The impact of children's rights on criminal justice

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Beyond *S v M*: Children of perpetrators who are primary caregivers

South Africa's criminal justice system has traditionally provided protection for the rights of three categories of persons, namely perpetrators, victims and witnesses – both adults and children. In recent years, however, there has been increasing jurisprudential recognition of a fourth category of affected persons whose rights and interests need to be independently protected. This category is the children of perpetrators (see *S v Kika* 1998 (2) SACR 428 (W); *S v Howells* 1999 (1) SACR 675 (C) and *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC)). The majority of these cases and subsequent academic literature has dealt almost exclusively with the upholding of children's rights within the context of sentencing primary caregivers (D Erasmus '"There is something you are missing: What about the children?": Separating the rights of children from those of their caregivers' (2011) 25 *SAPL* 124; A Skelton 'Severing the umbilical cord: A subtle jurisprudential shift regarding children and their primary caregivers' (2008) 1 *CCR* 351; JD Mujuzi 'Punishment in the eyes of the Constitutional Court of South Africa: The relationship between punishment and the rights of an offender in the sentencing of primary caregivers of children' (2011) 24 *SACJ* 164). There is an emerging judicial trend towards considering children's rights in all instances where a court exercises a discretion that will ultimately curtail the right to parental care. It is this trend that the subsequent case descriptions seek to highlight.

Bail

The first case in which children's rights, particularly those enshrined in s 28(1)*(b)* and 28(2) of the Constitution have been recognised is *S v Peterson* 2008 (2) SACR 353 (C). The appellant – who stood accused of having her husband, Taliep Peterson, murdered – appealed against the refusal of the Wynberg regional court to grant her application for bail pursuant to s 60(11)*(a)* of the Criminal Procedure Act. This involved a schedule 6 offence and accordingly the accused was required to adduce

evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit her release. Among many new facts relied on in her second application, one allegation was that the appellant was the primary caregiver of the couple's minor daughter (Z) (at para 47). The appellant argued that the court was thus enjoined to consider the interests of her child particularly in light of s 28(1)*(b)* – the right of a child to parental care – read with s 28(2) of the Constitution.

The court, in making its determination of whether exceptional circumstances existed justifying the release of the appellant on bail, correctly held *inter alia* that where the special circumstances relied on include the constitutionally protected interests of a minor child, the court must take cognisance of the child's right to family care or parental care, or to appropriate alternative care when removed from the family. Moreover, that in any decision regarding bail for a primary caregiver which necessarily impacts upon a child, sight must not be lost that the child's best interests are of paramount importance (at para 63). The court also correctly made the observation that such interests do not simply override all other legitimate interests. Rather they must be carefully balanced and weighed in light of the ostensibly conflicting interests (at para 73). Central reliance was placed on the principles enunciated in *S v M* (above) (at paras 64–65).

Finding in principle that the fact that an accused is a primary caregiver may constitute exceptional circumstances pursuant to s 60(11)*(a)* of the Criminal Procedure Act, the court turned to the facts of the case. The court found that 'it seems clear that, at all relevant times the role of primary caregiver was shared by Nanny, the housekeeper, and the deceased' (at para 74). Finding that the appellant was not the primary caregiver, the court nevertheless addressed the question of the child's care. It held as follows (at para 76):

> 'I am quite satisfied that she is presently in excellent hands, under the supervision of persons who love and care for her and have voluntarily undertaken this duty since the appellant's incarceration, if not already from the time of the death of the deceased. [Z] is, in my view, in more than appropriate alternative care, as envisaged by s 28(1)*(b)* of the Constitution.'

Despite the appeal being dismissed on the facts of this particular matter, the court found that in appropriate situations the fact that a person is a primary caregiver may qualify as an exceptional circumstance justifying his or her release on bail as envisaged in s 60(11)*(a)* of the Criminal Procedure Act. It also provides that, where a person is not a primary caregiver or that his or her release is not justified, appropriate steps must nevertheless be taken to ensure that the child is appropriately cared for.

Appeal against sentence

In *S v EB* 2010 (2) SACR 524 (SCA) the Supreme Court of Appeal had to determine whether a 'fair sentence' imposed on the appellant – who was a mother of two minor children – needed to be interfered with where there had been a change of circumstances regarding the care of her children. The appellant (who was convicted on her guilty plea of 67 counts of fraud) was sentenced to 5 years' imprisonment, 2 of which were suspended (at paras 1-2). In her application for leave to appeal and to adduce further evidence the appellant alleged *inter alia* that whilst a custodial sentence was appropriate at the time of sentencing such sentence was no longer appropriate given that her mother (who was to care for the children) had passed away (at para 2). Moreover, that in order to make up for lost income stemming from her incarceration her husband had to work extra hours resulting in him being unable to appropriately care for the children (at para 2). The appellant also sought to introduce the evidence of a psychologist who put forward that '[t]he family is in desperate need for a mother to take charge again of the emotional and physical wellbeing of the family' (at para 2).

The court began by elaborating on the requirements for an application to adduce further evidence. In this vein it reaffirmed the requirements set by it in the matter of *S v De Jager* 1965 (2) SA 612 (A) at 613A, which provides that (1) there should be some reasonably sufficient explanation why the evidence was not led at the trial; (2) there is a *prima facie* likelihood the evidence is true; and (3) the evidence should be materially relevant to the outcome of the trial (at para 5). Moreover, the general rule is that an appeal court will decide the judgment appealed from on the facts in existence at the time it was given (at para 5). However where 'exceptional and peculiar circumstances' are present a court may deviate from this general rule (at para 5). The court in this instance explicitly refrains from defining 'exceptional and peculiar circumstances', finding that they should be determined on a case-by-case basis (at para 5). The court considered whether the evidence sought to be adduced was materially relevant. It held that it was not, as the unchallenged evidence of the probation officer led in the sentencing court provided that on the appellant's own version her 'husband would be responsible for looking after the children' as her 'mother was apparently very ill' and was therefore not in a position to care for the children (at para 10).

