

## Conclusion

The Court held that under the circumstances of the case, with B.M. being under the age of 18 and just 2 years older than the girl, with whom he was in a romantic relationship, a suspended 24-month sentence was excessive. The sentence was reduced to 210 hours of community service within a 16-week period.

## Significance

The Court was faced with the unfortunate effect of criminalizing consensual sex amongst adolescents. The boy was 17 and the girl 15 and were in a romantic and sexual relationship, which might not have been obvious until the girl's pregnancy exposed their relationship to the criminal justice system. Tsanga J., in his judgment, acknowledged the disharmony in the laws where the Constitution recognises a 17-year-old as a child (defined as below 18), while the Criminal Code (where child is defined as below 16) treats the individual as an adult liable to prosecution under the offence of having sex with a young person.

This is a typical example of the idiosyncratic impact of criminalization of consensual sexual conduct on the adolescent. In the “Teddy Bear” cases also discussed in this volume, the South African High and Constitutional Courts grappled with a similar matter and held sexual offences provisions to be contrary to the best interests of the child, and an infringement on their rights, including the rights to dignity and privacy of the child. It is unfortunate that adolescent boys involved in consensual sexual conduct with their girlfriends are caught in the web of discrepant laws and exposed to the harshness of the criminal justice system.

***Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another***  
[2013] ZAGPPHC 1, Case No. 73300/10  
South Africa, High Court

## COURT HOLDING

By criminalising various consensual sexual conduct or activity: (i) between children who are between 12 and 15 years of age, and (ii) between two children who are within two years of age of one another, where one child is 16 or 17 years old, and the other is under 16, Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 (the “Act”) and the definition of “sexual penetration” in Section 1 of the Act are inconsistent with the Constitution of South Africa (the “Constitution”) and are therefore invalid.

## Summary of Facts

In the case before the High Court, the Applicants challenged the constitutional validity of Sections 15, 16 and 56(b)(2) of the Act, which criminalised consensual sexual activities between children of certain ages. The Applicants brought their applications (i) in their own interest as organizations dedicated to protecting children's rights pursuant to Section 38(a) of the Constitution; (ii) on behalf of children

at risk of being criminalised to protect their rights pursuant to Section 38(c) of the Constitution and Section 15(2)(c) of the Children's Act 38 of 2005 ("Children's Act"); and (iii) in the public interest pursuant to Section 38(d) of the Constitution and Section 15(2)(d) of the Children's Act.

## Issues

The broader issue before the Court was whether by criminalising consensual sexual activity between children of a certain age, Sections 15 and 16 of the Act were unconstitutional for infringing on children's constitutional rights to dignity, privacy, and bodily and psychological integrity, and were contrary to the best interests of the child as protected in Section 28 of the Constitution. The issues can be put more specifically as follows:

1. Whether Sections 15(1) and 56(2)(b), as read with the definition of "sexual penetration" in Section 1 of the Act, were unconstitutional to the extent that they:
  - o Criminalise a child aged 12-15 for engaging in an act of consensual sexual penetration with another child who is also 12-15 years old; and,
  - o Criminalise a child aged 16 or 17 for consensual acts of sexual penetration with a child under 16, where the age gap between them is two years or less.
2. Whether Sections 16 and 56(2)(b) of the Act and the definition of "sexual violation" in Section 1 of the Act are unconstitutional to the extent that they criminalise a child aged 15-15 years old for engaging in consensual sexual conduct with another child aged 12-15 years old, where there is more than a two-year age difference between the two children.

Further, in the event that the Court upheld the constitutionality of Sections 15 and 16 of the Act, the Applicants asked the Court to determine:

3. Whether Section 54(1)(a) of the Act, which requires a person who has knowledge that the impugned offences have been committed by a child under 18 years of age to report such knowledge to a police official; and
4. Whether Sections 50(1)(a)(i) and 50(2)(a)(i) of the Act, which require children convicted of the impugned offences to be included in the National Register for Sex Offenders were unconstitutional insofar as they apply to children engaging in consensual sexual activities.

