CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 53/06
[2007] ZACC 18

M[*] Applicant

versus

THE STATE Respondent

CENTRE FOR CHILD LAW Amicus Curiae

Heard on : 22 February 2007

Decided on : 26 September 2007

JUDGMENT

SACHS J:

[1] When considering whether to impose imprisonment on the primary caregiver of young children, did the courts below pay sufficient attention to the constitutional provision that in all matters concerning children, the children's interests shall be paramount?

Background

[*] At the commencement of the hearing on 22 February 2007 this Court issued an order that the citation of the case name in this matter shall be "M v The State" in order to protect the identity of the applicant's three minor children.

[2] M is a 35 year old single mother of three boys aged 16, 12 and 8. In 1996 she was convicted of fraud and sentenced to a fine coupled with a term of imprisonment that was suspended for five years. In 1999 she was charged again with fraud, and while out on bail after having been in prison for a short period, committed further fraud. In 2002 she was convicted in the Wynberg Regional Court on 38 counts of fraud and four counts of theft. The Court took all the counts together for purposes of sentence. The total amount involved came to R29 158, 69. The Court asked for a correctional supervision report. The report indicated that M would be an appropriate candidate for a correctional supervision order. Despite strong pleas from her attorney that she not be sent to prison the Court sentenced her to four years' direct imprisonment.[1]

[3] The Regional Magistrate refused to grant bail pending an appeal, but after M had been in jail for three months, the Cape High Court granted leave to appeal and allowed her to be released on bail. The High Court later held that she had been wrongly convicted on a count of fraud involving an amount of R10 000, and, since this reduced the quantum of the remaining counts to R19 158, 69, converted her sentence to one of imprisonment under section 276(1)(i)[2] of the Criminal Procedure

[1] The order reads as follows:

> "All the counts are taken as one for purposes of sentence and you are sentenced to: FOUR (4) YEARS' IMPRISONMENT. In terms of Section 280 of the Criminal Procedure Act the Court orders that if the suspended sentence imposed on the 24th of February 1996 is put into operation, if that is put into operation, that two years of the four years that is imposed today will run concurrently with that sentence."

[2] Section 276(1) provides:

> "(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—
>
> . . .

Act (the CPA). The effect of this change was that after she had served eight months imprisonment, the Commissioner for Correctional Services (the Commissioner) could authorise her release under correctional supervision. The Court denied her leave to appeal against this sentence to the Supreme Court of Appeal.

[4] M then petitioned the Supreme Court of Appeal for leave to appeal against the order of imprisonment. The Supreme Court of Appeal turned down her request. It did not give reasons. She next applied to this Court for leave to appeal against the refusal of the Supreme Court of Appeal to hear her oral argument, as well as against the sentence imposed by the High Court.

[5] This Court refused the first part of her application, namely, that she be given leave to appeal on the ground that the Supreme Court of Appeal had given no reasons for refusing to hear oral argument. It did, however, enrol her application for leave to appeal against the sentence. The directions by the Chief Justice required the parties to deal with the following issues only:

I. What are the duties of the sentencing court in the light of section 28(2) of the Constitution and any relevant statutory provisions when the person being sentenced is the primary caregiver of minor children?

II. Whether these duties were observed in this case.

III. If it was to hold that these duties were not observed, what order should this Court make, if any?

(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board."

The Registrar was directed to serve a copy of these directions on the Minister for Social Development and the Minister for Justice and Constitutional Development, who were given the opportunity to file affidavits if they wished.

[6] Advocate Paschke was appointed curator ad litem. He produced a comprehensive report supported by a report compiled by a social worker, Ms Cawood. The Centre for Child Law of the University of Pretoria was admitted as amicus curiae and Ms Skelton made wide-ranging written and oral submissions on the constitutional, statutory and social context in which the matter fell to be decided.

[7] The applicant, the curator and the amicus all contended that the effect of section 28 of the Constitution was to require sentencing courts, as a matter of general practice, to give specific and independent consideration to the impact that a custodial sentence in respect of a primary caregiver could have on minor children. On the facts of this case they argued that due consideration of the interests of M's children required that an appropriately stringent correctional supervision order should be imposed in place of a custodial sentence.

[8] The National Director of Public Prosecution replied that current sentencing procedures in the courts already took account of the interests of children, and that on the facts of the case the decision of the High Court should not be interfered with. Counsel for the Department of Social Development and the Department of Justice and

Constitutional Development adopted a similar position, submitting a comprehensive report from a team of social workers to assist the Court.

[9] We are grateful to all the above persons for the careful and methodical manner in which they undertook their tasks. In matters concerning children it is important that courts be furnished with the best quality of information that can reasonably be obtained in the circumstances. The extensive information and thoughtful arguments advanced by all the above-mentioned protagonists in this matter fully meet this standard. Aided by this most helpful material I respond in sequence to the questions as formulated in the directions.

I. What are the duties of the sentencing court in the light of section 28(2) of the Constitution and any relevant statutory provisions when the person being sentenced is the primary caregiver of minor children?

(a) The current approach to sentencing

[10] Sentencing is innately controversial.[3] However, all the parties to this matter agreed that the classic *Zinn*[4] triad is the paradigm from which to proceed when

[3] South African Law Commission *Report on a New Sentencing Framework* Project 82 (November, 2000) at para 1.1. The report explains at para 1.2 that individual decisions are announced to a critical public who analyse them against a variety of expectations. They not only ask whether the sentences express public condemnation of the crime adequately and protect the public against future crimes by the reform and incapacitation of offenders and by the deterrence of both the individual offender and other potential offenders, but also whether the sentences are just in the sense that similar sentences are being imposed for offences that are of equal seriousness or heinousness. In addition there is a growing expectation that the sentence must be restorative, in the sense both of compensating the individual who suffered as the result of a crime and of repairing the social fabric that criminal conduct damages. All these concerns are inevitably particularly prominent amongst victims of crime, who have a special interest in the offences that they themselves have suffered.

embarking on "the lonely and onerous task"[5] of passing sentence. 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.[6] In *Banda* Friedman J explained that:

> "The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern."[7]

Since January 2003, what was previously known as the South African Law Commission (the SALC) has been called the South African Law Reform Commission. Because the publications by that Commission referred to in this judgment were brought out before its name was changed, I use the former designation.

[4] In *S v Zinn* 1969 (2) SA 537 (A) at 540G-H the Appellate Division formulated the triadic sentencing formula as follows: "What has to be considered is the triad consisting of the crime, the offender and the interests of society." The *Zinn* triad has subsequently become the mantra when pronouncing sentence, but courts have been criticised for invoking it perfunctorily as an invocation. Nevertheless, the triad still retains its status as sentencing north star (see for example *S v Malgas* 2001 (2) SA 1222 (SCA) at 1232A where the triad once again received the Supreme Court of Appeal's imprimatur).

[5] *Malgas* above n 4 at 1225H quoting Hogarth *Sentencing as a Human Process* (University of Toronto Press, Toronto 1971) at 5.

[6] Thus, placing over-emphasis on the nature of the crime at the expense of the personal circumstances of the offender was regarded in *Zinn* (above n 4 at 540F/G-G) as a misdirection, rendering the sentence susceptible to being set aside by a court of appeal. This Court has also held in *S v Dodo* 2001 (2) SA 382 (CC); 2001 (5) BCLR 423 (CC); 2001 (1) SACR 594 (CC) at para 38 that if carried to disproportionate extremes, it would amount to disregard of the interests of the convicted person since it ". . . is to ignore, if not to deny, that which lies at the very heart of human dignity".

It has been suggested that the triad is incomplete because it leaves the victim out of the equation (*S v Isaacs* 2002 (1) SACR 176 (C) at 178B/C-C). This issue is not before us, and need not be further entertained. Linked to this is the need to reconfigure the sentencing process in appropriate cases in keeping with the principles of restorative justice (SALC *Report on a New Sentencing Framework* above n 3 at 24-5), a matter which is considered below at paras 64 and 71.

[7] *S v Banda and Others* 1991 (2) SA 352 (B) at 355A-B/C.

And, as Mthiyane JA pointed out in *P*,[8] in the assessment of an appropriate sentence the court is also required to have regard to the main purposes of punishment, namely, its deterrent, preventive, reformative and retributive aspects. To this the quality of mercy, as distinct from mere sympathy for the offender, had to be added. Finally, he observed, it was necessary to take account of the fact that the traditional aims of punishment had been transformed by the Constitution.[9] It is this last observation that lies at the centre of this case.

[11] *P* confirmed the need for a re-appraisal of the juvenile justice system in the light of the Constitution. The issue was the extent to which the interests of a child should weigh where the child herself was the offender. The present case calls upon us to consider the situation where it is not a juvenile offender facing sentencing but the primary caregiver of a child. In these circumstances, does the new constitutional order require a fresh approach to sentencing? More particularly, does section 28 of the Constitution add an extra element to the responsibilities of a sentencing court over and above those imposed by the *Zinn* triad, and if so, how should these responsibilities be fulfilled?

---

[8] *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA); [2006] 1 All SA 446 (SCA); 2006 (1) SACR 243 (SCA) at para 13. P, a twelve year old girl had paid two men to suffocate and then slit the throat of her grandmother, with whom she lived, after she had drugged her. For this act she had furnished the murderers with articles from the deceased's house and offered herself sexually to them. The trial Court had imposed a correctional supervision order, and the State had appealed to the Supreme Court of Appeal. After emphasising the significance of the United Nations Convention on the Right of the Child (the CRC) and section 28 of the Constitution, the Supreme Court of Appeal partially upheld the appeal, concluding that correctional supervision on its own was not severe enough. It held that a sentence of seven years' imprisonment, entirely suspended on condition of P's compliance with a rigorous regime of correctional supervision, was more appropriate. In *P* it was held at para 19 that the Constitution and the international instruments did not forbid incarceration of children in certain circumstances, but merely required that the "'child be detained only for the shortest period of time'" and that the child be "'kept separately from detained persons over the age of 18 years'." The Supreme Court of Appeal noted that it was not inconceivable that some of the courts may be confronted with cases which required detention.

[9] Id at para 13.

(b) The significance of section 28(2) of the Constitution

[12] Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child." South African courts have long had experience in applying the "best interests" principle in matters such as custody or maintenance.[10] In our new constitutional order, however, the scope of the best interests principle has been greatly enlarged.[11]

[13] Indeed, it is the very sweeping character of the provision that has led questions to be asked about its normative efficacy. For example, in *Jooste* Van Dijkhorst J stated:

> "[The] wide formulation [of section 28(2)] is ostensibly so all-embracing that the interests of the child would override all other legitimate interests of parents, siblings and third parties. It would prevent conscription or imprisonment or transfer or dismissal by the employer of the parent where that is not in the child's interest. That can clearly not have been intended. In my view, this provision is intended as a general guideline and not as a rule of law of horizontal application. That is left to the positive law and any amendments it may undergo."[12]

[10] The best interests of the child principle was articulated as long ago as 1948 by the Appellate Division in *Fletcher v Fletcher* 1948 (1) SA 130 (A), and has since found application in numerous judgments. Section 7(1) of the Children's Act 38 of 2005, parts of which entered into force on 1 July 2007 and replaces the Child Care Act 74 of 1983 and Children's Act 33 of 1960, sets out a lengthy list of factors for courts to consider when determining a child's best interests under the Act and under the Constitution. Such factors include, but are not limited to, the nature of the personal relationship between the child and the parents; the child's physical and emotional security; the need for a child to be brought up within a stable family; and the relevant characteristics of the child. See also Barrett and Burman "Deciding the best interests of the child: an international perspective on custody decision-making" (2001) 118 *SALJ* 556 at 560. Compare Bennett "The best interests of the child in an African context" (1999) 20 *Obiter* 145 at 150-1 stating that protecting the interests of the family was indirectly protecting the interests of children, who like other individuals were not thought of as rights-bearers in the customary context.

