

Author: E Coetzee

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CAN THE APPLICATION OF THE HUMAN RIGHTS OF THE CHILD IN A CRIMINAL CASE RESULT IN A THERAPEUTIC OUTCOME?

E Coetzee*

1 Introduction

In the standard criminal court procedure, minor children have not been given primary consideration during the sentencing process of the primary caregiver by criminal courts. Until recently, the sentencing process followed in South Africa only considered the interests of children as a circumstance or mitigating factor that the offender could utilise during the sentencing process. A change has come about because of the special protection provided to children by Section 28 of the Constitution of the Republic of South Africa, 1996, in recognition of their vulnerability in society.¹ Section 28(1) affords various rights to children, and Section 28(1)(b) in particular states that every child has the right to family care or parental care or to appropriate alternative care when removed from the family environment. Section 28(2)² indicates that the child's best interests are of paramount importance in every matter concerning the child.³ The questions posed in the article are: What does the change that was brought about when the sentencing court considered Section 28(1)(b) and 28(2) involve when sentencing the primary caregiver of minor children? Will the application of these sections to the sentencing process result in a therapeutic outcome for all the parties affected by this wrongful incident?

* Enid Coetzee. Blur LLB LLM (UNISA) MPhil (UP). Lecturer, Faculty of Law, University of Johannesburg (Auckland Park Campus), South Africa (ecoetzee@uj.ac.za).

1 Constitutional Court 2009 <http://bit.ly/ddyc1g>; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 78 (hereafter *Grootboom*); Friedman *et al* "Children's Rights" 47–45.

2 In *Minister for Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17, the court stated that S 28(2) creates a specific right independent of the rights provided for in S 28(1).

3 See 3.1.

The therapeutic jurisprudence approach is new to the realm of South African law.⁴ The website of the *International Network on Therapeutic Jurisprudence* explains the concept as follows:

Therapeutic jurisprudence concentrates on the law's impact on emotional life and psychological wellbeing. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law's role as a potential therapeutic agent should be recognized and systematically studied.⁵

Therapeutic jurisprudence focuses our attention on the human, emotional and psychological side of law and the legal process.⁶ Wexler⁷ explains that, from a therapeutic jurisprudence viewpoint, the law itself can be a potential therapeutic agent in that legal rules, procedures and the behaviour of legal actors may produce therapeutic or anti-therapeutic results. The concept suggests that anti-therapeutic consequences of the law are bad, while therapeutic consequences of the law are good.⁸ Therapeutic jurisprudence wants us to be aware of this and wants us to see whether we can make or apply the law in a more therapeutic way.⁹ It is concerned with the improvement of the law and the operation thereof by searching for ways of minimising negative and promoting positive effects on the well-being of those affected by the law.¹⁰

Goldberg¹¹ is of the opinion that the criminal sentencing process (as a legal procedure) can be a therapeutic opportunity. According to Rautenbach,¹² the application of therapeutic jurisprudence during the court process can have the effect that law as a punitive agent changes to law as a healing agent. Du Plessis and

4 In South Africa, the only literature that has explored the feasibility thereof in relation to the South African framework suggests that the therapeutic jurisprudence approach is applied in cases of domestic violence (Du Plessis and Sinclair 2007 *Stell LR* 91–117) and customary courts (Rautenbach 2005 *SAJHR* 323–335).

5 Wexler 1999 <http://bit.ly/dn5HSZ>.

6 Wexler 1999 <http://bit.ly/dn5HSZ>.

7 1992 *Law and Human Behavior* 27–38.

8 King *et al Non-Adversarial Justice* 27.

9 Wexler 1999 <http://bit.ly/dn5HSZ>.

10 King *et al Non-Adversarial Justice* 26.

11 *Judging for the 21st Century* 32.

12 Rautenbach 2005 *SAJHR* 323.

Sinclair¹³ emphasise that a therapeutic jurisprudence approach requires the legal processes following a crime or contravention of the law, for example sentencing, to be developed and conducted in such a manner that all the individuals involved in a particular incident or repetitive wrongful incidents must be considered and protected. The terms of a sentence can also provide an offender with the means to confront their transgression and to start a process of change.¹⁴ Therefore, from a therapeutic perspective, when considering Section 28(1)(b) and 28(2) as part of the sentencing process, the process should be developed so as to protect all the individuals affected by the crime. In the article, case law is discussed in order to determine the impact that the inclusion of the human rights of the child had on the sentencing process. It will then be determined whether this inclusion might improve therapeutic outcomes without the apprehension that the interests of justice will be forfeited.¹⁵

2 The sentencing framework used in South Africa

The basic principles of sentencing in South Africa are based on the *dictum* of Rumpff JA in the decision *S v Zinn*,¹⁶ which stated that "[w]hat has to be considered is the triad consisting of the crime, the offender and the interests of society".¹⁷ An appropriate sentence should therefore reflect the severity of the crime, consider all the mitigating and aggravating factors surrounding the person of the offender and serve the interests of society.¹⁸ In *S v Kibido*,¹⁹ Olivier JA stated that:

Now, 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 court has a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each H factor taken into account

13 Du Plessis and Sinclair 2007 *Stell LR* 99.

14 Goldberg *Judging for the 21st Century* 32.

15 Wexler 1992 *Law and Human Behavior* 27.

16 1969 2 SA 537 (A) 540G.

17 Also referred to as the *Zinn* triad.

18 Terblanche *Guide to Sentencing in South Africa* 137.

19 1998 3 All SA 72 (A) 76E (hereafter *Kibido*).

