CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 63/10
[2011] ZACC 7

In the matter between:

S — Applicant

and

THE STATE — Respondent

together with

CENTRE FOR CHILD LAW — Amicus Curiae

Heard on : 9 November 2010

Decided on : 29 March 2011

---

JUDGMENT

---

KHAMPEPE J:

*Introduction*

[1] This is an application for leave to appeal against the decision of the Supreme Court of Appeal that dismissed, with reasons,[1] an application for leave to appeal against a

[1] *S v The State*, Case No 444/09, Supreme Court of Appeal, 31 March 2010, as yet unreported.

decision of the Free State High Court, Bloemfontein (High Court) in effect confirming a sentence imposed by the Regional Court at Parys (Regional Court). The High Court had refused Mrs S's petition in terms of section 309B of the Criminal Procedure Act[2] (the Act).

[2] The issue raised in the application is whether the sentencing court and the Supreme Court of Appeal, in their reasons, followed the correct approach to sentencing as set out in the decision of this Court in *S v M*.[3] Mrs S contends that the Regional Court and the Supreme Court of Appeal failed to establish whether she was a primary caregiver with the result that the sentence imposed paid insufficient regard to the best interests of her children. Mrs S argues that had the approach in *S v M* been followed, the sentencing court would not have imposed a custodial sentence.

*Factual background*

[3] Mrs S is a 33 year old married mother of two children, a daughter, E, born 12 August 2002, and a son, H, born 12 October 2005. During December 2005, whilst employed at a firm of insurance brokers, she falsified a valuation certificate in respect of a wristwatch and a ring by altering it to a certificate in respect of a ring only.[4] She also effected a further alteration by substituting her own name for that of the true owner.

[2] 51 of 1977. Section 309B(5) makes provision for applications for leave to appeal.

[3] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC), where this Court set aside a sentence of imprisonment and substituted it with a correctional supervision sentence in terms of section 276(1)(h) of the Act.

[4] Above n 1 at para 9.

During January 2006, she lodged a claim for the loss of the ring with Mutual & Federal Insurance, but the claim was not met. The potential loss to the insurance company was R42 000.[5]

*Proceedings in the Regional Court*

[4] On 20 March 2007, she pleaded guilty to forgery, uttering and fraud in the Regional Court. She testified in mitigation of her sentence. The State led the evidence of Ms Marinda Viljoen (Ms Viljoen), a probation officer, whose report was also received as evidence. The evidence can be summarised as follows.

[5] Mrs S has had a difficult upbringing as her father abused alcohol and when in a state of insobriety, he assaulted her, her mother and her siblings.[6] She was compelled to leave school at a young age to seek employment in order to support her family. She is married and has had a tempestuous relationship with her husband but has on occasions been on good terms with her mother-in-law. On other occasions, she has accused her mother-in-law of siding with her husband with regard to his extra-marital affair. Regarding her offences, she explained that she had committed the offences when she was experiencing financial difficulties as a result of paying for her daughter's medical fees. Her children require special care. Her daughter suffers from a dysfunctional heart valve. E has had surgery and requires constant medication for which Mrs S and her husband

[5] Id.

[6] Id at para 12.

have to pay. H suffers from chronic chest infections and the doctor suspects that he has asthma and requires constant attention.

[6] Ms Viljoen's pre-sentence report portrayed Mrs S in a bad light, as manipulative, dishonest, greedy, sly and as a troublemaker who drank alcohol in excess. It also presented her as being irresponsible in the management of her finances. The report was compiled on the basis of the interviews Ms Viljoen conducted with Mrs S's previous employers and her husband's family. The report found that, should a custodial sentence be imposed, there would be an adequate family support system to care for the children and that Mrs S's mother-in-law would assist Mr S to care for the children.

[7] For purposes of sentencing, the counts of forgery and uttering were taken together and Mrs S was sentenced to two years' imprisonment, conditionally suspended for five years. On the count of fraud, she was sentenced to five years' imprisonment with conditional correctional supervision in terms of section 276(1)(i) of the Act.[7] She has a previous conviction for fraud also committed in the course of her employment with her previous employer. For that conviction, she received a suspended sentence of

[7] Section 276(1)(i) provides:

> "**Nature of punishments**—
>
> (1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—
>
> . . .
>
> (i) Imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board."

imprisonment on condition that she, amongst other things, compensate the complainant through regular monthly repayments. She defaulted on these payments. In determining her sentence, the court took into account that Mrs S's mother-in-law had agreed to assist Mr S to look after the children. Mrs S, following the imposition of her sentence, applied for leave to appeal against sentence. Leave was refused.

*Court proceedings preceding Supreme Court of Appeal*

[8] Leave to appeal against sentence having been refused, Mrs S applied to the High Court to lead the further evidence of a social worker, Dr Wessels, on sentence. The application for leave to lead further evidence was filed together with a petition for leave to appeal. The High Court granted leave to appeal and remitted the matter to the Regional Court, in terms of section 309C(7)(d) of the Act,[8] for the reception of the further evidence, without deciding the petition.