[11] See for instance *Brandt v S* [2005] 2 All SA 1 (SCA) at paras 15-6.

[12] *Jooste v Botha* 2000 (2) SA 199 (T) at 210C-D/E. That case turned in part on whether, in the interests of a child, the courts could compel a father to show love and care to his child (hence the reference to horizontal

[14] While section 28 undoubtedly serves as a general guideline to the courts, its normative force does not stop there. On the contrary, as this Court has held in *De Reuck*,[13] *Sonderup*[14] and *Fitzpatrick*,[15] section 28(2), read with section 28(1), establishes a set of children's rights that courts are obliged to enforce. I deal with these cases later.[16] At this stage I merely point out that the question is not whether section 28 creates enforceable legal rules, which it clearly does, but what reasonable limits can be imposed on their application.

[15] The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights. As Sloth-Nielsen pointed out:

> "[T]he inclusion of a general standard ('the best interest of a child') for the protection of children's rights in the Constitution can become a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and

---

application). The Court held that there is not a legally enforceable obligation upon parents to love and care for their children. This is a difficult issue on which this Court need not express an opinion.

[13] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC); 2003 (2) SACR 445 (CC) at paras 54-5.

[14] *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) also reported as *LS v AT and Another* 2001 (2) BCLR 152 (CC) at para 29.

[15] *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17.

[16] See below para 26.

> administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children's lives."[17]

[16] Secondly, section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child (the CRC).[18] Section 28 has its origins in the international instruments of the United Nations.[19] 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.[20] I do not suggest that a children's rights model for juvenile justice, where children themselves are directly in trouble with the law, should automatically be transposed to sentencing in cases where children are only indirectly affected because their primary caregivers are about to be sentenced. What should be carried over, however, is a parallel change in mindset, one that takes appropriately equivalent account of the new constitutional vision.

---

[17] Sloth-Nielsen "Chicken soup or chainsaws: some implications of the constitutionalisation of children's rights in South Africa" (1996) *Acta Juridica* 6 at 25. The change is illustrated by alterations made to the Child Care Act. As Sloth-Nielsen observes, before interim amendments were brought about by the Child Care Amendment Act 96 of 1996, the principal Child Care Act was not child-centred, but focused on parents' unfitness or inability to care for their child. The best interests of the child were not expressly a paramount consideration for decisions regarding children in terms of the Child Care Act. Children living on the street, children with disabilities, and other significant groups of vulnerable children in especially difficult circumstances in South African society were accordingly largely ignored in the statutory framework before the new constitutional order came into being (Sloth-Nielsen "The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" (2001) 17 *SAJHR* 210 at 211).

[18] The CRC was ratified by South Africa on 16 July 1995.

[19] See Mthiyane JA in *P* above n 8 at para 15.

[20] Per Ponnan AJA in *Brandt* above n 11 at para 17. In *P* above n 8 at paras 19-20 the Supreme Court of Appeal further pointed out that the overarching thesis of the international instruments and the Constitution was that child offenders should not be deprived of their freedom except as a measure of last resort and then only for the shortest possible period of time, and adds at para 14 even then the sentence must be individualised so as to prepare the child offender for reintegration into society upon his or her release from prison. It added at para 16 that the principles guiding a sentencing officer in arriving at a suitable sentence for a juvenile offender are the principles of proportionality and the best interests of the child.

[17] Regard accordingly has to be paid to the import of the principles of the CRC as they inform the provisions of section 28 in relation to the sentencing of a primary caregiver. The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation.[21] What unites these principles, and lies at the heart of section 28, I believe, is the right of a child to be a child and enjoy special care.[22]

[18] Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature 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 unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

[19] Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct

---

[21] SALC *The Review of the Child Care Act* (18 April 1998) Issue Paper 13 Project 110 at para 2.1.

[22] Article 25(2) of the Universal Declaration of Human Rights states that "[m]otherhood and childhood are entitled to special care and assistance . . . ".

themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.

[20] No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse[23] and maximise opportunities for them to lead productive and happy lives. Thus, even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can.

[21] These considerations reflect in a global way rights, protection and entitlements that are specifically identified and accorded to children by section 28. They are

[23] In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paras 77-8 Yacoob J pointed out that the fact that section 28(1)(b) contemplated that a child had the right to parental or family care in the first place, and the right to alternative appropriate care only where that was lacking, did not mean that the State incurred no obligation towards children who are being cared for by parents or members of family. He stated that the State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated in section 28. Normally that obligation would be fulfilled by enacting legislation and implementing enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28.

extensive and unmistakable. Section 28(1) provides for a list of enforceable substantive rights that go well beyond anything catered for by the common law and statute in the pre-democratic era.[24] For present purposes, it is necessary to highlight section 28(1)(b) which states that "[e]very child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment".

[22] Furthermore, as Goldstone J pointed out in *Fitzpatrick*, section 28(1) is not exhaustive of children's rights:

> "Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and 28(2) must be interpreted to extend beyond those provisions. It creates a right that is

---

[24] Section 28(1) of the Constitution provides:

> "Every child has the right—
>
> (a) to a name and a nationality from birth;
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic health care services and social services;
>
> (d) to be protected from maltreatment, neglect, abuse or degradation;
>
> (e) to be protected from exploitative labour practices;
>
> (f) not to be required or permitted to perform work or provide services that—
>
> (i) are inappropriate for a person of that child's age; or
>
> (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
>
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
>
> (i) kept separately from detained persons over the age of 18 years; and
>
> (ii) treated in a manner, and kept in conditions, that take account of the child's age;
>
> (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
>
> (i) not to be used directly in armed conflict, and to be protected in times of armed conflict."

> independent of those specified in s 28(1). This interpretation is consistent with the manner in which s 28(2) was applied by this Court in *Fraser v Naude and Others.*"[25] (Footnote omitted.)

It will be noted that he spoke about a right, and not just a guiding principle. It was with this in mind that this Court in *Sonderup* referred to section 28(2) as "an expansive guarantee" that a child's best interests will be paramount in every matter concerning the child.[26]

[23] Once more one notes that the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular. Thus, the concept of "the best interests" has been attacked as inherently indeterminate, providing little guidance to those given the task of applying it.[27] Van Heerden in *Boberg* states that:

> "[T]he South African Constitution, as also the 1989 United Nations Convention on The Rights of the Child and the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women, enshrine the 'best interests of the child' standard as 'paramount' or 'primary' consideration in all matters concerning children. It has, however, been argued that the 'best interests' standard is problematic in that, *inter alia*: (i) it is 'indeterminate'; (ii) members of the various professions dealing with matters concerning children (such as the legal, social work and mental health professions) have quite different perspectives on the concept 'best interests of the child'; and (iii) the way in which the 'best interests' criterion is interpreted and applied by different countries (and indeed, by different courts and other decision-

[25] Above n 15 at para 17.

[26] Above n 14 at para 29.

[27] See, for example, Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff, The Hague 1998) 46-51; Clark "A 'Golden Thread'? Some Aspects of the Application of the Standard of the Best Interest of the Child in South African Family Law" (2000) 1 *Stell LR* 3 at 15; Reece "The Paramountcy Principle: Consensus or Construct?" (1996) 49 *Current Legal Problems* 267 at 268; Heaton "Some General Remarks on the Concept 'Best Interests of the Child'" (1990) 53 *THRHR* 95 at 95.

> makers within the same country) is influenced to a large extent by the historical background to, and the cultural, social, political and economic conditions of the country concerned, as also by the value system of the relevant decision-maker."[28] (Footnotes omitted.)

[24] These problems cannot be denied. Yet this Court has recognised that it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. Thus, in *Fitzpatrick* this Court held that the best interests principle has "never been given exhaustive content", but that "[i]t is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child."[29] Furthermore "'(t)he list of factors competing for the core of best interests [of the child] is almost endless and will depend on each particular factual situation'."[30] Viewed in this light, indeterminacy of outcome is not a weakness. A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.

[25] A more difficult problem is to establish an appropriate operational thrust for the paramountcy principle. The word "paramount" is emphatic.[31] Coupled with the far-

---

[28] Van Heerden et al *Boberg's Law of Persons and the Family* 2 ed (Juta & Co Ltd, Kenwyn 1999) at 502-3.

[29] Above n 15 at para 18.

[30] Id at fn 11 quoting from Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, Dordrecht 1995) at 47.

[31] It is notably stronger than the phrase "primary consideration" referred to in international instruments. Article 3 of the Convention on the Rights of the Child provides:

reaching phrase "in every matter concerning the child", and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. Similarly, a vast range of private actions will have some consequences for children. This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2). The problem, then, is how to apply the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally-protected interests.

[26] This Court, far from holding that section 28 acts as an overbearing and unrealistic trump of other rights, has declared that the best interests injunction is capable of limitation. In *Fitzpatrick* this Court found that no persuasive justifications under section 36 of the Constitution were put forward to support the ban on foreign persons adopting South African-born children, which was contrary to the best interests of the child.[32] In *De Reuck*,[33] in the context of deciding whether the definition and criminalisation of child pornography was constitutional, this Court determined that

> "In all action concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 4 of the African Charter on the Rights and Welfare of the Child provides:

> "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."

[32] Above n 15 at para 20.

[33] Above n 13.

section 28(2) cannot be said to assume dominance over other constitutional rights. It emphasised that

> ". . . constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36."[34] (Footnote omitted.)

Similarly, in *Sonderup* this Court stated that the international obligation to return a child to the country of his or her residence for determination of custody would constitute a justifiable limitation under section 36 of section 28 rights.[35] This limitation on section 28(2) was counterbalanced by the duty of courts to weigh the consequences of the court's decision on children.[36] Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.

[27] Given the significance of section 28, what then is the proper approach to sentencing where the person convicted is the primary caregiver?

(c) The proper approach of a sentencing court where the convicted person is the primary caregiver of minor children

---

[34] Id at para 55.

[35] Above n 13 at para 36.

[36] Id at paras 33 and 35.

[28] The directions in this matter referred to sentencing of primary caregivers, not to the wider class of breadwinners. Simply put, a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly. This is consonant with the expressly protected right of a child to parental care under section 28(1)(b). We are accordingly not called upon in this judgment to deal with delineating the duties of the sentencing court where the breadwinner is not also the primary caregiver. Suffice it to say that, as in all matters concerning children, everything will depend on the facts of the particular case in which the issue might arise.

[29] Counsel for the State submitted that sentencing practices in our courts already took account of the impact on children through applying the *Zinn* triad, that is, through looking at the crime, the criminal and the community. She contended that sentencing courts as a matter of routine consider the personal circumstances of the criminal, including their parental obligations, and weigh them against the gravity of the crime and its impact on the community. Hence, it was said, no change in present sentencing practice is called for, and the sentence imposed by the High Court should not be interfered with.

[30] The tart reply of the amicus was that a child of a primary caregiver is not a "circumstance", but an individual whose interests needed to be considered independently. The weight to be given to those interests and the manner in which they were to be protected would depend on the particular circumstances. But, she

contended, these interests were not to be swallowed up by and subsumed into the consideration of the culpability and circumstances of the primary caregiver.

[31] The curator and the amicus also pointed out that South Africa's obligations under international law underscored the special requirement to protect the child's interests as far as possible. Article 30(1) of the African Charter on the Rights and Welfare of the Child, expressly dealing with "Children of Imprisoned Mothers", provides that:

> "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*." (Emphasis added.)

