

**EVALUATING THE BEST INTEREST OF A CHILD AS A FACTOR INFLUENCING
THE SENTENCING OF THE PRIMARY CAREGIVER**

BY

MOTHEKOA GRATITUDE RAMONYAI



MINI-DISSERTATION

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS

FOR THE DEGREE OF

MASTER OF LAWS

IN THE

FACULTY OF MANAGEMENT AND LAW

(School of Law)

AT THE

UNIVERSITY OF LIMPOPO

SUPERVISOR: Prof A Van der Merwe

2017

Contents

DECLARATION.....	i
ACKNOWLEDGEMENT.....	ii
DEDICATION.....	iii
ABSTRACT.....	iv
ABBREVIATIONS.....	v
CHAPTER 1.....	1
INTRODUCTION.....	1
1.1 Introduction.....	1
1.2 Problem statement.....	3
1.3 Significance of the study.....	4
1.4 Research objective and aims.....	4
1.5 Literature review.....	5
1.5.1. Sentencing in the South African context.....	5
1.5.2. The new dimension of sentencing: the application of ‘the best interests’ principle’ in sentencing of primary caregivers of children.....	6
1.5.3. The development of the law since <i>S v M</i>	9
1.6 Research methodology.....	11
1.7 Limitation of the study.....	11
1.8 Organisation of chapters.....	11
CHAPTER 2.....	12
THEORETICAL FRAMEWORK ON THE RIGHT OF THE CHILD TO CARE.....	12
2.1. Introduction.....	12
2.2 International and regional children’s rights instruments.....	13
2.2.1 The United Nations Convention on the Rights of the Child (1989).....	13
2.2.2 The African Charter on the Rights and Welfare of the Child (1990).....	15
2.2.3 The UN Guidelines for the Alternative Care of Children (2010).....	19
2.2.4 The UN Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (2010).....	21
2.2.5 United Nations Standard Minimum Rules for the Treatment of Prisoners (2015).....	21
2.3 The South African perspective on the right of the child to care.....	22
2.3.1 The right to family/parental and alternative care in terms of Section 28(1)(b).....	22
2.3.2 The standard of the best interests of the child in terms of section 28(2).....	24
2.4 Conclusion.....	29
CHAPTER 3.....	31
3.1 Introduction.....	31
3.2 Earlier cases pre- <i>S v M</i>	31

3.2.1 <i>S v Kika</i> 1998 (2) SACR 428 (W).....	31
3.2.2 <i>S v Howells</i> 1999 (1) SACR 675 (CPD).....	32
3.3 <i>S v M</i> 2008 3 SA 232 (CC).....	35
3.3.1 Facts.....	35
3.3.2 Key questions.....	36
3.3.3 Majority judgement.....	36
3.4 Final sentence.....	44
3.5 Academic commentary.....	44
3.6 Conclusion	47
THE DEVELOPMENT OF THE RIGHT OF THE CHILD TO CARE IN THE SENTENCING PROCESS THROUGH CASE LAW POST <i>S v M</i> -JUDGEMENT	49
4.1 Introduction	49
4.2 Adherence to the <i>S v M</i> guidelines for the sentencing of a caregiver	50
4.3 Applicable case law.....	51
4.3.1 <i>S v Langa</i> 2010 (2) SACR 289 (KZP)	51
4.3.2 <i>S v GL</i> 2010 (2) SACR 488 (WCC).....	52
4.3.3 <i>S v Londe</i> 2011 (1) SACR 377 (ECG)	54
4.3.4 <i>MS v S (Centre for child law as Amicus Curiae)</i> 2011 (2) SACR 88 (CC).....	55
4.3.5 <i>S v Pillay</i> 2011 (2) SACR 409 (SCA)	59
4.3.6 <i>S v Piater</i> 2013 (2) SACR 254	61
4.3.7 <i>De Villiers v S</i> 2016 (1) SACR 148 (SCA)	62
4.3.8 <i>S v N</i> 2016 (2) SACR 436 (KZP)	65
4.4 Findings, Comments & Conclusions	67
4.4.1 Summary of findings	67
4.4.2 The impact of a primary caregiver's incarceration on the child.....	68
4.4.3 Developing a child-centred approach	69
4.4.4 General conclusion	71
CHAPTER 5	73
CONCLUSION AND RECOMMENDATIONS	73
5.1 Introduction	73
5.2 Conclusion	73
5.3 Recommendations	75
BIBLIOGRAPHY	76
Books and chapters	76
Journal articles	76
Statutes	79
Case law.....	79
International Instrument	81

Regional Instrument	81
General Comments	81
Guideline	81
Rules	81
Internet sources	81
Thesis.....	82

DECLARATION

I, **Mothekoa Gratitude Ramonyai**, declare that the mini-dissertation, “**Evaluating the best interest of a child as a factor influencing the sentencing of the primary caregiver**”, hereby submitted to the university of Limpopo for the Master of Laws degree has not previously been submitted by me for a degree at this or any other university, that this is my own work in design and execution, and that all the sources that I have used or referred to have been designated, acknowledged and fully cited.

.....

.....

Ms. Ramonyai MG

Date

ACKNOWLEDGEMENT

Praises be to the Lord. He has been the light of my academic journey. Isaiah 60: 22
'When the time is right, I, the Lord will make it happen.

To my amazing supervisor, Professor A Van der Merwe, I am grateful for the guidance and impeccable knowledge you instilled in me. She gave me the opportunity to discover what I am capable of as an emerging researcher.

To Ms MM Thubane, thank you for encouraging me to undertake this study and being my pillar of strength throughout this academic journey.

To my loving partner, Mr PV Nakeng, for taking care of our son, Lesedi while I was busy putting this mini-dissertation together and for the unfailing support.

Finally, my family and my siblings, Lehlogonolo and Ramasela, thank you for the prayers, support and the continuous encouragement. This would not be possible without them.

DEDICATION

I am dedicating this mini-dissertation to my beloved mother, Motlatso Florence Ramonyai, for the invaluable emotional and financial support and believing in me. Thank you for taking care of the little one over the weekend allowing me time to work on my research.

ABSTRACT

This mini-dissertation seeks to evaluate the best interests of the child as a separate factor that influences the sentencing of a primary caregiver. When a parent is in conflict with the law, the child stands to be affected sentence that the court may impose on the caregiver. A custodial sentence has the potential of affecting the child's right to parental care. Therefore, in the event where a custodial sentence is appropriate, alternative care of the child by other persons become a possible option. The author recommends that after applying the principles articulated in *S v M* and making use of a child impact report; the right of the child to parental care should carry more weight. Thus, courts should duly consider the best interest of the child as an independent factor when negative effects to the child are associated with the sentence. Where appropriate, with either a non-custodial sentence or adequate alternative care (in the case of imprisonment).

Key words: best interests of the child; sentencing phase; sentencing factor; primary caregiver; non-custodial sentence; parental care; alternative care.

ABBREVIATIONS

ACRWC- African Charter on the Rights of Women and Children

CCR- Constitutional Court Review

CPA- Criminal Procedure Act

CRC- Convention Rights of the Child

PERL- Potchefstroom Electronic Law Review

SACJ- South African Journal of Criminal Justice

SAJHR- South African Journal on Human Rights

SALJ- South African Law Journal

THRHR- Tydskrif vir Hedendaagse Romeins-Hollandse Reg

CHAPTER 1

INTRODUCTION

1.1 Introduction

In South Africa, the sentencing principles are based on the *S v Zinn* decision,¹ which requires that the courts consider the triad consisting of the crime, offender and the interests of society. Previously, the courts considered the child of the caregiver as a mere mitigating factor, rather than a separate factor from the Zinn triad. International and regional instruments recognise the need for special protection of the rights of children. Article 3(1) of the United Nations Convention on the Rights of the Child² (hereafter the CRC) states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration. While article 4(1) of the African Charter on the Rights of Women and Children³ (hereafter the ACRWC) provides that, the best interests of the child must be 'the' primary consideration in all action concerning children.

South Africa as a member state of the CRC and ACRWC has an obligation placed on it to ratify both instruments in its constitution paving the way for the rights of children at a national level. Before the constitutional dispensation, a judicial officer was not required by law to consider the effects of the imposed sentence on the children of the offender, even if the offender was a caregiver.⁴ South Africa's criminal justice system provided protection for the rights of only three categories of persons, namely, perpetrators, victims and witnesses. As highlighted above, the minor children of perpetrators were not considered as an individual factor in sentencing of the caregiver. The sentencing process recognised the interests of children as a mere 'circumstance or mitigating factor' in favour of the primary caregiver. Punishment used to focus mainly on achieving its aims and did not consider the impact a sentence would have on the rights of the dependants of the offender.⁵ In addition to the aims of sentencing,

¹ 1969 2 SA 537 (A).

² The CRC was ratified on 16 June 1995)

³ The ACRWC was ratified on 7 January 2000).

⁴ Mujuzi 2011 3 SACJ 398.

⁵ Mujuzi 2011 2 SACJ 164.

before *S v M*, the *Zinn*⁶- triad was used as the main guidelines of sentencing.⁷ On occasion, the after effects of the crime on the victims were considered.⁸ Since 1996, the Constitution of the Republic of South Africa has created a platform in which the sentencing court has to consider the effects of punishment on the children of the primary caregiver, when it imposes a sentence of imprisonment.⁹ Section 28(1)(b) protects the right of the child to care. It provides that every child be entitled to family, parental or alternative care when removed from the family environment. Thus, if a child is separated from their caregiver because of imprisonment, the state must ensure that alternative care is arranged for the period that the primary caregiver is detained. The prescript of the best interests of the child are provided for in section 28(2) provides for the primacy of the best interests of the child as they are of paramount importance in every matter concerning the child.

Therefore, it is important that courts consider the interests of children in making the decision, regarding the type of sentence to impose on the primary caregiver. Recently, the jurisprudential development recognises a fourth category of affected persons, namely, children of perpetrators.¹⁰ *S v M (Centre for Child Law as Amicus Curiae)*¹¹ (hereafter *S v M*) was the ground breaking case which led to the consideration of children in the sentencing process. It breaks away from the traditional approach to sentencing. The court in *S v M* held that sentencing courts should enquire on the impact the sentence would have on the right of the children to receive parental care. Where possible, the courts must impose a non-custodial sentence to ensure that the children are not deprived of the right to care and support of the primary caregiver.¹² In *S v M*, M an unmarried mother of three minor children who was the sole custodian and caregiver to her children. She was charged and convicted of thirty-eight counts of fraud committed (on three different occasions), and was sentenced to four years' direct imprisonment. The matter was taken on appeal and her argument against the

⁶ See *S v Zinn* 1969 2 SA 537 (A).

⁷ The well-known Zinn triad required that before a sentence could be imposed, the following factors be considered; the nature of the crime, the circumstances of the offender and the interest of society should always be considered.

⁸ Mujuzi 2011 2 SACJ 170.

⁹ Ibid.

¹⁰ Carnelley & Epstein 2012 1 SACJ 180. Post-M there has emerged academic literature that appreciates the upholding of the rights of children when parents are in conflict with the law, for example, Skelton 2008 1 CCR351; Mujuzi 2011 2 SACJ 164; Erasmus 2011 25 SAPL 124.

¹¹ 2008 3 SA 232 (CC)

¹² Mujuzi 2011 2 SACJ 164.

sentence was that the direct imprisonment imposed was not in the best interest of the children, as they would be separated from her. She argued that the sentence imposed infringed the right to of the children to receive parental care and as the sole caregiver. The court reasoned in favour of M, that the best interest of a child must be of paramount consideration in all proceedings affecting them; therefore, it was in the best interests of the children to continue to receive care from their mother. The judgement in *S v M* brought a change by expanding the application of section 28. Since 2008, special protection has been provided to children affected by the commission of offences by their caregivers. Because children are vulnerable,¹³ courts are now, when sentencing the primary caregiver, required to balance the interests and the right of the child to care with any other competing interests.¹⁴ Although the right of the child to care is not the determinative factor of the sentencing option to be adopted by the court, the guidelines articulated in *S v M* and the constitutional injunction that gives primacy status to the best interests of the child makes it mandatory that the right of the child to parental, family or alternative care be considered.¹⁵

1.2 Problem statement

The *Zinn*-triad is the traditional approach used in sentencing. Pre *S v M*, the standard of the best interest of the child was considered in mitigation of the offender and the right to parental care was not given an independent and special focus. Because South Africa is a member state to the international and regional instruments, it has an obligation to align its domestic child law provisions with the instruments. It implemented a special constitutional section for children, enshrined in section 28(1)(b) which advocates for the right to parental care when the child is separated from the parent and section 28(2) of the Constitution gives consideration to the best interest of the child. The incarceration of the primary caregiver has an impact on the child, as it curtails the right of the child to parental care. Therefore, when a child is separated from their caregiver, it would be in the best interest of the child to continue to receive family or in some cases alternative care.

¹³ Coetzee 2010 3 *PELJ* 126.

¹⁴ Moyo 2013 29 *SAJHR* 314.

¹⁵ *Idem* 329.

Although the courts need to impose an appropriate sentence for the offence committed, the child, on the other hand, should not be punished for their parent's deeds. Children are now considered as separate individual beings with their own personality. A child of a caregiver is no longer seen as a 'circumstance' of the offender, but an individual whose interests needed to be considered independently.¹⁶ The question arises as to what the current guidance is in *S v M*, regarding the right of the child to receive parental, family or alternative care. In other words, under what circumstances, would it carry enough weight, as a separate sentencing factor, rather than just a mitigating factor. In addition, the question is posed as to the effect of *S v M* in cases where the primary caregiver is sentenced. The ultimate question is whether the rights of children to receive family, parental or alternative care are allocated enough weight to influence a non-custodial sentence.

1.3 Significance of the study

The study will provide knowledge and awareness to laypersons and persons in the legal fraternity on the developments in law regarding the right of the child to parental, family or alternative care when sentencing their caregiver. As highlighted above, the court's focus was mainly on the offender, the victim and witnesses. The court gave little or no regard to the rights or interests of the child. Post-constitutional era, section 28(1) and section 28(2) gives special protection of the rights of the child, because the child stands to be affected by the custodial sentence of the caregiver. Therefore, sentencing courts are required by law to consider the best interests of children when sentencing the primary care giver, by taking reasonable steps to minimise the adverse impact the children may endure due to loss of parental care.

1.4 Research objective and aims

The objective of this study is to evaluate the development, as well as implementation, of the approach towards the best interests of the child, as a separate factor, when sentencing a primary caregiver with children. The recognition of children as indirect actors during the sentencing phase are thus examined.

The aims of the research are as follows:

¹⁶ This is a submission made by the *amicus* in *S v M* para [30]. See Skelton 2008 1 CCR 355.

- To evaluate the international and constitutional frameworks that concern the right of the child to care, whose primary caregiver is in conflict with the law.
- To analyse *S v M* as a guideline to how courts can go about establishing the best interests of the child (the right to parental care) as a separate factor, as opposed to a mere mitigating factor in sentencing primary caregivers.
- To examine how South African courts have applied the right of the child to care in the sentencing phase since *S v M*.
- To trace the full development and influence brought to the law by the decision of *S v M* as seen in post-*M* case law and academic literature.
- To determine shortcomings regarding the realisation of the considerations of the best interests of the child and to formulate recommendations made in this regard.

1.5 Literature review

1.5.1. Sentencing in the South African context

The sentencing phase is the most difficult and complicated phase. There are four key stages involved. Firstly, the state is given an opportunity to prove that the accused has previous convictions, followed by the defence and the state that may present evidence relevant to sentencing. Thirdly, both the defence and state are given the opportunity to address the court on any evidence presented before it and the matter of the sentence, and, lastly, the court must impose a proper sentence based on the available information. As noted earlier, the starting points in sentencing are the three basic elements of the Zinn-triad.¹⁷ The sentencing court imposes an appropriate sentence based on all the circumstances of the case. Every case involves many facts, factors and features which may have some influence on the sentence.¹⁸ The presiding officer has to determine which of the many facts are relevant to the sentence and decide what weight to attach to each one of them. A balance needs to be struck amongst all these

¹⁷ Terblanche 2016 *Guide to Sentencing* 151-166: As mentioned in para 1.1 above, the elements are firstly, the crime, since it is most important to consider the crime and its seriousness to be able to determine an appropriate sentence. Secondly, the sentencing officer must know the accused personal circumstances, his or her character and the particular motives of the accused. The culpability or the blameworthiness of the offender should be assessed closely. Lastly, the interest of society should be weighed. Although this component is not well described, it should have some influence on the sentence. It may be said that punishment should be 'fair to society' and refers to two aspects, namely 'the reaction of society to the commission of a certain crime, and as a statement that the sentence should serve society'.

¹⁸ Terblanche 2016 *Guide to Sentencing* 128.

factors and circumstances. A sentence is appropriate if it reflects the gravity of the crime, takes into consideration the mitigating and aggravating factors of the offender, as well as the interests of society.¹⁹ A party wishing to rely on a particular mitigating or aggravating factor must provide sufficient factual basis for that fact through the production of evidence.²⁰ Mitigating factors should reduce the sentence imposed, as the court relies on the factors before it. This best interest principle is important where the appeal court has to reconsider the sentence of the trial court. In exceptional circumstances, the court may take into account factors presented after the trial. After weighing all the factors, the court has a choice to decide whether the accused should be removed from society or be rehabilitated within society. The court has the discretion to determine the nature and extent of the punishment to be imposed for all offences.²¹ The discretion belongs to the presiding officer. Sentencing discretion exist because it permits the possibility of a balanced and fair sentence, and for individualisation. All sentence options that is available may be considered but it must be explained to the accused person why the particular final option has been chosen.

1.5.2. The new dimension of sentencing: the application of ‘the best interests’ principle’ in sentencing of primary caregivers of children

The drafting of the new Constitution of South Africa and the ratification of regional and international instruments created an opportunity for the rights of children to be recognised. The best interest principle is enshrined in the Constitution. Section 28(2) gives paramountcy to the best interests of the child in every matter or decision that concerns the child.²² The constitutional provision has established a point of reference on the rights of children. Courts have a duty to implement and interpret provisions in a manner that favours and advances the rights of children. The application of the best

¹⁹ Terblanche 2016 *Guide to Sentencing* 152. Aggravating and mitigating factors are, according to *S v Ramba* 1990 2 SACR 334, all those factors a court can properly take into account in aggravating or mitigation of a sentence. The imposition of a sentence revolves around balancing mitigating and aggravating factors.

²⁰ Section 274 of the Criminal Procedure Act provides that “(1) A court may, before sentencing, receive such evidence it thinks fit in order to inform itself as to the proper sentence to be passed. (2) the accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court”.

²¹ Terblanche 2016 *Guide to Sentencing* 127. Generally, a court is expected to act within the limits prescribed by the legislature and in accordance with the guidelines laid down by higher courts and the discretion must always be balanced with constitutional rights. For serious offences the sentencing discretion is governed by the minimum sentences provided for in s 51 of the Criminal Law Amendment Act 105 of 1997. The discretion to deviate from these prescribed sentences may not be exercised arbitrarily.

