appeal on the question of mandatory corporal punishment **vel non**, given on the same day. In the one it was held that the statement of the punishment in those sections of the Penal Code where the words "with corporal punishment" appear made the imposition of corporal punishment mandatory (See **Tlounyane v The State 1989 BLR 552**). In the other it was held that it was not mandatory (see **Basson and Another v The State 1989 BLR 217**). In each instance the Court consisted of a Bench of three Judges. In each instance, too, the decision in the **Petrus case** was, it would appear, not brought to the attention of the Judges concerned. Because of this conflict in the two decisions mentioned, the Court in the **Dinoko case**, consisting then of five Judges, was called upon to revisit the question of whether the statement of the punishment in those sections in which the words "with corporal punishment" appear made corporal punishment mandatory or not. As stated by **Amissah P** who gave the main judgment in the **Dinoko case** (at p 621 C):

"Our concern is to give a decision not for the particular case which has been disposed of, but for future guidance of all courts."

Moreover, it must be pointed out that although the Petrus case was not referred to in the judgment in the Dinoko case, two of the Judges in the latter case viz Amissah P and Aguda JA, who concurred in the judgment of Amissah P, had participated in the Petrus case. They were also two of the Judges in the Basson case. Two of the Judges in the Tlounyane case, viz Doyle JA and Schreiner JA, also sat in the Dinoko case, and they were persuaded that their judgment in the Tlounyane case was incorrect.

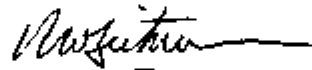
As set out earlier, the ratio of this Court's decision in the Dinoko case was that the word "liable" in the Section, as in Section 300 (1) (a) in this case, does not import any sense of compulsion. This point was not raised in either the Basson or the Tlounyane case but it was the factor which compelled Doyle JA and Schreiner JA to come to the view that their decision in the latter case was wrong. We carefully considered all the judgments referred to and it was clear to us that the majority of the Judges in those cases had eventually come to the conclusion that the imposition of corporal punishment was not mandatory. We also came to the conclusion that the reasoning in the Dinoko case was to be preferred to that in the Petrus case. In addition the decision in the Dinoko case, being the most recent one, was the one we were more inclined to follow. Furthermore as a three-Judge court we felt bound by the more recent decision of a Full Bench of this Court consisting of five Judges. We therefore held that the imposition of corporal

punishment is not mandatory where a person is convicted of contravening Section 300 of the Penal Code.

In the present case the appellant has to undergo a long term of imprisonment and it was our conclusion that the imposition of strokes in addition to the imprisonment was not justified and should be set aside.

We accordingly allowed the appeal to the extent referred to earlier in this judgment.

Delivered in open court at Lobatse on ~~2001~~ July 2001.



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N.W. ZIETSMAN  
[JUDGE OF APPEAL]

I agree:



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P.H. TEBBUTT  
[ACTING JUDGE PRESIDENT]

I agree:



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K.R.A. KORSAH  
[JUDGE OF APPEAL]