[32] The curator emphasised that section 28(2) of the Constitution should be read with section 28(1)(b) which provides that every child has a right to family or parental care, or appropriate alternative care when removed from the family environment. Taken together, he contended, these provisions impose four responsibilities on a

sentencing court when a custodial sentence for a primary caregiver is in issue. They are:

- To establish whether there will be an impact on a child.
- To consider independently the child's best interests.
- To attach appropriate weight to the child's best interests.
- To ensure that the child will be taken care of if the primary caregiver is sent to prison.

[33] These appear to me to be practical modes of ensuring that section 28(2) read with section 28(1)(b), is applied in a sensible way. They take appropriate account of the pressures under which the courts work, without allowing systemic problems to snuff out their constitutional responsibilities.[37] Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children

[37] See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 35 where this Court held in relation to systemic delays in the criminal justice system that

> "there must come a time when systemic causes can no longer be regarded as exculpatory. The Bill of Rights is not a set of (aspirational) directive principles of State policy — it is intended that the State should make whatever arrangements are necessary to avoid rights violations."

In *S v Jaipal* 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC); 2005 (1) SACR 215 (CC) at paras 55-6 this Court stated:

> "For the State to respect, protect, promote and fulfil the rights in the Bill of Rights, resources are required. The same applies to the State's obligation to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. The right to a fair trial requires considerable resources in order to provide for buildings with court rooms, offices and libraries, recording facilities and security measures and for adequately trained and salaried judicial officers, prosecutors, interpreters and administrative staff.
>
> . . . Furthermore, all those concerned with and involved in the administration of justice — including administrative officials, judges, magistrates, assessors and prosecutors — must purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances." (Footnotes omitted.)

placed at risk. This should become a standard preoccupation of all sentencing courts. To the extent that the current practice of sentencing courts may fall short in this respect, proper regard for constitutional requirements necessitates a degree of change in judicial mindset. Specific and well-informed attention will always have to be given to ensuring 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 court.

[34] In this respect it is important to be mindful that the issue is not whether parents should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct. This would be a mischaracterisation of the interests at stake. Indeed, one of the purposes of section 28(1)(b) is to ensure that parents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cellphones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable.

[35] 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.

[36] There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of principle, consistency of treatment and individualisation of outcome.

(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

(b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.

(c) If on the *Zinn* triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must

apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

(d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

(e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

(d) Competing rights

[37] These guidelines are consistent with the State's constitutional duty to protect life, limb and property by diligently prosecuting crime. A balancing exercise has to be undertaken on a case-by-case basis. It becomes a matter of context and proportionality. Two competing considerations have to be weighed by the sentencing court.

[38] The first is the importance of maintaining the integrity of family care. The White Paper for Social Welfare underlines that

> "[t]he well-being of children depends on the ability of families to function effectively. Because children are vulnerable they need to grow up in a nurturing and secure family that can ensure their survival, development, protection and participation[38] in family and social life. Not only do families give their members a sense of belonging,

[38] It will be noted that these are the four principles said to underlie the CRC, see above para 17.

> they are also responsible for imparting values and life skills. Families create security; they set limits on behaviour; and together with the spiritual foundation they provide, instill notions of discipline. All these factors are essential for the healthy development of the family and of any society."[39]

[39] The second consideration is the duty on the State to punish criminal misconduct. The approach recommended in paragraph 36 makes plain that a court must sentence an offender, albeit a primary caregiver, to prison if on the ordinary approach adopted in *Zinn* a custodial sentence is the proper punishment. The children will weigh as an independent factor to be placed on the sentencing scale only if there could be more than one appropriate sentence on the *Zinn* approach, one of which is a non-custodial sentence. For the rest, the approach merely requires a sentencing court to consider the situation of children when a custodial sentence is imposed and not to ignore them.

[40] The tension lies between maintaining family care wherever possible, on the one hand, and the duty on the State to deal firmly with criminal misconduct, on the other. As the *Zinn* triad recognises, the community has a great interest in seeing that its laws are obeyed and that criminal conduct is appropriately prosecuted, denounced and penalised. Indeed, it is profoundly in the interests of children that they grow up in a world of moral accountability where self-centred and anti-social criminality is appropriately and publicly repudiated. In practical terms, then, the difficulty is how appropriately and on a case-by-case basis to balance the three interests as required by

---

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

Zinn, without disregarding the peremptory provisions of section 28. This requires a nuanced weighing of all the interlinked factors in each sentencing process. The normative setting for the balancing will be the intricate inter-relationship between sections 28(1)(b) and 28(2) of the Constitution, on the one hand, and section 276(1) of the CPA on the other.

[41] The *Zinn* triad postulates that an element of the circumstances of the primary caregivers that will be taken into account is the special severity for the caregivers of being torn from their children. This, however, is a consequence of their misconduct for which the law, in the light of all the circumstances, will require that they take appropriate responsibility. Section 28(1)(b) is concerned with something different, namely, the indirect but potentially very powerful impact on the children.

[42] The children are innocent of the crime. Yet, as the amicus points out, children's needs and rights tend to receive relatively scant consideration when a primary caregiver is sent to prison. The amicus asserts that in practice the *Zinn* triad is usually applied in a manner that focuses on the offender and pays little attention to the children. Yet, separation from a primary caregiver is a collateral consequence of imprisonment that affects children profoundly and at every level. Parenting from a distance and a lack of day-to-day physical contact places serious limitations on the parent-child relationship and may have severe negative consequences. The children of the caregiver lose the daily care of a supportive and loving parent, and suffer a

deleterious change in their lifestyle.[40] Sentencing officers cannot always protect the children from these consequences. They can, however, pay appropriate attention to them and take reasonable steps to minimise damage. The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls 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.

[43] *Howells*[41] is an example of a case where attention was carefully given to the interests of children. The appellant had been convicted in the Regional Court of having defrauded her employer to the extent of approximately R100 000. She had been sentenced by the Regional Court to four years' imprisonment in terms of section 276(1)(i) of the CPA. The appellant was divorced and had three dependent children. Two factors counted strongly against her: she had spent most of the proceeds of her

[40] A study conducted by the Centre for the Study of Violence and Reconciliation in the three female prisons in Gauteng found that 37% of children of imprisoned mothers are cared for by grandparents, 28% by other family members and 22% are placed in alternative care by the Department of Social Development. Only 13% of children with mothers in prison are cared for by their fathers (see Haffejee et al "Minority Report: The imprisonment of women and girls in Gauteng" (2006) *Centre for the Study of Violence and Reconciliation*, Research Brief 4, February 3). According to the annual report of the Inspecting Judge of Prisons, women account for only 2% of the South African prison population (Annual Report by the Inspecting Judge of Prisons for the period 1 April 2005 to 31 March 2006). The South African Human Rights Commission has recently reported that 84% of imprisoned women are mothers (South African Human Rights Commission *The impact of imprisonment on women and children: Are we acting in children's best interest?* SAHRC Briefing to Correctional Services Portfolio Committee, 25 August 2006). Thus, given that only a small percentage of the prison population is made up of women, the effects of requiring investigation prior to sentence would not be unduly onerous for our already over-burdened courts. At the same time the process must be gender-neutral, so that the children of those men who are primary caregivers should also receive the protection of the Constitution.

[41] *S v Howells* 1999 (1) SACR 675 (C); [1999] 2 All SA 233 (C) affirmed on appeal by the Supreme Court of Appeal in *Howells v S* [2000] JOL 6577 (SCA).

crime on gambling, and she had a previous conviction for fraud. Van Heerden AJ introduced the constitutional dimension in the following manner:

> "I have anxiously considered the effect on the minor children of the sentence imposed by the magistrate, bearing in mind the constitutional injunction that 'a child's best interests are of paramount importance in every matter concerning the child', as also the constitutionally entrenched right of every child 'to family or parental care, or to appropriate alternative care when removed from the family environment'".[42] (Reference omitted.)

Van Heerden AJ observed further that the best interests of the child principle, which formed part of our common law as developed by the courts, had been given international significance by the ratification by South Africa of the CRC, which provides in article 3(1) that

> "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[43]

[44] She then went on to hold that there was a real risk that should the appellant be imprisoned the children would have to be taken into care. Although this was highly regrettable and made her reluctant to condemn the appellant to imprisonment, van Heerden AJ nevertheless decided to uphold the sentence on the basis that it was necessary to serve the interests of society and the element of deterrence. Emphasising the need simultaneously to protect the interests of the appellant's children, however, she made special provision in the order to ensure that the Department of Welfare and

---

[42] Id at 681e/f-g.

[43] Id at 681g-h/i.

Population Development would be requested to see to it that the children were properly cared for during their mother's imprisonment and kept in touch with her.[44]

[45] *Howells* and *P*[45] illustrate that there is scope for a balancing analysis involving section 28 within the current sentencing framework. The courts in these matters relied on the *Zinn* triad; both had regard to the CRC; and both explained why on the facts of the case correctional supervision alone would be insufficient.[46] What distinguishes *Howells* from the approach of the sentencing courts in the present matter is not the outcome so much as the character of the analysis. In *Howells* the implications of section 28 were expressly weighed. In the present matter, as will be seen, they were barely touched upon. The required balancing exercise was not properly conducted.

II. Whether the duties were observed in this case

[46] A rather perfunctory question put to M by the Regional Magistrate and by the prosecutor at her trial centred around whether, if she went to prison, the children

[44] The order included the following:

> "The Registrar of this Court is requested immediately to approach the Department of Welfare and Population Development with the following request:
>
> 3.1 That the Department of Welfare and Population Development investigate the circumstances of appellant's three minor children without delay and take all appropriate steps to ensure that
>
> 3.1.1 the children are properly cared for in all respects during the appellant's period of imprisonment;
>
> 3.1.2 the children remain in contact with the appellant during her period of imprisonment and see her on a frequent and regular basis, insofar as prison regulations permit; and
>
> 3.1.3 everything reasonably possible is done to ensure the reunification of the appellant with her children on appellant's release from prison and the promotion of the interests of the family unit thereafter." (Id at 683c-f.)

[45] Discussed above at paras 10-1.

[46] See also *Brandt* above n 11 at paras 15-6 (sentencing a minor and applying constitutional and international human rights principles).

would not be on the street.[47] That enquiry was inadequate. The quality of alternative care should have been more 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. Similarly, attention should have been paid as to who would maintain the children in M's absence. It might well be that the Regional Magistrate would have decided that the behaviour of M was so bad that even if the effect on the children would be drastic, a custodial sentence could not be avoided. In these circumstances, however, the Court should have ensured through an appropriate order that the negative impact on the children was reduced as much as possible.[48] Yet, no social worker's report was called for. Nor was any other method used for acquiring adequate information. The Regional Magistrate when imposing the sentence simply stated:

---

[47] The record at 356 of the proceedings before the trial Court reads as follows:

> "Prosecutor: How long did you spend in custody? — Five weeks. In total? — I was for five weeks and four days because I was four days in hospital. And who looked after your children in that time? — My mom. Is she staying in the same house you are staying in? — No. Where is she staying? — With my sister. And she's there and she looks after the sister's children there? — That's correct. So she can then, there is at least a place for your children to go? — No, at the time my sister took leave so that she could look after her own kids and mom came to stay with me, stayed at my place.
>
> Court: Is she still staying at your place? — No, Your Worship, she comes on a weekend but she doesn't stay at my place, she stays with my sister but at the time I was arrested my sister took leave from work, so she looked after her kids and my mom came to stay in my house.
>
> Prosecutor: But they won't be on the street, that's what I'm saying? — No they won't be on the street. And steps can be taken for the fathers to try and ensure maintenance? — They're not working. Yes but steps can be taken with them, not so? — I presume so.
>
> Court: I think what he's also saying to you is, if the Court would send you to jail the children will be accommodated either by your mother or your family or the fathers of the children? — They're not in a position to accommodate, Your Worship.
>
> Prosecutor: Meaning what? — My eldest son's father stays in a room and my two kids' father stays all over the show. I'm never able to get a physical address on him. Okay, but your family or your mother would be able to look after them . . . (intervention) — Financially my mother won't be able to look after them. But they will have a house to go to? — Yes, Your Worship."

