

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Review number: 09/2016

In the matter between:

THE STATE

Applicant

and

MPHO GIFT DIBETSO

Respondent

JUDGMENT BY: HINXA, AJ

DELIVERED ON: 23 MARCH 2016

HINXA AJ:

- [1] This matter served before this court as a special review in terms of Section 304 (A)1(a) of the Criminal Procedure Act No 51 of 1977 (the “CPA”).
- [2] The accused was charged in the Regional Court, Thaba Nchu for having sexual intercourse with a 14 year old child in contravention of Section 51(1) read with relevant sections of the Criminal Law (Sexual Offences and Related matters) Amendment Act, 32 of 2007 (“Act 32 of 2007”).
- [3] On 17 September 2015 the accused person who was legally represented pleaded guilty to the charge and tendered an

explanatory statement in terms of Section 112 (2) of the CPA. He was duly convicted on his plea on the same date, after which the court adjourned. The rationale behind the adjournment was for the trial court to be provided with a pre-sentence report.

[4] The Regional Magistrate (“Magistrate”) thereafter harboured some doubts about the propriety of the conviction she had pronounced. She (Magistrate) then summed up her reasoning in forwarding the matter on special review as follows, “Accused was 17 years of age when the offence was committed ... case was remanded to obtain a pre-sentence report. It later came to light that the requirements as set out in section 15 (2) (a) of Act 32/2007 were not complied with ...”. She then cited the aforesaid section though not verbatim and prayed that the conviction be set aside.

[5] At this juncture I consider it prudent to refer to the relevant section in full. It reads as follows:

*“The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the [National] Director of Public Prosecutions if **[both] A [and B were children] was either 16 or 17 years of age at the time of the alleged Commission of offence and the age difference between A and B was more than two years ...**”*

[6] In this connection I need refer only to the *ratio decidendi* of Khampepe J in **The Teddy Bear Clinic for Abused Children and Ano v Minister of Justice and Constitutional Development and Another** [2013] ZACC 35. Dealing with the

prosecutorial discretion ordained by this section at paragraph 83 she opined that whilst the rationale was to ensure that the prosecutor would choose to act with circumspection (in the prosecution of the child), that does not do enough to alleviate the invasion of the children rights.

- [7] Reverting to the facts of this case, it is common cause that both children fell within the category envisaged by Section 15 (2) and no written authority was first solicited from the Director of Public Prosecutors (“DPP”). On this ground alone, the conviction cannot stand.
- [8] That having been said, another aspect still warrants scrutiny. Section 15 of Act 32 of 2007 relied upon by the prosecution in sustaining conviction herein and also cited by the magistrate in forwarding this matter on special review was, in its entirety, declared unconstitutional and invalid in *The Teddy Bear case* (supra) (paragraph [117] (I)). Pursuant thereto, section 2 of Act No 5 of 2015 was substituted for Section 15. It follows therefore that even if the DPP’s written authority had been secured, the conviction would still not be sustainable due to constitutional impropriety thereof.
- [9] I accordingly make the following order:
- 9.1 The conviction is set aside.
- 9.2 I leave it to the discretion of the DPP whether to re-instate prosecution or not.

M.D HINXA AJ

I concur

B.C. MOCUMIE, J