²² Coetzee 2010 3 *PELJ* 130.

interest of the child originates from family law. The new constitutional dispensation has expanded the application of the best interest of the child to include aspects of criminal law that involves primary caregivers of minor children.²³ The Constitution, as well as regional and international instruments, provide for the protection of the interests and rights of children in general, as well as, those children whose parents are incarcerated.²⁴ These instruments put the best interests of the children in the forefront, creating an obligation that member states adhere and comply as signatories.²⁵ The best interests' concept has been a subject of intense academic analysis, more than any other concept in the CRC.²⁶ Legal scholars are of the opinion that defining the best interests' principle is not an easy task. They have observed that because of its indeterminacy, it should be applied with flexibility, based on a particular situation and it should not be generalised.

In the case of *B v M*,²⁷ the court attempted to define the concept of the 'best interests of the child' as follows:

"It is appropriate to have regard to the term "best" which introduces a comparative quality. The Shorter Oxford English Dictionary includes as definitions, "excelling all others in quality", "most advantageous" and "most appropriate. Two distinctions are drawn: first, between that which is considered consonant with the child's welfare and that which is not; secondly, between those interests which are more advantageous to a child than others, which are less advantageous. It may, of course, develop that a combination of factors – some neutral, some less advantageous, some more advantageous and even some seemingly disadvantageous - may together approximate or combine to form a child's "best interests".²⁸

The definition is still not clear, but what can be adduced from the definition is that the best interests' principle in the legal sense means different things to different people. The principle plays different roles and it is of a controversial nature.²⁹ Section 28(2) has expanded its meaning of application to include all aspects of the law that affect

²³ Carnelley & Epstein 2012 1 SACJ 180.

²⁴ 1989. See further discussion in Chapter 2 on the regional and international instruments. The African Charter on the Rights and Welfare of the Child (1990), the United Nations Guidelines for the Alternative Care of Children without Parental Care, the Bangkok Rules (2010).

²⁵ Couzens 2018 UKZN 3.

²⁶ Mezmur 2017 in Boezaart 2017 Juta 412. See Bonthuys 2006 20 *International Journal of Law, Policy and Family* 5-7; Visser 2007 70 *THRHR* 459 – 469.

²⁷ 2006 BCLR 1034 (W).

²⁸ *B v M* para [142].

²⁹ Mezmur 2017 in Boezaart Juta 413.

the children.³⁰ The interpretation of this constitutional provision extended to case law. In the High Court judgment of *De Reuck v Director of Public Prosecutions*,³¹ the court held that a child's best interests was the most important factor to be considered when balancing or weighing competing rights and interests concerning children.³² Earlier cases have dealt with the interests of the child, but have not done so explicitly.³³ The significance of *S v M* lies in its expansion of the meaning of 'the best interests of the child standard'. The issue before the court was whether the sentencing court took into consideration the effects of the imprisonment on the children of the accused as primary caregiver. It was found that the best interest of the child cannot be decided in abstract, but on the circumstances of the particular case concerned. It was concluded that, because of the impact of possible loss of the right to receive parental care on the children, sentencing courts must attach due consideration and appropriate attention to them. It should also take reasonable measures to minimize damage.³⁴

The new dimension in criminal law matters brought by *S v M* has created an era where the right of the children to receive parental, family or alternative care of the caregiver are to be considered during the sentencing process. This has resulted in a therapeutic outcome, which places attention on the human, emotional and psychological side of the law. Although the *Zinn* triad remains the basic measure to be used by sentencing courts to determine an appropriate sentence, in cases where the sentence should be direct imprisonment, the court has to ensure that it considers the parental, family and alternative care of the child. Notwithstanding a custodial sentence, the best interest may be attended through ensuring that the child receives appropriate care which may be parental, family or alternative care (as prescribed by section 28(1)(b)). In cases where the court cannot decide whether to impose a custodial or non-custodial sentence and the offender is a primary caregiver 'the best interests of the child', as an independent factor, should tip the scale.³⁵

³⁰ Currie & De Waal 2013 Juta 619.

³¹ 2003 3 SA 389 (W).

³² Currie & De Waal 2013 Juta 622.

³³ See *S v Howells* 1991 1 SACR 675 (C) and *S v Kika* 1998 2 SACR 428 (W). These cases will be discussed further in Chapter 3.

³⁴ Currie & De Waal 2013 Juta 623.

³⁵ Coetzee 2010 3 PELJ 126.

1.5.3. The development of the law since *S v M*

South Africa has received international attention for its landmark decision of *S v M*. The Constitutional Court ruled that the sentencing court have a duty to recognise and consider the best interests of a child when sentencing their primary or sole caregiver to a term of imprisonment.³⁶ The judgement directly addressed the role of the courts to consider the paramountcy of the best interests of the child when sentencing a primary caregiver of dependent children to imprisonment. The main constitutional question before the Court was whether the sentencing court had paid sufficient attention to the constitutional provision that in all matters concerning children, their interests be paramount?³⁷ In considering the duties of a court when sentencing a primary caregiver with dependent children, Sachs J held that sentencing courts should avoid the negative impact of the sentence (i.e. loss of parental care). He held that:

“Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children’s interests that threatens to do so”.³⁸

Since then, there have been a number of criminal cases taking into consideration the best interests of the children.³⁹ It should be noted that the principles established in *S v M*, are not easily applied in the practice. In some instances, the sentencing courts ignore the guidelines and in other cases, given the seriousness of the offence, imprisonment is the appropriate sentence. For example, the Supreme Court of Appeal, in *De Villiers v S*,⁴⁰ set aside the decision of the High Court and reduced the custodial sentence of De Villiers from five years to an effective term of six months. This was described as a triumph for the rights of children that echoed precedent dictating that, where a child stand to be affected by the incarceration of a primary caregiver, careful consideration must be afforded to the best interests of that child.⁴¹ Lerer observed that a court might consider the best interests of caregiver’s children without undermining the interests of justice and punishment.⁴² There is plenty of potential for courts to

³⁶ *S v M* para [18].

³⁷ *S v M* para [1].

³⁸ *S v M* para [35].

³⁹ For example, *De Villiers v S* 2016 1 SACR 148 (SCA); *S v Londe* 2011 1 SACR 377 (ECG); *S v N* 2016 2 SACR 436 (KZP); *S v Piater* 2013 2 SACR 254 (GNP); *S v Langa* 2010 SACR 289 (KZP).

⁴⁰ 2016 1 SACR 148 (SCA).

⁴¹ Lerer 2013 9 *North Western Journal of Law and Social Policy*43.

⁴² *Ibid*.

consider such children's interests in a robust child-centred manner when imposing a sentence on the primary caregiver. Lerer pointed out that the multi-factor test can be amended to include the individual interests of the children of the primary caregiver facing incarceration, and that this additional factor should never be the sole probative factor, but it must be thoroughly and evenly considered by courts.⁴³ The available information regarding the family unit should also be considered by the sentencing court as one of the factors to determine the appropriate conditions for pre-trial release. In a case where caregiver is a flight risk, or poses a danger to society, the interests of society may outweigh the right of the child to parental care. The development in relation to the consideration of the best interest of children in the sentencing process is indeed significant for children's rights. Children of primary caregivers are now recognised as a separate category of affected persons in the criminal justice system where their rights have to be advanced and protected.

The best interest of child, since the judgment of *S v M*, raises an ideology that it can be seen as independent factor in the sentencing of a primary caregiver. However, the scale towards imposition of imprisonment depends on various circumstances, such as the gravity of the offence, which may cause a non-custodial option to be inappropriate.⁴⁴ In *S v Piater*,⁴⁵ the appellant contested that the trial court has misdirected itself in disregarding the mitigating factors presented before the court. One being the fact that the appellant was a primary caregiver, which the court did not give due regard to during sentencing. However, the gravity of offences committed by the appellant, coupled with the aggravating factors, called for long-term detention.⁴⁶ In *MS v S*,⁴⁷ the court found that the appellant was not the sole, but main caregiver, of the minor children. Even though the husband worked long hours it did not mean the children would not be looked after. Therefore, it was decided by the majority that a custodial sentence was not detrimental to the right of the children to care.⁴⁸ On appeal to the constitutional court the sentence in terms of section 276(1)(i) was found to be in

⁴³ Ibid.

⁴⁴ Lerer 2013 9 *North Western Journal of Law and Social Policy* 45.

⁴⁵ 2013 2 SACR 254 (GNP).

⁴⁶ *S v Piater* para [21].

⁴⁷ 2011 2 SACR 88 (CC).

⁴⁸ *MS v S* para [25].

order, but it was ordered that a social worker should visit the children during the first 3 months of her effective incarceration of ten months.⁴⁹

1.6 Research methodology

The research conducted for this mini-dissertation is library and desktop based. Primary sources, such as international and regional children's right instruments, the Constitution, legislation and case law will be examined. In addition, secondary sources, such as textbooks, national and international journals, and the internet, as a source of extracting information, will be analysed.

1.7 Limitation of the study

The research focuses on the best interests of children when sentencing their primary caregivers. It evaluates how the right to parental care in the best interest of the child, can be used as a separate factor in the sentencing phase of criminal proceedings in order to protect the right of the child to receive parental, family or alternative care. Although the punishment options in terms of the South African sentencing framework will be mentioned constantly, they will not be examined in detail.

1.8 Organisation of chapters

This mini-dissertation consists of five chapters.

- Chapter two discusses the theoretical framework on the right of the child to care.
- Chapter three analyses the right of the child to care and the sentencing of the caregiver pre-*S v M*.
- Chapter four traces the development of the right of the child to care post-*S v M*.
- Chapter five draws a conclusion and some recommendations going forth.

⁴⁹ *MS v S* Para [45].

CHAPTER 2

THEORETICAL FRAMEWORK ON THE RIGHT OF THE CHILD TO CARE

2.1. Introduction

This chapter focuses on the application on the best interest of the child as the yardstick with which to measure the right of the child to care against the sentencing of the primary caregiver. It reviews international and regional and instruments concerned with promotion and protection of the right of the child to care. The best interest of the child principle is incorporated in regional and international instruments.⁵⁰ It is entrenched in section 28(2) of the Constitution. South Africa has a rich children's jurisprudence,⁵¹ and the best interest of the child principle forms the main part of the children's law.⁵² The Constitution of South Africa has recognition to the prescript of the best interest of the child in section 28(2) of the Constitution which states that the best interests of the child are of paramount importance in every matter concerning the child and the right of the child to parental, family or alternative care is enshrined in section 28(1)(b) of the Constitution.

Section 28(2) of the Constitution implies that when parents, organs of state, private and public bodies make decisions that affect a child, and such decisions must be the best option for the child. Therefore, when a caregiver of the minor child is sentenced, the best interest of the child must be considered and the right of the child to parental care must be protected. Member states should create and implement laws/policies to ensure this at all stage of judicial and administrative decision-making to the reintegration of caregivers in the family and community, the best interests of the child are put forward. The prescript of the best interests of the child should be considered in entirety in decisions that affect the life of a child, as it runs like a golden thread through the fabric of law relating to children.⁵³ The standard of the best interest of the child has been previously applied in family law matters and customary law,⁵⁴ but now

⁵⁰ The best interest of the child is dealt with at international level in the United Nations Convention on the Rights of the Child and at regional in the African Charter on the Rights and Welfare of the Child.

⁵¹ For example, Skelton 2009 9 *AHRLJ* 482-501; Skelton 2012 88 *Temple Law Review* 887-904; Skelton 2012 1 *SACJ* 180-193; Sloth-Nielsen & Kruse 2013 *UWC*; Couzens 2013 *SACJ* 672-688.

⁵² *Kaiser v Chambers* 1969 4 SA 224 (C).

⁵³ *Kaiser v Chamber* 1969 4 SA 224 (C) at 228 G.

⁵⁴ See Ozah & Hansungule 2017 in Boezaart Juta 286-288. In customary law, the best interests of the child were served by protection of the family and upholding what was best for the family unit rather than an individual. In *Hlophe v Mahlalela* 1998 1 SA 449 (T), the court applied the best interests of the child

finds application in any matter that affects the child. The standard of the best interest of the child is now occupies centre stage in every matter that involves the child. The standard of the best interest of the child is described by legal scholars such as Friedman to be indeterminate, vague and general as there was no fixed criterion that is followed by the courts to decide what decisions are in the best interest of the child.⁵⁵ The interest of each child should be assessed on an individual basis and not in abstract.⁵⁶

2.2 International and regional children's rights instruments

The special protection afforded to children originates from international law. The vulnerability of children has led to the recognition that they deserve special protection. These instruments discussed below seek to protect the children's integrity, dignity and any imbalance of power that may occur.⁵⁷ The prescript of the best interest of the child as it is contained in a number of legal instruments should be applied in every decision that affects a child. The international and regional children's rights instruments discussed below encompass the standard of the best interest of the child, the protection afforded to children whose parents are incarcerated as well as, the right of the child to care.

2.2.1 The United Nations Convention on the Rights of the Child (1989)

The Convention on the Rights of the Child⁵⁸ (hereafter the CRC) is the watershed in the history of children.⁵⁹ The CRC was established in 1989,⁶⁰ and it recognises the rights of children under human rights. It sets the standard that children should be given special protection and care because of their physical and mental immaturity. Article 3 of the CRC provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

principle to resolve a dispute concerning the custody of the child. The case involved lobolo payments which were not paid in full and the maternal family of the child argued that the father was not entitled to the child. However, the parents of the child had entered into a civil marriage. The matter was decided on the basis of the best interests of the child. The father was awarded the custody of the child as it was in the child's best interests.

⁵⁵ Freedman 1992 6 *International Journal of Law and Family* 55.

⁵⁶ Ozah & Hansungule 2017 in Boezaart Juta 283.

⁵⁷ Boyd 2015 *UWC* 6.

⁵⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 7 June 2019].

⁵⁹ Freeman and Veerman 1992 5.

⁶⁰ South Africa became a signatory to the CRC on January 1993 and ratified it on 16 June 1995.

legislative bodies, the best interests of the child shall be a primary consideration. Article 3 implies that the children's best interests should be given primary consideration and it serves as a principle of interpretation that must be applied by courts of law, social welfare institutions, administrative authorities and legislative bodies in matters relating to children.⁶¹ This means that when a primary caregiver is sentenced, the best interest of the child should be considered. Again, member states are bound to ensure that the best interests of the child are at the forefront when dealing with children, by enacting legislative and other measures that protect and develop the rights of children. South Africa ratified the CRC on 16 June 1995. By ratifying the CRC, South Africa incurred the obligation of placing domestic laws concerned with children in line with the CRC. It thus adopted a Constitution in which section 28 contains specific rights of children.

Sachs J in *S v M* noted the influence made by the CRC on South African law as follows:

“As a State party to the United Nations Convention on the Rights of the Child (the CRC), section 28 must be seen as responding in an expansive way to our international obligations as it originates from the international instruments of the United Nations. Thus, since its introduction the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's rights, within which to position traditional theories on juvenile justice”.⁶²

The CRC has enlightened the perspective that children should be seen as their own being, with their own rights and must be considered as individuals. Accompanying the CRC text is the commentary that offers guidance on the application of the CRC. The UN Committee on the Rights of the Child (hereafter the Committee) seeks to ensure that state parties to the CRC protect and advance the interests of children.⁶³ The Committee recommends that if the accused has child-caring responsibilities, the principle of the best interests of the child should be carefully and independently considered by independent professionals and taken into account in all decisions related to detention, including pre-trial detention, sentencing and decisions concerning the placement of the child. The rights of child whose parents are in conflict with the

⁶¹ Van Buren in Davel (2017) Juta 203.

⁶² *S v M* para [16].

⁶³ UN Committee on the Rights of the Child (CRC), General comment No. 14 on the rights of the child to have his or her best interests taken as a primary consideration (art.3, para.1), 29 May 2013, CRC/C/GC/14, available at: <https://www.refworld.org/docid/51a84be4.html> [accessed 6 June 2019].

law are similar and equal to every other child. The preamble of the CRC recognised that for the full development of a child, he/she has to be in a happy, nurturing and loving family environment. There are several provisions that protect children, including those of incarcerated parents. Article 9(1) provides that state parties shall ensure that a child shall not be separated from their parents against their will, unless competent authorities determine that such a separation is necessary for the best interests of the child. The article states that separation of children from their parents is warranted for in cases of neglect or abuse. Article 9(3) provides when the children are separated from their parent, regular contact with the separated parent should be maintained, except if it is contrary to the child's best interests. Where the separation is as a result of detention or imprisonment of the parent, the child as well as other family members should be provided with information regarding the whereabouts of the absent member unless the provision of the information would be contrary to the well-being of the child.

Article 20(1) provides that the state should provide assistance and special protection to the child who was removed from their family environment. These provisions highlight that a child should enjoy unlimited access to his/her parents and an adequate standard of living that will assist the child's growth. Article 27 (2) places the responsibility of care on the parents. It provides that "parents or others responsible for child should have the primary responsibility to secure within their abilities and financial capabilities, the conditions of living necessary for the child's development

2.2.2 The African Charter on the Rights and Welfare of the Child (1990)

The African Charter on the Rights and Welfare of the Child (hereafter the ACRWC)⁶⁴ is a continental instrument that deals primarily with issues of children in Africa. The ACRWC was established in 1990 following, which South Africa ratified on 7 January 2000.⁶⁵ This is a pioneering and most progressive treaty on the rights of children. The establishment of ACRWC is informed by the need to protect children who are vulnerable and may run more risk of being victims of human rights violation than adults. A regional child's rights instruments such as the ACRWC was a necessity. It provides for an elaborate protection and advancement of the rights of children, including those

⁶⁴ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at:

<https://www.refworld.org/docid/3ae6b38c18.html> [accessed 7 June 2019].

⁶⁵ South Africa became a signatory on 10 October 1997.

of incarcerated mothers. The ACRWC contains a stronger level of protection for children than the CRC. It takes a more far-reaching approach⁶⁶ to protect the rights of children in Africa and adds a unique African flavour. The ACRWC has been cited in *S v M* thus creating a promising jurisprudence on the advancement and protection of the rights of children. The ACRWC embodies in article 4(1), the 'best interests' principle which states that in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration. The ACRWC takes the best interests concept further as it ensure that all its provisions should be applied and implemented in matters relating to the interests of children.⁶⁷ South Africa as a member state has an obligation to enact legislation and policies that ensure formal processes and strict procedural safeguards that assess and determine the child's best interests for any decisions that affect the child in the correct manner.

The ACRWC recognises the need for the affected child to be heard in Article 4(2) which provides that in all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law. This implies that children should have the opportunity to participate in sentencing procedures against their caregiver and where necessary, they should be able to have a legal representative or guardian to give enough weight to their right to participation. Article 18(1) protects the family unit by providing that the family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.

A child is entitled to parental care and protection thus, Article 19(1) states that every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of

⁶⁶ The ACRWC holds high regard the interests of the child. The far-reaching approach implies that where there are competing interests and the best interests of the child are one of them, it should surpass them.

⁶⁷ Levesque & Van Bueren 1995 19 *Fordham International Law Journal* 832.

the child. Article 19(2) provides that every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis. Article 19(3) states that where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. Where a child is separated from their parents, Article 25 provides that any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance. The ACRWC contains a provision that specifically focus on the children of incarcerated mothers. Article 30(1)(a) provides that states should provide special treatment to expectant mothers and young mothers of infants and young children who have been accused or found guilty of breaking the law.

