SACHS J ABRIDGED JUDGMENT

S v M

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

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.

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) of the Criminal Procedure 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?

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. However, all the parties to this matter agreed that the classic *Zinn* triad is the paradigm from which to proceed when embarking on "the

lonely and onerous task" 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. 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."

And, as Mthiyane JA pointed out in *P*, 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. 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?

(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. In our new constitutional order, however, the scope of the best interests principle has been greatly enlarged.

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."

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*, *Sonderup* and *Fitzpatrick*, 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. 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 administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children's lives."

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). Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's rights, within which to position traditional theories on juvenile justice. 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. 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. 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.

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 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 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 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. 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 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.*" (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.

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. 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-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." (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." 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'." 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. 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. 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. In *De Reuck*, in the context of deciding whether the definition and criminalisation of child pornography was constitutional, this Court determined that 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." (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. This limitation on section 28(2) was counterbalanced by the duty of courts to weigh the consequences of the court's decision on children. 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

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. 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 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 cell phones 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.

    1. A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
    2. 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.

3. 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.
4. If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
5. 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 in family and social life. Not only do families give their members a sense of belonging, 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. 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 *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. 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* 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 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'". (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."

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 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.

45. *Howells* and *P* 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. 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 would not be on the street. 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. 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:

"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."

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.

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. 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 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."

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.

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. 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." (Footnote omitted.)

59. Correctional supervision is a multifaceted approach to sentencing comprising elements of rehabilitation, reparation and restorative justice. The South African Law 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." (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, which are prominent forms of restorative justice. 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.

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. It is aimed at enabling offenders to lead a socially responsible and crime-free life during the period of their sentence and thereafter. 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. 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 and undertakes to co-operate in meeting them.

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. 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."

62. Another advantage of correctional supervision is that it keeps open the option of restorative justice 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. Thus, our courts have observed that one of its strengths is that it rehabilitates the offender within the community, without the negative impact of prison and destruction of the family. It is geared to punish and rehabilitate the offender within the community leaving his or her work and domestic routines intact, and without the negative influences of prison.

63. As Kriegler AJA has observed, it should not be categorised as a lenient alternative to direct imprisonment. It can, depending on the circumstances, involve an exacting regime, even house arrest. 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."

64. I now turn to the forms that correctional supervision can take. A great plus is its adaptability. Conditions are flexible 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. The sentencing courts must themselves identify the specifics of the correctional supervision sentence, 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 was not desirable for it to specify the manner in which the sentence is to be carried out. It was held that the court must retain effective control over the sentence without compromising flexibility. 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, 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 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, 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. 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. It would no longer be operative if she is incarcerated. 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 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.

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 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. 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 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.

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 than from her being sent back to prison.