Even though the court has this discretion, Friedman J²⁰ states that when determining sentence, the court should "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". If the court fails to take certain factors into account or attaches the wrong value to these factors, it will amount to a misdirection "but only when the dictates of justice carry clear conviction that an error has been committed in this regard".²¹

2.1 *The second leg of the triad*

This segment revolves around the criminal and is often referred to as "individualisation".²² Many mitigating factors are taken into account when the offender is considered and prior to *S v M*²³ one of the factors considered by the court included the interests of children. In *S v Shangase*,²⁴ it was found that one of the potentially relevant factors the court would regard as mitigating the severity of desirable punishment was whether the accused was in regular employment and had dependants. However, economic circumstances will only become significant if measured against other factors, and these factors may only have an influence on the outcome of the sentence if a non-custodial sentence is contemplated.²⁵

The punitive aspect of the sentence was increased in a case in which the offender had a family who was dependent upon the offender, since the dependants would have been left without the care of that person if the offender received a sentence of imprisonment.²⁶ This was the situation in *S v Benetti*.²⁷ The appellant had been convicted of seven counts of theft and was sentenced to three years' imprisonment. Some of the factors that the court considered with regard to the sentence were that she had two previous convictions of theft, had two minor children, earned R328 per

20 *S v Banda* 1991 2 SA 352 (BG) 355A.

21 *Kibido* 76F.

22 Terblanche *Guide to Sentencing in South Africa* 150.

23 2007 2 SACR 539 (CC) – hereafter *M* case.

24 1972 2 SA 410 (N) 423D.

25 Terblanche *Guide to Sentencing in South Africa* 197.

26 Terblanche *Guide to Sentencing in South Africa* 198.

27 1975 3 SA 603 (T) – hereafter *Benetti*.

month after tax and her husband earned R500 per month after tax.²⁸ An appeal was brought against the sentence on the basis that it was too severe.

Hiemstra J²⁹ concluded that the community would benefit more by keeping the family of the accused intact and preserving her productivity. The overriding factor was that the interests of society were better served by her repaying the stolen amount.³⁰ The judge suspended the three years' imprisonment for three years on condition that the accused did not again commit any offence of dishonesty during the period of suspension and repaid at least R200 per month to the SA Permanent Building Society, from which she stole the money.³¹ In his judgment, Hiemstra J³² made the following statement:

We wish to adopt a more enlightened approach in which the probable effect of incarceration upon the life of the accused person and those near to her is carefully weighed.

Until recently, the interests of children were only considered as a mitigating factor of the offender during the sentencing process and not as an independent factor apart from the *Zinn* triad. The consideration of dependants during the sentencing process became significant as a result of the inclusion of children's rights in the Constitution.

3 Section 28 of the Constitution

The *Child Care Act*³³ did not recognise the worldwide rights of children under international law and did not make provision for future challenges, such as the phenomenon of street children, unaccompanied foreign children, or the difficulties that HIV/Aids would pose for the community.³⁴ The ideal opportunity to adequately recognise the rights of children was provided by the drafting of a new constitution for South Africa and the ratification of international instruments, such as the United

28 *Benetti* 603B, 605B.

29 *Benetti* 605G.

30 *Benetti* 605D–E.

31 *Benetti* 606A.

32 *Benetti* 605G.

33 74 of 1983, repealed by Schedule 4 of the *Children's Act* 38 of 2005, which came into operation on 1 July 2007.

34 Skelton and Proudlock "Interpretation, objects, application and implementation of the Children's Act" 1–6.

Nations Convention on the Rights of the Child (hereafter the CRC)³⁵ and the African Charter on the Rights and Welfare of the Child.³⁶

3.1 Section 28(2) of the Constitution

Article 3 of the CRC states:

[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 interest of the child shall be a primary consideration.³⁷

Section 28(2) embodies Article 3 by stating that a child's best interests are of paramount importance in every matter concerning the child.³⁸ In the *M* case, Sachs J³⁹ avers that the phrase "paramountcy principle" is notably stronger than the phrase "primary consideration". He further states that it is difficult to establish an appropriate operational impetus for the paramountcy principle:

The word 'paramount' is emphatic. Coupled with the far-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.⁴⁰

Section 7(2) of the Constitution obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights, including the rights of children. According to *Christian Education South Africa v Minister of Education*,⁴¹ Section 7(2), coupled with the duty of the state towards children, places a powerful obligation on the state to act. The obligation to respect the rights of children implies that the state may not

35 Adopted by the General Assembly of the UN in 1989 and ratified by South Africa on 16 June 1995.

36 Adopted in Addis Ababa, Ethiopia, on 11 July 1990 and entered into force on 29 November 1999. Signed by South Africa on 10 October 1997 and ratified on 7 January 2000. See also Skelton and Proudlock "Interpretation, objects, application and implementation of the Children's Act" 1–6, 1–7.

37 Article 4 of the African Charter on the Rights and Welfare of the Child contains a similar provision, which states, "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."

38 Also referred to as the "paramountcy principle".

39 *M* case para 31.

40 *M* case para 25.