The African Committee of Experts on the Rights and Welfare of the Child (hereafter the African Committee)⁶⁸ recognise that children of incarcerated caregivers should be afforded protection as they experience violation of their rights and become invisible once the caregivers are incarcerated. The African Committee saw the need to protect children from negative effects of the stigma of the status of their parents being in conflict with the law as well as the psychological trauma of separation caused by the arrest and subsequent to the imprisonment of their primary caregivers.⁶⁹ Member states have an obligation to implement and enact policy, legislative, administrative and judicial measures to ensure that the best interests of the children whose mothers are in prison are protected.⁷⁰ Article 30(1)(d) prohibits children being incarcerated with

⁶⁸ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No.1 on Article 30 of the ACRWC: “Children of Incarcerated and Imprisoned Parents and Primary Caregivers, 8 November 2013, available at: <https://www.refworld.org/docid/545b49844.html> [7 June 2019].

⁶⁹ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No.1 on Article 30 of the ACRWC: “Children of Incarcerated and Imprisoned Parents and Primary Caregivers, 8 November 2013, available at: <https://www.refworld.org/docid/545b49844.html> [7 June 2019] para [3].

⁷⁰ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No.1 on Article 30 of the ACRWC: “Children of Incarcerated and Imprisoned Parents and Primary Caregivers, 8 November 2013, available at: <https://www.refworld.org/docid/545b49844.html> [7 June 2019]para [24]. The measures include ensuring that alternatives to custodial sentences for expectant prisoners or those with children; that the respective legislation provides for safeguards to expectant prisoners or those with children where it is considered imperative for judges or magistrates to impose custodial sentences to such prisoners; legislative and administrative mechanisms which ensures that a decision for a child to live in prison with his/her mother or caregiver who is subject to judicial review; the consideration of the child’s own views and give them due weight in accordance with the age and maturity of the child and the legislative and administrative measures to ensure that they take into account the

their mothers by providing that state parties should ensure that mothers are not imprisoned with their children. Article 30 ensures that state parties must consider non-custodial sentences or placement of the affected children in appropriate alternative care for caregivers with young children and other alternatives to incarceration. The scope of the article focused mainly on the children of incarcerated mothers. However, the African Committee extended the application to children affected by the incarceration of their sole or primary caregiver.⁷¹ The African Committee advocates for an individualised, informed and qualitative approach, which implies that the interests of each child should be based on the case on the individual child and adequate research on the personal information of the child, should be conducted.⁷² Article 30 provides that a sentencing court should prefer a non-custodial sentence.

The African Committee is aware of the various sentencing procedures and option used by the member states and that they do not take into consideration the minor children of the primary caregivers.⁷³ Article 30 requires that member states review their sentencing procedure and reform it according to the guidelines articulated in *S v M*.⁷⁴ A non-custodial sentence should be preferred, before imposing a custodial one, and where a custodial sentence is considered, it should be appropriate taking the best interest of the child into consideration.⁷⁵ The purpose of article 30 is not to help the

importance of maintaining direct contact with parents or caregivers on a regular basis particularly during early childhood as well as the overall conditions of incarceration.

⁷¹ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No.1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers, 8 November 2013, available at: <https://www.refworld.org/docid/545b49844.html> [7 June 2019] para [10]. Article 30 applies when primary caregivers are accused or found guilty of being in conflict with criminal law. All stages of the criminal proceedings to sentencing phase as well as the form of sentence imposed fall within the scope of Article 30.

⁷² African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No.1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers, 8 November 2013, available at: <https://www.refworld.org/docid/545b49844.html> [7 June 2019] para [14-15].

⁷³ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No.1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers, 8 November 2013, available at: <https://www.refworld.org/docid/545b49844.html> [7 June 2019] para [35].

⁷⁴ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No.1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers, 8 November 2013, available at: <https://www.refworld.org/docid/545b49844.html> [7 June 2019] para [36]; *S v M* 2008 3 SA 232 CC para [36].

⁷⁵ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No.1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers, 8 November 2013, available at: <https://www.refworld.org/docid/545b49844.html> [7 June 2019] para [37].

convicted primary caregivers to evade accountability for their offences but for the consideration of children's best interests.⁷⁶ The court is under an obligation to have regard to the right of the child to care, including appropriate alternative care when sentencing the child's caregiver. When placing the child in care, the children who are capable of expressing themselves can be consulted and have their views heard, if it is in their best interests.⁷⁷ Finally, Article 30(1)(f) states that the aim of punishment should be the restoration, the integration of the mother to the family life and social rehabilitation.⁷⁸

2.2.3 The UN Guidelines for the Alternative Care of Children (2010)

The United Nations Guidelines for the Alternative Care of Children⁷⁹ were adopted by the UN General Assembly in 2010. The document is not legally binding but provides valuable guidelines for international and domestic jurisdictions concerning the care and treatment of children when alternative care is an option. Guideline 1 contains the purpose of the guideline which serves to enhance the implementation of the CRC and secure the care of children removed or are at risk of being removed from family environment. Again, Guideline 2 (a) provides that efforts must be made to ensure that the children are kept in, or return them to, the care of their family. The Guidelines may be used by competent authorities dealing with children placed in alternative care and may assist them in determining the appropriate placement of a child. The principles in Guideline 3 states that the family is seen as the fundamental group of society and the natural environment for the growth, well-being and protection of children, thus efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents.

⁷⁶ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No.1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers, 8 November 2013, available at: <https://www.refworld.org/docid/545b49844.html> [7 June 2019] para [39].

⁷⁷ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No.1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers, 8 November 2013, available at: <https://www.refworld.org/docid/545b49844.html> [7 June 2019] para [40].

⁷⁸ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No.1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers, 8 November 2013, available at: <https://www.refworld.org/docid/545b49844.html> [7 June 2019] para [6].

⁷⁹ UN General Assembly, Guidelines for the Alternative Care of Children: resolution/ adopted by the General Assembly, 24 February 2010, A/RES/64/142, available at: <https://www.refworld.org/docid/4c3acd162.html> [accessed 7 June 2019].

Guideline 4 supports the need of the child to be cared for in a family environment by providing that every child and young person should live in a supportive, protective and caring environment that promotes his/her full potential. Guideline 5 provides that where the child's own family is unable, even with appropriate support, to provide adequate care for the child, or abandons or relinquishes the child, the State is responsible for protecting the rights of the child and ensuring appropriate alternative care. When the children are to be placed in alternative care, firstly Guideline 11 provides that all decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence. Secondly, Guideline 12 states that the decisions regarding children in alternative care, including those in informal care, should have due regard for the importance of ensuring children a stable home and of meeting their basic need for safe and continuous attachment to their caregivers.

Thirdly, Guideline 13 provides that children must be treated with dignity and respect at all times and must benefit from effective protection from abuse, neglect and all forms of exploitation. Lastly, Guideline 14 states that removal of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration. The Guidelines promotes parental care in Guideline 33 which provides that States should develop and implement consistent and mutually reinforcing family-oriented policies designed to promote and strengthen parents' ability to care for their children. Guideline 48 provides that when the child's sole or main carer maybe the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration.

The Guidelines require that states should take into account the best interests of the child when deciding whether to remove children from the parental care and placing them under family or alternative care. The removal of such children should be treated in the same way as other instances where separation is considered and should have all the necessary resources to help them develop fully. What can be drawn from the Guidelines is that it recognises family or alternative care where parental care is not possible.

2.2.4 The UN Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (2010)

The UN Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders⁸⁰ (hereafter the Bangkok Rules) were adopted in 2010 and led to the revised UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) that are discussed infra. The purpose of the Bangkok Rules is to guide policy makers, legislators, sentencing authorities and prison staff on reducing unnecessary imprisonment of women and to meet the specific needs of women who are incarcerated. It also gives guidance on gender-sensitive alternatives for both pre-trial detention and sentencing post-convictions which address the most common causes of offending. Rule 2.2 provides that before or on admission in jail, women with caretaking responsibilities for children shall be permitted to arrange for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children.

Rule 23 forbids the prohibition of family contact as a way of a disciplinary measure. Rule 49 stipulates that decisions on whether a child should reside in prison with a parent should be based on the standard of the best interests of the child. Rule 64 states that a non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

2.2.5 United Nations Standard Minimum Rules for the Treatment of Prisoners (2015)

The revised UN Standard Minimum Rules for the Treatment of Prisoners,⁸¹ known as the 'Nelson Mandela Rules', were adopted in 2015. They provide two rules that protect the rights of children of incarcerated parents. Rule 28 requires special provisions in women's prisons for prenatal and postnatal care. Rule 29 requires that decisions on

⁸⁰ UN General Assembly, United Nations Rules on the Treatment of Women Prisoners and Non-Custodial

Measures for Women Offenders (the Bangkok Rules) : note/ by the Secretariat, 6 October 2010, A/C.3/65/L.5, available at: <https://www.refworld.org/docid/4dcbb0ae2.html> [accessed 7 June 2019].

⁸¹ UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution/ adopted by the General Assembly, 8 January 2016, A/RES/70/175, available at: <https://www.refworld.org/docid/5698a3a44.html> [accessed 7 June 2019].

whether a child will reside in prison with their parent are based on the prescript of the best interests of the child.

2.3 The South African perspective on the right of the child to care

Section 28 of the Constitution provides an additional protection of children, drawn from those in the CRC. It provides for the protection and advancement of children's rights thus recognising their vulnerability in society.⁸² Once more, children should be seen as separate human beings and individual rights bearers. Section 28 in guarantees the right to protection and family care in section 28(1)(b) and also determines the best interests are of paramount importance in every matter concerning the child in section 28(2). The right to care as envisaged in section 28(1)(b) and the prescript of the best interests will be discussed to address some of the research questions.

2.3.1 The right to family/parental and alternative care in terms of Section 28(1)(b)

Section 28(2) should be read together with section 28(1)(b) in the context of children whose parents in conflict with the law. Link between these two rights is that the best interests of the child should be taken into consideration in situations where the child would be separated from their primary caregiver. Section 28(1)(b) provides that a child has the right to family, parental or appropriate alternative care when removed from the family environment.⁸³

2.3.1.1 The right to family or parental care

The first part of the subsection protects the child's right to receive some form of care, be it family or parental care and guards against law-related and administrative actions that may separate the children from their primary caregiver. It also ensures that affected children are adequately taken care of.⁸⁴ The aim of section 28(1)(b) is to preserve a healthy parent-child relation and at the same time, protecting the children the family unit from unnecessary acts by organs of state.⁸⁵ Children should not be separated from their parents, unless there are circumstances that indicate that the

⁸² Skelton 2015 Springer 13.

⁸³ Section 2 (b) of the Children's Act 38 of 2005 provides for family care. It gives effect to section 28 of the Constitution.

⁸⁴ Skelton 2009 Juta 285.

⁸⁵ Skelton 2009 Juta 47-8. See also S v M para [20].

separation would be in the best interests of the children.⁸⁶ A child may be separated from his/her caregiver when such separation is necessitated by operation of law. Imprisonment of the child's primary caregiver is one of the basis for separating a child from his/her caregiver. Therefore, courts should use caution when considering the interests of children, as children are affected and tend to be in vulnerable state in cases where they would be separated from their caregivers as a result of incarceration.⁸⁷ Thus, courts should struck a balance between the state's right to punish the caregiver and the right of the child to care. Section 28(1)(b) emphasises that in the best interests of a child, the parent must fulfil their parental responsibilities with diligence when they are needed. An imprisoned parent cannot fulfil their full parental responsibilities, therefore the state has to hop in and assist with alternative care. The state must place measures to provide alternative quality care and ensure that children of incarcerated parents are placed in a similar environment to that they lived in. The right to parental care means the right to be cared for by your birth parents while family care, extends to alternative caregivers, adoptive parents and extended family.⁸⁸

2.3.1.2 The right to alternative care

The second part of the subsection speaks on the right to alternative care. Section 28(1)(b) provides for the right to alternative care where parental care is lacking. Alternative care refers to placing a child in a foster home, adoptive or institutional care. Depending on the circumstances of a child, alternative care may be preferred over family care as in some instances; it would not be in the best interests of the child to be placed under such care. The arranged alternative care must be a conducive, nurturing family environment which would enhance the growth and development of the child.⁸⁹ In *C v Department of Health and Social Development*,⁹⁰ the children of the applicant were separated from their parents due to concerns that they were in need of care and protection. The children were removed from their parents, while they were begging on the streets. The parents approached the HC for relief and the children were returned

⁸⁶ Currie and De Waal 2010 Juta 606.

⁸⁷ Skelton 2009 Juta285; See also *S v M* para [7].

⁸⁸ Skelton 2009 Juta 47-50.

⁸⁹ See also *S v M* para 22.

⁹⁰ 2012 2 SA 208 (CC).

to them. They challenged that the law was unconstitutional as it did not allow for automatic review of decisions by social workers or police to remove their children. Their case was based on Article 9 of the CRC, which states that states Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. Article 19(1) of the ACRWC which provides that a child should not be separated from his or her parents unless necessary for the best interests of the child and subject to judicial review, with an opportunity to participate in the proceedings.

The majority of the CC upheld the challenge by finding the law unconstitutional because it failed to provide judicial review of the decision to remove the child from the parent and that the right of automatic review was vital for a fair process which allowed children's best interests to be properly considered. Skweyiya J, concurring with the majority, pointed out that the right to parental care is a secondary right, where family or parental care is preferred.

2.3.2 The standard of the best interests of the child in terms of section 28(2)

Section 28(2) advocates for the paramountcy of the best interest of the children in matters relating to children. Section 28(2) provides that the child's best interests are of paramount importance in every matter concerning a child. Sections 28(2) together with section 28(1)(b) are the yardsticks with which to measure the protection and advancement of children's rights in South Africa. The objective of section 28(2) is to expand on the application and meaning of the best interests principle to include all matters or aspects that affect children.⁹¹ However, section 28(2) does not expand on what the determinate factors of the standard of the best interests of the child. It makes provision for the paramountcy of the children's interests in every matter that concern children. Section 28 has a wide ambit and also serves as a guideline to the courts that the principle extends beyond the rights in section 28(1)(b). The principle of the best

⁹¹ Boezaart 2017 Juta 345.

interest of the child has complex functions.⁹² Legal scholars have debated the interpretation of the concept of 'the best interests' since it has been included in the Constitution. The source of assertion revolved around its application; as rule of law, as fundamental right or as principle of interpretation. Skelton, views it an interpretation tool. She noted that the principle of the best interests of the child helps develop the meaning of some of the other rights in the Bill of Rights.⁹³ Section 28(2) is thus used to determine the ambit, and to limit other competing rights, as the section was not merely an interpretation tool, but a right in itself. Bonthuys opines that in order to understand the concept of the best interests' principle, one need to determine the use of the best interest, whether it should be used as constitutional value, a principle of interpretation, a rule or as an independent right?⁹⁴ Visser answered in pointing out that the striking features of the current approach to the principle is that it contains an independent right, though the relevant texts do not use an explicit rights language in relation to the prescript of the best interests of the child.⁹⁵

Skelton agrees with Visser and notes that section 28(2) should be seen as an independent right and not as an interpretation tool.⁹⁶ The independence of the right was confirmed in *Minister for Welfare and Population Development v Fitzpatrick*⁹⁷; the court held that the prescript of the best interests of the child creates an independent right from all the other rights.⁹⁸ Skelton defines section 28(2) as an "all on all sides" because it applies the paramountcy principle beyond the interests of the child.⁹⁹ In some cases, the best interests of the child is called a 'standard' or a 'principle'. In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*¹⁰⁰ the court found that section 28(2) played two roles: firstly, the prescript of the best interests of the child serves as a guideline on achieving a course that serves the interests of the child¹⁰¹ and as a standard that tests conduct or provisions that affects children. The Constitutional Court has not dealt with the best interests' principle

⁹² Couzens 2018 *University of Kwa-Zulu Natal* 2.

⁹³ Skelton 2017 in Boezaart Juta 346.

⁹⁴ Bonthuys 2006 20 *International Journal of Law, Policy and the Family* 5.

⁹⁵ Visser 2007 70 *THRHR* 459-469.

⁹⁶ Skelton 2015 Springer 280.

⁹⁷ 2000 (7) BCLR 713 (CC) para [17].

⁹⁸ *Minister of Welfare and Population Development v Fitzpatrick* para [18] and [22].

⁹⁹ Skelton 2008 1 *CCR* 35.

¹⁰⁰ 2013 BCLR 1429 (CC) para [69-71].

¹⁰¹ See *Jooste v Botha* 2000 (2) SA 199 (T) para [210D].

extensively, as a result it creates an impression that the 'best interests' is not a fundamental right.¹⁰² Currie and De Waal argues that the inclusion of the best interests' concept in the Constitution makes it a self-standing right that strengthens other rights.¹⁰³ Couzens argues that section 28(2) as an independent right creates a problem as the content of the right contained in the section runs the risk of undermining the potential benefits which arise from declaring it a right. It reverses the gains achieved by declaring it a right and fails to add as an advantage on the nature and use of the best interests of the child.¹⁰⁴ The application of the standard of the best interest of the child creates an obligation that courts should consider the standard when sentencing primary caregivers. This does not mean that the prescript of the best interests of the child should undermine other competing interests and caregivers should be given non-custodial sentences because they have parental responsibilities. In case where the caregiver is sentenced to a custodial term, the best interests of the child must be considered when placing them in alternative care.

2.3.3 The Children's Act 38 of 2005

The Children's Act discusses the standard of the best interests of the child and the right to care to some extent. Section 1 of the Children's Act defines the concept of care, in relation to a child, to include, where appropriate -

- (a) within available means, providing the child with -
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, well-being and development; and
 - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;

¹⁰² Bonthuys 2006 20 *International Journal of Law, Policy and the Family* 7.

¹⁰³ Currie and De Waal 2013 *Juta* 619.

¹⁰⁴ Couzens 2018 *University of Kwa-Zulu Natal* 2.

- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.

The objectives of the Children's Act are contained in section 2 which promotes the preservation and strengthening of families and gives effect to the right of the child to family care or parental care or appropriate alternative care when removed from the family environment, social services, protection from maltreatment, neglect, abuse or degradation; and that the best interests of a child are of paramount importance in every matter concerning the child. Section 2 of the Children's Act emphasises the constitutional rights provided for in section 28 of the Constitution and to strengthen, support and recognise that the best place for a child to grow up in is a family environment. The state cannot always ensure that every child has a family, but it may facilitate environments that nurture and support a family-child relationship. For that reason, it is necessary that the state take steps to ensure that children separated from their parents by imprisonment or to protect the best interest of the child receive quality and nurturing family environment when placed in alternative care.

Alternative care in terms of section 167 can take the form of foster care, child and youth care centres and temporary safe care. The paramountcy of the best interests of the child standard is dealt with in Section 9 which states that all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied. The list of factors that can be used to determine the standard of the best interests of the child are set in section 7(1) which provides that whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely -

- (a) the nature of the personal relationship between -
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards -
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;

- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from -
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child –
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's -
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by-
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

These factors are not close-ended; they may be substituted by the courts to suit the best interests of the child. In terms of the Children's Act, a child may participate in decision-making in matters that affect him/her as section 10 provides that every child that is of such an age, maturity and stage of development as to be able to participate

in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

2.4 Conclusion

The prescript of the best interests of the child and the right to care are contained in relevant provisions in the CRC, ACRWC and the Constitution of South Africa. CRC does not deal specifically with the children of incarcerated caregivers, but it protects their right to parental care in Article 9. It also provides that a child have a right to live with his/her parents unless it is contrary to the best interests of the child. ACRWC in Article 30 deals with children of incarcerated parents, it promotes for non-custodial sentence and where it is not possible, the affected children should be provided with appropriate alternative care. The inclusion of the best interests of the child in the Constitution elevated the best interests of the child principle to a constitutionally protected fundamental right. The constitutional injunction of the best interest principle entrenched in section 28(2) requires that it be carefully deliberated in decisions that would affect the child. Therefore, where the caregiver is sentenced to a custodial sentence, the right of the child to care in section 28(1)(b) of the Constitution is curtailed.