## Court's Analysis

The Court undertook an analysis of the text of the impugned provisions and noted that the terms "sexual violation" and "sexual penetration" were defined so broadly that they included conduct that virtually every normal adolescent participates in at some stage or another, including conduct that could be positive, normal, and healthy if consensual. Sections 15 and 16 as read with Section 56 of the Act produced anomalous results, including that consensual sexual conduct between adolescents was criminalised.

The Court also examined the purpose of the legislation, and noted that it was primarily to protect children from predatory adults. The Court considered evidence from experts in child psychology and mental health, which described ages 12 to 16 as a period when adolescents are vulnerable, as they “have physiological ability and psychological disposition to engage in various sexual activities, but not yet the fully developed cognitive and emotional apparatus to deal with such experiences in a constructive fashion.”<sup>21</sup> As such, adolescents need protection and support.

According to the expert evidence, the impugned provisions went beyond protection of children and criminalised harmless and even beneficial consensual sexual activity. This harmed adolescents in a number of ways, including causing adolescents who were charged with such offences to experience emotional distress such as shame, regret, anger, and embarrassment. It further promoted stigmatisation of adolescent sexuality, and suppressed and drove underground expressions of sexuality, making it difficult for adolescents to access guidance they need from adults. Further, it could also compromise the work of organisations and individuals in support of adolescents, as they might be seen to be promoting illegal activities. The Court noted that sexual health services to adolescents would be compromised due to the requirement that individuals must report sexual behaviour that was otherwise normal and healthy.

The Court also considered the expert opinion that the enforcement of the provisions would subject many adolescents to the criminal justice system. This would have a negative impact on their healthy and normal development, as they may suffer trauma and secondary victimisation.

Despite the differing opinions amongst the Deponents, the Court noted that the majority agreed that “. . . using the weapon of the criminal justice system to deal with adolescent sexuality would further marginalise young people and will have long-term harmful consequences not only in respect of their own sexuality but also in respect of their own personal psychological well-being.”<sup>22</sup>

The Court then considered the arguments of the respondents, that the provisions of the Act which gave discretion to the prosecuting authorities on offences relating to children, would be implemented in accordance with relevant provisions of the Constitution, the Children’s Act, and the Child Justice Act. As such, prosecutions would not be pursued if they were not in the best interests of the child. The respondents also argued that the diversion mechanism could be used to prevent children from facing the full force of the criminal justice system.

The Court considered the constitutionally guaranteed rights that might be violated by the impugned provisions. It held that the effect of the impugned provisions, including the harm caused by unjustified intrusion into the private and intimate sphere of children’s relationships, violated Section 28 of the Constitution, which entrenches protection of the best interests of the child, including protecting children from undue exercise of authority.

The Court also held that children have an inherent right to dignity recognised in Section 10 of the Constitution. It referred to the case of *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) where the Constitutional Court of South Africa held that laws that proscribed certain consensual sexual activity were an unjustifiable limitation of the rights of equality, dignity, and privacy. The Court applied the same reasoning to consensual sexual conduct between adolescents.

The Court further held that the impugned provisions contravened not only the right to bodily and psychological integrity, under Section 10 of the Constitution, but also the right to intimate and personal relationships, under Section 14 of the Constitution.

The Court also referenced the case of *S v. M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) to state that children are entitled to a realm of personal space and freedom in which to live their own lives, and are to be protected even from the conflicting rights of the community.

The Court emphasised that rights of children are not subordinate to adults. It referred to its decision in *Christian Lawyers of South Africa v. Minister of Health and Others* (Reproductive Health Alliance as Amicus Curiae) 2005 (1) SA 509 (T) where it held that rights guaranteed under Sections 10 (right to dignity), 12 (right to bodily and psychological integrity), 14 (right to privacy), and 27 (right to health care services including to reproductive health) of the Constitution also applied to girls under the age of 18.