[48] As had been done in *Howells* above n 41, discussed above at paras 43-4.

> "You are a mother of minor children. The Court has had regard to that but I am satisfied that if the Court at the end of the day would impose imprisonment here that they will be accommodated as such."[49]

[47] There was virtually nothing in the Regional Magistrate's reasons for sentence to show that she applied a properly informed mind to the duties flowing from section 28(2) read with section 28(1)(b). It appears from the argument advanced on behalf of the State that the Regional Magistrate was acting in a manner largely consistent with current practice. If, however, paramountcy of the children's interests is to be taken seriously, and this is present sentencing practice, this practice needs to be reviewed so as to bring it in line with constitutional requirements.

[48] I conclude therefore that the Regional Magistrate passed sentence without giving sufficient independent and informed attention as required by section 28(2) read with section 28(1)(b), to the impact on the children of sending M to prison. This failure carried through into the approach adopted by the High Court. Though the High Court was not unsympathetic to the plight of M and her children, and noted that imprisonment would be hard both for her and the children, it should have gone further and itself made the enquiries and weighed the information gained. In these circumstances the sentencing Courts misdirected themselves by not paying sufficient attention to constitutional requirements. This Court is therefore entitled to reconsider the appropriateness of the sentence imposed by the High Court.

[49] Record at 363.

III. What order, if any, should this Court make?

(a) Should this Court decide the sentence?

[49] The first question to be decided is whether this Court should itself resolve the issue of sentence or else remit it to the Regional Court or the High Court. Appeal courts are generally reluctant themselves to determine what an appropriate sentence should be. Accordingly, having found a misdirection to have existed, this Court would ordinarily remit the matter either to the Regional Court or to the High Court to pass sentence afresh in the light of this judgment. In the present matter, however, there are two special features that point away from remitting the matter. Both flow from the fact that this has become something of a test case.

[50] In the first place, this Court has received comprehensive, carefully researched and well-drafted reports from different sources concerning the interests of the children.[50] In addition we have heard argument from counsel on both sides, as well as from the curator and the amicus, on what the appropriate sentence should be. Secondly, the delays involved in pursuing the initial prosecution followed by appeals first to the High Court, then to the Supreme Court of Appeal and finally to this Court, together with the need to ensure that a curator was appointed to protect the interests of the children, has meant that many years have elapsed since the offences were committed. It is clearly in the interests of the children and of all concerned that the matter achieves finality. In these special circumstances the interests of justice require

[50] The curator submitted a social work report prepared by Ms Cawood, as well as his own report, and the Department of Social Development submitted reports prepared by a team of social workers.

that this Court itself bring the matter to a close by determining the appropriate sentence. I accordingly consider the question of what the sentence should be.

[51] I turn to the extensive information provided by the curator and the Department of Social Development. Though in argument some differences in the respective reports are acknowledged, they were said to relate essentially to evaluations as to how well the children could adapt to being placed under alternative family care, rather than to questions of fact. On the basis that it would not be in the interests of the children for the matter to be unduly prolonged, we were urged to follow the recommendations of the curator that an appropriate correctional supervision order be imposed.

[52] On the other hand, as counsel for the State pointed out, the starting point must be that M has defrauded members of the community not once, not twice, but three times, and done so over a period of years, apparently having been unable to control her dishonest impulses while under a suspended sentence and then later while released on bail. When refusing her request for correctional supervision the High Court stated:

> "It . . . appears, as found by the magistrate, that the present offences were committed over a period of time while she had ample time to reflect and to desist from such criminal conduct. If one takes as an example the charges relating to the fraudulent use of a third party's credit card, it appears that appellant had used the credit card for payment of her purchases on no less than 32 occasions at various retailers over a period of more than three months. This shows careful and deliberate planning on the part of the appellant. As I have already mentioned, the appellant is a suitable candidate for a sentence of correctional supervision. She is a divorcee with three minor children and has a fixed address and regular source of income through her cleaning business. A sentence of imprisonment will no doubt cause her and her

> children great hardship. However, one has to take the interests of the community into account."[51]

The State submitted that this Court should confirm the sentence imposed by the High Court.

[53] M's counsel, with the support of the curator, responded that she had already spent three months in prison, one month while awaiting trial before having been granted bail, and three months serving her sentence before being released on bail. Furthermore, the delay in finalising the matter had in fact provided M with the opportunity to demonstrate her capacity to develop business activities and increase her income, apparently through honest endeavour. For seven years she had manifested an ability and a will to function actively in society, apparently without breaking the law.

[54] He added that all the reports indicate that she is a good parent in her dealings with her children and that they are devoted to her; even though some alternative family care could be arranged if she were to go to prison, this could involve splitting up the children and placing them in homes far away from the schools they presently attend and the community in which they live. As the curator pointed out, they live in a socially fragile environment and are at an age where major disruptions to their lives could have seriously deleterious consequences. Further imprisonment would in all probability impose more strain than the family could bear, with potentially devastating effects on the children.

[51] At 3 line 21 to 4 line 9 of the judgment.

[55] It was further contended that M had indicated in the correctional supervision report that she would pay back her victims, starting with the R4 000 of her bail money and putting aside R1 500 per month to cover the rest of the R19 000 she derived from her fraudulent conduct. Such repayments would contribute positively towards achieving the objectives of restorative justice in a most direct way. M could be required to work out a schedule of repayments and then repay the amounts through direct encounter with the persons she defrauded. It was stated that such payment to the victims would be far more meaningful from a community point of view than payment of a fine to the State.

[56] The argument in favour of correctional supervision concluded by proposing that M could be obliged to do work in the community that is manifestly of a socially beneficial character. This would simultaneously and in a practical way reconcile the personal interests of M and her children with those of the community.

(b) Correctional supervision or custodial sentence?

[57] The second question which arises is whether paying due regard to the interests of the children requires imposing a correctional supervision order on conditions which do not necessitate further imprisonment. Alternatively, are the facts of the case so compelling that the sentence of the High Court should be confirmed with a *Howells* type order ensuring that the interests of the children receive particular attention from the authorities? The answer requires a close examination of the purposes of

correctional supervision, giving special attention to the manner in which it relates to the interests of the children in this matter.

[58] The Legislature, by the introduction of correctional supervision, has sought to distinguish between two types of offenders: those who ought to be removed from society and imprisoned and those who, although deserving of punishment, should not be so removed.[52] This Court has held that:

> "The introduction of correctional supervision with its prime focus on rehabilitation, through section 276 of the Act, was a milestone in the process of 'humanising' the criminal justice system. It brought along with it the possibility of several imaginative sentencing measures including, but not limited to, house arrest, monitoring, community service and placement in employment. This assisted in the shift of emphasis from retribution to rehabilitation. This development was recognised and hailed by Kriegler AJA in *S v R* as being the introduction of a new phase in our criminal justice system allowing for the imposition of finely-tuned sentences without resorting to imprisonment with all its known disadvantages for both the prisoner and the broader community.
>
> The development of this process must not be seen as a weakness, as the justice system having 'gone soft'. What it entails is the application of appropriate and effective sentences. An enlightened society will punish offenders, but will do so without sacrificing decency and human dignity."[53] (Footnote omitted.)

[59] Correctional supervision is a multifaceted approach to sentencing comprising elements of rehabilitation, reparation[54] and restorative justice. The South African Law

---

[52] *S v R* 1993 (1) SA 476 (A) at 488G; 1993 (1) SACR 209 (A) at 221h.

[53] *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at paras 67-8 (per Langa J).

[54] In the SALC *Report on a New Sentencing Framework* above n 3 at para 2.31 it was recognised that this is a sentencing option that needs to be developed vigorously. The SALC submits that increased emphasis should be placed on reparation for victims of crime in any new sentencing arrangement. Reparation has gained great

Commission (the SALC) has underlined the importance of correctional supervision, observing:

> "There is increasing recognition that community sentences, of which reparation and service to others are prominent components, form part of an African tradition and can be invoked in a unique modern form to deal with many crimes that are currently sanctioned by expensive and unproductive terms of imprisonment."[55] (Footnote omitted.)

The SALC reports that specific legislative provision has been made in other jurisdictions for a wide range of community-based sentences, including participation in victim-offender mediation and family group conferencing,[56] which are prominent forms of restorative justice.[57] The imprisonment of offenders for less serious offences and for impracticably short periods was identified by the SALC as a shortcoming of the existing sentencing system.[58]

---

acceptance in England, subject to section 104 of the Criminal Justice Act 1988 which requires a court to consider making a compensation order in every case involving death, injury, loss or damage.

[55] Id at para 1.4.

[56] This order is available in terms of section 52(1)(g) of the Correctional Services Act 111 of 1998.

[57] SALC Report above n 3 at para 3.3.30.

[58] Id at para 1.8.c:

> "[I]maginative restitutive alternatives could provide solutions more satisfactory to all parties, while at the same time saving valuable prison resources for those offenders deserving harsher punishment."

Correctional supervision is provided for by the CPA. Section 276(1)(h) of the Act provides that "[s]ubject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely . . . correctional supervision". This sentence option was introduced into the CPA by the Correctional Services and Supervision Matters Amendment Act 122 of 1991. The Act also introduced section 84 into what was then the Prisons Act 8 of 1959 (now the Correctional Services Act). Section 84 provided that:

> "Every probationer shall be subject to such monitoring, community service, house arrest, placement in employment, performance of service, payment of compensation to the victim and rehabilitation or other programmes as may be determined by the court, the Commissioner or prescribed by or under this Act, and to any other such form of treatment, control or supervision, including supervision by a probation officer, as the Commissioner may determine after consultation with the social welfare authority concerned in order to realise the objects of correctional supervision."

The greater part of the Prisons Act was repealed by section 137 of the Correctional Services Act but section 84F is still operational and governs the limitation on correctional supervision. Correctional supervision is defined in section 1 of the CPA as

[60] In *S v R* Kriegler AJA noted that correctional supervision does not so much describe a specific sentence but is a collective term for a wide range of measures which share one common feature, namely, that they are executed within the community.[59] It is aimed at enabling offenders to lead a socially responsible and crime-free life during the period of their sentence and thereafter.[60] A sentence of correctional supervision endeavours to ensure that offenders abide by the conditions imposed upon them so as to protect the community from offences which such persons may commit.[61] A requirement for the imposition of a sentence of correctional supervision is that the offender agrees not only to such sentence, but also to the stipulated conditions ordered[62] and undertakes to co-operate in meeting them.

> ". . . a community based sentence to which a person is subject in accordance with Chapter V and VI of the Correctional Services Act, 1998, and the regulations made under that Act if—
>
> . . .
>
> (b) it has been imposed on him under section 276(1)(h) . . ."

[59] Above n 52 at 220H. The essential penal elements of correctional supervision were identified in *Roman v Williams NO* 1998 (1) SA 270 (C); 1997 (9) BCLR 1267 (C); 1997 (2) SACR 754 (C) at 282I-283A as

> "house arrest during specific hours each day, rehabilitational, educational or psychotherapeutic programmes, regular community service in various forms, abstinence from criminal or improper conduct and from use or abuse of alcohol and drugs . . . [as well as] constant monitoring."