In such cases, the state is obliged to provide special protection for a child deprived of family environment and ensure that appropriate alternative family or institutional placement is available. The CRC, ACRWC and Constitution should be interpreted and implemented to protect the right of the child to parental care using the best interests' principle to ensure the realisation of their rights. The constitutional concept of the best interests' principle applies '*to every matter concerning the child*'. South Africa's ratification to the CRC and ACRWC means that it has to carry the values of both treaties that relates to the best interests of the child. The courts must take the CRC and the ACRWC into consideration when interpreting section 28 of the Constitution. Section 39(1) of the Constitution encourages courts to consider international law when interpreting the Bill of Rights. Where there is a clash of rights or interests, the best interests must override the decisions in situations where the decisions may be contrary to the well-being of the child.

In summary, the court in applying their mind when making a decision regarding a child with an incarcerated primary caregiver has to remember that children are vulnerable; they need to be nurtured and be taken care of. The courts must follow a child-centred approach to protect the rights and interests of children with incarcerated parents. It should shifting the focus in order to give regard to constitutional requirements would reduce the destruction of the right to family life.

CHAPTER 3

SENTENCING OF A CAREGIVER AND THE RIGHT OF THE CHILD TO CARE PRIOR S v M

3.1 Introduction

Pre-constitutional era, sentencing in criminal law was governed by the principles found in *S v Zinn*, which requires that courts should consider the following three factors: the nature of the crime, the personal circumstances of the offender and the interests of the society.¹⁰⁵ Prior to the judgement of *S v M* children were not regarded as affected persons in the criminal sentencing process. Children and their interests formed part of the offender's circumstance or a mere mitigating factor in the sentencing process. The best interests of the child were not given regard in criminal proceedings. The influence in children's rights in sentencing became recognised in *S v Kika* and *S v Howells*, which will be discussed below. Although the earlier case law did not apply an in-depth child-centred approach, it established the duty that a sentencing court had a duty to consider the rights of the children and the impact of the sentence on the children.

3.2 Earlier cases pre-S v M

3.2.1 *S v Kika* 1998 (2) SACR 428 (W)

This was the first case to link the sentencing of a primary caregiver to section 28(1)(b) of the Constitution.¹⁰⁶ The matter came before the High Court as an automatic review. The accused was convicted of assault with intent to commit grievous harm. He was sentenced to a fine of R3000 or 18 months imprisonment should he default on payment.¹⁰⁷ Cloete J highlighted that the magistrate ignored the statement by the accused when mitigating the sentence. The accused mentioned that she was the sole guardian and a mother of two minor children.¹⁰⁸ The court found that the magistrate acted irresponsibly by passing a sentence without taking any steps for the welfare of the children whose ages were also not known by the court. The trial court judge referred to section 28(1)(b) of the Constitution and noted that a judicial officer who imposed sentence of imprisonment on an accused who was a custodian of a minor

¹⁰⁵ Carnelley & Epstein (2012) 1 SACJ 106.

¹⁰⁶ Skelton (2008) 1 CCR 107.

¹⁰⁷ *S v Kika* para [429B].

¹⁰⁸ *S v Kika* para [430B].

child must make appropriate enquiries with a view to issue an order as contemplated by section 11(1) of the Child Care Act 74 of 1983.¹⁰⁹ Furthermore, in making such a decision the judicial officer must bear in mind that the accused as the mother of the child can be permitted to have the child in prison with her as permitted by section 94 of the Correctional Services Act 8 of 1959. Cloete J requested that an enquiry be held as to what happened to the children of the accused. The police visited the accused's home and found from the children's maternal grandfather that the children were looked after by the accused's friend who was unemployed.¹¹⁰ The court ordered that the sentence be set aside; the matter was referred back to the trial court for the purposes of sentencing.¹¹¹ The court ordered that should the sentence of imprisonment be imposed, the magistrate should conduct an enquiry that an order in terms of section 11 of the Child Care Act should be made or that the welfare of the children is properly considered.¹¹²

3.2.2 *S v Howells* 1999 (1) SACR 675 (CPD)

The appellant was a divorcee with three minor children. She was convicted of fraud which she committed over a period of two years.¹¹³ She was sentenced to four years' imprisonment in terms of section 276(1)(i) of the CPA, plus a further 2 years' imprisonment suspended for a period of 5 years on some conditions.¹¹⁴ She appealed against the sentence on the basis that her children's interests were not taken into consideration as the sentencing court imposed a custodial sentence. Mr Howells had access to the children, was a co-resident parent and he maintained the children.¹¹⁵ Mr Howells was not suitable to care for the children as he would come home drunk.¹¹⁶ When the sentence was imposed, the appellant was employed. Her earnings and the child maintenance received from her ex-husband were sufficient for taking care of herself and the children.¹¹⁷ Counsel for the appellant argued that a sentence in terms

¹⁰⁹ *S v Kika* para [430D]. Section 11(1) provides that "if it appears to any court in the course of any proceedings before that court that any child has no parent or guardian or that it is in the interest of the safety and welfare of any child that he be taken to a place of safety, that court may order that the child be taken to a place of safety and be brought as soon as may be thereafter before a children's court".

¹¹⁰ *S v Kika* para [431F].

¹¹¹ *S v Kika* para [431G].

¹¹² *S v Kika* para [431H].

¹¹³ *S v Howells* para [675E].

¹¹⁴ *S v Howells* para [676E].

¹¹⁵ *S v Howells* para [678A].

¹¹⁶ *S v Howells* para [678D].

¹¹⁷ *S v Howells* para [678H].

of section 276(1)(i) of the CPA was suitable, as the appellant was a productive person and could make a positive contribution in her work environment and gain public trust again.¹¹⁸ He further rose that it would not be in the interests of the children to impose a sentence of imprisonment because the appellant's ex-husband is not suitable to take care of the children.¹¹⁹ Their maternal grandparents worked full-time and spoke a different language. He noted that imprisonment of the appellant would therefore be detrimental to the minor children.¹²⁰ Van Heerden AJ had to establish whether there was a material misdirection when the sentence was imposed, in order to interfere with the sentence. He found that the magistrate had carefully considered the various sentencing options available. According to the learned judge the seriousness of the offence and the interests of society it was justifiable to impose a sentence of imprisonment.

He also emphasised that the offence committed was a serious one and it involved the betrayal of a position of trust.¹²¹ The learned judge held that the appellant's personal circumstances, the interests and needs of the minor children would require that the appellant be sentenced to correctional supervision in terms of section 276(1)(h) of the CPA. He considered the effect on the minor children of the sentence imposed by the magistrate, taking into account section 28(2) and section 28(1)(b) of the Constitution.¹²² The court emphasised that where the sentence to be imposed would result in the imprisonment of the accused, the magistrate must conduct an enquiry regarding the well-being of the children.¹²³ This meant that the interests of society outweighed the interests of the appellant and her children.¹²⁴ It was noted by the court that there was a real risk that should the appellant be imprisoned; her children would be taken into care.¹²⁵ The sentence imposed promoted the element of deterrence needed to curb the increasing incidence of white-collar crime.¹²⁶

¹¹⁸ *S v Howells* para [679C].

¹¹⁹ *S v Howells* para [679E].

¹²⁰ *S v Howells* para [679F].

¹²¹ *S v Howells* para [680I].

¹²² *S v Howells* para [681F].

¹²³ *S v Howells* para [682E].

¹²⁴ *S v Howells* para [682F].

¹²⁵ *S v Howells* para [682E]; See also Coetzee 2010 13 (3) PELJ 139.

¹²⁶ *S v Howells* para [682F].

Van Heerden AJ highlighted that that the court was aware of the need to protect the interests of the appellant's minor children and would in its order include provisions designed to achieve this end as best as possible.¹²⁷ It has been brought to our attention that the magistrate erred in imposing the sentence, because he sentenced the appellant to four years' imprisonment in terms of section 276(1)(i) of the CPA, plus a further 2 years' imprisonment suspended for a period of 5 years on certain conditions.¹²⁸ The Supreme Court of Appeal held that the sentencing court must consider the maximum period of imprisonment imposed by including both the suspended and unsuspended sentence.¹²⁹ The court ordered made the order that the Registrar must approach the Department of Welfare and Population Development to investigate the children's children without delay and take appropriate steps to ensure that the children are well cared for, the children remain in contact with the appellant while she was incarcerated ant that the family is reunited once the accused is released from prison.¹³⁰

In both the cases, the rights of the children were limited in terms of section 36(1) of the Constitution, where the court considered the interests of society as well as the need to deter the offender and sending a strong message to the public against committing a similar offence. The imposition of a custodial sentence and an order that alternative care should be arranged, even after considering the best interests of the child was an example of a limitation to the interests of the children to cater for other interests. This shows that when a primary caregiver of minor children is sent to prison, the court along with all relevant authorities should directly protect the right of the children to care. The court failed to make an order of alternative care while the mother was in prison. There was lack of an adequate legal and policy arrangements that ensured that the sentencing courts investigated the best interests of the child prior the imposition of a custodial sentence. A competent court would have used the available evidence to give an order on the alternative caregiver and the address without further delays.

¹²⁷ *S v Howells* para [682H].

¹²⁸ *S v Howells* para [682I].

¹²⁹ *S v Howells* para [683A].

¹³⁰ *S v Howells* para [683 B-F].

Following a child centred approach does not mean that the best interests of the child should outweigh all the other factors in that case or the court to 'fit into the shoes of the child'. What is required is that the sentencing court must protect the rights of the innocent children, while balancing all competing interests when sentencing a primary caregiver.

3.3 S v M 2008 3 SA 232 (CC)

The case of *S v M* is worthy of a lengthy discussion as it is the leading case that elaborates on the best interests of the child and the right of the child to care when sentencing a caregiver. It recognises children as the most vulnerable members of society. It discusses how the court should apply the best interest of the child in a child-centred approach. Now, the best interest principle has to be applied from the time of arrest to the sentencing of the primary caregiver to protect the child's rights from infringement.

3.3.1 Facts

M was a 35-year old single mother and the primary caregiver to three minor boys. She was convicted of fraud and sentenced to a fine coupled with a term of imprisonment that was suspended for five years. Her legal representative requested correctional supervision as a form of punishment. As *M* was deemed an appropriate candidate for correctional supervision, the court requested for a correctional supervision report, which indicated that she qualified for correctional supervision.¹³¹ The Wynberg Regional Court convicted *M* of 38 counts of fraud and 4 counts of theft. She was sentenced to four years' direct imprisonment. Pending the outcome of her appeal regarding the sentence in the Regional Magistrate's Court. When the Cape High Court heard her matter, it concluded that she was wrongly convicted for one count of fraud. *M* was granted leave to appeal and bail.

Her previous sentence was converted to imprisonment under section 267(1)(i) of the CPA.¹³² Given the seriousness of the offence the court had to impose a direct custodial sentence rather than a sentence of correctional supervision. *M* petitioned to the Supreme Court of Appeal as she was unsatisfied with the High Court's order of

¹³¹ *S v M* para [2].

¹³² *S v M* para [3].

imprisonment. She had hoped for a non-custodial sentence based on the fact that there were mitigating factors. The High Court had failed to consider her children's right to parental, family or alternative care. Her request to appeal the sentence imposed by the Regional Court was turned down by the High Court. She proceeded to approach the Constitutional Court which enrolled her application for leave to appeal against the sentence imposed by the High Court.¹³³

3.3.2 Key questions

The Constitutional Court raised a few main questions. They included the following:¹³⁴

3.3.2.1. What constitutes the 'best interests of the child' in relation to the case?

3.3.2.2. Whether the rights of children, as set out in section 28, require more from the sentencing court over and above the responsibilities that were imposed by the Zinn-triad.

3.3.2.3. What is the proper approach that the sentencing court has to follow when sentencing a primary caregiver of minor children?

3.3.2.4. Whether the duties as prescribed to the sentencing court have been observed.

3.3.2.5. What is the appropriate sentence to be imposed on *M*?

3.3.3 Majority judgement

The majority judgement was handed down by Sachs J with whom six other judges concurred.¹³⁵ They considered the questions highlighted above and discussed the effect of the best interests of the child on any sentencing court as the point of departure.

3.3.3.1 The understanding of the 'best interests of the child' principle in order to protect the right of a child to receive parental, family and alternative care

The court expanded on the importance of section 28 of the Constitution and how it could be applied in the sentencing process. This section protects children from all angles and their right to form part of a family unit. Section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child. When a caregiver is sent to prison the family life of the child is disrupted. Section 28(1)(b)

¹³³ *S v M* para [4].

¹³⁴ *S v M* para [5].

¹³⁵ Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, Nkabinde J, O'regan J, Skewyiya J, Van der Westhuizen J and Navsa J.

places an obligation on the state to provide alternative care when the children are separated from their primary caregiver. The section provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. Sachs J has made a valuable contribution that where the accused person was the caregiver to minor children the issue was the imposition of a sentence without paying appropriate attention to the need to have special regard for the child's interests, and it was not the sentencing of the primary caregiver in and of itself, that threatens to violate the interests of children.¹³⁶ He examined the competing interests (the importance of maintaining the integrity of family care and the duty of the State to punish criminal misconduct), and in weighing up the conflicting interests he provided that:

“The paramountcy principle, read with the right to family care, required that the interests of children who stood to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it called for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned”.¹³⁷

Sachs J established a three-step test. The first includes the consideration of the interests of children; the second, the retention in the inquiry of any competing interests because the best interests' principle does not trump all other rights and lastly, the apportionment of appropriate weight to the interests of the child. This shows the need to incorporate the best interests' principle in all legal matters where children are involved.¹³⁸ Sachs J has provided a greater clarity on the nature of the best interests' principle.¹³⁹

3.3.3.2 The approach the sentencing court has to follow when imposing sentence on a caregiver of minor children

The correct approach is set out in section 28, which requires that the sentencing courts must consider the 'best interests of the child' and balance other competing interests. Sachs J held that:

¹³⁶ *S v M* para [34].

¹³⁷ *S v M* para [42].

¹³⁸ Gallinetti 2010 25 (1) *SAPL* 115.

¹³⁹ Gallinetti 2010 25 (1) *SAPL* 116.

“Focused and informed attention needs to be given to the interest of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in an adequate position to balance all the varied interests involved, including those of the children placed at risk. Specific and well-informed attention will always have to be given to ensure that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing courts”.¹⁴⁰

The applicant, curator and *amicus* agreed with the court on the effect of section 28. The section requires the sentencing court to give specific and independent consideration to the impact that a custodial sentence of a primary caregiver would have on the minor children.¹⁴¹ The view of the *amicus* was that the child of a primary caregiver should not be seen as a ‘circumstance’ but an individual whose interests need to be considered independently.¹⁴² This was a correct way because children are vulnerable beings and deserve to be protected and heard. The interests of each child would depend on the circumstances of their cases. The competing interests in M’s case was the right of the children to parental or family care and their best interests considered, as well as, the rights of society to be protected by the punishment of criminal conduct.¹⁴³ Sachs J supported the *amicus* by emphasising the individuality of the children and as right-holders. He highlighted:

“Every child has his or her own dignity. A child should be constitutionally imagined as an individual with a distinctive personality, and not as a minute adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents umbilically destined to sink or swim with them. The sins and traumas of fathers and mothers should not be visited on their children”.¹⁴⁴

The view by the judge on seeing the child as a separate being to their parents is agreed with. Although the children are born from their parents, they are individuals that as they mature they will be capable to make their own decisions. So they should not be painted with the same dirty brush. Again, Sachs J noted that section 28 meant that the children should not be punished for their parent’s mistakes. On the other hand, the right to parental care cannot be used by the primary caregiver to evade the consequences his/ her wrongdoings. However, a non-custodial sentence should

¹⁴⁰ *S v M* para [33].

¹⁴¹ *S v M* para [7].

¹⁴² *S v M* para [30].

¹⁴³ Skelton 2008 1 CCR 355.

¹⁴⁴ *S v M* para [18].

always be considered, not as a way for the parents to escape punishment for their wrongdoings but to protect the interests and the right of the children to.¹⁴⁵ The court observed that innocent children could be protected from harm through proper consideration their right to parental care and held as follows:

“Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, 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”.¹⁴⁶

The purpose of section 28 is to ensure that where possible, the law must avoid any breakdown of family life or parental care that may threaten to put children at risk. Where the rupture of the family is unavoidable, the State is obliged to minimise the consequent negative effect on the children.¹⁴⁷ The State is placed with the duty to arrange suitable alternative care in the absence of family or parental care and must refrain from any action that can infringe upon the rights of the children.¹⁴⁸ Although the State must create conditions in which children can lead happy and productive lives, alternative care is always not in the ‘best interests of the child’.¹⁴⁹ Children who are separated from their parents are likely to relocate to other areas far from their usual surroundings. In those childcare centres provided for by the state as alternative care, children are ill-treated and not well taken care of and even when cared for by family members, the carers bear financial burdens and sometimes the children are molested and exposed abuse.

The right to parental care must be taken into account by a sentencing court where more than one sentence may be imposed on such a person. Every child should enjoy parental care, as well as their childhood in a nurturing family environment. Where their family life is at stake, section 28(1)(b) comes into play and emphasise that children should be able to observe life lessons from their parents. Sachs J observed that

¹⁴⁵ Carnelley & Epstein 2012 1 SACJ 107.

¹⁴⁶ *S v M* para [35].

¹⁴⁷ *S v M* para [20].

¹⁴⁸ Coetzee 2010 13 (3) *PELJ* 135.

¹⁴⁹ *S v M* para [20].

section 28(1)(b) serves a purpose to show that parents have a responsibility to be a role model to their children by swaying them in the right direction. That is how to deal with challenges and differentiating right from wrong. As well as, their financial, physical and emotional needs.¹⁵⁰ Considering the current approach to sentencing, Sachs J stated that the classic *Zinn-triad*¹⁵¹ was the departure point in sentencing. In cases where the accused was a primary caregiver, the court had to ensure that appropriate attention was afforded to the interests of children when deciding on an appropriate sentence. The majority viewed, as also pointed out above, that in all relevant matters, the children of perpetrators will weigh in as an independent consideration and the weight to be attached to a particular case would depend on its merits.¹⁵² The court formulated guidelines that a sentencing court has to follow where a primary caregiver of children is involved. This will serve as a basis that the right of the children to parental, family or alternative care has been taken into consideration.

The sentencing court should find whether the accused is a primary caregiver of minor children, where there are indications that might be so. I disagree with the indication statement because it means that the court must have a suspicion that the accused is a caregiver. What evidence will the court draw from? Will the court use the age of the accused? That will not be the correct way. The court has a duty to ask the accused on their first appearance whether he/she was a primary caregiver or not and it should gather evidence to confirm the information presented by the accused. Not every case requires a pre-sentence report, as the convicted person can clarify his/her personal circumstances along with supporting evidence. The state may verify the information by conducting an investigation. Where the court deems a custodial sentence as appropriate, it should ascertain the effect of the sentence on the children and ensure that the children would be well taken care of while their parent is in prison. Also, in cases where the sentence is non-custodial, the court must take into account the best interests of the child. Lastly, the court must apply the paramountcy principle as a guide for imposing an appropriate sentence, where there are a range of sentences that are available.¹⁵³ The imposition of a non-custodial sentence does not mean that the best

¹⁵⁰ *S v M* para [34].

