IN THE COURT OF APPEAL OP SWAZILAND

HELD AT MBABANE APPEAL NO. 5/83

In the matter of:

MIRRIAM LULANE First Appellant

BEATRICE SIDZADZANE NDZABANDZABA Second Appellant

and

THE QUEEN Respondent

CORAM: MAISELS P.

VAN WINSEN, J.A.

AARON, J.A.

Heard: 5th February, 1983

Delivered: 16th February, 1983

JUDGMENT

VAN WINSEN, J.A.

The appellants were indicted for the murder of a child of nine years of age. It appears from the evidence of Nomsa Dlamini that in July of last year the two appellants arrived at her homestead to report the death of the child Thembisile. They reported to Nomsa that they had used small sticks to beat the child and the child had died. They gave Nomsa no account of how the child had come to die or why they had beaten her.

It can be concluded from a note on the record of this case in the Trial Court that the child's body was in fact examined by a doctor but at the time of the trial the doctor was absent from the country. In the result, there is no medical evidence as to the cause of her death. However, Sub-inspector Vilakazi saw the body of the child and he, in his evidence, gives a full description of the nature of the injuries to the child. He says, in the course of his evidence, that on the 29th July of last year the two appellants arrived at the Siteki police station to report the death of the child. Following on the report, he accompanied the first appellant to her home and he saw the child's body, including across her face and over her head. Asked about the extent of the bruises and cuts, he says: "I noticed that all over the hands, knees, legs, there were some bruises and cuts." Each of the appellants produced a stick to the police officer which she claimed she had used in beating the child. There was substantially no cross-examination of this witness at all. Counsel for the second appellant asked no questions and counsel for the first appellant merely established from Sub-Inspector Vilakazi that appellant No.1 was the guardian of the child.

An application was made on behalf of both appellants for their discharge at the conclusion of the Crown case but this application was refused and both counsel closed their respective clients'

cases without calling any evidence.

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In the result, the Court did not have the benefit of the only two persons who knew about what had happened to the child and who, as between the two of them, inflicted the various injuries to the child. The learned Chief Justice rightly concluded that in the absence of evidence as to the cause of the death of the child, the murder charge had not been established by the Crown. However, on the strength of the admissions which the two appellants made to the Sub-Inspector, as well as to Nomsa, the Court found both the appellants guilty of assault with intent to do grievous bodily harm. He then imposed a sentence of eighteen months' imprisonment on each of the appellants, but took into account the fact that they had been in custody since the 29th July, 1982, and antedated their imprisonment to that date.

In brief, the Notice of Appeal contended that the Crown had failed to prove that the appellants had exceeded the reasonable bounds of chastisement of the child. The facts are, of course, that appellant No.1, who was the guardian of the child, had the right to chastise the child in moderation. Appellant No.2, of course, did not stand in that relationship to the child and had no such right. It was contended by counsel for appellant No.1 that the Crown had failed to discharge the onus of proving an intention on the part of his client to inflict grievous bodily harm to the child, I can find no merit in this contention. The severity of the assault of the child, as appears from the extent of the injuries on the body of the

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child as reported by Sub-Inspector Vilakazi, raises a clear inference in my view that appellant No.1's intention was to cause grievous bodily harm to the child.

As far as appellant No.2 was concerned, who had no right at all to chastise the child but nevertheless participated in the beating, by so doing engaged in a common purpose with appellant No.1 to inflict severe injuries on the child.

In my view, it does not avail appellant No.2 to claim that there was no evidence as to which blows she actually struck and which blows were struck by appellant No.1 No.2 appellant, on her statement to the Sub-Inspector, clearly acted in concert with appellant No.1. If she, in fact, wished to disassociate herself and claim that blows that she delivered did not indicate an intention to do grievous bodily harm on her part, the proper thing to have done was to give evidence and to state this. In the light of the extent of the injuries suffered by the child, there is no substance in the contention which was advanced on behalf of both appellants that the correct verdict was one of assault and not assault with an intention to do grievous bodily harm. In this particular case, I agree with the contentions made by counsel for the two appellants that it is most desirable to have medical evidence in a case of this nature. However where, as in this case, that evidence is absent, I am of the view that in the light of

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Sub-Inspector Vilakazi's accurate description of the injuries, the absence of the medical evidence is of no assistance to the two appellants. In the light of what I have just said, I can see no good grounds for interfering with the conviction on the merits of this matter.

Finally, on the question of the sentence and its appropriateness, I would say that in the absence of proof that the beating was the cause of the child's death, the sentences are indeed severe. The learned Trial Judge did say, in the course of his judgment, that, in determining the sentence, he took into account the fact that the appellants had been in custody since the 29th July, last year. I

deduce from this that the learned Judge regarded their crimes as sufficiently heinous to warrant their incarceration in some form or another for a period of eighteen months. While I agree that an offence of this nature of the sentence, been unduly severe. In my view there is a substantial difference between the sentence imposed by the learned Judge and the one which I would have considered appropriate in the circumstances of this case. I accordingly consider that there should be a reduction in the period of imprisonment. In the result, therefore, the appeal on the merits is dismissed but the sentences in each case are reduced to twelve months' imprisonment, to take effect from the 29th July,1982.

SIGNED

L. VAN WINSEN, J.A.

I agree.

SIGNED

I. MAISELS, P.

I agree.

SIGNED

S. AAEON,J.A.