41 2000 4 SA 757 (CC) para 47 (hereafter *Christian Education South Africa*).

perform any action that can infringe upon the rights of children and the obligation to protect and promote such rights entails that the state must implement rules that prevent third parties from infringing upon children's rights.⁴²

Section 7(3) provides that the rights in the Bill of Rights are subject to limitation provided for in Section 36(1)⁴³ or other provisions of the Bill of Rights. According to this section, it is clear that all the rights provided for in the Bill of Rights may be limited, and this includes children's rights. However, since the word "paramount", according to the *Oxford Dictionary*,⁴⁴ means "more important than anything else" or "supreme", there is confusion regarding the applicability of Section 36(1) in this instance. In *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*,⁴⁵ Behrtelsmann J concluded that, if there were opposing rights that needed to be weighed against each other, the rights of the child will always presume preference. Bekink and Bekink⁴⁶ concur with this stance by proposing, "any court, tribunal or forum is constitutionally obliged to determine any dispute that relates to children in such a manner that the interests of children ultimately triumph".

The Constitutional Court clarified the position in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*⁴⁷ by stating that Section 28(2) does not presume superiority over other constitutional rights. According to Langa DCJ:⁴⁸

42 Skelton and Proudlock "Interpretation, objects, application and implementation of the Children's Act"1–7; *Grootboom* para 78 stated: "... the State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by S 28". This obligation would normally be fulfilled by passing laws and creating 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 S 28.

43 Section 36(1) of the Bill of Rights states: "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 ...".

44 Soanes and Stevenson *Concise Oxford English Dictionary* 1038.

45 *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T) 177B–178C: "... ek [is] die mening toegedaan dat art 28(2) inderdaad die fundamentele reg van elke kind vestig om in die opweging van strydende partye se botsende belange – en dus ook die strydende partye se aansprake op fundamentele regte en die handhawing daarvan – in die eerste gelid te staan".

46 2004 *De Jure* 21–40.

47 2003 2 SACR 445 (CC) 470D–470E (hereafter *De Reuck*).

48 *De Reuck* 470E.

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.

According to Sachs J,⁴⁹ the standard to be applied when undertaking the limitations analysis is the nuanced and contextual one required by Section 36.

In *Christian Education South Africa*, it was contended that Section 10 of the *South African Schools Act*,⁵⁰ which prohibits corporal punishment in schools, infringed the rights of the parents of children at independent schools who, in accordance with their religious convictions, had consented to corporal punishment. The respondent argued that the infliction of corporal punishment infringed, *inter alia*, Section 28 of the Constitution.⁵¹ In reaching his judgment, Sachs J weighed the parents' rights to freedom of belief⁵² and practice of religion⁵³ against Section 28 to determine which right should be limited. Section 28(2) was not automatically preferred above the other rights in the Constitution. It was concluded that it was reasonable to limit the rights of the parents in order to protect the rights of the children.

3.2 Section 28(1)(b) of the Constitution

As indicated above, Section 28(1) affords various rights to children. For the purpose of the article, only Section 28(1)(b) is relevant and will henceforth be discussed. The first part of Section 28(1)(b) states that every child has the right to family care or parental care.

The legislature deemed it fit to distinguish between "family care" and "parental care". On numerous occasions, the courts explained the purpose of this distinction. It is

49 *Christian Education South Africa* para 31.

50 84 of 1996, S 10 states: "Prohibition of corporal punishment (1) No person may administer corporal punishment at a school to a learner. (2) Any person who contravenes S (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault."

51 *Christian Education South Africa* para 2.

52 S 15(1) of the Constitution states that: "everyone has the right to freedom of conscience, religion, thought, belief and opinion".

53 S 31(1) of the Constitution states that: "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practice their religion and use their language ...".

apparent from these cases that parental care includes the care provided by biological parents, adoptive parents, foster parents and step-parents.⁵⁴ "Family care", according to *Du Toit*,⁵⁵ includes care provided to a child by its extended family. Skweyiya AJ⁵⁶ states that by including family care or parental care in Section 28(1)(b), "the constitution recognises that family life is important to the wellbeing of all children".

Friedman *et al*⁵⁷ distinguish three purposes that this section has, which are acknowledged by the courts. The first purpose is the preservation of a healthy parent-child relationship in the family environment against unnecessary executive, administrative and legislative acts.⁵⁸ In *Patel v Minister of Home Affairs*,⁵⁹ an alien was found guilty of an offence by contravening Section 58 of the *Aliens Control Act*⁶⁰ by using a false permit. This conviction rendered the prospective father liable to arrest and removal from South Africa in terms of Section 45 of the *Aliens Control Act*.⁶¹ A warrant for his detention and removal was subsequently issued.⁶² Booysen J was of the view that the respondents, when reaching this decision, had not considered, *inter alia*, Section 28(1)(b).⁶³ The court held that the applicant was entitled to the right to be heard in respect of the issue of the warrant and an application made by him for permanent residence, and that Section 28(1)(b) had to be considered by the respondent.⁶⁴

The second purpose of this section is that care of a certain quality be given to all children.⁶⁵ Lastly, the section indicates the parties that must furnish such care. *Bannatyne v Bannatyne*⁶⁶ concurs that it is primarily the duty of the parents to care

54 *Du Toit v Minister for Welfare and Population Development* 2002 JOL 10181 (CC) para 6 (hereafter *Du Toit*); *SW v F* 1997 1 SA 796 (O) 802G-802H; *Heystek v Heystek* 2002 2 SA 754 (T) 757C-757D; Friedman (n 1) 47-3.

55 Para 18; *Jooste v Botha* 2000 2 SA 199 (T) 208D-208E (hereafter *Jooste*) notes grandparents or uncles and aunts as extended family.

56 *Du Toit* para 18.

57 Friedman *et al* "Children's Rights" 47-48.

58 *Jooste* 207I-207J.