¹⁵¹ 1969 2 SA 537 (A). According to the triad the nature of the crime, the personal circumstances of the criminal and the interests of the community are the relevant factors determinative of an appropriate sentence.

¹⁵² *S v M* para [28].

¹⁵³ *S v M* para [36].

interests of the child have been taken into full consideration, as many courts have the tendency of punishing the accused of the offence committed rather than the effect of the sentence on the accused's child. The courts have to weigh the rights of the child as an independent factor in imposing a sentence. On the other hand, where the primary caregiver has committed a serious offence, the courts must sentence a primary caregiver to prison if a custodial sentence is appropriate. Where a term of imprisonment is imposed, the court must ensure that the children will be taken care of during the period of incarceration and not to ignore them.¹⁵⁴ Section 28(2) read with section 28(1)(b) of the Constitution places some responsibilities when a custodial sentence for a primary caregiver is in issue.¹⁵⁵ Sachs J explained that the imposition of these four responsibilities on a sentencing court would ensure that the interests of children are taken into account at appropriate moments in the sentencing process.¹⁵⁶

The importance of maintaining the integrity of family care¹⁵⁷ and the duty of the state to punish criminal misconduct has to be weighed by the sentencing court where the right to family, parental or alternative care must be taken into account as an independent factor.¹⁵⁸ Sachs J concluded that sentencing officers must give due consideration and be diligent when dealing with the interest of children who stand to be affected.¹⁵⁹ Children are the invisible population, thus the courts have a duty to be their voice in the process and protect them in any possible way.

3.3.3.3 Observation of the court's duties in this case

The court had to determine whether the duties imposed on the sentencing court had been observed by the Regional Court and the High Court. It pointed out the regional magistrate asked obligatory questions to determine who will look after the children when the caregiver is sent to prison, without giving any considerations to the right of the children to family, parental or alternative care in sentencing the caregiver. The enquiry conducted by the magistrate was inadequate. The court fell short of a social

¹⁵⁴ *S v M* para [39].

¹⁵⁵ *S v M* para [32]. The responsibilities are that the court should establish whether there will be an impact on a child; where there is an impact, it must consider the child's interest independently; it must attach the appropriate weight to the child's best interest and to ensure that the child will be taken care of if the primary caregiver is sent to prison.

¹⁵⁶ *S v M* para [33].

¹⁵⁷ *S v M* para [38].

¹⁵⁸ *S v M* para [39].

¹⁵⁹ *S v M* para [42].

worker's report and no other method was used to acquire adequate information regarding the children's future. The quality of alternative care that the children will receive was not fully investigated, as well as the potential impact that splitting the children up and moving them would have had on their schooling and other activities.¹⁶⁰ The courts must ensure that it reduces the negative impacts on the children. The High Court and Regional Court failed to comply with the obligations imposed on them by section 28(2), read with section 28(1)(b) of the Constitution, as they did not apply their minds in this instance.¹⁶¹ The High Court was aware of the fact that the accused was a primary caregiver, but failed to consider the right of the children to care. It did not investigate what consequences the imposition of a custodial sentence on the accused would have on the children, neither obtained sufficient information regarding the accused children. Sachs J thus found that both sentencing courts misdirected themselves by not paying sufficient attention to constitutional requirements. The Constitutional Court was therefore entitled to reconsider the appropriateness of the sentence imposed by the High Court.¹⁶²

3.3.3.4 Appropriate sentence

Sachs J explained that where a sentence has been set aside on appeal, the Constitutional Court would normally have to remit the matter either to the Regional Court or the High Court, where either of the courts would impose a new sentence in light of the Constitutional Court's judgement.¹⁶³ However, in this case the matter had to be finalised, as many years had passed since the offence was committed. It was also in the best interest of the children to do so. In determining an appropriate sentence, he explained that they were faced with two options: the first was to sentence the accused to a period of correctional supervision and the other was to sentence the accused to a period of imprisonment. The learned judges explained that although M's offences were committed repeatedly, motivated by greed and were serious. It was not in the interest of the children to send M to prison.

He concluded that an accused should not be excluded from correctional supervision just because they are repeat offenders.¹⁶⁴ M was placed under an order of correctional

¹⁶⁰ *S v M* para [46].

¹⁶¹ *S v M* para [47].

¹⁶² *S v M* para [48].

¹⁶³ *S v M* para [49].

¹⁶⁴ *S v M* para [75].

supervision. Correctional supervision has rehabilitation as its main aim as it takes place within the society.¹⁶⁵ The court highlighted additional advantages of correctional supervision as follows:

“It 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 prison does, given the conditions in our overcrowded prisons.¹⁶⁶ It keeps open the option of restorative justice in a way that imprisonment cannot do. One of its strengths is that it rehabilitates the offender within the community, without the negative impact of prison and destruction of the family. It is geared to punish and rehabilitate the offender within the community leaving his or her work and domestic routines intact and without the negative influences of prison”.¹⁶⁷

The accused has to agree to the conditions attached to the form of correctional supervision. If used proactively, it yields good results. This form of punishment is great as it transitions the accused back into the society. It allows them to lead a socially responsible life.¹⁶⁸ They are able to go back to do their daily activities such as going to work. It reduces the state's expenses in providing alternative care and welfare services to the children of the offender. Sachs J in arriving at this decision was influenced by the fact that all the reports presented before the court indicated that M was a good parent and her children are devoted to her. Imprisonment would involve separating the children from their parent. An alternative care could be arranged but the children may be placed in homes far away from the schools they went to, as well as their communities. The curator also indicated that further imprisonment had the effect of placing more strain than on the family with potentially devastating effects on the children.¹⁶⁹

Given the negative impact of possible incarceration of M and that if the accused was sent back to prison her business would collapse and she would not be able to maintain her children,¹⁷⁰ Sachs J concluded that:

¹⁶⁵ Terblanche S 2008 1 SACJ 125.

¹⁶⁶ S v M para [61].

¹⁶⁷ S v M para [62].

¹⁶⁸ S v M para [60].

¹⁶⁹ S v M para [54].

¹⁷⁰ S v M para [68].

“The evidence made available to us establish that, despite the bad example M has set, she is in a better position than anyone else to see to it that the children continue with their schooling and resist the pressures and temptations that would be intensified by the deprivation of her care in a socially fragile environment. It is to the benefit of the community, as well as of her children and herself, that their links with her not be severed if at all possible.¹⁷¹

This evidence indicated that the children should receive primary care from their mother.¹⁷² Sachs J concluded the circumstances of this case meant that M, her children, the community and the victims who would be repaid from her earnings, stood to benefit more if she was placed under correctional supervision than being sent back to jail.¹⁷³

3.4 Final sentence

As indicated above, the court upheld the appeal. The sentence imposed by the High Court was set aside. It was replaced with a suspended sentence of four years provided that M would not be convicted of a similar offence and that she repaid all her victims. She was placed under correctional supervision in terms of section 276(1)(h) of the CPA for three years, coupled with community service of ten hours per week for three years and that she received counselling on a regular basis.

3.5 Academic commentary

The *S v M* case elicited commentary from several authors. Coetzee notes the sentencing process from a therapeutic point.¹⁷⁴ She describes the judgement as falling within therapeutic jurisprudence. According to Coetzee therapeutic jurisprudence requires the court to apply the law in a therapeutic manner, by searching for ways that will minimise negative effects and promote positive effects on the wellbeing of those affected by the law.¹⁷⁵ She elaborates on those parts of the judgement that supported her view, and argued that the court’s finding, that the use of section 28 was to prevent the law from breaking down family life or parental care, facilitated a therapeutic outcome in sentencing. Though the court applied the traditional *Zinn*-triad, it still reached a conclusion that a non-custodial sentence was the appropriate sentence.

¹⁷¹ *S v M* para [70].

¹⁷² *S v M* para [67].

¹⁷³ *S v M* para [76].

¹⁷⁴ Coetzee 2010 13 (3) *PELJ* 146.

¹⁷⁵ *Ibid.* See further literature on therapeutic jurisprudence at www.therapeuticjurisprudence.org (accessed 30 May 2019).

Despite alternative family care being available, should their mother be imprisoned, Sachs J was of the opinion that alternative care was inappropriate and not in the best interests of the children (or for their well-being). Since evidence presented showed that M was the best person to take care of the children, further imprisonment would affect the children negatively. Therefore, the sentence of imprisonment was suspended and replaced with a correctional supervision order. Coetzee concludes that the consideration of the well-being of the children resulted in a shift from a custodial to a non-custodial sentence.¹⁷⁶ In addition, not only did the children benefit from this decision, but also the crime victims.¹⁷⁷ Mujuzi notes that *S v M* departed from the traditional approach, where punishment focused on the offender and not on the children of the offender.¹⁷⁸ Skelton welcomes the decision in *S v M*.

She argues that it was in line with regional instruments, in particular, the ACRWC. She emphasises that the sentencing court's new duty to consider the rights of the children when sentencing their primary caregiver, derives support from international and regional instruments. It was highlighted that the *amicus* submissions distinguished between the ACRWC and the CRC; the ACRWC contains a separate and distinctive commentary on 'children of imprisoned mothers', namely article 30, which has no counterpart in the CRC.¹⁷⁹ Article 30 of ACRWC reads:

"States Parties to the present Charter shall undertake to provide special treatment of expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- (a) Ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
- (b) Establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- (c) Establish special alternative institutions for holding such mothers;
- (d) Ensure that a mother shall not be imprisoned with her child;
- (e) Ensure that a death sentence shall not be imposed on such mothers;
- (f) The essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation."

¹⁷⁶ Coetzee 2010 13 (3) *PELJ* 148.

¹⁷⁷ See *S v M* para [67].

¹⁷⁸ Mujuzi 2011 *SACJ* 172.

¹⁷⁹ Skelton 2009 2 *SAJHR* 490. See African Charter on the Rights and Welfare of the Child at <http://www.achpr.org/instruments/child/#a30> (accessed 30 May 2019).

Skelton also notes that the *S v M* judgement represents a slight shift away from the rights of the caregiver towards the rights of their children. The judgement did not get involved in the discussion of the rights of the primary caregiver, but focused on the best interests of the children and their rights. The court's discussion centred on rights of the children to family and parental care and their best interests given appropriate weight. She was of the view that the *S v M* judgement's most insightful aspect lies in its development of child law where the court held that children's rights were distinct from those of their caregivers.¹⁸⁰ This distinction presented a significant new development on the rights of children in criminal proceedings.¹⁸¹ Skelton further opposed the state's argument that the consideration of the rights of children by the sentencing courts puts primary caregivers at an advantage of evading punishment, pointing out that it is difficult to identify the precise circumstances in which the best interests of the child will justify a non-custodial sentence.¹⁸²

Carnelley and Epstein's perspective is from a social, financial and psychological impact. They point out that the imprisonment of caregivers has short and long term consequences that should be considered.¹⁸³ One consequence is the destruction of the family unit and in such case, the child should be provided with alternative care. The alternative caregiver will also incur financial baggage as a result of taking care of an extra person, which may result in the child having to relocate or change the caregiver. The child of the incarcerated parent may also suffer from emotional and psychological problems. The severity of the impact would depend on the age of each child. All these matters should be attended to. Freedman highlights the difficulty that the various sentencing courts face when determining the best interest of the child.¹⁸⁴ Couzens agrees with Freedman by stating that the difficulty in applying the principle of the child's best interest is to precisely determine its scope.¹⁸⁵

It should consider, in particular, the types of actions which concerns the child or children, and to which this principle should be applied. Courts are often faced with similar tasks, for example, when deciding on matters relating to divorce, placement of

¹⁸⁰ Skelton 2008 1 *CCR* 351.

¹⁸¹ *Ibid* 352.

¹⁸² *Ibid* 363.

¹⁸³ Carnelley and Epstein 2012 1 *SACJ* 113.

¹⁸⁴ Freedman 2008 2 *SACJ* 236.

¹⁸⁵ Couzens 2012 1 *Studia Universitatis Babes-bolyai Iurisprudentia* 59.

children, or adoptions. Taking into account the child's best interest in decisions related to family law is similarly challenging.

3.6 Conclusion

The judgement in *S v M* creates a major change in the judicial approach during sentencing in criminal proceedings in South Africa. The court made considerable efforts to apply a child-centred approach when sentencing a caregiver. Though children of such perpetrators are simply third parties in the particular sentencing matter, a new precedent was set whereby courts must protect the right of the child to care. It can be drawn from *S v M* that, when deciding on an appropriate sentence, a child should no longer be viewed as a mere mitigating factor or a circumstance of the offender. Where the accused is a primary caregiver, the best interests of the child should be weighed as an independent or separate factor. In considering what sentencing option is appropriate, the sentencing officer must pay attention to the rights of the child to receive parental, family or alternative care as stipulated in section 28(1)(b).¹⁸⁶ In summary, the Constitutional court thus established a guidelines that must be followed when sentencing a caregiver, in that the interest of the children must be given primary consideration, as an independent factor.

The court in *S v M* considered the best interests of the children though they were not the ones on the wrong side of the law. Although the children were only indirectly involved, they still stand to be affected by the court's decision to impose a custodial sentence. Such a sentence would mean that their right to parental care will be curtailed.¹⁸⁷ The guidelines in *S v M* only apply to caregivers and not breadwinners. The primary caregiver needs not be the biological parent of the child concerned. In South Africa most children are cared for by foster parents or extended family members. The courts are now aware of the need to balance the varied interests that may arise during the proceedings. The case of *S v M* established that the discretion of the sentencing court is determined by the availability of the other parent to take care of the child. If the court is satisfied that the other parent is capable of taking care of the child, then a custodial sentence may be imposed.¹⁸⁸ If the court establishes that

¹⁸⁶ Coetzee 2010 13 (3) *PELJ* 150.

¹⁸⁷ Couzens 2012 1 *Studia Universitatis Babes-bolyai Iurisprudentia* 63.

¹⁸⁸ See chapter 4 of this mini-dissertation on the manner in which the court imposed custodial and non-custodial sentences.

the custodial sentence affects the children, the court has to apply section 28(2) of the Constitution and to put the best interest of the child principle into play.¹⁸⁹ *S v M* confirms previous Constitutional Court case law that section 28(2) should not be interpreted to mean that the best interest of the child should override other competing interests or receive priority in all cases. The right may be limited in terms of section 36 of the Constitution.¹⁹⁰ This is also emphasised by Article 3(1) of CRC,¹⁹¹ which states that the best interests of the child is one of the existing factors, but not primary, therefore other legitimate interests may thus take priority over the best interests of the child. The consideration of the best interests of children in the sentencing process highlights the conflict between the best interests of a child and the interest of society when punishing the wrongdoer in serious crimes. Where a custodial sentence is the appropriate sentence, courts must ensure that they have adequate information on the impact the sentence will have on the child.

¹⁸⁹ Couzens 2012 1 *Studia Universitatis Babes-bolyai Iurisprudentia* 63.

¹⁹⁰ Coetzee 2010 13 (3) *PELJ* 164.

¹⁹¹ UN General Assembly, Convention on the Rights of the Child 1989.

CHAPTER 4

THE DEVELOPMENT OF THE RIGHT OF THE CHILD TO CARE IN THE SENTENCING PROCESS THROUGH CASE LAW POST *S v M*-JUDGEMENT

4.1 Introduction

Chapter 3 showed that, prior to *S v M*, punishment focused mainly on achieving its objectives without considering the impact the sentence would have on the rights of the minors under the offender's care. However, relying on section 28 of the Constitution, the Constitutional Court broadens the punishment discussion to include an emphasis on the effect the punishment would have on the children, should their caregiver be sent to prison.¹⁹² In assessing South African jurisprudential developments since the landmark case of *S v M* in the sentencing of primary caregiver, several academics note the considerable impact this judgement had.¹⁹³ *S v M* is described as revolutionising sentencing in cases where the person being sentenced is the sole primary caregiver of minor children, but not necessarily in the case of a main caregiver.¹⁹⁴

The right of the child to parental, family or alternative care should now always be considered when sentencing primary caregivers of minor children. Its major impact on sentencing procedure, reasserts the central role and the right of the children to care as an independent consideration in the sentencing process.¹⁹⁵ This means that the children's right to care should weigh against any other competing interest. The right of the child to parental, family or alternative care should not be viewed as an aspect under the personal circumstances of the accused (as a primary caregiver) and should be given primary consideration. The Constitutional Court found that where both a custodial and a non-custodial sentence were appropriate, the best interests of the children should weigh in favour of a non-custodial sentence, and thus should be the preferential sentence. Where a non-custodial sentence is inappropriate, suitable alternative care should then be arranged.¹⁹⁶

¹⁹² Mujuzi 2011 2 *SACJ* 164.

¹⁹³ See for example Skelton & Mansfield-Barry 2015 *European Journal of Parental Imprisonment* 14-15.

¹⁹⁴ Terblanche 2017 20 *PELJ* 12.

¹⁹⁵ *Ibid.*

¹⁹⁶ Skelton & Mansfield-Barry 2015 *European Journal of Parental Imprisonment* 14.

Since the *S v M* judgement, children have been recognised as a fourth category of persons¹⁹⁷ that should be considered during the sentencing process where the person being sentenced is a primary caregiver. The sentencing court must now, where a number of sentencing options are available, ensure that the right of children to care be given primary consideration and must weigh as an independent factor. The case will be discussed in detail below with the commentary of legal scholars. This chapter traces the implementation of the *S v M* principles in consequent case law.

4.2 Adherence to the *S v M* guidelines for the sentencing of a caregiver

As highlighted above, *S v M* has significantly rearranged the sentencing framework, making room for the rights of affected children to be introduced into the decision-making process.¹⁹⁸ Since then, courts have been more sensitive to the interests of children where their primary caregiver is to be sentenced. They further take precaution when dealing with children, by following the guidelines articulated in *S v M*, in all matters where there are indications that the accused might be a primary caregiver. Since *S v M* the court has a duty to ensure that the needs of children are considered along with the State's need for punishment, in an attempt to reduce the negative effects of curtailing the right to parental, family or alternative care on the children.¹⁹⁹ The courts can now distinguish between caregivers and co-caregivers of minor children during sentencing.²⁰⁰

Regional and international instruments²⁰¹ also drew inspiration from the principles outlined in *S v M*, which strengthened children's rights in criminal law. *S v M* not only

¹⁹⁷ See Skelton 2012 1 *SACJ* 180.

¹⁹⁸ Donson 2016 63 (3) *Probation Journal* 335.

¹⁹⁹ Skelton & Mansfield-Barry 2015 *European Journal of Parental Imprisonment* 13.

²⁰⁰ Skelton & Mansfield-Barry 2015 *European Journal of Parental Imprisonment* 14. In *MS v S* 2011 (2) SACR 88 the court found that the child's mother was not the only primary caregiver, as the child's father was still living in the household with the children and was able to make suitable arrangements for their care. With this case Khampepe J noted that *S v M* should be applied in cases where a primary caregiver is the main, but not the sole caregiver.

