

that the sexual organs of a girl would penetrate those of a boy, so that she could be charged of this crime. The Court could have explored this definitional dilemma and determined whether it was gender-neutral. Indeed, men have suffered a pattern of disadvantage in jurisdictions where rape and defilement only pertain to women. The disadvantage is the invisibility of rape and defilement of men and boys under the law, leaving many men and boys suffering rights violations that the state does not recognise and address accordingly.

***S v. Brian M.* [surname editorially abridged]
[2015] ZWHHC 106, CRB No. B467/14
Zimbabwe: High Court**

COURT HOLDING

A sentence of 24 months' imprisonment for statutory rape was excessive considering that the perpetrator was a young boy of 17 involved in a romantic relationship with a girl of 15.

Summary of Facts

B.M was convicted under Section 70 of the Criminal Law Codification and Reform Act (Chapter 09:23) of having sexual intercourse with a person under the age of 16. B.M was 17 and the girl was 15 at the time of the alleged statutory rape(s). The two were boyfriend and girlfriend. The girl became pregnant. B.M. was charged, convicted, and sentenced to 24 months in prison, with 8 months set to be suspended if he did not violate any sex laws for 5 years, and with the remaining 16 months suspended if he performed 525 hours of community service within a 16-week period.

Issue

Whether a 24-month sentence for statutory rape is excessive for a 17-year old perpetrator who had consensual sex with a 15-year old, with whom he was in a romantic relationship.

Court's Analysis

The Court listed several reasons for determining that the sentence was excessive. First, it stated that the purpose of the law is to protect children under the age of 16 from sexually transmitted diseases, unintended pregnancies, and predatory adults. However, the prohibitions apply equally to persons aged 17 as to persons much older, even though one of the purposes of the law is to protect children from predatory adults. The Court noted that under Section 81 of the Constitution of Zimbabwe, 17-year-olds are "children." Other jurisdictions exempt youthful violators from prosecution when the violator's age is within two or three years of the victim's age. The Court noted that, according to some reports, 66% of people aged 15 to 19 engage in unprotected sex. It also noted that, in another case, juvenile sex offenders who committed the more serious crime of rape were not sentenced to imprisonment, such as in the case of *S v. M* 2009 (1) ZLR 47.

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