Section 276A(1) of the CPA further provides:

> "Punishment shall only be imposed under section 276(1)(h)—
>
> (a) after a report of a probation officer or a correctional official has been placed before the court; and
>
> (b) for a fixed period not exceeding three years."

[60] Section 50(1) of the Correctional Services Act. Chapter VI of this Act (which commenced on 31 July 2004) deals extensively with correctional supervision (or "community corrections", in the wording of the chapter).

[61] Section 50(2) of the Correctional Services Act.

[62] Section 51(2) of the Correctional Services Act.

[61] It is an innovative form of sentence, which if used in appropriate cases and if applied to those who are likely to respond positively to its regimen, can serve to protect society without the destructive impact incarceration can have on a convicted criminal's innocent family members.[63] Thus, it creates a greater chance for rehabilitation than does prison, given the conditions in our overcrowded prisons. The SALC cautioned in 2000 that "South African prisons are suffering from overcrowding that has reached levels where the conditions of detention may not meet the minimum standards set in the Constitution."[64]

[62] Another advantage of correctional supervision is that it keeps open the option of restorative justice[65] in a way that imprisonment cannot do. Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control.[66] Thus, our courts have observed that one of its strengths is that it rehabilitates the offender within the community,[67] without the

[63] *S v Schutte* 1995 (1) SACR 344 (C) at 350c-d.

[64] SALC Report above n 3 at para 1.37. In *S v Lebuku* 2006 JOL 17622 (T) at 13-5 Webster J refers to the 2003/2004 Annual Report of the Judicial Inspectorate of Prisons in which Justice Fagan recommends at para 16.2 the use of non-custodial sentences to help reduce the overcrowding in our prisons. He also provides a helpful discussion encouraging judges to actively explore all available sentencing options and to choose the sentence best suited to the crime. See also *S v Siebert* 1998 (1) SACR 554 (SCA) at 559c-d.

[65] For a discussion of restorative justice see the minority judgments of Mokgoro J and Sachs J in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) especially at paras 68 and 114, respectively.

[66] SALC Report above n 3 at para 3.3.34.

[67] See too Pinnock *What Kind of Justice?* University of Cape Town, Institute of Criminology Occasional Paper Series 4-95 (1995), http://web.uct.ac.za/depts/sjrp/publicat/whatknd.htm, accessed on 16 August 2007; Maepa (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* Institute for Security Studies Monograph No 111 (February 2005), http://www.iss.co.za/pubs/Monographs/No111/Chap2.htm at ch 2 where Batley points out that although there are a number of definitions of restorative justice, they all contain the following three principles: (1) crime is seen as something that causes injuries to victims, offenders and communities and it is in the spirit of ubuntu that the criminal justice process should seek the healing of breaches, (2) the redressing of imbalances and the restoration of broken relationships; and (3) not only government, but victims, offenders and their communities should be actively involved in the criminal justice process at the earliest point and to the maximum extent possible; and in promoting justice, the government is responsible for preserving order and the community is responsible for establishing peace.

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.[68]

[63] As Kriegler AJA has observed, it should not be categorised as a lenient alternative to direct imprisonment.[69] It can, depending on the circumstances, involve an exacting regime, even house arrest.[70] In similar vein Conradie J has emphasised that

> "[i]n some ways it is harder than imprisonment. A cynic once said that the easiest life on earth is being a soldier or a nun: you only have to obey orders. Prison is like that. A model prisoner is the one who best obeys orders. These are not ideal circumstances, generally, for the regrowth of character. Correctional supervision gives an offender greater scope for regrowth of character. It involves a good deal of psychological strain, it takes a great deal of restraint and determination on the part of a probationer. It can be very stressful. A probationer does not have his freedom — far from it — but he is not cut off from the community altogether. His support systems are not destroyed and in this way his rehabilitation prospects are enhanced. Moreover, there is the benefit that society does not lose the skills of someone who is able to maintain himself and his dependants, as well as the family unit. Community service, which goes hand in hand with correctional supervision, is beneficial."[71]

[68] *S v E* 1992 (2) SACR 625 (A) at 633a-b.

[69] *S v R* above n 53 at 488C-D. See also *S v Williams* above n 53 at para 67; *S v Schutte* above n 63 at 349c-i quoting with approval the unreported judgment of Conradie J in *The State v Margaret Gladys Harding* SS61/92, 23 September 1992, unreported. In *S v Ingram* 1995 (1) SACR 1 (SCA) at 9e-f it was held that coupled with the correct conditions, correctional supervision could, in appropriate cases, even be suitable for serious offenders.

[70] *S v E* above n 69 at 633a-b.

[71] *Margaret Gladys Harding* above n 69 at 1749 of the record of that case.

[64] I now turn to the forms that correctional supervision can take. A great plus is its adaptability.[72] Conditions are flexible[73] and can be fashioned to meet the specific circumstances of each offender's case. It has ushered in a new sentencing phase because it is so strikingly diverse.[74] The sentencing courts must themselves identify the specifics of the correctional supervision sentence,[75] but not necessarily the manner in which it is to be implemented. In *Govender* it was held that while the court should clearly indicate the duration and extent of the specific components of the sentence, it

[72] Section 52(1) of the Correctional Services Act entitles a court when ordering correctional supervision to impose any of the following stipulations to the sentence regime:

(a) Placement under house detention;

(b) imposition of community service;

(c) an order to seek employment;

(d) an order to take up and remain in employment;

(e) an order to pay compensation or damages to victims;

(f) an order to take part in treatment, development and support programmes;

(g) an order to participate in mediation between victim and offender or in family group conferencing;

(h) an order to contribute financially towards the cost of the community corrections to which he or she has been subjected;

(i) a restriction to one or more magisterial districts;

(j) an order to live at a fixed address;

(k) an order to refrain from using or abusing alcohol or drugs;

(l) an order to refrain from committing a criminal offence;

(m) an order to refrain from visiting a particular place;

(n) an order to refrain from making contact with a particular person or persons;

(o) an order to refrain from threatening a particular person or persons by word or action; and

(p) subjecting the offender to monitoring.

[73] The SALC in its report above n 3 at para 3.3.35 is calling for a more flexible process for imposing sentences. It is not always feasible to obtain comprehensive pre-sentencing reports, particularly in rural areas. They propose that the court should have a discretion to dispense with some of the requirements. In addition, reports should be capable of being provided for by a wider group of competent people. But see the discussion in *Schutte* above n 63 at 351b-c.

[74] *S v R* above n 53 at 487E-F.

[75] Appellate courts have been reluctant to impose conditions for correctional supervision and have generally referred such cases back to lower courts to work out the conditions. In *S v R* above n 52 at 492A-B, despite the existence of a probation report the Court deemed it unwise to compose a sentence itself. The Court of first instance was considered the most appropriate forum. See also *S v Sibuyi* 1993 (1) SACR 235 (A) at 251e-f and *Koopman v S* [2005] 1 All SA 539 (SCA) at para 63.

was not desirable for it to specify the manner in which the sentence is to be carried out.[76] It was held that the court must retain effective control over the sentence without compromising flexibility.[77] This appears to be a sound principle.

(c) The appropriate sentence in this matter

[65] M is a repeat offender and committed the offences over a period of time and during the suspension period of her previous sentence. The offences were deliberate and calculated, involving deception of people who trusted her. She was driven by greed rather than need. Given the seriousness of her misconduct, the sentence of four years' imprisonment must stand. M has already spent three months in prison, one awaiting trial, and two after the sentence was imposed. The question before us is whether this Court should backdate the three months already served,[78] suspend the rest of the sentence, and itself now place her under correctional supervision on terms that this Court prescribes, or whether she should be sent back to prison, allowing correctional supervision to be considered by the Commissioner after a further five months.

[66] Sentencing is always difficult. Nevertheless, I have come to the conclusion that, with the extra evidence made available to us, what is called for is backdating the sentence already served, suspending the rest of the sentence so that she need not go

[76] *S v Govender* 1995 (1) SACR 492 (N) at 497c-d.

[77] Id at 497e-g.

[78] Section 282 of the CPA provides for antedating of a sentence of imprisonment to a specific date not earlier than the date on which the sentence of imprisonment was imposed.

back to prison after this order is issued, and adding a correctional supervision order made by this Court under section 276(1)(h) of the CPA.

[67] In coming to this conclusion I am influenced by the fact that, as the reports indicate, it is clearly in the interests of the children that they continue to receive primary care from their mother. This Court has not one but three reports. For this reason this Court is more favourably placed than the Regional Court and the High Court were. The custodial sentences they imposed were by no means incongruent with the evidence they had before them. What was lacking was a report concerning the manner in which the children stood to be affected. It is clear that M is a single parent who is almost totally responsible for the care and upbringing of her sons. Ms Cawood's report indicates that all three boys rely on M as their primary source of emotional security, and that imprisonment of M would be emotionally, developmentally, physically, materially, educationally and socially disadvantageous to them. In Ms Cawood's view, should M be incarcerated, the children would suffer: loss of their source of maternal and emotional support; loss of their home and familiar neighbourhood; disruption in school routines, possible problems in transporting to and from school; impact on their healthy developmental process; and separation of the siblings.

[68] The curator notes further that M appears to be a devoted mother whose life revolves around her three children,[79] that she has a loving, nurturing and caring relationship with all three boys, and that all of the children's basic needs are currently being met by M.[80] He points out that the sustained viability of M's most lucrative business is threatened if she goes to jail, leaving her without an income. The business concerned with ensuring collection of child maintenance, of which she is the heart and soul, provides the vast bulk of her income.[81] It would no longer be operative if she is incarcerated.[82] Without an income M would be unable to afford paying for the upkeep of the household and she would default on her bond repayments, resulting in the bank attaching her house and evicting her children and whoever lives with them. Nor would M be able to afford maintaining her children while in prison.

[69] The social report submitted on behalf of the State does not contradict any of these factual averments. Indeed, it accepts that should she return to prison her main business would collapse. The effective thrust of the report is to establish that the children will not be abandoned should M's sentence be upheld, because alternative family care could be arranged. Whether or not some form of alternative family care could be provided is the one issue that cannot be determined on the papers. Suffice it to say that the proposal that M's sister and her family take care of the three children or

---

[79] For example, she serves on the governing body of the school of the youngest two children, she takes the children to school and fetches them in the afternoon and takes them to extra-mural activities (from about 13:00 to 15:00 every weekday) and supervises their homework in the evenings.

[80] She receives only an amount of R250 per month from the father of the eldest son as contribution to his maintenance.

[81] It yields an income of R9 500 per month. Her catering business, which brings in an amount ranging from R1 000 to R3 000 per month, on the other hand, would continue to be managed by her business partner.

[82] Indeed, her previous spell of imprisonment had led to the demise of the enterprises she carried on at that time.

only the younger two while the older one moves to stay with his father, or arranging alternative non-family care, cannot be in the best interests of the children.[83]

[70] The evidence made available to us establishes 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 not just a question of whether they would be out on the street. And it is not just M and the children who have an interest in the continuity of her guidance. 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.

[71] Important though this factor is, I do not believe that on its own it should be decisive in this case. It takes on special significance because it is allied to other considerations pointing towards the advantages for all concerned of M receiving correctional supervision without further imprisonment.