²⁰¹ For example, the Human Rights Council in 2012 adopted a resolution Rights of the Child (2012): A/HRC/RES/19/37 which called upon states to emphasise non-custodial measures when sentencing primary caregivers of minor children. The States also had to take account of other sentencing considerations along with the best interests of the child. The African Committee of Experts on the Rights and Welfare of the Child on Children of Incarcerated and Imprisoned Parents and Primary Caregivers in 2013 General Comment No 1: African Charter on the Rights and Welfare of the Child Article 30 (1) quoted the *S v M* judgement and confirmed that the best interests of the child must be given primary consideration where the parent stand to be incarcerated. See also Skelton & Mansfield-Barry (2015) *European Journal of Parental Imprisonment* 15.

had a significant impact on the sentencing procedure both in South African and international courts, but its principles have also been applied beyond the sentencing context, to include bail proceedings.²⁰² The court provided guidelines that should be considered where the caregiver of minor children is sentenced, which emphasises the significance of the children of the offender, putting their interests as priority. *S v M* has developed and established principles that are observed globally.²⁰³ As a result of the development, in some cases post-*S v M*, the sentences were set aside, some were remitted back to the trial courts to reconsider sentence, and in others the sentence was reduced on the basis that they had not considered the right of the child to parental, family or alternative care.²⁰⁴ In numerous cases the offenders before the courts were primary caregivers of minor children where the principles and guidelines articulated in *S v M* had to be applied.

4.3 Applicable case law

This section will analyse reported case law where the courts considered the right of the child to care when sentencing the primary caregiver and how they evaluated and applied the principles articulated in *S v M*.

4.3.1 *S v Langa* 2010 (2) SACR 289 (KZP)

The appellant was convicted on six of the seven counts. She was charged with charged on two counts of murder, two counts of kidnapping, one of theft and one of malicious injury to property. She was sentenced to life imprisonment for count one, 20 years' imprisonment for count two, 10 years' imprisonment for counts three and four and 7 years' imprisonment for counts five and seven.²⁰⁵ The issue before the court was whether the sentencing court considered the right of the children to parental, family or alternative care when it imposed a term of life imprisonment.²⁰⁶ The appellant

²⁰² See *S v Peterson* (2008) 2 SACR 353 (C) where the court found that being a primary caregiver of a child makes you eligible for bail as an exceptional circumstance under the Criminal Procedure Act. However, in this case the accused was a co parent and the exception did not apply to her and was given a custodial sentence. The court then ensured that the children were well taken care of. The court emphasises the principle of making sure that the best interest of the children is considered even when the offender is not their primary caregiver.

²⁰³ Skelton & Mansfield-Barry 2015 *European Journal of Parental Imprisonment* 14.

²⁰⁴ Skelton & Mansfield-Barry (2015) *European Journal of Parental Imprisonment* 15. See below *S v Londe* 2010 (1) SACR 377 (ECG), *S v De Villiers* 2016(1) SACR 148 (CC), *S v Piater* 2013 (2) SACR 254 and others to be discussed in case law showing the developments brought about by the *S v M* decision.

²⁰⁵ *S v Langa* para [1].

²⁰⁶ *S v Langa* para [2].

was sentenced before the Constitutional Court decision of *S v M*. Steyn J (as he then was) found that the court did not err in its decision to impose a sentence of life imprisonment on the appellant, despite that she was a primary caregiver of six children. The court was aware of the appellant's children and that they would be cared for should a custodial sentence be imposed on the caregiver.²⁰⁷ The court found that the seriousness of the offence as well as the interests of the society in punishing the crime outweighed the interests of the children. This was expected of the sentencing court because considering the interests of the child does not mean that it should be lenient on the primary caregiver. A strong message should be sent out to the public that the law punishes those in conflict with the law regardless of their status as caregivers of children. The fact that the accused was a primary caregiver did not mean that a non-custodial sentence was appropriate. The nature of the offences she had committed was so serious that it warranted life imprisonment.

Steyn J considered the interests of the children and was aware of the hardship they would suffer as a result of the imprisonment of their caregiver. The court avoided the negative effects of imprisonment on the children and it made a similar order to that in *Howells*.²⁰⁸ It ordered the Registrar of the court to approach the Department of Social Welfare to conduct an investigation on the circumstances of the appellant's six minor children immediately. The Department of Social Welfare had to ensure that the children were properly cared for, they remained in contact with the appellant during her period of imprisonment and that everything possible was done to ensure that the appellant be reunified with her children.²⁰⁹ The case demonstrates that the right of the children to parental care were considered and that the court acknowledged that incarceration has a negative impact on the children of the primary caregiver. It took reasonable steps to ensure alternative care was arranged as soon as it became aware that the accused was a caregiver of children.

4.3.2 *S v GL* 2010 (2) SACR 488 (WCC)

The appellant was convicted of culpable homicide. She was sentenced to 10 years' imprisonment of which 4 years' imprisonment was suspended for a period of 5 years

²⁰⁷ *S v Langa* para [10].

²⁰⁸ *S v Langa* para [11].

²⁰⁹ *S v Langa* para [12].

on condition that she was not convicted of culpable homicide deriving from assault.²¹⁰ The appeal arose from the submission of the appellant that the sentence imposed on her was severe and the court *a quo* did not properly consider the right of the children to parental care when she concluded that 6 years' imprisonment was appropriate. The court found that the court *a quo* erred in devoting too little attention to the right of the children parental or family care in the sentencing process and in his sentencing remarks. It also failed to adopt the guidelines developed by the Constitutional Court and to give careful consideration of the children's right to care of the primary caregiver facing a possible custodial sentence.²¹¹ Bozalek J noted that children required special attention and to have their interests duly considered in the sentencing process.²¹² The shortcomings found in this case were remedied by the new evidence tendered at the appeal stage in a form of a social worker's report.

The State highlighted that the social worker's report dealt with guidelines stated in *S v M* regarding the approach of a sentencing court when imposing a sentence on a primary caregiver. The main focus of the report was to investigate the best interests of the appellant's minor children and how they stand to be affected should the appellant be required to serve a custodial sentence.²¹³ The social worker's report indicated that should a custodial sentence be imposed, the children would be cared for by both their maternal and paternal grandparents.²¹⁴ It also appeared that the appellant was not the sole primary caregiver to the children as the young child resided with the paternal grandparents after the death of the mother.²¹⁵ After consideration of the report the court found that there was no clear evidence that warranted the imposition of a non-custodial sentence when considering the right of the children to parental or family care.²¹⁶ A sentence in terms of section 267(1)(h) of the CPA would be most suitable, because of the seriousness of the offence and the need to consider the interests of the minor children of the caregiver.²¹⁷

²¹⁰ *S v GL* para [4].

²¹¹ *S v GL* para [19].

²¹² *S v GL* para [17].

²¹³ *S v GL* para [5].

²¹⁴ *S v GL* para [22].

²¹⁵ *S v GL* para [23].

²¹⁶ *S v GL* para [8].

²¹⁷ *S v GL* para [7-8].

The court found that the role of the appellant as a primary caregiver was the strongest mitigating factor in favour of a non- custodial sentence. The accused's personal circumstances were largely favourable because she was a first time offender, had a steady income, carried out her parental duties and had no previous history of using violence against the deceased.²¹⁸ The view that the interests and rights of the children should be sensitised and the traditional aims of sentencing should not be departed from is agreed with. Furthermore, the advantage of this type of sentence is that it is flexible and it can consider the interests of children at the same time serving the interests of justice and the society. Parents must be punished for their wrongdoing and not use children to receive some sympathy and reduced or non-custodial sentences. The court found that there was no warrant for the High Court to interfere with the sentence on appeal, in the absence of any misdirection on the part of the sentencing court.²¹⁹ In consideration of all the relevant circumstances, the judge found that the sentence imposed by the magistrate was appropriate. The appeal against the sentence was dismissed and the court allowed appellant a reasonable period of time to make the necessary arrangements for the alternative care of the children.²²⁰

4.3.3 *S v Londe* 2011 (1) SACR 377 (ECG)

This matter came before the court as a matter of automatic review. The accused was a first time offender. She was convicted of assault with intent to commit grievous bodily harm and was sentenced to 36 months' imprisonment.²²¹ The issue before this court was whether the magistrate considered who would take care of the children when their caregiver was sentenced to a custodial sentence.²²² The court found that the outstanding feature of the accused's personal circumstance was that she was a primary caregiver to two minor children and she was seven months pregnant at the time of sentence. The accused testified that the children lived with her and their maternal grandmother.²²³ Although the children lived with their grandmother, there were no investigations that were made regarding the quality of care provided by her and the welfare of the children if their mother was sent to prison.

²¹⁸ *S v GL* para [24].

²¹⁹ *S v GL* para [8].

²²⁰ *S v GL* para [39].

²²¹ *S v Londe* para [1].

²²² *Ibid.*

²²³ *S v Londe* para [2].

When sentencing a primary caregiver of minor children, it was essential for the trial court to obtain a pre-sentence and a correctional supervision report before an appropriate sentence can be considered.²²⁴ The purpose of the pre-sentence report is to give adequate information regarding children of caregiver's needs as well as how best their interests can be considered. The welfare of the children was important when considering the appropriate sentence, thus the court held that a sentence of correctional supervision may be appropriate in all the circumstances, taking into account the right of the children to receive parental care and other mitigating factors.²²⁵ The order confirmed the conviction, but the sentence of 36 months' imprisonment was set aside.²²⁶ The matter was remitted back to the trial court for a new sentence taking into account the judgment of *S v M*.²²⁷ The case did not consider the interests of the children. There was no adequate information regarding the welfare of the children as well as their needs.

It did not investigate if the grandmother would be able to adequately care for the children. The court did not consider the impact that the children would endure as a result of the incarceration of their mother. The case of *S v M*, as precedent, requires that where the accused is a primary caregiver, the sentencing courts must take due consideration on the right of the child to care. The case provides that where there is a possibility of imposition of a custodial sentence, the courts must apply its mind to consider the impact of the sentence on the child, it must ensure that adequate alternative care is arranged and the form of punishment imposed on the primary caregiver is less detrimental to the interests of the child.

4.3.4 *MS v S (Centre for child law as Amicus Curiae)* 2011 (2) SACR 88 (CC)

Mrs S was married woman, with two minor children.²²⁸ She was convicted with fraud and sentenced to 8 years' imprisonment with 3 years suspended on the usual conditions.²²⁹ She appealed against the sentence and argued that the custodial sentence imposed did not pay attention to the right of the children to parental or family

²²⁴ *S v Londe* para [2].

²²⁵ *S v Londe* para [2].

²²⁶ *S v Londe* para [3].

²²⁷ *S v Londe* para [5].

²²⁸ *MS v S* para [3].

²²⁹ *MS v S* para [4].

care.²³⁰ In regional court, on the charges of forgery and uttering she was sentenced to two years' imprisonment, conditionally suspended for five years'. On the count of fraud, she was sentenced to 5 years' imprisonment with conditional correctional supervision in terms of section 267(1)(i) of the CPA.²³¹ The court imposed the sentence based on the fact the children would be cared for by Mr S and Mrs S's mother in-law.²³² Mrs S's appeal to the Supreme Court of Appeal was dismissed. The High Court and the Supreme Court of Appeal in imposing the sentence also relied on the report of Mrs S's social worker that portrayed her as a responsible mother and being financially responsible for the children.²³³ Mrs S argued that both courts did not invoke section 28 when it imposed the sentence and did not conduct an inquiry that established if she was a primary caregiver or not.²³⁴ The state opposed the appeal on the basis that the interests of Mrs S's minor children were taken into account by the previous courts.

Mrs S's husband was available to take care of the children whilst she was serving her term of imprisonment.²³⁵ The counsel for Mrs S used as the evidence of the social worker that indicated that a custodial sentence would have a detrimental impact on the interests of the children. The report indicated that Mrs S's mother-in law would no longer be able to take care of the children due to ill-health and the incarceration of Mrs S would have a major impact on the children's right to care.²³⁶ The *amicus* made a written submission that the *court a quo* did not pay adequate attention to the right of the minor children to parental care. It emphasised that there was insufficient evidence on the quality of care the children would receive from the family structure. The *amicus* requested the Constitutional Court to appoint a *curator ad litem*.²³⁷

The curator's report provided adequate information regarding the circumstances of the children. It indicated that Mrs S' youngest child was 5 years old, in Grade R and the oldest was 8 years old, in Grade 3. The report established that Mrs S was the caregiver of the children and it would not be in the best interests of the children for her to be

²³⁰ *MS v S* para [2].

²³¹ Para 7.

²³² *Ibid.*

²³³ *MS v S* para [12].

²³⁴ *MS v S* para [23]. See also para 30 on other arguments.

²³⁵ *MS v S* para [26]. See para 33.

²³⁶ *MS v S* para [32].

²³⁷ *MS v S* para [27].

incarcerated. The children depended on her for emotional security and she attended to their day-to-day tasks. It was submitted that the imprisonment of the caregiver would have a detrimental effect on the emotional and physical development of the children.²³⁸ The report concluded that Mrs S had improved her life. She was employed and devoted her time to her parental responsibilities. Her employer had indicated that should she be incarcerated; her position would be filled. Mr S was unable to care for the children as he worked long hours, which his employer had refused to alter. He earned an income of R8 500, which could not have been enough to cover the tuition fees, medical expenses and necessities of the children. He could not have been able to pay a child-minder to assist him with caring for the children. If Mrs S was sent to prison, the children could be without a caregiver.²³⁹

Khampepe J (as she then was), who wrote the minority judgement, found it difficult to decide whether the Regional Court gave due consideration to the type of care the children would receive.²⁴⁰ The court was mindful that the sentencing court was not required to protect the children from the negative consequences of being separated from their primary caregivers. It was required only to pay appropriate attention to their interests and to take reasonable steps to minimise damage.²⁴¹ The judge was not persuaded by the State's submission that it had balanced all competing interests. She found that the court did not apply the guidelines in *S v M* because it did not fully investigate the quality of alternative care the children would receive. There was no investigation by the court on who would look after the minor children's daily needs during Mrs S's incarceration and the alternative joint care considered between Mr S and his mother was not explained.²⁴²

Khampepe J found that Mr S was not a suitable alternative caregiver, as he would periodically leave the common home to be with his girlfriend. When he was present at home, he did not play any significant role with regard to the care of the children. The judge emphasised that because the children were sickly and of tender age, the Regional Court had to pay sufficient attention to them.²⁴³ The court found that the

²³⁸ *MS v S* para [42].

²³⁹ *MS v S* para [43].

²⁴⁰ *MS v S* para [35].

²⁴¹ *Ibid.*

²⁴² *MS v S* para [36].

²⁴³ *MS v S* para [37].

Regional Court had imposed the sentence on Mrs S without giving adequate and informed consideration to the impact a custodial sentence would have on the children.²⁴⁴ Furthermore, the Supreme Court of Appeal had not applied its mind as to whether it was necessary to take steps to ensure that the children could be adequately cared for, taking into account that Mr S's mother was unavailable. Although the report indicated that Mr S would look after the children, it failed to address the adequacy of the care the father could provide.²⁴⁵ Khampepe J found that the alternative care was not supported by the information contained in the report. There was no indication as to who would care for the children's special needs, as they suffered from chronic illnesses and required constant medical treatment and attention. The judge agreed that there was little information about the quality of care the children would receive if left with their father under such circumstances.²⁴⁶

Khampepe J held that sentence of correctional supervision was appropriate as it would not be in the best interests of the children that they be cared for by Mr S,²⁴⁷ Mrs S was the only suitable person to adequately care for the needs of the children and it was not in the interests of the children to curtail their right to parental care because of their ages and health needs,²⁴⁸ Mrs S has since been employed.²⁴⁹ That way her children would not suffer from the negative consequences that flow from a custodial sentence.²⁵⁰ Cameron J, wrote for the majority, and pointed out that Mrs S was a repeat offender who continued to re-offend while serving a suspended sentence, thus she should serve a custodial sentence. The majority concurred with the sentence in terms of section 276(1)(i) of the CPA imposed by the Regional Court because although imprisonment was warranted for, there was a prospect of early release on a correctional supervision programme.²⁵¹

There majority were aware of the negative impact that Mrs S's children would suffer,²⁵² it held that unlike *S v M*, Mrs S was not the sole caregiver of the children, as she was

²⁴⁴ *MS v S* para [38].

²⁴⁵ *MS v S* para [44].

²⁴⁶ *Ibid.*

²⁴⁷ *MS v Spara* [49].

²⁴⁸ *MS v Spara* [50].

²⁴⁹ *MS v Spara* [51].

²⁵⁰ *MS v S* para [52].

²⁵¹ *MS v Spara* [57].

²⁵² *MS v S* para [60].

united with the father of her children. Mr S was a co-resident parent, who was willing to take care of the children during her incarceration, although he worked long hours it did not mean that the children would be without childcare resources. Thus a non-custodial sentence would not ensure their nurturing and would not compromise the best interests of the children.²⁵³ The majority found that the purpose of the reports was not to suggest that the fundamental needs of the children would be neglected if their mother was incarcerated.²⁵⁴ The majority in dismissing the appeal, were aware that the children might suffer hardship. The court ordered the Department of Correctional Services to ensure that a social worker visited the children regularly and that the reports be submitted to the department on the well-being of the children during their caregiver's incarceration.²⁵⁵ The majority ordered that the National Commissioner of Correctional Services to ensure that a social worker in the employ of the Department of Correctional Services visited the children, at least once a month and submitted a report as to whether alternative care would be necessary.²⁵⁶

The courts must guard against giving minimal attention to the needs of the children. The courts in carrying out its duties must, conduct more robust child-centred enquiries to ascertain the impact the custodial sentence would have on the children, should their primary caregiver be incarcerated. The needs and interests of the children must be considered properly during the sentencing process. Where the courts impose a custodial sentence, the quality of alternative care must be assessed. The court had to pay proper attention to those issues and take measures to minimise damage when weighing up the competing needs of the children and the need to punish Mrs S for her misconduct. *S v M* stressed that the importance of paying appropriate attention to the right of the children to care was not to assist parents to evade appropriate punishment but to protect the innocent children from avoidable harm.

4.3.5 *S v Pillay* 2011 (2) SACR 409 (SCA)

The appellant was a mother of six minor children.²⁵⁷ She was charged with fraud. She was convicted on a plea of guilty. She was released on bail pending the finalisation of

²⁵³ *MS v S* para [63].

²⁵⁴ *MS v S* para [64-65].

²⁵⁵ *MS v S* para [66].

²⁵⁶ *MS v Spara* [68].

²⁵⁷ *S v Pillay* para [4].

the proceedings.²⁵⁸ The appellant was sentenced to 5 years' imprisonment in terms of section 276(1)(i) of the CPA.²⁵⁹ The issue that the court had to determine was whether the trial court over-emphasised the retribution and deterrence aspect of sentencing at the expense of the right of the appellant's children to care and the impact the incarceration would have on her dependent children.²⁶⁰ The only information regarding the children was that there were six of them. The sentencing court had two reports before it, one from a social worker employed by the Department of Social Development and another from a Correctional Services officer. In relation to the children, the social worker's report recorded that she lived with her six minor children and her mother. She had a good relationship with the children and had a broken relationship with the father of her first child.²⁶¹

The Correctional Services officer's report only provided that the appellant had six children.²⁶² The only useful information regarding the children was obtained during cross-examination of appellant by the prosecutor. It was established that the father of the eldest child had stopped paying maintenance when she was four, the father of the other three had passed on and the father of the remaining two had moved abroad and the appellant had no further contact with him.²⁶³ After Seriti AJ (as he then was) considered the evidence, he held that section 28(2) of the constitution promotes the primacy of the best interest of the child and it was clear that the appellant could be a possible candidate of correctional supervision. The judge found that a sentence in terms of section 276(1)(h) of the CPA, namely correctional supervision, was appropriate because it had flexible conditions; it was adaptable and could be shaped to meet the specific circumstances of each offender's case.²⁶⁴

The court highlighted that in *S v Howells*,²⁶⁵ the court resorted to a similar order to deal with the position of minor children after the incarceration of a caregiver.²⁶⁶ The court

²⁵⁸ *S v Pillay* para [1].