[9] The Regional Court received the evidence of Dr Wessels in terms of section 309B(5)(c)(i) of the Act, but omitted to record its findings as required by section

[8] Section 309C(7)(d) provides:

> "**Petition procedure**—
>
> (7) Judges considering a petition may, whether they have acted under subsection (6)(a) or (b) or not—
>
> . . .
>
> (d) in the case of an application for further evidence, grant or refuse the application, and, if the application is granted the judges may, before deciding the application for leave to appeal, remit the matter to the magistrate's court concerned in order that further evidence may be received in accordance with section 309B(5)."

309B(5)(c)(ii).[9] The petition and the further evidence of Dr Wessels were then served before the High Court, which refused leave to appeal.

[10] Mrs S then applied to the High Court for leave to appeal this refusal. During the hearing of that application, the State submitted that the interests of justice required that the sentence be set aside and remitted to the Regional Court for reconsideration. The High Court, regarding itself as *functus officio*, granted leave to appeal to the Supreme Court of Appeal.

*Supreme Court of Appeal proceedings*

[11] The Supreme Court of Appeal found that the High Court had erroneously considered the petition and Dr Wessels's further evidence because the High Court did not have the recordal of findings before it.[10] It found that the recordal of the findings pertaining to further evidence did not comply with section 309B(5)(c)(ii) of the Act, as the Regional Court had failed to make a finding on the cogency and sufficiency of the evidence.[11] Notwithstanding, it found that these irregularities were not insurmountable since the Supreme Court of Appeal was in no worse a position to consider the further

[9] Section 309B(5)(c) provides that:

> "The court granting an application for further evidence must—
>
> > (i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
> >
> > (ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness."

[10] Above n 1 at para 6.

[11] Id at para 3.

evidence of Dr Wessels than if the Regional Court had properly recorded the further evidence.

[12] In deciding the merits of the application for leave to appeal, the Supreme Court of Appeal noted the striking dichotomy between the reports of Ms Viljoen and Dr Wessels,[12] but found it unnecessary to resolve them, as it accepted the evidence in the report of Dr Wessels.[13] Dr Wessels's report portrayed Mrs S quite propitiously; that she was a loving and caring mother who maintained gainful employment in order to provide for the family. Despite this, the Supreme Court of Appeal found that:

> " The sentence imposed is in line with sentences imposed generally for similar offences. There is nothing in the circumstances of this matter with regard to the appellant or the offence which persuade me that there is a reasonable prospect of the high court interfering on appeal with the sentence imposed. The conditional suspension of the term of imprisonment on counts 1 and 2 and the term of imprisonment from which the appellant may be placed under correctional supervision in the discretion of the Commissioner or a parole board on count 3, provides the appellant with another opportunity for rehabilitation mostly outside prison."[14] (Footnote omitted.)

[13] It held that there were no reasonable prospects of success in an appeal against her sentence. The application for leave to appeal against the refusal of Mrs S's petition in the Regional Court was accordingly dismissed.[15]

[12] Id at para 13.

[13] Id at para 14.

[14] Id at para 15.

[15] Id at para 16.

[14] Before considering the main issues raised in this case, it is necessary to consider two preliminary issues. The first is whether the late filing of the application for leave to appeal and the late filing of the record should be condoned. The second is whether leave to appeal should be granted.

*Condonation*

[15] The test for determining if condonation should be granted is whether it is in the interests of justice.[16] Factors relevant to this inquiry include, but are not limited to: the extent and cause of the delay; the prejudice to other litigants; the reasonableness of the explanation for the delay; the significance of issues to be decided in the intended appeal; and the prospects of success. None of these factors are decisive. The inquiry is one of weighing each against the others in order to determine where the interests of justice lie.[17]

[16] Mrs S has applied for condonation for the late filing of the application for leave to appeal, which was filed more than two months late, and for the late filing of the record. The delay was occasioned by the difficulty in obtaining counsel with the requisite experience in constitutional litigation.

[16] See *S v Mercer* [2003] ZACC 22; 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4; *Head of Department, Department of Education Limpopo Province v Settlers Agricultural High School and Others* [2003] ZACC 15; 2003 (11) BCLR 1212 (CC) at para 11; and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[17] *Van Wyk v Unitas Hospital and Another (Open Democracy Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.

[17] The record was lodged nine days late. The delay was occasioned by a lack of proper communication between Mrs S's attorneys and the correspondent attorneys with regard to the lodging of the record.

[18] The State does not oppose these applications. In view of the importance of the right the Constitution confers on every child in terms of section 28 of the Constitution,[18] I do not consider the prospects of success to be decisive of condonation here. In any event, there is, in my view, a satisfactory explanation for the delay, and there was no prejudice to the State. In these circumstances, it is in the interests of justice to grant condonation for both the late filing of leave to appeal and the late filing of the record.

*Should the application for leave to appeal be granted?*

[19] The application for leave to appeal should be granted only if two important considerations are satisfied. The first is whether the application raises a constitutional issue. The second is whether, if it does, it is in the interests of justice to hear the appeal.