[72] To start with, her offer to repay the persons she defrauded appears to be genuine and realistic. It would have special significance if she is required to make the repayments on a face-to-face basis. This could be hard for her, but restorative justice

---

[83] The report of the curator and Ms Cawood concluded that all alternative care scenarios presented to the Court are undesirable in light of what is contemplated in section 28 of the Constitution. In particular non-family care has been described as most unsuitable. It has been established that these alternative care scenarios may result in dividing the children at an age and time where they need one another most. To remove them from their home and familiar environment is likely to cause them enormous physical and psychological upheaval. This would also produce major disruptions in their school routines and there may inevitably be a need to change schools. It may also mean a huge turn-around in their comfortable and disciplined lifestyle.

ideally requires looking the victim in the eye and acknowledging wrongdoing. There might be practical problems in this case in ensuring that M meets individually with each of the many persons she defrauded. The Commissioner will accordingly be called upon to determine precisely how the repayments are to be effected.[84] What matters is that in both a practical and symbolical way M begins to restore a relationship that would otherwise remain ruptured. For M herself this process of acknowledgement and reconciliation removes the silent brand of criminality that imprisonment would bring, and facilitates restoration of trust and her reintegration into the community.

[73] At the same time, simply paying back the fruits of her crime would not be sufficient. M should be required to do a substantial amount of community service to mark and respond to the extent of her depredations on the community. Credit card fraud destroys trust. The whole community loses. Bearing in mind the amount of time she needs to spend on her business activities and on looking after the children, she should be required to devote ten hours a week for three years to doing community service. The Commissioner should determine precisely what form the sentence should take, together with the manner in which it is to be supervised. The objective should be for her to do truly useful work so that both she and the community feel rewarded.

[74] Furthermore, M displayed a degree of compulsive deception in circumstances where she was bound to be caught sooner or later. She is clearly a person of

[84] It is understood that the Commissioner may delegate this and other tasks referred to in this order to an appropriate official.

considerable drive and capacity. The work she does not only brings her an income, it fulfils a community need. Yet, all this stands to be ruined if a compulsion to cheat reasserts itself in her. Counselling is called for. She, society and her children can only benefit if she gains insight into what led her to prey deceitfully and recklessly on store after store. Here too the Commissioner should establish an appropriate regimen for counselling, and monitor compliance.

[75] Finally, it is necessary to place in the balance the following facts. M has shown a meritorious aptitude to organise her life productively and pursue successful entrepreneurial activities during the past seven years. There is no suggestion on the papers that she has behaved dishonestly during this period. She has a fixed address and has been stated to be a suitable candidate for correctional supervision. It is in the public interest to reduce the prison population wherever possible. To compel her to undergo further imprisonment would be to indicate that community resources are incapable of dealing with her moral failures. I do not believe that they necessarily are. Nor do I believe that the community should be seen simply as a vengeful mass uninterested in the moral and social recuperation of one of its members. M has manifested a will to conduct herself correctly. As the courts have pointed out, persons should not be excluded from correctional supervision simply because they are repeat offenders.[85]

[85] See for example *S v Scheepers* 2006 (1) SACR 72 (SCA); *S v Flanagan* 1995 (1) SACR 13 (SCA); *S v Van der Westhuizen* 1994 (1) SACR 191 (O); *S v R* above n 52.

[76] None of the above should be seen as diminishing the seriousness of the offences for which she was properly convicted. Nor should it be construed as disregarding the hurt and prejudice to the victims of her fraud. Nevertheless, I conclude that in the light of all the circumstances of this case M, her children, the community and the victims who will be repaid from her earnings, stand to benefit more from her being placed under correctional supervision[86] than from her being sent back to prison.

Order

[77] The following order is made:

1. Leave to appeal against the sentence imposed by the Cape High Court is granted.
2. The appeal is upheld.
3. The sentence imposed by the High Court is set aside and replaced by the following:
   (a) The accused is sentenced to four years' imprisonment with effect from 29 May 2003.
   (b) The 45 months of her imprisonment still to be served is suspended for four years on condition that she is not convicted of an offence which is committed during the period of suspension and of which dishonesty is an element, and further on condition that she complies fully with the order set out in paragraph (d) below.

[86] Her agreement under section 50(2) of the Correctional Services Act may be assumed from the information placed before us by her counsel.

(c) The accused is placed under correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977 for three years, which correctional supervision must include the following:

   (i) She performs service to the benefit of the community for ten hours per week for three years, the form of such service and the mode of supervision to be determined by the Commissioner for Correctional Services; and

   (ii) she undergoes counselling on a regular basis with such person or persons and at such times as is determined by the Commissioner for Correctional Services.

(d) The accused must repay to each of the persons or entities that she defrauded, as identified in the charges on which she was convicted, an amount equal to the value of goods she obtained. This must be done in the manner specified in a schedule to be determined by the Commissioner for Correctional Services on the basis of R4 000 bail money being immediately available and payment of the balance at a rate of no less than R1 500 per month.

Moseneke DCJ, Mokgoro J, Ngcobo J, O'Regan J, Skweyiya J, Van der Westhuizen J concur in the judgment of Sachs J.

MADALA J:

Introduction

[78] I have had the benefit of reading the judgment of Sachs J. While I agree with him on certain aspects of the judgment, I am unable to support his approach particularly on his assessment of the evidence for the purpose of determining an appropriate sentence and the sentence he proposes. In the circumstances, I have decided to set out my views separately.

Background

[79] This is an application for leave to appeal against the decision of Fourie J and Van Riet AJ in the Cape High Court on 14 September 2005.

[80] The Centre for Child Law (the Centre) applied to be admitted as amicus curiae. A curator ad litem (the curator) was also appointed to represent the interests of the children. We are indeed indebted to the Centre and to the curator for the assistance rendered in this matter and for submitting heads of argument and presenting oral submissions.

[81] In the interests of protecting the identity of the children concerned, this Court ordered that the applicant's name be made anonymous and that henceforth she be referred to as "M".

[82] M is a 35 year old single mother of three minor boys aged approximately 16, 12 and 8 respectively. She lives with the children in a three bedroom house. She is presently on bail pending the outcome of her application for leave to appeal in this Court.

[83] On 25 May 2003, after pleading guilty to several charges of fraud and theft in the Wynberg Regional Court (the Regional Court), the applicant was sentenced to a period of four years' imprisonment. On 29 May 2003, her application for bail was also dismissed. The applicant approached the High Court for bail and on 27 July 2003 it was fixed at R4 000, by which time she had already served an effective period of three months' imprisonment.

[84] The applicant noted an appeal against the severity of the sentence on 22 March 2005 and the Regional Court's sentence of four years' imprisonment was altered to a sentence of four years in terms of section 276(1)(i) of the Criminal Procedure Act (CPA) 51 of 1977.[1] The applicant subsequently appealed and the High Court turned

[1] Section 276 provides:

> "(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—
>
> . . .

down her application for leave to appeal. The Court did however extend her bail whilst her application for leave to appeal to the Supreme Court of Appeal was pending. The Supreme Court of Appeal dismissed her application for leave to appeal. The applicant then approached this Court for leave to appeal against the sentence imposed by the High Court.

[85] M has now approached this Court on the basis that the Regional Court did not take into account the paramountcy of the interests of the children before imposing a term of effective imprisonment against a primary caregiver. In the directions issued by the Chief Justice, the parties were called upon to address, among others, the following matters:

(a) What are the duties of a sentencing court in the light of section 28(2)[2] of the Constitution and any relevant statutory provisions when the person being sentenced is the primary caregiver of minor children;
(b) were these duties observed in this case; and
(c) if it is held that those duties were not observed, what order should this Court make in this case, if any?

Issues

[86] As I see the matter, the real issues that need to be considered in this case are:

(i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner."

[2] Section 28(2) provides:

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

(a) The considerations, duties and approaches of sentencing courts in respect of the best interests of children;
(b) to what extent a recidivist primary caregiver of minor children can avoid a custodial sentence; and
(c) whether in this particular case this Court should interfere with the sentence imposed by the High Court on the applicant?

I provide a brief factual analysis before proceeding to answer the questions as articulated above.

Record of previous convictions

[87] On 24 February 1996, M was convicted of one count of fraud and was sentenced to three years' imprisonment, the whole of which was suspended for a period of five years on condition that she would not be convicted of fraud, theft, forgery, uttering or any attempt to commit any of such offences during the period of suspension. She was also ordered to pay compensation in the sum of R10 000.

[88] While on suspension, she breached the conditions of the suspended sentence imposed on 24 February 1996. Both counts were taken as one for purposes of sentence. She was sentenced in terms of section 276(1)(h) of the CPA[3] and a sentence of three years correctional supervision and 576 hours of community service was imposed. The convictions and sentences were later set aside. In June 1999, M was

---

[3] Section 276 provides:

> "(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—
>
> . . .
>
> (h) correctional supervision".

again arrested on a fraud charge and released on R4 000 bail in August 1999. Between 12 November 1999 and 13 February 2000, whilst on bail, M committed further fraud offences. In 2003, she was charged with eighty four counts of fraud and theft but was convicted in the Regional Court of having committed thirty eight counts of fraud and four counts of theft. She had pleaded guilty to thirty four counts of fraud and three counts of theft, but was also convicted of theft in respect of count 83 after entering a plea of not guilty. All counts were taken together for purposes of sentence. The total prejudice was R29 158, 69.

[89] In May 2003, M was sentenced by the Regional Magistrate (the Magistrate) to four years' direct imprisonment. The three year suspended sentence of 24 February 1996 was ordered to run concurrently with the four year term of imprisonment. On appeal to the High Court, the theft conviction in respect of count 83 was set aside thus reducing the total prejudice from R29 158, 69 to R19 158, 69. The Magistrate's sentence was set aside and replaced with a correctional supervision sentence of four years imprisonment in terms of section 276(1)(i) of the CPA.[4]

[90] M challenges the decision in the High Court on the ground that it had failed to give sufficient weight to the fact that she had children in need that depended on her and the impact that incarceration would have on them. The failure to take into account the best interests of the children, in her submission, resulted in the imposition of a custodial sentence rather than one of correctional supervision.

[4] See above n 1.

[91] Before I consider the arguments advanced by M, it is appropriate to review the findings made by both the Regional Court and the High Court against the background of evidence on this issue and the submissions made by the parties in this case.

Magistrate's findings

[92] It is clear from the reading of the proceedings in the Regional Court that the Magistrate considered: (a) the applicant's personal circumstances; (b) the interests of society and (c) the seriousness of the offence. The Magistrate sought to achieve a balance by weighing all the aforementioned factors during sentencing in accordance with the requirements in *S v Zinn*.[5] The Magistrate took into account the fact that M was a repeat offender as well as her personal circumstances. The record shows that the Magistrate was alive to the fact that M was a "mother of minor children" and the impact incarceration would have on her children. These are apparent from the following exchange captured in the record:

> "Prosecutor: How long did you spend in custody? — Five weeks. In total? — I was for five weeks and four days because I was four days in hospital. And who looked after your children in that time? — My mom. Is she staying in the same house you're staying in? — No. Where is she staying? — With my sister. And she's there and she looks after the sister's children there? — That's correct. So she can then, there is at least a place for your children to go? — No, at the time my sister took leave so that she could look after her own kids and mom came to stay with me, stayed at my place. Court: Is she still staying at your place? — No Your Worship, she comes on a weekend but she doesn't stay at my place, she stays with my sister but at the time that

[5] 1969 (2) SA 537 (A) at 540G-H where it was held that judicial officers must take into consideration "the triad consisting of the crime, the offender and the interests of society."

> I was arrested my sister took leave from work, so she looked after her kids and my mom came to stay in my house
> Prosecutor: But they won't be on the street, that's what I'm saying? — No, they won't be on the street.
> . . .
> Prosecutor: It is so that you were aware of the suspended sentence, not so? — That's correct. And yet despite that you on numerous occasions and you were convicted on 42 charges in this case which occurred over a period of time, you kept on committing further offences well knowing that this sentence was hanging over your head, not so? — That's correct. A similar offence to be specific, not so? — That's correct.
> And that didn't deter you. In fact when you were arrested on this case that didn't deter you from committing further offences, is it not so? — On which case? In this case, even after you were arrested on this case and released on bail, you committed further offences? — That's correct."