²⁵⁹ *S v Pillay* para [2].

²⁶⁰ *S v Pillay* para [11].

²⁶¹ *S v Pillay* para [17].

²⁶² *S v Pillay* para [18].

²⁶³ *S v Pillay* para [20].

²⁶⁴ *S v Pillay* para [14].

²⁶⁵ 1999 (2) SACR 675 (C).

²⁶⁶ *S v Pillay* para [16].

concluded that the matter be set aside for fresh sentencing after the court *a quo* had obtained proper evidence on the circumstances of the children.²⁶⁷

4.3.6 *S v Piater* 2013 (2) SACR 254

The appellant was a married woman with two minor children aged 15 and 12. She was convicted of fraud, forgery, uttering and theft and was sentenced to an effective 7 years' imprisonment.²⁶⁸ The issues before the court was that the trial court had overemphasised the seriousness of the offences and the interests of society at the expenses of the interests of the appellant's children, the sentence was inappropriate and that direct imprisonment was the only suitable sentence.²⁶⁹ Makgoka J (as he then was) was convinced that the regional magistrate gave focused attention to the interests of the appellant's minor children and balanced them with other considerations²⁷⁰ and the regional magistrate took into account all these factors in passing judgement.²⁷¹ He highlighted that the minor children's circumstances were more favourable as to how they stood to be affected by direct imprisonment than those in *S v M*.²⁷² It was found that the appellant was not the children's sole caregiver and her husband was their co-resident parent.

He would be able to take care of them during her incarceration, though he worked long hours. There was nothing that indicated that he would not be able to engage the children's care resources needed to ensure that the children are well looked after during his absence at work.²⁷³ The court held that a custodial sentence would not compromise the children's interests. There was no doubt that the imprisonment of appellant would have a negative impact on the minor children, especially the girl-child. It appeared that an appropriate sentence in this matter was clearly custodial.²⁷⁴ Makgoka J noted that the sentencing court should give sufficient independent and informed attention, as required by section 28(2) read with section 28(1)(b) of the Constitution, to the impact on the children of sending their primary caregiver to prison. Children are vulnerable and easily affected, therefore they need to be given focused

²⁶⁷ *S v Pillay* para [26].

²⁶⁸ *S v Piater* para [1].

²⁶⁹ *S v Piater* para [7].

²⁷⁰ *S v Piater* para [26].

²⁷¹ *S v Piater* para [43].

²⁷² *S v Piater* para [25].

²⁷³ *S v Piater* para [25].

²⁷⁴ *Ibid*.

attention and diligence when they are involved. The sentence that the court imposed should have been less detrimental to the children and should have considered their needs. Given the gravity of the offences, coupled with the aggravating factors a long-term imprisonment was called for.²⁷⁵ The court concluded that a custodial sentence was the only suitable option given all the relevant factors. It considered the 4 years' imprisonment to be appropriate and set aside the 7 years' imprisonment. The court was aware of the fact that the children might suffer hardship during the appellant's incarceration. It made an order that the National Commissioner of Correctional Services should employ a social worker of the Department to visit the children of the appellant at least once a month for the first three months. Furthermore, a report from the social worker should be submitted to the office of the National Commissioner of Correctional Services as to whether the children of the appellant are in need of care and protection as envisaged in section 150 of the Children's Act and to take reasonable steps requires by the provision.²⁷⁶

4.3.7 *De Villiers v S* 2016 (1) SACR 148 (SCA)

The accused was the primary caregiver of two minor children.²⁷⁷ She was charged and convicted of 31 counts of fraud, and sentenced to 8 years' imprisonment, with 3 years suspended on the usual conditions.²⁷⁸ The issue brought before the court was that the regional magistrate had not given regard to the fact that she was a caregiver to minor children.²⁷⁹ The accused and the amicus argued that direct imprisonment was not warranted and would be detrimental to the right of the children to care. The state, on the other hand, contended that, given the seriousness of the offences, a non-custodial sentence would not be sufficient punishment. Lewis AJ highlighted the duties of a sentencing court when sentencing a caregiver with children, in that section 28 of the Constitution required that due consideration should be given to the interests of the child. The sentencing court had to establish what the impact of imprisonment would be on the children.

²⁷⁵ *S v Piater* para [46].

²⁷⁶ *S v Piater* para [48].

²⁷⁷ *De Villiers v S* para [1].

²⁷⁸ *De Villiers v S* para [4].

²⁷⁹ *De Villiers v S* para [5].

It should consider independently the children's right to parental care and ensure that the children will be taken care of if the caregiver is sent to prison.²⁸⁰ Lewis AJ pointed out that when considering the right of the children to parental, family or alternative care a court must consider evidence as to their current position.²⁸¹ In this case, the court received a report prepared by a counselling psychologist which addressed the circumstances of the children.²⁸² The evidence presented indicated that Mrs De Villiers lived with her mother.²⁸³ She was employed as a Group Manager at Houghton House.²⁸⁴ She had at that time instituted divorce proceedings against her husband.²⁸⁵ The children were entirely supported by Mrs De Villiers because her husband was a drug addict and could not make much contribution to the maintenance of the children.²⁸⁶ Mrs De Villiers's mother could not afford to maintain the children as she made little income from her salon business. She could also not look after the children as her own as she suffered from ill-health and was assisted by a domestic worker.²⁸⁷

Mrs De Villiers, in contrast, had flexible working hours and had ample time to prepare and take them to school and help them with their homework.²⁸⁸ The report from the counselling psychologist advised for a non-custodial sentence because the children would be at risk as they would lose their secure environment.²⁸⁹ The court, in assessing all the evidence, found that the trial court and the full bench failed to examine the interests of the children independently. They further did not call for a proper investigation into the accused's current position or the children's circumstances, and thus erred by not taking proper steps to look into the children's well-being.²⁹⁰ The Supreme Court of Appeal proposed a sentence of correctional supervision under section 276(1)(h) of the CPA.²⁹¹ Mrs De Villiers' was considered a suitable candidate because she was rehabilitated and was employed. She supported the children financially and was the caregiver as her mother was ill and made little

²⁸⁰ *S v M* para [32].

²⁸¹ *De Villiers v S* para [11].

²⁸² Van der Merwe 2016 2 *Criminal Justice Review* 24.

²⁸³ *De Villiers v S* para [14].

²⁸⁴ *De Villiers v S* para [22].

²⁸⁵ *De Villiers v S* para [23].

²⁸⁶ *De Villiers v S* para [24].

²⁸⁷ *De Villiers v S* para [24].

²⁸⁸ *De Villiers v S* para [25].

²⁸⁹ *De Villiers v S* para [39].

²⁹⁰ *De Villiers v S* para [38].

²⁹¹ *De Villiers v S* para [9].

income from her business.²⁹² The psychologist presented to the court the negative emotional state of the children while the mother was incarcerated, and testified that since her return, they were happier, doing well at school and were emotionally secured.²⁹³ Their father did not feature in their world and has had very little contact with them recently, nor contributed financially towards the children. They cannot live with their paternal grandparents because of religious differences.²⁹⁴ Lewis JA held that it would be wrong to over-emphasise her personal circumstances, therefore the seriousness of the offences should also be addressed.²⁹⁵ The position before the court was that the Supreme Court of Appeal could consider sentencing afresh, and it was in the interest of finality to impose a new sentence, since it was in as good a position as the trial court to do so.²⁹⁶

Regarding the evaluation of the sentence to be imposed, the court viewed that finality had to be reached because the matter was already delayed. The main concern was whether a sentence that involved imprisonment was necessary.²⁹⁷ The state argued for a sentence in terms of section 276(1)(i) of the CPA. Lewis AJ held that because of the seriousness of the offence, the sum of money involved and the need to punish Mrs De Villiers a custodial sentence was warranted for.²⁹⁸ This was because Mrs De Villiers committed fraud in a position of trust and society must be made aware that a person that abuses such a position for their own gain should not walk free. He considered the interests of the children by noting that the sentence should not be lengthy, taking into account the period she was incarcerated after her appeal failed. The court gave Mrs De Villiers an opportunity to make care arrangements for her children before her incarceration.²⁹⁹

The appeal was upheld, the sentence of 8 years' imprisonment was set aside and replaced with 3 years' imprisonment in terms of section 276(1)(i) of the CPA. An order was made to have the sentence to take effect four weeks after the date of the order.³⁰⁰

²⁹² *De Villiers v S* para [39].

²⁹³ *De Villiers v S* para [40].

²⁹⁴ *De Villiers v S* para [42].

²⁹⁵ *Ibid.*

²⁹⁶ *De Villiers v S* para [49].

²⁹⁷ *De Villiers v S* para [48].

²⁹⁸ *De Villiers v S* para [50].

²⁹⁹ *De Villiers v S* para [51].

³⁰⁰ *De Villiers v S* para [52].

In this case the seriousness of the offence and the interests of society outweighed the right of the children to parental care. However, the court ensured that the effects of incarceration on the children should be minimised. The court ensured that alternative care was arranged for the children by the primary caregiver before she went to prison. The court wanted to serve the interests of justice, and at the same time consider the best interests of the child.

4.3.8 *S v N* 2016 (2) SACR 436 (KZP)

N was a first time offender and a caregiver of two minor children, aged 2 and 16. She was convicted of murder and was sentenced to 5 years' imprisonment in terms of section 276(1)(i) of the CPA. N argued that the sentence did not give due to the fact that she was a primary caregiver. The court imposed a sentence in terms of section 276(1)(i) of the CPA as N indicated that her cousin would take care of her son should she be sent to prison.³⁰¹ Poyo-Dlwati J (as she then was) found that of all the mitigating factors raised,³⁰² the major concern of the matter was that the N was a primary caregiver. The 16-year-old was taken care of by her paternal family. The 2-year-old was the one who would suffer the most because the mother looked after him daily, was of a tender age and required special attention. She was the only parent he knew.³⁰³ This meant that the court should have taken into account the best interests of the minor children when sentencing N, as she was the primary caregiver of the children.³⁰⁴

The court noted the rights of the children by using the provisions of section 28 of the Constitution and the decision of *S v M*. It was submitted on behalf of the accused that her cousin would take care of N's son should a term of imprisonment be imposed. There was also an alternative, where the Correctional Services social worker's report indicated that N could be incarcerated at a prison with a children's facility.³⁰⁵ The court observed that although best interests of the children are of paramount importance and should be taken into account, it would not be ideal for the child to be incarcerated with the mother. Again, the child could not be kept in prison with N as it was against Article 30 of the ACRWC. Poyo-Dlwati J quoted *S v M*, where Sachs J emphasised that best

³⁰¹ *S v N* para [12].

³⁰² *S v N* para [11-12].

³⁰³ *S v N* para [12].

³⁰⁴ *S v N* para [13].

³⁰⁵ *S v N* para [14].

efforts must be made to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk.³⁰⁶ In situations where a rupture of the family becomes inevitable, the state is obliged to minimise the consequent negative effect children as far as it can.³⁰⁷ She emphasised that although there would be an impact on the child as a result of the sentence imposed, that impact would be minimal as the child would be taken care of while she was away.³⁰⁸ The court found that the sentence imposed took into account the best interests of the children and considered all the other available factors. With the toddler in the care of the cousin, the immediate best interests of the toddler were catered for and the long-term interests of the child had to be taken into account. Poyo-Dlwati J expressed the view that a long period of separation between mother and child was not in the best interests of the child 'especially due to his age'.³⁰⁹ A sentence of 5 years' imprisonment in terms of section 276(1) (i) of the CPA was imposed.

This meant that the offender may be placed under correctional supervision. In passing this sentence the court took all personal circumstances that qualified as substantial and compelling circumstances justifying a less severe sentence than the prescribed one.³¹⁰ The sentence in terms of section 276(1)(i) of the CPA reconciled all competing considerations: it was a custodial sentence, given the gravity of the offence which was brief enough on account of all the mitigating personal circumstances. It involved an independent consideration of the short and long term best interests of the child concerned.³¹¹ The submissions provided that the decision in *S v N* linked up well with the reasoning, thoughts and observations of Sachs J in the Constitutional Court decision of *S v M*.³¹² It was further submitted that *S v N* should not be interpreted as a precedent, to the effect that babies and toddlers may never be in prison with their mothers. The decisive consideration in this case was the fact the cousin was going to look after the child while the mother was in prison.

The facts of each case determine what route the courts should take to minimise the negative effects on a child as a result of imprisonment of a primary caregiver. It was

³⁰⁶ *S v M* para [14].

³⁰⁷ *Ibid.*

³⁰⁸ *S v N* para [15].

³⁰⁹ *S v N* para [14].

³¹⁰ *S v N* para [16].

³¹¹ Van der Merwe 2016 2 *Criminal Justice Review* 23.

³¹² *S v M* para [18].

constitutionally required that the best interests of the child must be considered independently.³¹³

4.4 Findings, Comments & Conclusions

4.4.1 Summary of findings

The case law discussed above, mostly considered the guidelines of the Constitutional Court were considered, without exception, before contemplating sentencing.³¹⁴ In two post-M judgments, the court set the sentences aside, and referred the matter back to that court to reconsider the sentence afresh, in light of the guidelines of M.³¹⁵ In one matters (as in the earlier judgment of Howells), the court ordered the Registrar to approach the Department of Welfare and Population Development to investigate the welfare of the children, to ensure that they remained in contact with the offender during the incarceration, and to ensure their reunification upon release.³¹⁶ In a number of judgments, the consideration of the guidelines in M resulted in an altered sentence.³¹⁷ The court in *S v N* even postponed the sentence for four weeks, to enable the offender to make the necessary arrangements for the children. In three of the matters, imprisonment in terms of section 276(1)(i) of the CPA was confirmed as appropriate.³¹⁸

In another three cases, direct imprisonment was confirmed. In *S v Langa*, the seriousness of the offence and interests of society thus outweighed the interests of the children. This does not mean that the interests of the children were not considered. The courts at appeal ensured that where the best interests of the child were not considered fully, that the court a quo should remedy their errors by obtaining adequate information on the circumstances of the children. It is clear that it is now consistently required that the best interests of the child should be placed on equal footing with other competing interests. Though all of the above courts a quo referred to *S v M*, not all of them properly applied the articulated principles extensively. Some courts a quo did not have the benefit of *S v M* at the time of sentencing, but it was factored in retrospectively by the court of appeal. The *S v M* precedent requires not only that the courts must

³¹³ Van der Merwe 2016 2 *Criminal Justice Review* 23.

³¹⁴ *S v GL* at paras 17- 34, *S v Langa* at para 12, *S v Londe* at para 2, *MS v S* at paras 25 onwards; and *S v Pillay* at paras 12-16.

³¹⁵ See *S v Londe* at para 4 and *S v Pillay* at para 26.

³¹⁶ See *S v Langa* at para 13.

³¹⁷ See *S v Piater* and *S v Pillay*.

³¹⁸ *S v N*, *S v Londe* and *S v GL*.

consider the interests of the child in depth and not in passing, but also not generally, but individually. Children of primary caregivers should be seen as actors in the sentencing process, although they are involved indirectly. It became clear that it is considered that sentencing courts commit a misdirection if it does not give due consideration to the interests of the children of the primary caregiver. As a result, in those cases³¹⁹ where it had been found that courts had neglected this duty, the sentences were set aside and remitted back for a fresh sentence. Though in most instances, the best interests of the child received attention, no judgment interrogated the psychological impact of the actual incarceration on the children, nor the direct financial implications on them (in the cases of breadwinners).

4.4.2 The impact of a primary caregiver's incarceration on the child

South African literature on the impact that children, with incarcerated parents, suffer is limited. Drawing from international studies,³²⁰ the impact that children endure is the same whether a child is from Africa or America, or whether it is short or long-term imprisonment that is imposed on the parent. Boudin proposes (that in) an effort to determine (potential) individual impact, the use of a child impact statement is essential.³²¹ Generally, incarceration does not only destabilise the family unit, but, as a result of the separation from their caregivers, children suffer from emotional problems. The bond between a mother and child is often destroyed because children lack funds to travel to the relevant prison, or the alternative caregiver is unwilling to accompany the child to prison. Furthermore, children of incarcerated parents may develop an issue with social interactions.³²² In addition, the incarceration of the one parent has a financial burden on the alternative caregiver. This sometimes means that the child should alternate between the alternative caregiver and extended family and in some cases, even relocate to another area.³²³ Given the above, it is essential that the child of the incarcerated parent maintains a relationship with the parent.³²⁴

³¹⁹ See *S v Londe* and *S v Pillay* above.

³²⁰ For example, Abramowicz 2011 *University of Colorado Law Review* 793- 879; Hofmann 2010 *Prison Journal* 398- 416; Chesa 2011 101 (1) *Journal of Criminal Law and Criminology* 78-117; Lerer 2013 9 (3) *North Western Journal of the Criminal Justice System* 31-32.

³²¹ Boudin 2011 1 *Journal of Criminal Law and Criminology* 116.

³²² Boudin 2011 1 *Journal of Criminal Law and Criminology* 78.

³²³ Hoffman 2010 *Prison Journal* 398.

³²⁴ Boudin 2011 1 *Journal of Criminal Law and Criminology* 79. Also see Lerer 2013 9 (3) *North-western Journal of Law and Social Policy* 32.

4.4.3 Developing a child-centred approach

Section 28(2) of the Constitution places a duty on decision-makers to consider the interests of the child separately from the parents. That means the court sees the child as an affected person in the criminal process and obtains adequate information of the child to determine the extent of the potential impact of the decision to imprison the primary caregiver on the child.³²⁵ The right of the child to care should be assessed on a case-by-case basis. To achieve a child-centred approach, a close and individualised examination of the precise real-life situation of the particular child involved, is needed.³²⁶ The case law discussed above, have not followed an individualised child-centred approach. Heaton questions whether the use of the individualised approach in every matter that concerns the child, means that general principles should be deviated from to cater for the best interest of the child.³²⁷ The use of a child-centred approach it is submitted, will assist the court to attach more weight to the best interests of the child, therefore it does not mean that the best interests of the child is overarching other interests.

To demonstrate the implication of the individualised approach, the Constitutional court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*,³²⁸ promoted the use of the individualisation approach in deciding when child witnesses should testify via an intermediary. It was emphasised that every child is unique with their own dignity, needs and interests. The child has to be treated with dignity and compassion, which means that a child should be treated with care and sensitivity and the personal circumstances of that child should be taken into consideration.³²⁹ The child-centred approach assists the court in assessing the customised needs of the particular child involved in the case.³³⁰ It was held that the

³²⁵ Couzens 2013 130 (4) SALJ 683.

³²⁶ S v M para [24].

³²⁷ Heaton 2009 34 (2) *Journal for Juridical Science* 5.