59 2000 2 SA 343 (D) 345G-345I (hereafter *Patel*).

60 96 of 1991.

61 *Patel* 345I-345J, 346A-346C.

62 *Patel* 348F-348G.

63 *Patel* 350E-350F.

64 *Patel* 350B-350G.

65 *M* case 566H, 573E-573F.

66 2003 2 SA 363 (CC) para 24.

for their children, but that the state must create the necessary environment to enable the parents to do so. Therefore, even when the parents can care for the child, it does not mean that it leaves the state with no responsibility. In *Grootboom*,⁶⁷ the Constitutional Court stated that:

[Section 28] requires the State to take steps to ensure that children's rights are observed. In the first instance, the State does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The State reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programs.

The second part of the section determines that in cases in which family or parental care is lacking,⁶⁸ the state is obliged to ensure that children receive the appropriate care.⁶⁹ These children can be placed in state institutions, such as places of safety, or the state can pay subsidies to private non-profit organisations to provide such care. Children can also be placed in the statutory foster-care system accompanied by the payment of a grant to the foster parent.⁷⁰

Children have the right to be cared for by their parents or extended family. The state must ensure that legislation is in place to oblige the caregiver(s) to fulfil this role and to create the setting to enable the parent(s) to do so. Another obligation is the preservation of existing family structures. Appropriate alternative care must be provided by the state in the absence of family or parental care. Furthermore, the state must refrain from any action that can infringe upon the rights of the children. It is clear that the state has a mammoth responsibility in terms of Section 28.

Since the state is obliged to respect and protect the rights of children, sentencing courts must consider Sections 28(2) and 28(1)(b) during the sentencing process when the person who is sentenced is the primary caregiver of minor children. It

67 Para 75.

68 For example if the children are removed, abandoned or orphaned.

69 *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC) para 79.

70 Sloth-Nielsen "Children" 23-11.

would be unconstitutional should a court impose a sentence of imprisonment upon the primary caregiver without having regard to the rights of the offenders' children.⁷¹

4 Discussion of case law relating to the imprisonment of primary caregivers

The influence of children's rights on the sentencing process became clear when it was recognised by the Witwatersrand Local Division in *S v Kika*,⁷² the Appeal Court in *S v Howells*⁷³ and the Constitutional Court in the *M* case.

4.1 The Kika case

This matter came before the high court on automatic review. According to Cloete J, with whom Hussain J concurred, the magistrate ignored a statement made in mitigation of sentence that the accused had two children, was the sole breadwinner and that there would be no one to look after the children were she to be sent to prison.⁷⁴ Cloete J further alleged that the magistrate acted irresponsibly when passing a sentence that could result in the accused being imprisoned, without considering any steps with regard to the welfare of the children.⁷⁵ The interests of the children as protected by the Constitution were not taken into account. The judge felt it appropriate to refer to Section 28(1)(b) in this context.⁷⁶ He requested one of the deputy attorneys-general to enquire about the children of the accused. The police visited the home of the accused and, according to the grandfather of the children, the children were being looked after by a friend of the accused who was unemployed and unable to support them, as was the grandfather.⁷⁷ The court ordered, *inter alia*, that the matter be referred to the magistrate for the purposes of sentence, and further that:

If the sentence imposed will result in the imprisonment of the accused, the magistrate is directed to conduct an enquiry with a view to determining

71 Terblanche *Guide to Sentencing in South Africa* 198.

72 1998 2 SACR 428 (W) – hereafter *Kika*.

73 1999 1 SACR 675 (C) – hereafter *Howells*, affirmed on appeal in *Howells v S* 2000 JOL 6577 (SCA).

74 *Kika* 430B.

75 *Kika* 430B.

76 *Kika* 430C.

77 *Kika* 431F.

whether an order in terms of s 11 of the Child Care Act⁷⁸ should be made or otherwise to satisfy himself that proper provision is made for the welfare of the children of the accused.⁷⁹

Cloete J had regard to the second part of Section 28(1)(b), which obliges the state to ensure that children will receive appropriate care in instances in which parental care is lacking. This would, for instance, be the case were the primary caregiver to be sent to prison. Cloete J instructed the magistrate to ensure that the children would be properly cared for were the appropriate sentence to be direct imprisonment.

4.2 *The Howells case*

The appellant in this case, who was 36 years of age and had three minor sons at the time of the hearing, was convicted of fraud committed over a period of two years.⁸⁰ The appellant had defrauded her employer of approximately R100 000 by misrepresenting delivery notes.⁸¹ She was sentenced to four years' imprisonment in terms of Section 276(1)(i)⁸² of the *Criminal Procedure Act*⁸³ and a further two years' imprisonment suspended for a period of five years on certain conditions.⁸⁴ She appealed against this sentence. Her submission was that the court *a quo* had erred in terms of the sentence imposed.⁸⁵ She also raised the fact that it would not be in the best interests of her children if she received a sentence of imprisonment, as her ex-husband was not a suitable person to care for the children.⁸⁶

In order to interfere with the sentence imposed by the magistrate, Van Heerden AJ had to establish whether there was a material misdirection when the sentence was

78 *Child Care Act* 74 of 1983 S 11 states: "If it appears to any court in the course of any proceedings before that court that any child has no parent or guardian or that it is in the interest of the safety and welfare of any child that he be taken to a place of safety, that court may order that the child be taken to a place of safety and be brought as soon as may be thereafter before a children's court."

79 *Kika* 431G–431H.