[18] Section 28 1(b) and (2) provides:

"**Children**—

(1) Every child has the right—

. . .

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

. . . .

(2) A child's best interests are of paramount importance in every matter concerning the child."

(3)

Where the interests of justice lie will depend on a number of considerations, including the prospects of success in the intended application.[19] I deal with each below.

*Does the application for leave to appeal raise a constitutional matter?*

[20] The question whether the sentencing courts have properly considered the best interests of the children in the light of section 28 of the Constitution when imposing sentence is a constitutional matter.[20]

[21] But, is it in the interests of justice to grant leave to appeal having regard to Mrs S's prospects of success in the matter? It is to this question that I turn. This Court in *S v M* has highlighted that every child has the right to enjoy special care.[21] Children are vulnerable and require a nurturing and secure family for their development.[22] To this extent, sentencing courts must perform their function in matters concerning the rights of children in a manner which at all times shows due respect for children's rights and that brings to bear focused and informed attention to the needs of the children at appropriate moments in the sentencing process.[23] The question whether the sentencing courts had

[19] *Armbruster and Another v Minister of Finance and Others* [2007] ZACC 17; 2007 (6) SA 550 (CC); 2007 (12) BCLR 1283 (CC) at para 24; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19; and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 10-2.

[20] Above n 3 at paras 12-5.

[21] Id at para 17.

[22] Id at para 38, quoting from Ministry for Welfare and Population Development *White Paper for Social Welfare: Principles, Guidelines, Recommendations, Proposed Policies and Programmes for Developmental Social Welfare in South Africa* (August 1997) Ch 8, s 1 at para 15.

[23] Id at para 36.

proper regard for the children's best interests when imposing sentence is a serious matter that strikes at the core of the administration of justice. The interests of justice demand that this Court, as the ultimate guardian of both the Constitution and children, investigate whether the High Court and the Supreme Court of Appeal have exercised their discretion in line with the requirements of section 28 of the Constitution.

[22] The allegation that a court imposed sentence without paying appropriate attention to the children's best interest is an important constitutional issue that goes beyond the interests of the parties. The prospects of success should, in the light of the importance of this constitutional issue, yield to the interests of justice. In the circumstances, leave to appeal should be granted.

*Merits*

[23] As already indicated, Mrs S in this Court challenges the decision of the Regional Court and the Supreme Court of Appeal. Her pivotal complaint is that the courts did not consider the interests of the children when they considered her sentence. It was argued that the Regional Court did not take heed of the best interests of the minor children in terms of section 28 of the Constitution in that no inquiry was conducted to establish if Mrs S was a primary caregiver. Had this inquiry been conducted, so it was contended, a custodial sentence would not have been imposed, as its imposition would render the children without a caregiver. It was argued that the courts' failure to conduct this inquiry was a serious misdirection warranting the setting aside of the sentence.

[24] Mrs S also applied to lead further evidence on the basis that the circumstances might have changed in relation to the care and welfare of the children. In this regard, it was contended that the further evidence of a social worker might shed more light on the impact the custodial sentence would have on the children. It was contended that, whilst Mrs S's mother-in-law was no longer willing to care for the children, Mr S would not be able to care for the children properly.

[25] It was contended that the Supreme Court of Appeal, notwithstanding the evidence of Dr Wessels, failed to demonstrate the shift in judicial mindset enunciated in *S v M*. It was argued that the court simply failed to have regard to the best interests of the children and this failure constituted a serious misdirection warranting the sentence to be set aside.

[26] The State opposes the appeal. It contends that the best interests of Mrs S's minor children were taken into account by the previous courts and that these courts properly followed the approach in *S v M.* Counsel for the State contended that this case was distinguishable from *S v M* in that Mrs S's husband is available to take care of the children whilst she is serving her term of imprisonment.

[27] The Centre for Child Law of the University of Pretoria was admitted as amicus curiae (amicus). The amicus made written and oral submissions. Its submissions were that the Regional Court and the Supreme Court of Appeal did not pay adequate attention

to the best interests of the minor children. It emphasised that there was insufficient evidence on the quality of care the children would receive from the family structure. It urged this Court to appoint a curator ad litem to investigate whether the circumstances might have changed and what would be in the best interests of the minor children in the circumstances, even if the sentence was not set aside.

[28] On 15 November 2010, this Court appointed Advocate Reinders (curator), a practising advocate at the Free State Bar Council, as a curator ad litem in respect of the minor children of Mrs S. This Court is indebted to the curator. The directions issued by the Chief Justice, dated 6 December 2010, required the curator to compile and submit a report dealing with: (a) what effect, in the event of this Court dismissing the application for leave to appeal, a custodial sentence would have on the children; and (b) what measures, if any, would need to be taken to ensure that the children are adequately cared for, if their mother is incarcerated.

[29] The curator produced a report whose factual findings are not disputed. The parties, together with the amicus, were invited to make written submissions regarding the report. Written submissions were received from Mrs S and the amicus, to which I shall return, whilst the State elected not to make any submissions in this regard.