The Court then gave its opinion on the arguments of the respondents, that prosecutorial discretion and diversion could prevent infringement of children's rights. The Court opined that diversion would still subject the child to processes that would infringe the child's rights. As for the argument that prosecutorial discretion would be exercised in accordance with the Constitution and other laws, the Court dismissed the argument on several grounds including that "prosecutorial discretion can never cure the existence of constitutionally invalid criminal offences."<sup>23</sup> Further, there were no guidelines on exercise of this discretion. The Court referred to other decisions such as *Dawood & Another v. Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), where the Court held that where Parliament conferred discretionary powers on an official that limited fundamental rights, Parliament ought to provide guidance on how such constitutional rights would be protected. The Court did not find tangible and concrete guidelines for the discretionary prosecution relating to matters regarding children under the Act.

After finding Sections 15 and 16 in violation of constitutional provisions, the Court inquired whether the limitation of rights was reasonable and justifiable under Section 36 of the Constitution. The Court noted that the purposes of the criminal provisions included protection of children from predatory adults, sexual predators, persons who sexually abuse children, and perpetrators of sexual abuse. However, it held that the criminalisation of consensual sexual conduct between children bore no relationship to the purpose of protecting children from predatory adults and abusers. The impugned provisions could not therefore pass muster under Section 36 of the Constitution.

## Conclusion

The Court invalidated the offending provisions and, by way of remedy, suggested amending the provisions by reading words into them. The Court then referred the matter to the Constitutional Court for confirmation.

## Significance

If sexuality is a sensitive subject in the human rights discourse, it is even more so when it concerns adolescent sexuality. The subject of adolescent sexuality has normally been within the purview of cultural and religious norms. This case was novel not only in that it brought adolescent sexuality

openly into the realm of human rights, but also in that it positively affirmed adolescents as sexual beings who can engage in consensual sexual conduct, and recognised certain forms of state interference with this as a violation of their rights.

One reason why the subject of adolescent consensual sexual conduct found its way to the Court is because South Africa comprehensively reviewed its sexual offences law to align it with human rights, and dealt more elaborately with the issue of adolescent consensual sexual conduct. Many African countries still maintain, in their sexual offences regimes, the so called “anti-defilement laws” that are designed to protect adolescents (and in many cases only adolescent girls) from engaging in sexual relations. These defilement laws regulate adolescent sexuality by proscribing consensual sexual relationships between adolescents. The following provision taken from the Malawi Penal Code is used here for illustration: “Any person who carnally knows any girl under the age of sixteen shall be guilty of a felony and shall be liable to imprisonment for life.”<sup>24</sup> “Any person” could be a boy of 15 or 16. This was the issue that the South African Court addressed, whether consenting adolescents engaging in sexual conduct should be punished.

A report by the Law Reform Commission of Tanzania highlighted a high rate of defilement where most of the victims are teenage girls, and the culprits are mostly within the same age-group.<sup>25</sup> As experts testified before the court, this high rate of defilement may be a result of the fact that many teenagers engage in consensual conduct amongst themselves. However, the criminal laws of countries such as Malawi and others, punish this conduct. In fact, the Tanzania Law Reform Commission recommended that the age of defilement be raised to 18. The side-effect of this indiscriminate law would be to subject more adolescents to unjustifiable scrutiny, condemnation, and punishment. The South African Court protected the children of South Africa from these undesirable effects.

Although criminal laws have an important role to play, they should not be regarded as best suited to ensure child and adolescent sexual health and well-being. Rather, it is by respecting the rights of the child and the adolescent, including the rights to dignity, privacy, and access to sexuality-related health services and education, that children and adolescents will be given the space and opportunity to enjoy sexual health and well-being as they evolve toward becoming adults.

***Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another***  
**CCT 12/13, [2013] ZACC 35**  
**South Africa, Constitutional Court**

## **COURT HOLDING**

Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Act) have the effect of harming the adolescents they intend to protect in a manner that constitutes a deep encroachment in the rights of dignity and privacy, as well as the best interests of the child principle.

The limitations are not justifiable when subjected to the requirements under Section 36 of the Constitution of South Africa (the Constitution).