80 *Howells* 675F.

81 *Howells* 675E.

82 S 276(1) of the *Criminal Procedure Act* 51 of 1977 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 – ... (i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board."

83 51 of 1977.

84 *Howells* 680H.

85 *Howells* 679C.

86 *Howells* 679E.

considered.⁸⁷ According to the magistrate, the seriousness of the crime and the interests of society justified the sentence of imprisonment.⁸⁸ It was, however, true that the appellant's personal circumstances and the interests of her minor children would best be served by a sentence of correctional supervision.⁸⁹ The judge then considered the effect of the sentence imposed by the magistrate on the children by taking Section 28(2) and 28(1)(b) into account.⁹⁰

The facts before the court indicated that should the appellant go to prison there was a real risk that the Department of Welfare and Population Development would have to ensure that the children were cared for.⁹¹ This was not the ideal situation, but the magistrate held that because of the seriousness of the crime, the interests of society outweighed the interests of the children.⁹² The rights of the children were therefore limited in terms of Section 36(1) by the other factors considered by the court. The judge agreed with the sentence the magistrate imposed on the appellant, but was also aware of the fact that the interests of the minor children had to be protected.⁹³ In order to achieve this end, Van Heerden AJ⁹⁴ made the following order:

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.

87 *Howells* 679H.

88 *Howells* 680I.

89 *Howells* 681E.

90 *Howells* 681F–681G.

91 *Howells* 682E–682F.

92 *Howells* 682F–682G.

93 *Howells* 682H.

94 *Howells* 683B–683F.

The judge applied Section 28(2) and 28(1)(b) to the sentencing process in order to determine whether the sentence of imprisonment imposed by the magistrate was to remain as it was. It was however determined that, given the seriousness of the crime, the interests of society outweighed the interests of the children. Yet, the second part of Section 28(1)(b) still required that the state in these circumstances guarantee the well-being of the children, and the judge therefore gave instructions to this effect to the Department of Welfare and Population Development. The court ensured that the children would be cared for during the time that the primary caregiver would be imprisoned. They would also have contact with their mother and the family would be provided with further assistance following her release from prison.

4.3 *The M case*

4.3.1 Background

In order to protect the identity of the children concerned, the Constitutional Court ordered that the applicant's name be kept anonymous and that she be referred to as "M". M was a 35-year-old divorced mother and had three minor boys aged approximately 8, 12 and 16 years, respectively, at the time of the hearing. On 24 February 1996, M was convicted on one count of fraud and sentenced to a fine and a suspended sentence. In June 1999, she was again charged with fraud and whilst out on bail, after having been in prison for a short period, she committed further fraud offences.

In 2002, the applicant was convicted on 38 counts of fraud and four counts of theft and was sentenced to four years' direct imprisonment. The Cape High Court granted leave to appeal against the sentence and allowed her to be released on bail. The high court held that she had been wrongfully convicted on a count of fraud involving an amount of R10 000, leaving the *quantum* of the remaining counts at R19 158,69. Subsequently, the sentence was converted to one of imprisonment under Section 276(1)(i) of the *Criminal Procedure Act*, which meant that, after serving eight months' imprisonment, the commissioner for correctional services could authorise her release under correctional supervision. M petitioned the Supreme Court of Appeal for leave

to appeal against the order of imprisonment. She based her application on the ground that the high court had failed to take into account the best interests of her children, which resulted in the imposition of a custodial sentence rather than correctional supervision. Her request was turned down and M proceeded to approach the Constitutional Court. That court enrolled her application for leave to appeal against the sentence.⁹⁵

4.3.2 *The majority judgment*

The majority judgment was delivered by Sachs J with whom six other judges concurred. According to Sachs J, the purpose of Section 28 is that the law must seek to avoid, if possible, any breakdown of family life or parental care that might threaten to place children at increased risk.⁹⁶ However, if this is inevitable, the state must minimise the consequent negative effect this will have on the children.⁹⁷ This statement is in accordance with Section 7(2), which obliges the state to protect the rights of the child. The core of his judgment with reference to the influence of Section 28(2) on the sentencing process involved the following:

Focused and informed attention needs to be given to the interest of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children 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.⁹⁸

In order to ensure that future sentencing courts give the appropriate attention to the interests of children while deciding on an appropriate sentence, Sachs J⁹⁹ provided a list of guidelines to be followed by the sentencing courts during the sentencing process in cases in which the primary caregiver of children is involved:

95 *M* case 541B–541E.

96 *M* case 554B.

97 *M* case 554B.

98 *M* case 559A–559B.

99 *M* case 560A–560F.

- (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 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.

The importance of maintaining the integrity of family care on the one hand and the duty of the state to punish criminal misconduct on the other have to be weighed by the sentencing court.¹⁰⁰ The court will first use the *Zinn* triad to determine an appropriate sentence. If there is a range of sentences that can be imposed, of which one has to be non-custodial, the court has to weigh the rights of the child as an independent factor in determining the appropriate sentence. If this is not the case, and the primary caregiver is sentenced to a term of imprisonment, the approach requires that a sentencing court see to it that the child or children will be cared for during that period of incarceration. This was the case in *Kika* and *Howells*.