[30] Mrs S advances two interrelated grounds of appeal that support her principal complaint that the Regional Court and the Supreme Court of Appeal failed to adopt the

child-centred approach that requires that the best interests of the children should be taken into account in the imposition of sentence. She draws attention to her evidence in the Regional Court, which, she says, lends support to her assertions that she is a primary caregiver and the imposition of a custodial sentence was inappropriate as it would render the children without a caregiver. She points out that the evidence which was served in that court included the following: that the children were financially and emotionally dependant on Mrs S; and that the imposition of sentence would have a deleterious effect on the children. She posits that the Regional Court already found that Mr S would, in view of his working conditions, be unable to shoulder the responsibility of caring for the children. She contends that in the light of the evidence that served in the Regional Court, that court was required to apply the paramountcy principle in determining an appropriate sentence. She argues that the custodial sentence was not the only appropriate sentence to impose in the circumstances. In doing so, she places reliance on *S v M*, arguing that her case falls squarely within it.

[31] The high watermark of her complaint against the Supreme Court of Appeal is that the Supreme Court of Appeal, failed to follow the approach set out in *S v M* when sentencing a primary caregiver. I point out, in passing, that this Court held that the standard preoccupations of all sentencing courts should be the consideration of the best

interests of the children, including the consideration of the quality of care that they would obtain in the event of her incarceration.[24]

[32] Counsel for Mrs S argued that the evidence of Dr Wessels had established that Mr S was prevaricating about shouldering the responsibility of caring for the children, that his mother was no longer available and willing to assist in the care of the children, and that incarcerating Mrs S would be so traumatic as to deleteriously affect the interests of the children. It was therefore contended that the decision of the Supreme Court of Appeal to refuse the petition was a serious misdirection that should warrant the setting aside of the sentence.

[33] In any event, the State contends that the Regional Court and the Supreme Court of Appeal properly considered the best interests of the children. It submits that this case is distinguishable from *S v M* in that the children's father is available to care for the children. In my view, all these submissions cannot be properly considered without putting in context the principles articulated in *S v M*. I briefly do so hereunder.

*The applicable test*

[34] The correct guidelines to be adopted by the sentencing courts, where a custodial sentence of a primary caregiver is in issue, are set out in *S v M*. They are:

[24] Above n 3 at para 33.

> "(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
>
> (b) . . . The court should also ascertain the effect on the children of a custodial sentence if such sentence is being considered.
>
> (c) If on the *Zinn*-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
>
> (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
>
> (e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose."[25]

*Did the previous courts consider the impact the sentence will have on the minor children?*

[35] I have grave difficulties with whether the Regional Court, being convinced that the custodial sentence was the only appropriate sentence to impose, gave due consideration to the adequacy of care the children would receive while Mrs S is incarcerated. I am mindful that a sentencing court is not required to protect the children from the negative consequences of being separated from their primary caregivers. It is required only to pay appropriate attention to their interests and take reasonable steps to minimise damage. This requires a balancing exercise that takes account of the competing interests.[26] The

[25] Above n 3 at para 36.

[26] Above n 3 at paras 38-9. These were stated to be (i) maintaining the integrity of family care and (ii) the duty on the State to punish criminal misconduct.

State submits that this intricate balancing exercise was undertaken and that Mr S and his family also undertook to care for the children. I am unpersuaded by this submission.

[36] Accepting that the court's attention was drawn to the need to provide alternative care for the children (by the Viljoen report), the court was required to investigate the effect the sentence would have on the children. The Court did not fully investigate the quality of alternative care the children would receive. Given that Mrs S's mother-in-law was not staying in the same household as the children, there was no investigation by the Court on who would look after their daily needs during Mrs S's incarceration. The alternative joint care seemingly considered between Mr S and his mother was simply not explained. For instance, there was neither an enquiry on who would take the children to school and fetch them, nor was there any consideration given to how the children would maintain a relationship with their mother when she was in prison and which prison would facilitate ease of contact between Mrs S and her children. All these matters are important considerations that the court did not investigate.

[37] Apart from the above, sight must not be lost that the gamut of the evidence sketching Mr S as an unsuitable alternative caregiver. The evidence showed that he would periodically leave the common home whilst maintaining liaisons with his paramour. The evidence also demonstrated that even when he was present at home he did not play any significant role with regard to the care of the children. I would emphasise that the children's tender age, and the fact that they are sickly, simply cries out

for the kind of attention the Regional Court ought to have paid, when weighing up the importance of the children's needs against the need to punish the mother.

[38] In the circumstances, the Regional Court imposed the sentence on Mrs S without giving adequate and informed consideration to the impact a custodial sentence would have on the children. The Supreme Court of Appeal also failed to follow the proper approach, notwithstanding that it received and considered the further evidence of Dr Wessels. The significance of Dr Wessels's report lies in that, it reports that Mr S's mother is no longer available to provide alternative care for the children. If anything, it obliterates any reliance there was in the Regional Court on the availability and willingness of Mr S's mother to assist in the care of the children.