[93] The Magistrate emphasised that M was not a first offender in the sentencing judgment. Of particular concern to the Magistrate was the fact that M continued to commit fraud while on bail and in full knowledge of her suspended sentence.

High Court's findings

[94] The High Court was of the opinion that in deciding the issue of sentencing, each case should be examined on its own facts. In deciding whether M was entitled to a suspended sentence, the High Court took into consideration that M committed the offences of fraud during the period of her suspended sentence. Moreover "even after she had been . . . released on bail, she continued committing the balance of the offences". The High Court also took into account that many of the "offences were committed over a period of time while she had ample time to reflect and to desist from such criminal conduct".

[95] In deciding whether correctional supervision was an appropriate sentence, the High Court held that although M was a suitable candidate for a sentence of correctional supervision because she was a divorcee with three minor children, there were other considerations such as the interests of the community that needed to be balanced in determining the appropriate sentence. The Court held that although a sentence of imprisonment would no doubt cause M and her children great hardship, a sentence of correctional supervision was not appropriate in these circumstances. It said:

> "[H]aving regard to the nature and extent of the offences of dishonesty committed by the appellant, as well as her previous conviction and the fact that she committed the present offences well knowing that she has a suspended sentence hanging over her head, the magistrate correctly concluded that to impose a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act, and not a period of imprisonment, would over-emphasise the appellant's personal circumstances at the expense of the interests of the community. I may add that had the appellant been a first offender, I probably would have inclined to the view that a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act would suffice."

In this Court

[96] In this Court the applicant's legal representative submitted that the Magistrate and the High Court had very little regard for the rights of the applicant's three minor children and dealt very superficially, if at all, with their rights. He submitted that the failure to consider the interests of the minor children was a "glaring misdirection" as

the interests of the children concerned had not been adequately addressed as contemplated in section 28(2) of the Constitution.

[97] It was also further submitted that the potential period of imprisonment of eight months, even though it may be shorter than that imposed by the Magistrate, would still have a major impact on the lives of the three minor children. It was further contended that the negative aspects of this period of imprisonment (albeit a short period) would be as devastating as a period of four years' direct imprisonment because *any* time that the applicant spends in prison would have adverse effects on her family and that it would infringe the children's constitutional rights in terms of section 28(2).

[98] The views of the amicus were that the Regional Court and the High Court paid scant attention to the fact that the applicant was a primary caregiver of three children. Moreover, no probation officer's report was elicited by the High Court in this regard. The amicus submitted that the Magistrate therefore embarked on the process of sentencing with virtually no regard for the well-being of the children should the applicant be sent to prison. The amicus contended that both courts failed to consider the best interests of the children and that it would not be reasonable and justifiable to limit their rights in terms of section 36 of the Constitution to sentence a primary caregiver to imprisonment. The failure to pay proper consideration to the interests of the three minor children resulted in a material misdirection.

[99] The respondents contended that although neither the Regional Court nor the High Court made an order regarding the minor children of the applicant, neither court erred in the consideration of a proper sentence.[6]

[100] Given all the aforesaid submissions, it is now appropriate to consider whether the Regional Court and the High Court adequately considered the children's interests during the sentencing proceedings.

[6] The High Court had the benefit of a correctional report as well as the testimony of the applicant and after all sentencing options were considered, it still found that given the circumstances of the case, direct imprisonment was the only suitable sentence.

[101] The amicus[7] and the curator[8] give detailed information on the substantive duties of a court when sentencing a primary caregiver. Although the information is in no way conclusive, they provide factors which may be considered in determining whether the provisions of section 28(2) of the Constitution were complied with. These factors appear in the judgment of Sachs J and I am in general agreement with his findings in this regard. I now examine the sentence imposed on M in light of the information provided by the parties to this application. The question then remains whether the High Court and the Regional Court misdirected themselves when imposing punishment on the applicant.

---

[7] The amicus made the following submissions in this regard:

> "(a) Ask questions to elicit whether the offender is a primary care-giver;
>
> (b) If imprisonment is being considered as a sentence for a primary care-giver the court must have sufficient information;
>
> (c) This triggers the need for a pre-sentence report by a probation officer which should be called for by the court;
>
> (d) The pre-sentence report must fully consider the possible effects on the child or children that will be caused by imprisonment and consider a range of alternatives;
>
> (e) Once the report is before the court, the court must consider if the rights of the children in terms of s28(2) and 28(1)(b) will be infringed by the imprisonment of a primary care-giver;
>
> (f) If the rights will be infringed, the court must decide if it is reasonable and justifiable to limit the rights;
>
> (g) If the court decides that it is reasonable and justifiable to limit the child's rights by sentencing the primary caregiver to imprisonment, the court must satisfy itself that there are adequate arrangements in place for the child, and where necessary must ensure such arrangements through the granting of additional orders relating to the opening of children's court inquiries and other matters."

[8] The curator made the following submissions:

> "(a) The sentencing court must consider the child's best interest independently of other sentence considerations.
>
> (b) Sufficient weight must be given to a consideration of the impact of the sentence on the minor children and the best interests of the minor children must be accorded 'paramount importance'.
>
> (c) An appeal court must not defer to the trial court or regard the matter as falling within the latter's discretion where the trial court has either not considered the impact of the sentence on the minor children or has attached insufficient weight to such consideration."

[102] A probation officer's report was not submitted to the Regional Court before the imposition of the sentence, this failure clearly falls short of the factors recommended by the amicus and the curator. The two-line reasoning by the Magistrate is not an analysis in the true sense of the word and is indeed a derisory application of the constitutional requirements provided for by section 28(2).

[103] In the High Court a correctional supervision report was available. However, the High Court merely referred to it cursorily when analysing the impact imprisonment would have on the minor children:

> "As I have already mentioned, the appellant is a suitable candidate for a sentence of correctional supervision. She is a divorcee with three minor children and has a fixed address and a regular source of income through her cleaning business. *A sentence of imprisonment will in no doubt cause her and her children great hardship*. However, one has to take the interests of the community into account." (Emphasis added.)

[104] It is remarkable that a probation officer's report was also not submitted in the High Court. Such a report should have been made available to the High Court before sentencing. Such failure, in my view, constitutes a material misdirection which warrants interference by this Court.

[105] The precedents set in *S v Kika*[9] and *Howells v S*[10] clearly demonstrates the stark difference employed in the reasoning of the lower courts in this matter and that which is required in cases where the primary caregiver is to be sentenced. In *Howells*, Van

[9] 1998 (2) SACR 428 (W) at 430a-f.

[10] [1999] 2 All SA 233 (C); 1999 (1) SACR 675 (C).

Heerden AJ probes the polarised interests involved weighing them against the interests of the children and the interests articulated in *Zinn*. This was clearly demonstrated in the court order in *Howells* which dealt specifically with the rights of the children concerned and the steps taken by the court to mitigate those factors.[11]

[106] The failure to consider the interests of the applicant's children in the Regional Court and in the High Court fell short of the constitutional requirements as envisaged in section 28(2) of the Constitution. That failure to employ a reasonable and comprehensive analysis may well stem from the high influx of cases in the lower courts and the short time-frames judicial officers have to contend with in those courts. Nevertheless, courts sentencing primary caregivers are obliged to apply a child-centred approach and not to merely treat children as a circumstance of an accused. Such an approach would undoubtedly meet the constitutional requirements necessitated by section 28(2) of the Constitution.

[107] Apart from the detailed report by the curator and social worker, the Department of Social Development also filed a report. The latter report shows that many relatives of the children concerned indicated that they are prepared to take care of the children's financial needs and to assist with their daily care. M herself informed the Department of Social Development that her relatives had looked after her children during the previous time she was in prison. A primary caregiver does not necessarily escape imprisonment because of the children. There must be other factors precipitating such

[11] Id at 241c-g.

an outcome. In a situation where the children will not suffer hardship, a primary caregiver may have to be incarcerated if there are aggravating factors justifying such an eventuality.[12] Whilst the best interests of the children may be paramount, they should not be the overriding consideration in determining whether or not a primary caregiver should be sent to prison.

[108] In light of these reports as well as the recommended guidelines advanced by the amicus and the curator, I will now embark on a balancing exercise taking into account all the competing interests in light of section 28(2) of the Constitution.

(a) To what extent can a recidivist primary caregiver of minor children avoid a custodial sentence

[109] The general objectives of sentencing are retribution, deterrence, prevention and rehabilitation. In assessing the most appropriate sentence a judicial officer should be guided by the guidelines proposed in the *Zinn* triad. However, the process does not stop there. In a case where a primary caregiver's sentence is being considered, the sentencing officer must go beyond the *Zinn* triad requirements. It would be proper, in deserving cases, to take into account the impact of imprisonment on dependants. This, however, does not imply that the primary caregiver will always escape imprisonment

[12] See *Howells* above n 10 at 240f-h where Van Heerden AJ held that on the facts in that case although there was a real risk, that should the appellant be imprisoned, her children would have to be taken into care, the nature and the magnitude of the appellant's offence and the interests of society outweighed the interests of the appellant and her children. She stated that:

> "[T]his is obviously highly regrettable and makes this Court reluctant to condemn appellant to imprisonment. But it is undoubtedly true that 'detection, apprehension and punishment in the way of imprisonment are prospects which a person embarking on this sort of crime must always foresee'." (Reference omitted.)

so as to protect the rights and best interests of the minor children. There must be circumstances justifying an alternative before the sentencing officer may decide to reduce the otherwise appropriate sentence. Such circumstances should be considered cumulatively and an objective evaluation of all the relevant factors is required.

[110] The factors to be considered include the ages and special needs of the minor children, the nature and character of the primary caregiver, the seriousness and prevalence of the offence committed and the degree of moral blameworthiness on the part of the accused. In a case where the primary caregiver is a first offender, has committed a relatively minor offence, has shown remorse and contrition and the children are of a tender age requiring special attention, the sentencing officer will be wary to send such a person to prison. Where, as is the situation with M, the primary caregiver is a recidivist who continues to commit crimes of a similar nature even whilst on bail and the children are relatively closer to their teens, it would be folly and a show of "maudlin sympathy"[13] to impose a non-custodial sentence. In such circumstances the primary caregiver may not escape a custodial sentence.

[111] In *Hodder v The Queen*[14] Murray J held:

> "Where serious offences are committed, it is inevitable that more severe punishment will be involved and that will be expected in almost every case to cause hardship to innocent persons associated with the offender and the commission of the offence, as victims or otherwise. It is right then that only in an exceptional case, quite out of the ordinary, should the hardship which a proper sentencing disposition will occasion to

[13] *S v Rabie* 1975 (4) SA 855 (A) at 861C-D.

[14] (1995) 15 WAR 264 at 287 as quoted in *S v The Queen* 2003 WL 23002572 (WASC), [2003] WASCA 309.

innocent third parties be allowed to substantially mitigate the court's sentencing disposition. The court should not lose sight of the fact that the hardship occasioned by the sentencing process is, in truth, caused by the offender who commits the offences and visits upon himself or herself the punishment of the court. Even so, the court should, as it was put by Wells J in Wirth, be prepared to drawback in mercy where it would, in effect, be inhuman to refuse to do so."