Sachs J used the *Howells* case as an example to demonstrate that there is scope for a balancing analysis involving Section 28 within the current sentencing framework.¹⁰¹ It was his opinion that *Howells* differed from the approach of the sentencing courts *in casu* with regard to the character of the analysis.¹⁰² Whereas in *Howells* the implications of Section 28 were expressly weighed, *in casu* they were barely touched

100 M case 560G–561A.

101 M case 563D.

102 M case 563E.

upon; therefore, the required balancing exercise was not properly conducted.¹⁰³ As these sentencing courts did not adhere to constitutional requirements, the Constitutional Court was entitled to reconsider the appropriateness of the sentence imposed by the high court.¹⁰⁴

All the reports presented to the court indicated that M was a good parent and that the children were devoted to her. Even though some alternative family care could have been arranged were M to go to prison, this would have involved separating the children and placing them in homes far from the schools they attended and the community in which they lived.¹⁰⁵ The *curator* indicated that further imprisonment would, in all probability, impose more strain than the family could bear, with potentially devastating effects on the children.¹⁰⁶ This arrangement was clearly not in the best interests of the minor children. This led Sachs J¹⁰⁷ to conclude that:

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 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.

Sachs J accordingly upheld the appeal and replaced the high court sentence with a sentence of four years' imprisonment, which was suspended for four years on condition that M was not convicted of a dishonesty offence during that period and that she repaid her victims. In addition, she was placed under correctional supervision for three years, which included community service of ten hours per week for three years and counselling on a regular basis.¹⁰⁸

103 *M* case 563E.

104 *M* case 565C.

105 *M* case 566H.

106 *M* case 566I.

107 *M* case 573E–573F.

108 *M* case 575D–575H.

4.3.3 *The minority judgment*

Madala J delivered a dissenting opinion, which was agreed to by two other judges. Madala J stated from the onset that he agreed with the reasoning of Sachs J to the extent that it related to the best interests of the children in terms of Section 28(2).¹⁰⁹ He was however unable to support the approach followed by Sachs J, particularly on the assessment of the evidence for the purpose of determining an appropriate sentence and the sentence Sachs J proposed, and decided to set out his views separately.¹¹⁰

Madala J¹¹¹ presented his opinion on the manner in which Section 28(2) should be applied by sentencing courts during the sentencing process as follows:

... courts sentencing primary caregivers are obliged to apply a child-centered approach and not to merely treat children as a circumstance of an accused. Such an approach would undoubtedly meet the Constitutional requirements necessitated by s 28(2) of the Constitution ... 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 the dependants. This, however, does not imply that the primary caregiver will always escape imprisonment 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.

According to Madala J,¹¹² the factors that need 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 offender. In the *M* case, the primary caregiver was a recidivist who continued to commit crimes of a similar nature even whilst out on bail and the children were relatively close to their teens. It would therefore be foolish and unnecessarily sentimental to impose a non-custodial

109 *M* case 581D.

110 *M* case 576D.

111 *M* case 582H, 583E–583F.

112 *M* case 583G–583H.

sentence.¹¹³ Furthermore, whilst it must be borne in mind that the best interests of the child are of paramount importance, Section 28(2) is subject to limitations that are reasonable and justifiable in compliance with the provisions of Section 36(1).¹¹⁴

As Sachs J did, Madala J held that the Constitutional Court should not interfere with the sentence imposed by the high court, unless a clear misdirection can be established. Madala J therefore concluded that, given the protracted history of the case, the interests of the applicant's children and the fact that the court had been furnished with the necessary information, the Constitutional Court was mandated to review the sentence of the high court in order to ascertain whether any misdirection had occurred.¹¹⁵

Madala J considered the underlying principles in the *Zinn* triad. Only then did he consider the duties of sentencing courts in respect of the best interests of children. He referred to a report filed by the Department of Social Development. According to the report, a number of relatives of the children involved in this case indicated that they were prepared to take care of the children's financial needs and to assist with their daily care, as they had done this the previous time that M had been in prison.¹¹⁶

Once the best interests of the children had been considered, Madala J found that there was no justifiable reason to interfere with the sentence imposed by the high court. He was encouraged in his view by the report of the Department of Social Development, from which it was clear that the children were in fact not at risk of severe prejudice were their mother to be incarcerated.¹¹⁷ He dismissed the appeal.

In conclusion, according to Sachs J, appropriate attention needs to be given to the interests of children during the sentencing process in order to balance all the relevant factors. In order to ensure that future sentencing courts have due regard for the interests of children, he compiled guidelines that need to be followed when the convicted person is a primary caregiver. The guidelines determine that an

113 *M* case 584A–584B.

114 *M* case 584E.

115 *M* case 585F, 586A.

116 *M* case 582I, 583A.

117 *M* case 589A.

appropriate sentence must be determined by using the *Zinn* triad. If the appropriate sentence is clearly custodial, the court has the duty to ensure the well-being of the children as required by Section 28(1)(b). However, if more than one sentence seems to be appropriate, one of which is a non-custodial sentence, Section 28(2) must be weighed as an independent factor against all the other factors to determine an appropriate sentence. *In casu*, Sachs J, as a result of applying Section 28(2), replaced the sentence of imprisonment with a sentence of correctional supervision.

Madala J concurred with Sachs J regarding the application of Section 28(2) when a primary caregiver is sentenced. His judgment entailed that children should not be treated as a mere circumstance of the accused, but that the sentencing officer must go beyond the *Zinn* triad in order to meet the constitutional requirements. Madala J considered the principles in the *Zinn* triad, after which he considered the interests of the children with care. He concluded that the interests of the children were to be limited and that the sentence of imprisonment was to stand.