[39] Notwithstanding this critical evidence, the Supreme Court of Appeal did not apply its mind to whether it was necessary to take steps to ensure that the children would be adequately cared for, having regard to the changed circumstances relating to the availability of Mrs S's mother-in-law, which Dr Wessels's report sharply pointed out. If the principles enunciated in *S v M* are to serve their purpose, courts must conduct more robust child-centred enquiries to ascertain the impact a custodial sentence will have on the children of primary caregivers should they be incarcerated. The answer to the question, whether the sentencing court has observed the guidelines, should ordinarily appear from the record itself through the reasons that are given on sentence.

[40] In this case, the Supreme Court of Appeal's consideration of sentence fell foul of the standard set out in *S v M*. The amicus submitted that the courts below paid less attention to the impact of the sentence on the primary caregiver than the High Court in *S v M*. I agree. In my view, this would entitle this Court to consider the appropriateness of the sentence imposed by the Regional Court.

*Should this Court interfere?*

[41] This Court is indebted to the curator for her report, despite serious time constraints. This Court is also indebted to the amicus for its submissions, in particular on the report of the curator.

[42] It is perhaps apposite to briefly summarise the contents of the report before dealing with the submissions presented. The report highlights the tender age and educational standard of each child. The daughter is now eight years old and is in grade three, whilst the son is five years old and is in Grade R. The curator has established that Mrs S is the primary caregiver and that it will not be in the best interests of the children for Mrs S to be incarcerated. Her view in this regard is based on the information of, an educational psychologist, and the school headmistress, that Mrs S is the primary source of the children's emotional security and attends to their day-to-day activities such as preparing them for school and collecting them from school. Her finding is that Mrs S's incarceration will have a deleterious effect on their emotional and material development.

[43] Mrs S's mother-in-law, who used to take care of the children periodically, has indicated her inability to do so because she now suffers from osteo-arthritis and back pain. In the meantime, Mrs S has improved her position in life since she committed the crime and has become a valued employee and devoted parent. Her employer has indicated that it would not be able to keep open her position in the event of her incarceration. Mr S earns R8 500 per month. He is unable on his own, and without the additional income of Mrs S, to pay for the children's tuition fees, medical expenses and daily necessities. Although he reportedly loves his children, he cannot pay someone to assist him with the care of the children. He works long hours, from 05h00 until 19h00, from Monday to Friday. Mr S's employer has advised that he cannot alter the working hours of Mr S. Mrs S has also recited the health problems of her children and their special needs arising from their illnesses. Following the withdrawal of their paternal grandmother, there is no one to take care of the children, if Mrs S is incarcerated.

[44] As already indicated, the curator finds that in the event of Mrs S's incarceration, the children would not be on the street because Mr S would take care of them. The report however, fails to address the adequacy of care the father would provide. I therefore have profound difficulties with the alternative care the report proposes. In my view, this alternative care is not supported by the information contained in this report. It is evident from the contents of the report that Mr S, by virtue of his long working hours, would not be able to adequately care for his children. Moreover, there is information that his working conditions cannot be altered. There is also a paucity of information on who will

prepare the children for school and who will collect them in the light of Mr S's long working hours. There is further no indication as to who will care for their special needs as they suffer from chronic diseases and require constant medical treatment and attention. It is inconceivable that Mr S will afford to secure the assistance that the curator seemingly recommends because, on the information presented, there are no available funds. It is only in these respects that I have found the report wanting. This view is shared by both Mrs S and the amicus. Mrs S has argued that *S v M* requires the quality of alternative care for the children to be assessed and considered properly during the sentencing process. I agree. There is scant information about the quality of care the children would receive if left with their father under these circumstances.

[45] I accept, as the curator found, that the children will be adversely affected by the incarceration of their mother as she is their primary caregiver. However, this on its own does not impose any obligation on the sentencing courts to protect, at all costs, the children from the inevitable consequences of losing their primary caregiver if she is incarcerated. All that is required is that the court must pay proper attention to these issues and take measures to minimise damage when weighing up the competing needs of the children, on the one hand, and the need to punish Mrs S for her misconduct, on the other. In *S v M*, this Court stressed that the importance of paying appropriate attention to the interest of the children—

> " is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm."[27]

[46] Given the information in the report and the curator's finding that the incarceration of Mrs S as a primary caregiver will impact adversely on the children, and the non-violent nature of the crime of fraud, I am persuaded by Mrs S's argument, which the amicus supports, that this is a case in which a range of possible sentencing options would be appropriate. I am minded that the facts of this case are indistinguishable from those in *S v M*. It may be that M committed more crimes. A quick comparison of the two cases demonstrates that M and Mrs S were both primary caregivers. They were each convicted of the same offence, namely fraud. They are repeat offenders. M had been found guilty of fraud on three occasions. On the first occasion, M was convicted of fraud and sentenced to a fine coupled with a term of imprisonment. The second occasion related to fraud committed while she was out on bail. On the third occasion, she committed 38 counts of fraud and four counts of theft. Mrs's offences pale in comparison to those of M. Although M was a single mother, the fathers of her children were considered unsuitable caregivers for the children. In this case, Mrs S's husband cannot adequately look after the children. He has never played any significant role in the care of these children.