[112] Whilst it must be borne in mind that the best interests of the child are of paramount importance,[15] section 28(2) like other rights enshrined in the Bill of Rights is subject to limitations that are reasonable and justifiable in compliance with the provisions of section 36 of the Constitution.[16] In my view, section 28(2) of the Constitution provides that a child's best interests must prevail *unless* the infringement of those rights can be justified in terms of section 36 of the Constitution. In *Howells*, Van Heerden AJ approached the limitation of the child's best interest by holding that although imprisoning a convicted criminal who is a primary caregiver would undoubtedly result in the children being taken into care, society's interest in

---

[15] This right creates an independent right that goes beyond the scope of the rights enumerated in section 28(1) of the Constitution. See *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at paras 17-18; *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T) at 176G-J; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 9; *Belo v Commissioner of Child Welfare, Johannesburg, and Others: Belo v Chapelle and Another* [2002] 3 All SA 286 (W) at para 19; *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC) at paras 20-22; *Magewu v Zozo and Others* 2004 (4) SA 578 (C) at para 18.

[16] Section 36 (1) reads:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

sentencing her to imprisonment outweighed the children's interests.[17] In this regard, rendering the child's best interests paramount does not necessitate that other competing constitutional rights may be simply ignored or that a limitation of the child's best interest is impermissible.[18]

(b) Whether in this particular case this Court should interfere with the sentence imposed by the High Court on the applicant

[113] I am in general agreement with the reasoning of Sachs J that ordinarily, appeal courts should not interfere with sentences imposed by the lower courts unless a clear misdirection can be established. This was held in *Malgas v S*[19] where Marais JA held that:

> "A court exercising appellate jurisdiction cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. . . .However even in the absence of a material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'."

[17] See above n 10 and 12.

[18] See *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) also reported as *LS v AT and Another* 2001 (2) BCLR 152 (CC) at paras 29-37; *Petersen v Maintenance Officer and Others* 2004 (2) SA 56 (C); 2004 (2) BCLR 205 (C) at para 20. See also the obiter statement in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC); 2003 (2) SACR 445 (CC) at para 55.

[19] [2001] 3 All SA 220 (A) at 229b-e.

Courts have reinforced this principle in many judgments.[20] However, given the protracted history of this case, the interests of the applicant's children and the fact that this Court has been furnished with the necessary information, this Court is mandated to review the sentence of the High Court in order to ascertain whether any misdirection has occurred. I now consider the appropriateness or otherwise of the sentence imposed. In doing so, I have regard to the factors stated hereunder.

(i) Previous convictions

[114] An accused's previous convictions are recognised in both local and foreign jurisdictions as being a determinative factor in the sentencing process.[21] In the case of *R v Hamilton,*[22] the Ontario Superior Court of Justice considered the fact that the accused had no previous convictions as a highly relevant factor in imposing a conditional sentence. In my view, M has not learnt from her previous brushes with the law.

(ii) Remorse

---

[20] See *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684A-B cited in *S v Pillay* 1977 (4) SA 531 (A) at 535A:

> "It is trite law that the determination of a sentence in a criminal matter 'is pre-eminently a matter for the discretion of the trial court'. In the exercise of this function the trial Judge has a wide discretion in deciding which factors – I here refer to matters of fact and not of law – he should in his opinion allow to influence him in determining the measure of the punishment."

See also *S v Anderson* 1964 (3) SA 494 (A) at 495F-H where the court held that:

> "A court that interferes with a sentence imposed by a lower court, itself exercises a discretion when it imposes a new sentence and there cannot, therefore, be a ready-made test in the strict sense of the word. Nor is it advisable to attempt to lay down a general rule as to when the Court's discretion to alter a sentence will be exercised."

[21] Section 271(4) of the CPA requires the courts to take proved previous convictions into account.

[22] (2003) 172 CCC (3d) 114.

[115] The level of remorse of an accused has been recognised as one of the many factors to be considered by a sentencing court. The court in *Hamilton* looked at the manner in which the accused demonstrated real remorse when deciding upon a sentence.[23] Notably this can be compared to the case before us where the applicant has adopted a supercilious attitude without any sign of remorse whatsoever and continued to commit further offences whilst on bail with the full knowledge of the impact that such callous action would have on her children. It is remarkable that even when she was in prison, the applicant continued to plan further acts of fraud. The applicant's lack of remorse in this case arises from her recidivism.

(iii) Interests of society

[116] The interests of society play a significant role as one of underlying principles in the *Zinn* triad. The interests of society in this case involve a broad interest in maintaining societal confidence in the criminal justice system.[24] The crime statistics report prepared by the Department of Safety and Security reveal that commercial crime in South Africa has increased by 5, 5 per cent from 2001 to 2007.[25] This increase is unacceptable and it reveals the importance of reinforcing the need for strict standards of punishment and encouraging methods of deterrence in our country. It is incumbent upon courts to foster conditions that allow for the police and the judiciary to function effectively and to have the ability to reprimand and penalise those who

[23] Id.

[24] See above n 22 at 159 where Hill J quoted from *R v Wust* (2000) 143 CCC (3d) 129 (SCC) at 139:

> "A legal system that condones excessively harsh, or for that matter, lenient sentences, will eventually lose the support of many members of the community."

[25] http://www.saps.gov.za/statistics/reports/crimestats/2007/categories.htm, accessed on 4 September 2007.

show a disregard for the very laws that are designed to protect both our country's economy and the private interests of individuals.[26]

[117] This Court should be wary of setting a precedent that creates a perception that courts will give primary caregivers a sentence that is disproportionate to what they deserve and which encourages them to use the interests of children as a tool in the judicial process. Higher courts have a responsibility not to send wrong messages to judicial officers. As stated earlier there can be no doubt that the children's interests must be considered, but this enquiry becomes tainted once those interests are elevated at the expense of other important relevant considerations such as those I have alluded to, including the seriousness and gravity of the offence.

(iv) Seriousness of the offence

[118] It can admit of no doubt that fraud of any nature and theft is a serious offence within our criminal justice system.[27] Van Heerden AJ held in *Howells*:

> "In a number of recent cases, courts have taken judicial notice of the disturbing increase in the incidence of the type of white-collar crime committed by the appellant, namely fraud and theft committed by people in positions of trust, and have taken this into account in imposing sentence. . . ."[28]

---

[26] In Burchell and Milton *Principles of Criminal Law* 3 ed (Juta, Landsdowne 2005) at 833 the following remarks are made:

> "The effect of admitting both proprietary and non-proprietary prejudice as a basis for charges of fraud is that the crime, in South African law, protects not only the individual's proprietary interests, but also the State's interest in the integrity of the administration's public affairs." (Footnote omitted.)

[27] See *S v Sadler* 2000 (1) SACR 331 (SCA) at 335g-j.

[28] See *Howells* n 10 above at 239c-d where the following cases are quoted: *S v Blank* 1995 (1) SACR 62 (A) at 79d-e; *S v Brand* 1998 (1) SASV 296 (C) at 306f-g; *S v Erasmus* 1998 (2) SACR 466 (SEC) at 472c-d.

[119] As a court of final instance in all constitutional matters, it is imperative that this Court does not set a precedent which creates the impression that primary caregivers must be given a slap on the back of their wrists in spite of the seriousness of the offences they have committed. In *The State v Govender*,[29] an unreported decision of the Natal Provincial Division delivered on 23 November 1976, Didcott J held:

> "A sentence for fraud would serve a very limited deterrent purpose on other members of the public. If people got the idea that they could commit fraud and that the worst that would happen to them if they were caught was that they would have to repay the money which they have unlawfully misappropriated. If that idea set abroad, fraud would be a worthwhile gamble in the minds of many people because the worst that would happen to them if they were caught would be that they would have to repay the money that they unlawfully obtained."

(v) Personal circumstances

[120] In the present case we are concerned with an individual who is self-employed, with a steady income from her own stable businesses. The applicant claims to have a regular source of income from her cleaning business. Furthermore, she has a partner who can, in my view, continue to operate the business even in her absence. It should also not be overlooked that the applicant is a repeat offender who committed further offences during the currency of her suspended sentence. She carefully planned the execution of the offences and it is reasonable to conclude that she was motivated by greed rather than need as she was gainfully employed at the time the offences were

[29] Case No AR869/1976, judgment delivered on 23 November 1976.

perpetrated.[30] It must furthermore be borne in mind in this case that we are dealing not with juvenile offenders who are about to be sentenced, but with the mother.

(c) The duties and approaches of sentencing courts in respect of the best interests of children

[121] Sachs J has responded well to the first question regarding the duties of a sentencing court when the person facing sentence is a primary caregiver of minor children. I am in agreement with his philosophical analysis of these duties namely the importance of maintaining the integrity of family care on one hand, and "the duty on the State to punish criminal misconduct" on the other.[31] His analysis is a confirmation of the fact that constitutional rights are to be scrupulously observed. However, courts have long understood that the everyday practical problems of satisfying these competing rights are not easily resolved.[32]

[122] I accept without reservation that the best interests of the child need to be considered by every judicial officer when considering the sentence to be imposed on a primary caregiver. The rationale for such an approach has been set out in length by

---

[30] *S v Sinden* 1995 (2) SACR 704 (A) at 709a-b where Van den Heever JA held that "the applicant persistently and deliberately betrayed the trust placed in her and did so from greed, not need."

[31] See above judgment of Sachs J at paras 38 and 39 respectively.

[32] In *S v Banda and Others* 1991 (2) SA 352 (B) at 355A-C, Friedman J identifies these practical difficulties:

> "The elements of the triad contain an equilibrium and a tension. A Court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern."

Sachs J in his judgment and requires no repetition. What remains is to say that the duties of the courts are to be imbued with a child centred approach and the courts must as a rule, judiciously consider a child's interests. My point of departure, however, is that the specific case before us involves highly competitive interests and that despite having taken into account the best interests of the children, I nevertheless arrive at the same outcome as the High Court. I am fortified in my view by the report of the Department of Social Development,[33] from which it is clear that the children are in fact not at risk of severe prejudice if their mother is incarcerated. The time of incarceration is likely to be eight months, a drastically reduced sentence and considering the repeated fraudulent conduct of the applicant, one cannot completely sacrifice the interests of society which is served by the criminal justice system for the interests of the children.[34]

[123] The High Court has effectively minimised the impact on the children as far as possible as set out in the preceding paragraph by sentencing the applicant under section 276(1)(i) of the CPA which requires M to do a shortened term of imprisonment. However, if she exhibits signs of rehabilitation, she may effectively only serve a term of eight months imprisonment. In my view, the approach adopted by the High Court reveals a great degree of mercy as the judge had due regard to the accused's circumstances, thereby giving her yet another chance to modify her behaviour knowing that failure to do so would result in a term of four years' imprisonment which would detrimentally impact on her children.

[33] See above para 30.

[34] See above n 12.

Conclusion

[124] Although a custodial sentence may seem harsh, the fact is that the applicant was shown mercy by the High Courts on a prior occasion but misused the opportunity of proving how repentant she was instead; she would not walk on a straight and narrow path for the benefit of the children during the period of suspension. She continued as if nothing had ever happened.

[125] I have had the benefit of many reports, recommendations and extensive oral argument and have endeavoured to balance all the competing interests. However, I find no compelling justifications why the applicant should not serve her custodial sentence.

[126] For all the reasons articulated in this judgment, I am not persuaded that the sentence imposed by the High Court should be interfered with in this matter. In the circumstances I would grant leave to appeal and dismiss the appeal.

Navsa AJ and Nkabinde J concur in the judgment of Madala J.

For the Applicant:	Mr W Booth instructed by William Booth Inc.
For the Respondent:	Advocate PJ Coetzee and Advocate SM Galloway instructed by The State Attorney, Pretoria.
For the Amicus Curiae:	Advocate A Skelton instructed by the Centre for Child Law.
Curator ad Litem:	Advocate R Paschke.