It will now be determined whether the inclusion of Section 28(1)(b) and 28(2) as part of the sentencing process might improve therapeutic outcomes. In order to do this, it is necessary to compare the standard criminal court procedure with a therapeutic court procedure.

5 What distinguishes a therapeutic result from a result that stems from a standard criminal court procedure?

5.1 *The difference between a standard criminal court procedure and a therapeutic court procedure*

According to Goldberg,¹¹⁸ the standard court procedure is recognised by it being an adversarial process with the emphasis on adjudication. In order to reach a judgment and decide upon a sentence, the court will interpret and apply the law, consider the *Zinn* triad by looking at the crime, the circumstances of the offender and the influence the crime had on society. As a result of the *M* case, the court will also

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consider Section 28(2) where applicable. After due consideration of all these factors, the court will come to a decision. Ultimately, this process will have a legal outcome.

A therapeutic court procedure takes the standard court procedure a step further. Therapeutic jurisprudence requires of the court to apply the law in a more therapeutic manner.¹¹⁹ It wishes to improve the operation of the law by searching for ways of minimising negative and promoting positive effects on the well-being of those affected by the law.¹²⁰ Even though therapeutic jurisprudence focuses primarily on individuals, the concept also considers the effect of the law on groups or society.¹²¹ It does not mean that the therapeutic jurisprudence approach expects the judge to become a therapist.¹²² In order to achieve a therapeutic outcome, the judge should be people-oriented as opposed to being case-oriented.¹²³ The purpose is to promote the well-being of all individuals and/or groups affected by the incident. It is expected of the judge to convey a sense of caring, compassion and respect for the dignity of all the parties involved in the court case.¹²⁴ Even in a case in which therapeutic values are subordinate to other values in making a legal decision, therapeutic jurisprudence may still offer suggestions for carrying out that decision more therapeutically and effectively.

5.2 Case law relating to the sentencing of primary caregivers: possible therapeutic outcomes

5.2.1 The Kika case

The magistrate that passed sentence in the *Kika* case disregarded the interests of the minor children even though a statement made in mitigation of sentence revealed that there was nobody to care for the children. An unemployed friend who was unable to support them looked after the children. The judge who reviewed the case was appalled that the magistrate did not even pay attention to the interests of the children as required by Section 28(1)(b). At the time that the case was heard the

119 Wexler 1999 <http://bit.ly/dn5HSZ>.

120 King *et al Non-Adversarial Justice* 26.

121 King *et al Non-Adversarial Justice* 27.

122 Goldberg *Judging for the 21st Century* 3.

123 Goldberg *Judging for the 21st Century* 5.

124 Goldberg *Judging for the 21st Century* 10.

magistrate was not even aware of the whereabouts of the children. This lack of attention prompted the judge to enquire immediately about the children to secure their well-being. He ordered that the magistrate, should the sentence of the primary caregiver be direct imprisonment, ensure that provision be made for care of the children as required by the second part of Section 28(1)(b). The application of the interests of the children to the sentencing process had the effect that even were the appropriate sentence to be direct imprisonment, there would be proper care for the children. The judge ensured that it would be the case with these children, thereby making the outcome of this case therapeutic. The well-being of the children was thus ensured.

5.2.2 *The Howells case*

In considering an appropriate sentence in the *Howells* case, Van Heerden AJ took Section 28(2) and 28(1)(b) under review. However, it turned out that the seriousness of the crime and the interests of society justified the sentence of imprisonment. The interests of the children were therefore limited. According to Sachs J, the approach followed in the *Howells* case is in accordance with the paramountcy principle, which only requires that the interests of the children who stand to be affected receive due consideration and which does not necessitate overriding all other considerations.¹²⁵

This being said, the state still had the responsibility in terms of Section 28(1)(b) to ensure that the children would be cared for during the time that the primary caregiver was incarcerated. As the father of the children was not a suitable person to care for the children, this implied that the children had to be taken into care. The judge requested the Department of Welfare and Population Development to investigate the circumstances of the three minor children. The department was further instructed to take all necessary steps to ensure that the children were properly cared for and that they remained in contact with their mother during the period of imprisonment. On her release from prison, the mother and her children had to be reunited and support had to be given to the family. Even though the mother was imprisoned, the children who were affected would be cared for during that time. The mother of the children would

125 *S v M* 2007 2 SACR 539 (CC) 562B.

also benefit from knowing that the children would be cared for, that they would visit frequently and that the family would be supported after her release from prison.

These consequences were brought about by the application of Section 28(1)(b) to the sentencing process, and are therapeutic. All the parties affected by this wrongful incident benefit from the instructions given by Van Heerden AJ. When making the legal decision regarding sentencing, Section 28(2) was limited. However, the application of the second part of Section 28(1)(b) ensured that the carrying out of that decision was still therapeutic, bearing in mind the well-being of the children.

5.2.3. *The M case*

According to Sachs J, the purpose of Section 28 is that the law must seek to avoid any breakdown of family life or parental care. In his judgment, Sachs J considered the *Zinn* triad and more than one appropriate sentence revealed itself, of which one was non-custodial. He then applied his own guidelines regarding the application of Section 28(2) in order to determine an appropriate sentence. He reviewed the care of the children of the offender should she be imprisoned. Section 28(1)(b) bestows the right on the child to appropriate alternative care when removed from the family environment. It was indicated that some alternative family care could be arranged should the mother be sent to prison, but Sachs J was of the opinion that this arrangement was not appropriate and not in the best interests of the children. Evidence indicated that M was in the best position to care for her children and that further imprisonment might be harmful to the children. The evidence prompted the judge to change the sentence of imprisonment to one of correctional supervision. As the court had to consider the rights of the offender's children during the sentencing process, this tipped the scale from a custodial to a non-custodial sentence. The result was that rights of the children were adhered to since they would be cared for by their mother.

