

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, PORT ELIZABETH)**

CASE NO.: CC32/2017

In the matter between:

THE STATE

v

SIMPHIWE APRIL

JUDGMENT

SEPHTON AJ:

[1] The accused is guilty of one count of contravening section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in that he had consensual sexual intercourse with a thirteen year old child.

[2] In sentencing the accused, I have to take into account his personal circumstances. He is 35 years old. He is not married but has two children who are 12 and 5 years old. He lives with the mother of his five year old child and both the child and the mother are dependent on him. The accused left school at standard six due to financial constraints.

[3] The accused has the following previous convictions:

- i. In 1999 he was convicted for escaping or attempt to escape and was imprisoned for six months;
- ii. In 1999 he was also found guilty of 2 counts of robbery and one of housebreaking with intent to rob. The charges were taken together for purpose of sentencing and he was sentenced to 10 years imprisonment suspended for five years.
- iii. In 2012 he was convicted of contravening section 4 of the Drugs and Drug Trafficking Act 140 of 1992 and sentenced to a fine of R1000 or 150 days imprisonment.

[4] The accused spent one month in custody prior to being released on bail in respect of this offence.

[5] The accused did not show any remorse for his actions and did not express any regret that he had consensual intercourse with a young child whose family was well known to him. He also did not appear to appreciate that he had abused a position of trust. It is well known that it is not safe for children to walk around at night alone and so the complainant's mother always made sure that she was accompanied by her friends or one of her brothers. According to the accused, the complainant requested him to accompany her home from the tavern for purpose of safety. He abused this position of trust.

[6] He was not alive to the dangers of sexually transmissible diseases or the prevalence of HIV/Aids and unwanted pregnancy. The complainant had to take anti-retroviral medication and the incident in question caused great emotional distress for her and parents.

[7] The Criminal Law (Sexual Offences and Related Matters) Amendment Act was the culmination of a lengthy process of research and consultation by the South African Law Reform Commission. Parliament has made an unequivocal choice of a uniform age of consent ...and opted to achieve the legitimate government purpose of protecting children.¹

[8] Both Mr van der Spuy for the accused and Ms Cerfontein for the Prosecution confirmed that the accused had been found guilty of a serious offence and that a custodial sentence is the only appropriate sentence. Mr van der Spuy did suggest that I consider suspending a part of the custodial sentence.

[9] The Court in Dube² stated that sexual crimes are regarded as serious because in the present times sexual molestation of children has become quite a serious social problem, giving rise as such to a legitimate uproar in the community (see the matter of *S v M* 1998 (1) SACR 463 (SCA)).

¹ *S v Geldenhuys* 2009(1) SACR 1 at 69

² *Dube v S* [2004] JOL 13221 (W),

[10] The State has a duty to protect children against sexual exploitation and the consequences thereof where such children have not reached an age at which, in the majority of cases, the child in question will have the requisite cognitive development and intellectual maturity to fully understand and appreciate the nature and consequences of sexual activities and to be able to give an informed consent to such activities.³

[11] Section 15 does not provide for any penalty for the contravention thereof. To consider an appropriate sentence I need to consider other cases where the accused was convicted of contravening section 15(1). In all of these cases a custodial sentence was imposed even though in some instances the perpetrator was a first offender.

11.1 In the Dube⁴ matter, the accused was convicted of statutory rape prior to the introduction of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. He received a custodial sentence of 12 months imprisonment. Here the court took into account that he was a first offender, that he admitted sexual intercourse; that at the time of sentencing he had been in custody for just short of four years and that at the time of his arrest the appellant was gainfully employed as a taxi driver and was responsible for his dependents including his wife and five minor children. The court also took

³ S v Geldenhuys 2009(1) SACR 1 at 63

⁴ Dube v S [2004] JOL 13221 (W),

into account that the complainant was only one week away from the consenting age at the time of the incident.

With respect I do not agree with Mr van der Spuy that the only difference between the accused in this matter and Dube is the length of the time spent in custody. In this matter the accused only admitted that he had had consensual intercourse with the complainant when the complainant had given evidence. He is not a first offender although none of his previous offences are of a sexual nature and he has only spent one month in custody.

11.2 Similarly in Fhetani⁵ where the accused's conviction of rape was overturned on appeal and replaced with one of statutory rape the court imposed a sentence of 3 years on the accused.

11.3 In Nelson⁶ the court overturned a conviction of rape and replaced it with a conviction of statutory rape in terms of the Sexual Offences Act No 23 of 1957. This act prescribed a sentence of imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such imprisonment. The appeal court imposed a sentence of three years imprisonment of which two years and two months are suspended for a period of five years on condition that the Accused/ Appellant is not convicted of the crime of rape, sexual intercourse with a child or any other offence under the Sexual Offences Act No 23 of 1957 as amended or under the Criminal Law Sexual Offences and Related Matters Act No 32 of 2007.

⁵ S v Fhetani [2007] JOL 20663 (SCA)

⁶ Nelson, unreported Western Cape High Court case no. A250/10 delivered on 8 February 2011

11.3 In Gwadi⁷ a sentence of five years for contravening section 15(1) was confirmed on appeal.

11.4 In Sheldon-Lakey⁸ the appeal court upheld a sentence of four years for contravening section 15(1).

11.5 In the Fisher⁹ matter the appellant was convicted in the Regional Court, Mitchell's Plain on 6 charges under the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 ("SORMA") and sentenced to 5 years imprisonment in terms of s276 (1)(i) of the Criminal Procedure Act, 51 of 1977 ("the CPA"). The appeal to the Western Cape High Court was against conviction only, the conviction was upheld.

[12] While due weight must be given to the appellant's personal circumstances, the offence he committed remains a serious one. The accused gave evidence that he has known the complainant and her family since 2009 when the complainant was 7 years old. She has grown up before his eyes with him regularly visiting her home and interacting with her family. He was placed in a position of trust and he abused this trust. As stated above he showed no remorse for his actions.

⁷ Sv Gwadi [2014] JOL 31687 (ECG)

⁸ S v Sheldon-Lakey 2016(2) SACR 632

⁹ Fisher v S (A51/2016) [2018] ZAWCHC 15 (9 February 2018)

[13] Right thinking members of society expect adults to protect children, not to abuse them. The sentence imposed upon the accused must clearly indicate that sexual intercourse by an adult with a child will not be tolerated.¹⁰

[14] In my view an appropriate sentence would be five (5) years' imprisonment. I accordingly sentence the accused to five (5) years' imprisonment.

S SEPHTON

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the State: Advocate Cerfontein, Director of Public Prosecutions, Port
Elizabeth

For the Defence: Adv van der Spuy, Legal Aid South Africa, Port Elizabeth

Date heard 28 February 2018

Date delivered: 02 March 2018

¹⁰ **Gwadi v S [2014] JOL 31687 (ECG)**