[27] Above note 3 at para 35.

[47] The only conspicuous difference between M and Mrs S is that Mrs S is married to an almost absent father, whereas M was not married to any of the absent fathers of her children. To distinguish between the two mothers, on the basis of marital-status alone, may in my view serve to create a discrete inequality in the law contrary to section 9(1) of the Constitution.[28] It should not be presumed that, only on the basis of marriage and co-residence, the father would take adequate care of the children. Even to start the analysis of whether the primary caregiver should be given a custodial sentence this way, on the basis that she has a married partner who lives with her, without regard to the realities of that family's life, is too normative an assessment of how parental responsibility in marriage is apportioned. The fact that a primary caregiver is married, and may be residing with her partner, is purely another factor to be taken into account and is not decisive when considering the sentencing of primary caregivers. The physical presence of the father does not mean that the father will be able to take adequate care of the children. What constitutes a primary care-giver is the following:

> " Simply put, a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly. This is consonant with the expressly protected right of a child to parental care under section 28(1)(b)."[29]

[28] Section 9(1) provides: "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[29] Above n 3 at para 28.

[48] It is incumbent on the courts to start their analysis from the basis of the best interests of the children, as mandated by section 28 of the Constitution, not just the mere interests of the children. If there appears to be a partner of a primary caregiver, the question should then be whether that partner can provide adequate care under section 28(1)(b) of the Constitution or whether there is evidence that that parent is inclined to neglect the children's needs, contrary to section 28(1)(d) of the Constitution.[30] The curator's report has failed to address any of the aspects of Mr S's potential care.

[49] As I have already stated, although fraud is a serious crime, it is non-violent in nature. It is not infrequent that a non-custodial sentence is imposed.[31] In *S v M*, this Court held that correctional supervision in terms of section 276(1)(h) of the Act was suitable for M notwithstanding her recidivism.[32] I am minded to find that it will not be in the best interests of the children for Mr S to care for them. Although he stays with the children, the evidence demonstrated that he has in the past periodically left the common home whilst maintaining liaisons with his paramour and will not be available to provide for their basic needs. This is underscored by the evidence of the headmistress of the pre-primary school the son attends. Despite that H has been in the school for four years, the

[30] Section 28(1)(d) provides: "Every child has the right-to be protected from maltreatment, neglect, abuse or degradation."

[31] *Saayman v S* (CA&R 82 / 07) [2008] JOL 22778 (E) (delivered on 7 December 2008) unreported. In this case, the appellant was a repeat offender and was convicted of six counts of fraud and sentenced to two years imprisonment suspended for five years; it was held by the appeal court that the regional magistrate missed the opportunity of imposing a conditional suspension which was compatible with restorative justice. See also *S v Scheepers* 2006 (1) SACR 72 (SCA); *S v Flanagan* 1995 (1) SASV 13 (A); and *S v R* 1993 (1) SASV 209 (A).

[32] Above n 3 at paras 74-7.

headmistress hardly knows Mr S. The person who runs the aftercare business asserted that Mrs S is a good mother who has a close bond with the children and attends to their needs. For all the years the educational psychologist has taken care of the children, she has seen Mr S only on a few occasions.

[50] Undoubtedly, on the evidence before this Court, Mrs S is the only person who can adequately look after the needs of the children and it will not be in the children's best interests, taking account of their ages and health requirements, to sever their links with her by imposing a custodial sentence.

[51] Although Mrs S has wronged society through her criminal misconduct, she has taken great strides to improve her position at work and shows great devotion to her family. Our society is not the kind that bays for blood at the altar of retribution. Her employer has confirmed that she is a valued employee and that her salary has been increased to R8 000 per month. From the report, Mrs S is making concerted efforts to turn away from a life of crime and to be a useful member of society. There is no suggestion that she has, since her conviction, behaved dishonestly. I have anxiously considered her previous conviction, but have come to the conclusion that she should not be excluded from correctional supervision only on that account. Correctional supervision, as this Court observed in *S v M*—

> " is an innovative form of sentence, which if used in appropriate cases and if applied to those who are likely to respond positively to its regimen, can serve to protect society without the destructive impact incarceration can have on a convicted criminal's innocent family members. Thus, it creates a greater chance for rehabilitation than does prison, given the conditions in our overcrowded prisons. The SALC cautioned in 2000 that 'South African prisons are suffering from overcrowding that has reached levels where the conditions of detention may not meet the minimum standards set in the Constitution.'"[33] (Footnotes omitted.)

[52] In the light of all the circumstances, I am of the view that society's natural indignation towards crime would still be satisfied by an imposition of correctional supervision. In this way, the children of Mrs S will not suffer from the negative consequences that flow from a custodial sentence.

*Conclusion*

[53] I would therefore place the applicant under correctional supervision in terms of section 276(1)(h) of the Act.

[33] Above n 3 at para 61.

