



CONSTITUTIONAL COURT OF SOUTH AFRICA

S v The State

CCT 63/10
[2011] ZACC 7
Decided on: 29 March 2011

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 29 March 2011, the Constitutional Court delivered judgment in a case in which Mrs S, a 33 year old married mother of two minor children, was convicted and sentenced in the Regional Court in Parys on charges of forgery, uttering and fraud. On the count of fraud she was sentenced to five years' imprisonment with conditional correctional supervision in terms of section 276(1)(i) of the Criminal Procedure Act.

Both her application for leave to appeal in the sentencing court and the Supreme Court of Appeal were unsuccessful.

In her application for leave to appeal to the Constitutional Court, Mrs S, supported by the Centre for Child Law as *amicus curiae*, contended that the sentencing court and the Supreme Court of Appeal failed to adequately consider the best interests of her children during the sentencing process. It was contended that the sentencing court and the Supreme Court of Appeal failed to follow the correct approach to sentencing the mother of young children as set out by the Constitutional Court in *S v M* where the Court described the duties of a court considering a sentence of imprisonment for a "primary caregiver".

On 15 November 2010, the Constitutional Court appointed a *curator ad litem* to compile a report dealing with the effects a custodial sentence would have on the children, and what measures, if any, would need to be taken to ensure that the children are adequately cared for in that event.

In a majority judgment by Cameron J (Moseneke DCJ, Brand AJ, Froneman J, Jafta J, Moegeng J, Nkabinde J, Skweyiya J and Yacoob J concurring), the Court dismissed the

application because the sentencing court had properly balanced out the constitutional interests at stake. The Court found that although *S v M* had revolutionised the sentencing process by re-asserting the central role of the interests of young children of someone being sentenced as an independent consideration, the applicant's situation was markedly different from that of the mother in *S v M*.

The Court noted that while the mother in *S v M* was almost exclusively burdened with the care of her children, Mrs S had a co-resident parent, in the form of Mr S. He was willing to care for the children during her incarceration. In *S v M*, information about the position of the young children and their care during their mother's incarceration was entirely lacking during the sentencing process. By contrast, the Court that sentenced Mrs S had at its disposal, and carefully considered, an informative probation officer report which included information about the future care of the children. To mitigate against the possible hardship arising out of Mrs S's incarceration, the Court directed the National Commissioner for Correctional Services appoint a social worker to visit Mrs S's children at least once every month during her incarceration.

In a minority judgment, Khampepe J held that both the sentencing court and the Supreme Court of Appeal failed to fully investigate the quality of alternative care the children would receive if Mrs S were to be incarcerated. Khampepe J concluded that: the children will be adversely affected by the incarceration of their mother; that there are a range of possible sentencing options; that Mr S would not be a suitable alternative caregiver; that the matter was indistinguishable from the *S v M* and therefore that Mrs S should be placed under correctional supervision.