³²⁸ 2009 4 SA 222 (CC). The case dealt with whether the services of an intermediary for child victims and witnesses were required. It addressed the constitutional validity of certain provisions of the Criminal Procedure Act 51 of 1977. Although the case does not directly link to the discussed aspect, its relevance relates to the individual autonomy of a child in criminal proceedings. The Constitutional Court found that the only way to determine whether the services were necessary was to deal with each child victim and witness on an individual case.

³²⁹ Reyneke 2014 113 *International Journal on Education, Law and Policy* 149.

³³⁰ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* para [120]. It is a given fact that not all perpetrators are good parents and not all children would benefit from this. The observation is that not all judicial decisions will be to the benefit of a group of children but would suit the interests of a particular child.

application of the best interest of the child principle means that judicial officers must consider how child victims and witnesses will be affected if they testified without an intermediary.³³¹ Following a child-centred approach also allows for the court to assess each child as an individual, allowing for his or her views to be heard in matters that affect them. The individualised centred approach protects the child from the negative effects arising from the criminal proceedings and it adheres to the constitutional requirement that the best interests of the child should be given primacy status.³³² Another case where a child-centred approach was followed is *C v Department of Health and Social Development, Gauteng*,³³³ where the adverse impact of removing the child from the family environment was acknowledged. The court held that section 28(2) of the Constitution requires that an appropriate degree of consideration must be given to the best interests of the child.

In the above case, giving adequate consideration to the best interest of the child, means that the family and the child concerned must be given an opportunity to make representations on whether removal is in the child's best interests.³³⁴ The child centred approach in this case, will require that the child be listened to. Thus, the child has the right to challenge the appropriateness of his or her removal.³³⁵ However, as highlighted earlier, the decision-makers have no obligation to always give the interests of the child primacy status, but rather to attach appropriate weight to the interests of the child. At all times the state must provide protection to children.³³⁶ By obtaining a child impact statement, the courts will consider the needs and interests of the child in depth. It is agreed that via such impact statement the real life situation of each child may be examined.³³⁷ The advantage of a child impact statement is that the court has access to information pertaining to the child as a recognised affected person. It is

³³¹ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* para [112-113].

³³² *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* para [122].

³³³ 2012 2 SA 208 (CC). In this case, the Constitutional Court had to confirm the constitutional invalidity of subsections 151 and 152 of the Children's Act. Subsection 151 authorised the removal of the child from the family environment to temporary care without the participation of the child and the parent, for the protection of the well-being of the child, while subsection 152 allowed a social worker or a police officer to remove the child without a court order, where it was reasonable to do so in protecting the child from further harm.

³³⁴ *C v Department of Health and Social Development, Gauteng* para [27].

³³⁵ *C v Department of Health and Social Development, Gauteng* para [77].

³³⁶ Couzens 2013 130 (4) SALJ 686.

³³⁷ Skelton 2008 1 CCR 359.

important to determine in each matter whether the parent's imprisonment will automatically have a negative impact on the child. Another reason for following an individualised child-centred approach, it is submitted that not all parents are necessarily good parents or contribute to a child's well-being in the home.

4.4.4 General conclusion

Post-*S v M*, it is apparent that children are now seen as independent individuals from their caregivers. Courts are, when sentencing the primary caregiver, more sensitive to the interests of the children.³³⁸ Because of the impact endured by the children of incarcerated caregivers, courts, to a varying extent, make use of the child-centred approach when sentencing the primary caregiver, thus obtaining evidence on the (potential) impact on the child. Many authors and legal scholars emphasise that where children are concerned, a non-custodial sentence should be preferred, mainly because children of imprisoned caregivers stand to be affected. It should be realised that, on occasion, separation of the child from the parent might be in their best interest. It is submitted that separation is not always detrimental to the child, as not all parents are necessarily good parents. Notwithstanding, where the state deems it fit to do such separation, courts are mindful to ensure that appropriate alternative care is arranged for the children.

The judgments analysed in this chapter show how the rights of affected children in decision-making on the appropriate sentence, are treated as a separate factor, because the children of an offender and their interests should be protected. Innocent children in criminal matters are thus, since 2007, worthy of protection under South African law.³³⁹ The judgement in *S v M* has ongoing effect in requiring that all South African courts must consider the impact of curtailing the right of the child to care when sentencing a primary caregiver. It has been accepted that, if imprisonment would be detrimental to the child, the scales must tip in favour of a non-custodial sentence, unless the offence is of a serious nature, warranting for a custodial sentence. Some academics view that the *S v M* case has created an era where children would be used as instruments by their parents to escape liability.³⁴⁰ It is important to note that *S v M* does not rule that primary caregivers should not go to prison because their children

³³⁸ Skelton 2008 1 CCR 351.

³³⁹ Carnelley & Epstein 2012 1 SACJ 35.

³⁴⁰ Skelton 2008 1 CCR 367.

would suffer hardship.³⁴¹ If after giving proper consideration to all the available options, imprisonment remains the only appropriate sentence, the court must be able to show how the children would be cared for in the caregiver's absence. Research indicates that there is an emerging international trend which shows that courts are likely to impose a non-custodial sentence to primary care-givers, such as community-based sentences, rather than imprisonment because they both play a similar role, with the latter having less impact on their family life.³⁴² It is, however, cautioned that a community based sentence should not be imposed on primary caregivers who should be incarcerated, as it would defeat the aims of punishment.³⁴³

Lesson learnt from the case law above include that decision-making which may affect children must be child sensitive, the law must be interpreted in a manner that favours advancing the interests of children and, lastly, the courts must function in a manner that gives due respect for children's rights. Yet, the best interests of children are important but they do not override other competing considerations and are not solely decisive as to whether the primary caregiver should be sent to prison or not.³⁴⁴ In the end, sentencing courts are mostly loyal to their sentencing tasks and do not completely sacrifice the interests of society for the interests of children.³⁴⁵

³⁴¹ Moyo 2013 29 *SAJHR* 344.

³⁴² Moyo 2013 29 *SAHJR* 337.

³⁴³ *Ibid.*

³⁴⁴ Moyo 2013 29 *SAJHR* 345.

³⁴⁵ Moyo 2013 29 *SAJHR* 346.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study investigated the influence the prescript of the best interests of the child has had in the consideration of the right of the child to care in sentencing his/her caregiver. *S v Zinn* offers the platform for the development of the sentencing of the primary caregiver. It adds a fourth element to the sentencing triad applicable when the sentenced offender is a caregiver. Before *S v M*, the rights of children in sentencing were recognised in *S v Kika* and *S v Howells*. Since *S v M*, when the offender is a primary caregiver of a child, the 'best interest' principle must guide courts as an independent factor, and not simply as part of her personal mitigating circumstances. Case law has been evaluated to determine to what extent the consideration of the right of the child to parental care, has been implemented towards the advancement and protection of the child's right to parental care. The conclusion below argues that, in order to allow more children access to parental care, more weight should be attached to the best interests' principle as an independent factor. Thereafter some recommendations are made.

5.2 Conclusion

The judgment of *S v M* has, by applying the best interests of the child in criminal law, brought a significant development into South African law. Before this case the order of the day was that the child's best interest applied only in family law. The *S v M* precedent, has since, placed a duty on sentencing courts to consider the best interests of the child when sentencing his or her primary caregiver, as the sentence does not only affect the accused, but also the child. Since imprisonment also has an impact on the children, they should be considered individually as a fourth category of affected persons. Children in criminal justice, and in particular those of perpetrators, had always been marginalised in the justice system. In *S v M*, section 28 of the Constitution, providing that children's interests should be considered in every matter concerning them, was interpreted to be applicable during all stages of the criminal trial.

The inclusion of the best interests of the child in criminal courts during sentencing, calls for the primacy of this principle. As a prerequisite, the best interests' principle

must serve as a guideline when the accused is a primary caregiver of a child. Even though they are not active actors in the criminal trial, it is important for courts to give due regard to this principle in all matters that affect the child. Though this factor has been considered in all the cases reviewed in chapter 4, in the vast majority it did not carry enough weight to prevent a custodial sentence for the perpetrator. The CRC and the ACRWC protects the right of the child to parental care. It further recognises that a child is an individual, and their right to parental care will be infringed. Therefore, it calls for the consideration of non-custodial sentences and other alternative measures to imprisonment of their parents. Despite the advocacy of non-custodial sentences by regional and international instruments and the negative effects associated with imprisonment, it remains, as highlighted above, the preferred form of punishment. In addition to the emotional impact of imprisonment on all parties involved, it also has financial implications on the state.

In some matters the state has to provide the children, who have been separated from their parents, with alternative care and social assistance. In as much as imprisonment is seen as a way to curb crime, it does not serve such purpose. This assertion should not be seen as a way to assist primary caregivers to evade punishment but an acknowledgement that children are the fourth category of affected persons. It also assists the children to suffer minimal impact and it minimises the prospect of breakdown of the family unit. Once the court is aware that the accused is a primary care giver it has a duty to ensure that it has adequate information on the particular child and not merely that the accused is a primary caregiver. It can be adduced from the cases discussed in chapter 4 that the courts may still impose a custodial sentence on a primary caregiver, given that the offence committed warrants for such a sentence. The role played by the decision of *S v M* was to inform courts of the drastic impact a sentence can have on a child.

There is thus a need for the courts to pay sufficient attention to the interests of the child and impose non-custodial sentences in deserving cases. The cry for non-custodial sentences should not be seen as a ticket for primary caregivers to evade punishment but as a way to protect the interests of the innocent children.

5.3 Recommendations

The recommendations flowing from this study are as follows:

5.3.1 Courts should consider the impact of the parent's imprisonment on the child(ren), using a child impact statement from a psychological expert.

As alluded to above, the impact suffered by children whose parents are incarcerated, is mostly severe, thus a child impact statement may assist the court with assessing the best interest of each individual child. The child impact statement would give adequate information on the child. The advantage of it is that it assists the court to identify the individual needs of, and extent of protection needed by, the particular child. The court will be well informed of the financial, social and emotional impact on the child and give due regard to the interests of the child concerned if the guidelines are adhered to.

5.3.2 The use of non-custodial measures in non-violent crimes

Courts should consider other measures to punish an accused for a non-violent crime. Rather than imposing a custodial sentence, courts must order community based sentences, including, job creation skills and counselling sessions, as a way of rehabilitation. It is submitted that parenting skills should also be monitored, enhanced if necessary, for ultimate benefit of the child. This, it is argued, will optimally protect the right of the child to parental, family or alternative care with a caregiver who is in conflict with the law. The well-being of the child can generally be improved by the day-to-day contact with the primary caregiver, also maintaining a healthy relationship with her.

BIBLIOGRAPHY

Books and chapters

Currie I & De Waal J (2013) *The Bill of Rights Handbook* 6th ed Cape Town Juta 606-623

Domingo W and A Barratt (2012) 'Parent and child' in Barratt (ed) *Law of Persons and the Family* 182

Freeman MDA and Veerman P (1992) *The Ideologies of Children's Rights* M Nijhoff 8

Mezmur BD (2017) 'The United Nations Convention on the Rights of the Child' in Boezaart T *Child Law in South Africa* 2nd ed Cape Town Juta 403

Ozah RLK and ZM Hansungule (2017) 'Upholding the Best Interests of the Child in South African Customary Law' in Boezaart T *Child Law in South Africa* 2nd ed Cape Town Juta 283

Skelton A (2009) "Children's Rights" in Woolman S et al *Constitutional Law of South Africa* 2nd ed Cape Town Juta 285

Skelton A (2014) *Litigating the Rights of the Child: the UNCRC in Domestic and International Jurisprudence* Springer 280

Skelton A (2017) 'Constitutional Protection of Children's Rights' in Boezaart T *Child Law in South Africa* 2nd ed Cape Town Juta 324

Terblanche S (2016) *Guide to Sentencing in South Africa* 3rd ed Cape Town Lexis Nexis 128-166

Van Buren G (2009) 'The United Nations Convention on the Rights of the Child: An Evolutionary Revolution' in Davel CJ (ed) *Introduction to Child Law in South Africa* 1st ed 203

Journal articles

Barratt A & Burman S 'Deciding the best interests of the child: an international perspective on custody decision-making' (2001) 118 *South African Law Journal* 556-573

Bonthuys E 'The best interests of children in the South African Constitution' (2006) 20 *International Journal on Law, Policy and the Family* 23-43

Boudin C 'Children of incarcerated parents: The constitutional right to the family relationship' (2011) 1 *Journal of Criminal Law and Criminology* 76-116

Carnelley M & Epstein CA 'Do not visit the sins of the parents upon their children: Sentencing considerations of the primary caregiver should focus on the long-term best interests of the child' (2012) 1 *South African Criminal Law Journal* 106-116

Coetzee E 'Can the application of the human rights of the child in a criminal case result in a therapeutic outcome?' (2010) 13 (3) *Potchefstroom Electronic Law Journal* 126-154

Couzens M 'The Best Interest of the Child as a Sentencing Factor: the South African Experience' (2012) 1 *Studia Universitatis Babes-bolyai Iurisprudentia* 5-194

Couzens M 'The best interests of the child and the Constitutional Court: A critical appraisal' (2018) *University of Kwa-Zulu Natal* 1-15

Donson F 'Weighing the balance: Reflections on the sentencing process from a children's rights perspective' (2016) 63 (3) *Probation Journal* 331-346

Freeman MDA 'Taking children's rights more seriously' (1992) 6 *International Journal of Law and Family* 52-71

Freedman W 'Constitutional Application' (2008) 2 *South African Criminal Law Journal* 2333-252

Gallinetti J 'What children would say about the jurisprudence of Albie Sachs' (2010) 25 (1) *South African Public Law* 108-116

Hofmann CH 'Prison programs and services for incarcerated parents and their under-aged children' (2010) *Prison Journal* 397-416

Lerer T 'Sentencing the family: Recognizing the needs of dependent children in the Administration of the Criminal Justice System' (2013) 9 *North Western Journal of Law and Social Policy* 25-57

Levesque RJR & Van Bueren G 'The International Law on the Rights of the Child' (1995) 19 *Fordham International Law Journal* 832-839

Millar H & Dandurand Y 'The Impact of Sentencing and Other Judicial Decisions on the Children of Parents in Conflict with the Law: Implications for Sentencing Reform' (2017) *Department of Justice Canada* 1-41

Moyo A 'Balancing the best interests of the child and the interests of society when sentencing youth offenders and primary caregivers in South Africa (2013) 29 *South African Journal on Human Rights* 314-350

Mujuzi JD 'Punishment in the eyes of the Constitutional Court of South Africa: The relationship between punishment and the rights of an offender in the sentencing of primary caregivers of children' (2011) 2 *South African Journal of Criminal Justice* 164-177

Mujuzi JD 'Sentencing' (2011) 2 *South African Journal of Criminal Justice* 398-416

Skelton A & Courtenay 'The impact of children's rights on criminal justice' (2012) 1 *South African Journal on Criminal Justice* 180 -193

Skelton A & Mansfield-Barry 'Developments in South Africa regarding the sentencing of primary caregivers' (2015) *European Journal on Parental Imprisonment* 1-27

Skelton A 'Do not visit the sins of the parents upon their children: sentencing considerations of the primary caregiver should focus on the long-term best interests (2012) 1 *South African Criminal Law Journal* 106-116

Skelton A 'Severing the Umbilical Cord: A Subtle Jurisprudential Shift Regarding Children and their Primary Caregivers' (2008) 1 *Constitutional Court Review* 351-368

Skelton A 'The development of a fledging child rights jurisprudence in Eastern and Southern Africa' (2009) 2 *South African Journal for Human Rights* 482-500

Sloth-Nielsen J & Kruuse H 'A maturing manifesto: The constitutionalisation of children's rights in South Africa' (2013) 21 *International Journal of Children's Rights* 646-687

Terblanche SS 'Twenty Years of Constitutional Court Judgements: What lessons are there about Sentencing?' (2017) 20 *Potchefstroom Electronic Law Journal* 1-37

Van der Merwe A 'Recent cases: Sentencing' (2013) 3 *South African Criminal Law Journal* 399-418

Van der Merwe S 'Sentencing: sentencing of a primary caregiver of minor children and the constitutional 'best interests' rights of children' 2016 (2) *Criminal Justice Review* 1-31

Visser PJ 'Some aspects on the "best interests" on the child principle in the context of public schooling' (2007) 70 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 459-469

Statutes

Child Care Act 73 of 1983, as repealed

Children's Act 35 of 2005

Constitution of the Republic of South Africa, 1996

Criminal Procedure Act 51 of 1977

Films and Publications Act 65 of 1996

Case law

B v M 2006 (9) BCLR 1034 (W)

De Reuck v Director of Public Prosecutions, Witwatersrand 2003 3 SA 389 (W); 2004 (1) SA 406 (CC)

De Villiers v S 2016 1 SACR 148 (SCA)

Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development 2009 4 SA 222 (CC).

Ex parte Chairperson of the Constitutional Assembly: in Re Certification of the Constitution of the Republic of South Africa 1996 4 SA 744 (CC)

Ferreira v Levine 1996 1 SA 984

French v French 1971 4 SA 298 (W)

Hlophe v Mahlalela 1998 1 SA 449 (T)

Jooste v Botha 2000 2 SA 199 (T)

Kaiser v Chamber 1969 4 SA 228 G

McCall v McCall 1994 3 SA 301

Minister of Welfare and Population Development v Fitzpatrick 2000 7 BCLR 713 (CC)

MS v S (Centre for Child Law as Amicus Curiae) 2011 2 SACR 88 (CC)

President of the Republic of South Africa and Another v Hugo 1997 4 SA 1 (CC)

R v Swanepoel 1945 AD 444

S v De Jager 1965 2 SA 612 (A)

S v EB 2010 2 SACR 524 (SCA)

S v GL 2010 2 SACR 488 (WCC)

S v Howells 1991 1 SACR 675 (C)

S v Kika 1998 2 SACR 428 (W)

S v Langa 2010 2 SACR 289 (KZP)

S v Londe 2011 1 SACR 377 (ECG)

S v M (Centre for Child Law Amicus Curiae) 2008 3 SA 232 (CC)

S v N 2016 2 SACR 436 (KZP)

S v Piater 2013 2 SACR 254 (GNP)

S v Pillay 2011 (2) SACR 409 (SCA)

S v Rabie 1975 4 SA 855 (A)

S v Ramba 1990 SACR 334 (A)

S v Zinn 1969 2 SA 537 (A)

Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2013 BCLR 1429 (CC)

Van Deijl v Van Deijl 1966 4 SA 260 (R)

International Instrument

United Nations Convention on the Rights of the Child (1989)

Regional Instrument

African Charter on the Rights and Welfare of the Child (1990)

General Comments

General Comment No.1 on Article 30 of the African Charter on the Rights and Welfare of the Child (2013)

UN Committee on the Rights of the child, General Comment on the Best interests of the child (2013)

Guideline

UN General Assembly, Guidelines for the Alternative Care of Children (2010)

Rules

UN Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (2010)

UN Standard Minimum Rules for the Treatment of Prisoners (2015)

Internet sources

African Charter on the Rights and Welfare of the Child at <http://www.achpr.org/instruments/child/#a30> (accessed 30/6/2019)

Therapeutic Jurisprudence at www.therapeuticjurisprudence.org (accessed 30June 2019)

Thesis

Boyd MT 'The determinants of the child's best interests in relocation disputes' (2015)
University of Western Cape