CAMERON J:

[54] I am indebted to my colleague Khampepe J for her careful exposition of the facts and issues, which I gratefully adopt. I agree with her that condonation should be granted for the late filing of the application for leave to appeal, and for the lateness of the record. I agree too that the application raises a constitutional issue, and that leave to appeal should be granted on the basis that there are reasonable prospects of success. But after reflection I differ from her conclusion that the appeal by the applicant, Mrs S, should succeed. In my view, the appeal should be dismissed, and the sentence of imprisonment the Regional Court imposed on her should stand.

[55] Because of the fullness and clarity of my colleague's exposition, my own reasons are brief. Mrs S was first convicted of fraud in August 2003. That conviction arose from abuse of her position of trust with her then employer. She was a first offender, and received a suspended sentence. One of the conditions of suspension was that Mrs S should repay the loss her fraud caused. She failed to do that. A further condition of suspension was that she should not be convicted of an offence involving fraud committed during the period of suspension. That condition, too, she breached. This led to the present proceedings. While the suspended sentence was still hanging over her, in March 2007, Mrs S was convicted of fraud for a second time, together with further charges of forgery and uttering. Again the fraud arose from her employment. Again it involved abuse of the position of trust her employment reposed in her.

[56] That Mrs S was now a repeat offender, together with the resemblances in the two infractions (both arising from her job and entailing the violation of trust), and the fact that suspending her sentence had seemingly not inhibited her, pointed to a custodial sentence. But strongly mitigating features also pointed away from prison. Mrs S pleaded guilty. The insurance company she defrauded did not actually pay out, so this time no loss was actually suffered. Mrs S told the sentencing court that she committed the second offence at a time of financial desperation. And her account of her life related a tale of struggle, survival of which deserved respect and sympathy.

[57] In imposing sentence on the fraud charge, the sentencing court balanced these factors carefully. The result was that the regional magistrate imposed on Mrs S the most flexibly lenient form of custodial sentence the Criminal Procedure Act[1] offers, namely incarceration under section 276(1)(i).[2] The usefulness of this provision comes to the fore when the sentencing court considers that imprisonment is essential, but the circumstances point away from an extended period. It entails imprisonment, but mitigates it

[1] 51 of 1977.

[2] Section 276(1)(i) provides:

> "Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—
>
> . . . .
>
> (i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board."

substantially by creating the prospect of early release on a correctional supervision programme.[3]

[58] Mrs S was sentenced to imprisonment for five years under that provision. Read with section 73(7) of the Correctional Services Act,[4] the provision empowers the National Commissioner of Correctional Services to convert her sentence of imprisonment to correctional supervision after she has served one sixth of her sentence. With good behaviour, Mrs S would have to serve only ten months before she becomes eligible for release. As the Supreme Court of Appeal observed, in dismissing Mrs S's application for leave to appeal, the sentence "is in line with sentences imposed generally for similar

[3] See *S v Scheepers* 2006 (1) SACR 72 (SCA) at para 12.

[4] 111 of 1998. Section 73(7) provides:

> "(a) A person sentenced to incarceration under section 276(1)(i) of the Criminal Procedure Act, must serve at least one sixth of his or her sentence before being considered for placement under correctional supervision, unless the court has directed otherwise, but if more than one sentence has been imposed under section 276(1)(i) of the said Act, the person may not be placed under correctional supervision for a period exceeding five years.
>
> (b) If a person has been sentenced to incarceration under section 276(1)(i) of the Criminal Procedure Act, and to incarceration for a period not exceeding five years as an alternative to a fine the person must serve at least one sixth of the effective sentences before being considered for placement under correctional supervision, unless the court has directed otherwise.
>
> (c) If a person has been sentenced to incarceration for—
>
> (i) a definite period under section 276(1)(b) of the Criminal Procedure Act;
>
> (ii) incarceration under section 276(1)(i) of the said Act;
>
> (iii) a period not exceeding five years as an alternative to a fine,
>
> the person shall serve at least a quarter of the effective sentences imposed or the non-parole period, if any, whichever is the longer before being considered for placement under correctional supervision, unless the court has directed otherwise.
>
> (d) A person sentenced to incarceration for a definite period in terms of section 276(1)(b) of the said Act may not be placed under correctional supervision unless such sentence has been converted into correctional supervision in accordance with section 276A(3) of the said Act."

offences".[5] That Court considered that there was nothing in the circumstances of the matter to justify interference with the sentence the Regional Court had imposed.

[59] However, after the trial court sentenced Mrs S, this Court delivered judgment in *S v M*.[6] There a mother, a single parent[7] who was "almost totally responsible for the care and upbringing" of her young children,[8] had been convicted of an infraction similar to Mrs S's. Like Mrs S she was a repeat offender. She was spared prison because this Court found that the sentencing court had failed to give sufficient independent and informed attention to the impact on the children of sending her to prison,[9] as required by the children's rights provisions in the Bill of Rights.[10] A sentence of imprisonment under

---

[5] *S v The State*, Case No 444/09, Supreme Court of Appeal, 31 March 2010, as yet unreported, at para 15.

[6] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (2) SACR 539 (CC). This judgment was delivered on 26 September 2007.

[7] Id at para 2.