However, it was not only the children who benefitted from this decision, but also other parties affected by the wrongful incident. In his judgment, Sachs J¹²⁶ indicated 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 than from her being sent back to prison.

The majority judgment is reminiscent of a therapeutic jurisprudence outcome.

When delivering the minority judgment, Madala J considered the principles in the *Zinn* triad and then took the interests of the children into account to determine whether there was a justifiable reason to interfere with the sentence imposed by the high court. According to a report by the Department of Social Development, relatives of the children were prepared to take care of the children, as they did on previous occasions that M had been imprisoned. The report also stated that the children were not at risk of severe prejudice, should their mother be sent to prison. Madala J decided to retain the sentence of imprisonment. The rights of the children were therefore limited in favour of a sentence of direct imprisonment.

Madala J did consider Section 28 and applied it in order to determine an appropriate sentence. He decided on the sentence of imprisonment because alternative care was available for the children. This arrangement would most certainly have relieved the state from its obligation to provide care for the children. However, viewed through a therapeutic jurisprudence lens, even in cases in which therapeutic values are subordinate to other values in making a legal decision, therapeutic jurisprudence may still offer suggestions for carrying out that decision more therapeutically and effectively. Although Madala J ensured that there was alternative care for the children, according to the report supported by Sachs J, this care was not appropriate. Madala J had regard for Section 28(1)(b), but was ignorant that the arrangement would have a negative effect on the children. He did not search for a solution that would result in a therapeutic outcome. The minority judgment is therefore indicative of a case in which anti-therapeutic results were produced.¹²⁷

126 *S v M* 2007 2 SACR 539 (CC) 575C.

127 Wexler 1999 <http://bit.ly/dn5HSZ>.

6 Conclusion

The *Zinn* triad remains the basic measure to be used by sentencing courts to determine an appropriate sentence. However, it is no longer the case that children will only be treated merely as a circumstance of the offender or as a mitigating factor when considering an appropriate sentence. In fact, even though the court has a wide discretion to decide which factors should be allowed to influence the measure of punishment, in a case in which the offender is a primary caregiver, Section 28(2) must be included as an independent factor.

Should an appropriate sentence have already revealed itself, the sentencing officer is obliged to pay attention to the rights of the child stipulated in Section 28(1)(b). However, if there is a range of sentences to be considered, the rights of the child must be placed on the scale as a separate factor to be weighed against the other factors. Section 28(2) therefore has the potential to have a direct influence on the outcome of the case. The judge will then determine an appropriate sentence. Should the sentencing court not adhere to the guidelines set by the Constitutional Court and not include the rights of the child as a factor to be considered when determining a sentence, it will be regarded as a misdirection. The court of review or appeal will then have to determine an adequate sentence by using the guidelines set by Sachs J. In this regard, the inclusion of Section 28(1)(b) and 28(2) has brought about a substantial change in the sentencing process. It is essential that the interests of children be considered when determining a sentence if the offender is the primary caregiver. Sachs J stated these sections should become a standard preoccupation of all sentencing courts in order to have proper regard for the constitutional requirements.¹²⁸ With reference to the case law discussed, it is justifiable to describe the effect of the Constitution on the South African legal system as revolutionary.¹²⁹

The inclusion of these sections in the sentencing process makes way for the possibility of a therapeutic outcome. The application of Section 28(2) can have the effect that a custodial sentence is changed to a non-custodial sentence, which would

128 *S v M* 2007 2 SACR 539 (CC) 559B.

129 Currie and De Waal *Bill of Rights Handbook* 2.

ultimately be to the advantage of the children of the offender. If the appropriate sentence is direct imprisonment, Section 28(1)(b) obliges the state to ensure that the children will receive appropriate alternative care. The application of the second part of Section 28(1)(b) can be utilised to apply the law in a more therapeutic way, as was the case in *Kika* and *Howells*. However, it is also possible that, after due consideration of Section 28(1)(b), the court will come to a decision without paying any attention to the human, emotional and psychological side of the legal process.¹³⁰ The process will have a legal outcome, but the judge will not search for ways to minimise the negative effects on the well-being of those affected by the law.¹³¹ Even though Madala J considered these sections, his application of the law without considering the possible negative consequences made the result anti-therapeutic. Thus, it cannot be concluded that the inclusion of children's rights during the sentencing process will always result in a therapeutic outcome. However, when a judge applies these sections, it can be an opportunity to create therapeutic results. Sachs J stated, "proper regard for constitutional requirements necessitates a degree of change in judicial mindset".

By including the rights of the child as part of the sentencing process, the process was developed and might in future be conducted in such a manner that all the individuals involved in a particular incident will be considered and protected.¹³² Du Plessis and Sinclair¹³³ claim that when one considers the different applicable fundamental rights, the application of a therapeutic jurisprudence approach and the protection of these rights may be viewed as mutually supportive.

130 Wexler 1999 <http://bit.ly/dn5HSZ>.

131 King *et al Non-Adversarial Justice* 26.

132 Du Plessis and Sinclair 2007 *Stell LR* 99.

133 Du Plessis and Sinclair 2007 *Stell LR* 105.

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SAJHR	South African Journal on Human Rights
Stell LR	Stellenbosch Law Review