# **Factsheet: AJ v STATE**

## **Background**

The applicant is a 15-year-old boy who was in a romantic relationship with a 13-year-old girl. On 1 January 2021, the applicant was summoned by police officers to the Thyolo police station, following a complaint lodged by the girl’s parents. The applicant was brought before the Thyolo Magistrates Court and charged with the offence of defilement in terms of section 138(1) of the Malawi Penal Code. The applicant, represented by SALC and CHREAA, filed an application for judicial review in the High Court. The case was referred to the a full bench of the High Court sitting as a Constitutional Court and will be heard on 15 February 2022.

## **Legal issues**

Section 138(1) of the Penal Code provides:

*“Any person who carnally knows any girl under the age of sixteen years shall be guilty of any felony and shall be liable to imprisonment for life.”*

The only defence available under this section is if the person accused reasonably believed that the complainant was of or over the age of 16 years. The offence does not distinguish situations where the person accused is also under 16, or a minor child, who had consensual sex with a girl under the age of 16.

The applicant argues that the application of the offence of defilement to consensual sexual relationships between adolescent children constitutes a breach of the constitutional rights of the applicant, including:

* Children’s rights in section 23(1) to treatment consistent with their best interests and welfare, as it involves exposing adolescent children to the criminal justice system at a young age and constitutes a barrier to access to sexual and reproductive information and services important for their development and health;
* Privacy in section 19(1);
* Dignity in section 21; and
* Equality in section 20, as the offence affects boy children who are prosecuted and jailed for the offence.

## **Constitutional Matter**

The issues for the Constitutional Court to determine are:

* Whether or not the offence of defilement under section 138(1) of the Penal Code, as it applies to consensual non-exploitative sexual relations between adolescent children violates the applicant’s right to privacy and dignity as provided under sections 19(1) and 21 of the Constitution.
* Whether or not the application of the offence of defilement under section 138(1) to the applicant and other adolescent children in consensual non-exploitative sexual relationships constitutes treatment that is harmful to their health and development, contrary to their best interests, as protected in section 23(1) of the Constitution.
* Whether or not section 138(1) of the Penal Code discriminates against the applicant on the basis of sex and violates his right to equality protected under section 20 of the Constitution.

## **Importance of the case**

In terms of section 138(1) of the Penal Code, it is illegal to have sex with a girl under the age of 16 in Malawi, and there are no exceptions for consensual non-exploitative sex when the accused persons are themselves children/adolescents. The offence has a maximum sentence of life imprisonment. Although minors cannot be sentenced to life imprisonment in Malawi, this has resulted in young people, particularly boys, being incarcerated for lengthy periods for consensual sex.

This criminalisation is discriminatory as it targets the boychild. In addition, because the law is not gender-neutral, boys do not receive any protection from sexual exploitation by older people.

The offence creates a barrier to the access to sexual and reproductive information and services for adolescent children, making it difficult for them to make informed decisions about their health and sexuality. This increases the risk of adverse outcomes among adolescents, including teen pregnancies, unsafe abortions, sexually transmitted infections and child marriages.

The case concerns the subjection of adolescents to the criminal justice system which is detrimental to their rights, development, mental health, education and growth.

Adolescents require information and support to enable them to make informed decisions about engaging in sexual activity. Yet, because the law prohibits consensual sex between adolescents, they are deterred from seeking such advice and information. Ultimately, criminal law is an inappropriate tool to deter adolescent sexuality. We encourage instead talking openly to adolescents about sex, supporting them to make healthy life choices, and ensuring that they are able to understand and respect the meaning of informed consent. Instead, criminalisation distorts the concept of consent, and makes it harder for boys and girls to report sexual abuse, for fear of themselves being admonished and persecuted.