[8] Above n 6 at paras 54 and 67-9.

[9] Above n 6 at paras 46-8.

[10] Section 28 of the Constitution states:

> "(1) Every child has the right—
>
> (a) to a name and a nationality from birth;
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic health care services and social services;
>
> (d) to be protected from maltreatment, neglect, abuse or degradation;
>
> (e) to be protected from exploitative labour practices;
>
> (f) not to be required or permitted to perform work or provide services that—
>
> (i) are inappropriate for a person of that child's age; or
>
> (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
>
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

section 276(1)(i) of the CPA was reduced to correctional supervision under section 276(1)(h).

[60] Mrs S too has young children for whom she cares. They are a daughter who is now eight and a son who is five. They are attached to her, and need her care. The reports submitted to the sentencing court by the probation officer, Ms Viljoen, employed by the Department for Correctional Services, and Dr Wessels, engaged by the family, establish that her going to prison will be hard on them.

[61] Though the state cited *S v M* in its written argument before the Supreme Court of Appeal, that Court did not expressly allude to it in its reasons. The question is whether it erred. Does *S v M* require that Mrs S, too, be spared prison? More precisely, does *S v M* impel intervention to change the sentencing balance the trial court found? Here the general impact of the decision was much pressed upon us. The amicus noted that *S v M* "has captured the imagination of organisations working for children's rights and penal reform internationally," and that it receives many requests for information about the

---

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

decision from law reform bodies across the world. It urged that *S v M* finds application on the facts before us. Indeed, counsel for Mrs S urged that, in view of the similarities between the two cases, the Constitution "required" a similar approach in this case.

[62] *S v M* has revolutionised sentencing in cases where the person convicted is the primary caregiver of young children. It has reasserted the central role of the interests of young children as an independent consideration in the sentencing process. Yet it would be wrong to apply *S v M* in cases that lie beyond its ambit. The mother in *S v M* was a single parent, and was almost exclusively burdened with the care of her children. There was no other parent who could, without disruption, step in during her absence to nurture the children, and provide the care they need, and to which they are constitutionally entitled.

[63] That is not the case here. Mrs S is not the children's sole caregiver. She is not "almost totally responsible"[11] for their care. Despite heartache and turbulence, well captured in her evidence and in the social workers' reports, Mrs S is united with the father of her children. He is their co-resident parent. And he is willing to care for them during her incarceration. Although he works long hours, there is nothing to indicate that he will not be able to engage the childcare resources needed to ensure that the children are well looked after during his absence at work. A non-custodial sentence is therefore not necessary to ensure their nurturing. And a custodial sentence will not inappropriately

[11] See [59] above.

compromise the children's best interests. The sentencing court in my view properly balanced out the constitutional interests at stake.

[64] In *S v M*, information about the position of the young children and their care during their mother's incarceration was entirely lacking.[12] Here, by contrast, an informative probation officer report dealing with the position of the children was available to the sentencing court, and carefully considered by the sentencing magistrate. A second report was later commissioned by the family and, after remittal to the trial court for inclusion in the record, evaluated together with the other evidence. Two reports were thus before the High Court and the Supreme Court of Appeal. Neither suggests that the fundamental needs or the basic interests of the children will be neglected if their mother is incarcerated.[13]

[65] After hearing argument, this Court obtained a further report from a curator. Nothing in the report of the curator suggests that the children will be inadequately cared for should their mother be incarcerated in accordance with the sentence imposed on her.

[12] Above n 6 at para 46.

[13] Dr Wessels finds that "both children are very attached to the accused and will find it very difficult [*sal baie swaar kry*] if they were to be separated from her for a long time." She notes that Mrs S's spouse stands by her "and is determined to support her should she have to undergo imprisonment" and that he appreciates that the "responsibility of the children's nurturance is very great and is uncertain whether he will be able to undertake it alone." (My translation.)

[66] To mitigate the possibility of the children enduring hardship during their mother's absence, it seems to me that this Court should order the Department for Correctional Services to ensure that a social worker visits them regularly, and that he or she provides the Department with reports on their well-being during their mother's absence.

[67] For these reasons I conclude that the appeal should fail.

[68] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.
4. The National Commissioner for Correctional Services is directed to ensure that a social worker in the employ of the Department for Correctional Services visits the children of the applicant, Mrs S, at least once every month during her incarceration, and submits reports to the office of the National Commissioner as to whether the children of the applicant are in need of care and protection as envisaged in section 150 of the Children's Act 38 of 2005 and, if so, to take the steps required by that provision.

Moseneke DCJ, Brand AJ, Froneman J, Jafta J, Mogoeng J, Nkabinde J, Skweyiya J, and Yacoob J concur in the judgment of Cameron J.

| | |
|---|---|
| For the Applicant: | Advocate A Friedman with I de Vos instructed by Kriek Van Wyk & Khumalo Inc. |
| For the Respondent: | Advocate JP du P Botha instructed by the National Director of Public Prosecutions. |
| For the Amicus Curiae: | Ms AM Skelton instructed by the Centre for Child Law. |