

Committee on the Rights of the Child Day of General Discussion 2011: Children of incarcerated parents



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Effect of incarceration

- There is much that can be said about the effects of incarceration of parents on their children
 - Psychological effects of separation
 - Practical effects of separation
 - Risk of relationship breakdown
 - Risk of children being taken into care
 - Stress on parent left behind, financial difficulties
 - Children more vulnerable to neglect/abuse
 - Difficulties in visiting
 - Children with mothers 'unnatural' and not permanent

How to minimise incarceration of parents?

- The question that must be posed is whether all the parents who are in prison really need to be there?
- Are the children's best interests considered when courts sentence parents?
- Could this be changed so that children are not left without parental care unless the risk to the community is grave?

International and regional law

- Convention on the Rights of the Child does not contain anything specific (except right to parental care)
- African Charter on the Rights and Welfare on the child has a clause specifically dedicated to 'children in prison with their mothers'

Article 30: Children of Imprisoned Mothers

- “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:

ACRWC Art 30

- (a) ensure that a non-custodial sentence will always be the first consideration 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 the holding of 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.”

South African Constitutional Court

- The SA Constitutional Court has dealt with two cases relating to the best interests of children when their primary caregivers are imprisoned.
- *S v M* (Centre for Child Law as amicus curiae) 2008 (3) SA 232 (CC)
- *MS v S* (Centre for Child Law as amicus curiae) 2011 (2) SACR 88 (CC)

S v M

- *S v M* was a ground breaking case. A woman who had been convicted of a series of frauds was facing imprisonment – actually only a brief period of about 6 months whereafter she would be considered for release to complete her sentence under correctional supervision (house arrest)

Primary care-giver

- Ms M was the primary care-giver of 3 boys. She had not been married to either of the 2 fathers and live separately from them
- The Court invited amicus curiae (friend of the court) to address the following question in written and oral argument:

Constitutional court question

- What are the duties of a sentencing court to consider the best interests of the child when considering imprisonment of a primary care-giver?

Judgment

- The Constitutional Court handed down a judgment which carefully considered best interests of the child, and how the concept should be weighed when there are competing rights (ie the community's right to be safe from crime). The majority of the court avoided the narrow thinking of 'offenders with children must not be allowed to get off lightly'. They focused on the child's rights to parental care and the best interests principle.

Sachs J

'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.'

Restorative justice

- Ms M was sentenced to a period of correctional supervision (without going to prison first). The sentence included community service and paying back to victims
- The Court noted that this type of sentence was more restorative and helped to balance the rights of the offender, her children, the victims and the community

Precedent

- The S v M judgment set a precedent which requires all South African courts to give specific consideration of the impact on the best interests of the child when sentencing a primary caregiver. If the possible imprisonment will be detrimental to the child, then the scales must tip in favour of a non-custodial sentence, unless the case so serious that that would be entirely inappropriate.

Measures to protect

- In cases where there is possible alternative to prison then the court must be satisfied that the children's needs will be met and that measures are in place to do so.
- In the *S v M* (and again in *MS v the State*) the Constitutional Court appointed a curator ad litem for the children who investigated and reported.

The good news since *S v M*

- The precedent has been applied in many South African cases (it is the most cited judgment the Centre has been involved with), it has been applied in bail proceedings as well as sentencing and it has often, though not always, resulted in a non-custodial sentence.

The not so good news

- The Constitutional Court in *S v M* used a gender neutral term and did not restrict primary caregiver to 'single primary caregiver' although Ms M was in fact single.
- In 2010 another woman, Mrs MS, also facing a short term of imprisonment for fraud, approached the Constitutional Court. The court below had said that *S v M* did not apply because she was married and lived with her husband.

MS narrows the precedent

- Centre for Child Law again entered as amicus curiae, argued to keep the precedent broad, that primary care-givers who were not 'sole' but 'main' should also be covered by *S v M*.
- Regrettably, the Constitutional Court, whilst reiterating what they had said in *S v M*, held that it applies only to single primary caregivers, and that the father in the household could look after the children. Only 1 dissent.

Conclusion

- Avoidance of remand detention and sentences of imprisonment for primary or 'main' caregivers is a preventive strategy that more countries should be encouraged to use
- The best interests of the child should be a central consideration at all stages of the system