However, despite coming to this conclusion the court held that even if the evidence was accepted to be true, it would have made no difference to the outcome (at para 10). This was due to the requirements that the evidence must be 'materially relevant to the outcome of the trial' and there must be 'exceptional and peculiar circumstances'.

The court held that the *dicta* of *S v M*, particularly at para 36-39, were instructive in relation to the 'materially relevant to the outcome of the trial' requirement. It found that on the facts of the case the only appropriate sentence in accordance with the *Zinn* triad was that of a period of direct imprisonment (at para 12). However, the court considered that being a primary caregiver may in appropriate circumstances justify interfering with a sentence on appeal, owing to a change of circumstance. On the facts of this case the evidence was 'not materially relevant, as it would not result in a non-custodial sentence being substituted' (at para 12).

In dealing with the question of whether 'exceptional and peculiar circumstances' existed justifying reception of the evidence at appeal stage the court found that although it dismissed the appeal in this matter such evidence could be admitted in suitable matters. The court expressly noted that '[t]he views expressed in this judgment are in no way a bar to that procedure being followed, as some additional and different considerations apply and the enquiry is not the same as that in the present appeal' (at para 15). The inclusion of this caveat is significant. It provides an avenue for primary caregivers to have their terms of imprisonment re-evaluated *alternatively* to have appropriate orders made, such as those made in *S v Howells* (above) and *Noorman v S* [2011] ZAWCHC 120 (see below), where there is a change in circumstances pertaining to the care of their minor children arising after sentence. This being said, from the court's application of *S v M* (above), it is highly doubtful that a change in circumstances regarding care of minor children would justify the conversion of a custodial sentence which meets the threshold requirement elaborated in *S v M* (above) into a non-custodial sentence.

Substantial and compelling circumstances

The last case in which a nuanced application of children's rights and the principles elaborated upon in *S v M* (above) occurred within the context of courts exercising their judicial discretion is that of the yet to be reported judgment of *Noorman v S* [2011] ZAWCHC 120. The matter arose out of an appeal from the regional court against the sentence of the appellant who was convicted of murdering her abusive 'common law' husband. Having convicted her of murder the regional court was enjoined by the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 ('Minimum Sentence Act') to impose a sentence of 15 years' imprisonment, unless substantial and compelling reasons existed justifying a departure. The regional magistrate, after considering a variety of factors taken cumulatively (namely appellant's age, that she was a first offender and a primary caregiver) found that

such substantial and compelling reasons existed. These, the magistrate contended, were insufficient to merit a substantial departure from the prescribed minimum, resulting in 13 years' direct imprisonment considered to be reasonable in the circumstances (at para 16).

The central question on appeal was whether or not any reason existed justifying interference with the sentence imposed by the magistrate (at para 19). The court found that on a correct interpretation of the *dicta* in *S v Malgas* 2001 (1) SACR 469 (SCA) all factors are relevant in determining whether substantial and compelling circumstances exist (at para 23). This led the court to pose the question: 'What, however, do we make of the case of *S v M* in the context of this matter where the appellant was the primary caregiver, indeed the only remaining parent of a very young child, following the murder by the appellant of the child's father?' (at para 25). The court, after a restatement of *S v M*, found that the magistrate did not have sufficient regard to the child (at paras 25-30). In particular, no reference was made in the magistrate's reasons to s 28 of the Constitution. Nor was there 'any trace of "an informed and nuanced weighting of all the interlinking factors of relevance to the sentencing process" and indicative of a changed judicial mindset consonant with an awareness of what an appropriate sentence will be in respect of the appellant if regard is had to the fact that she was the primary caregiver' (at para 30). The court, although conceding that the provisions of s 28 weigh in as an independent factor only if there is more than one appropriate sentence on the *Zinn* approach (at para 39), correctly found that this did not automatically exclude consideration of the child's right to parental care (at para 47), particularly in light of the *dicta* of *S v Malgas* (above) read with *S v Vilakazi* 2009 (1) SACR 552 (SCA). Whilst on the facts of the case imprisonment was the only option, the failure by the magistrate to conduct an enquiry envisaged in *S v M* was tantamount to a misdirection warranting the court to interfere with the sentence (at paras 47–49).

The court found that, cumulatively, substantial and compelling circumstances existed warranting a departure from the prescribed minimum sentence of 15 years (at para 49). The court then turned to 'what the duration thereof should be, bearing in mind also the provisions of s 28 of the Constitution' (at para 51). Considering the conflicting interests at play, those being the child's right to parental care and the state's duty to punish criminal misconduct (at para 38), the court replaced the original sentence of 13 years' imprisonment with one of 4 years' imprisonment, coupled with an order that the Department of Social Development investigate the matter to ensure that the child is cared for during the appellant's incarceration (at para 52).

Child offenders

Media access in child justice court proceedings

In 2010 Eugene Terreblanche – the leader of the Afrikaner Weerstandsbeweging ('AWB') – was found murdered on his farm on the outskirts of Ventersdorp. The murder sparked immense national and international interest with the media speculating on the motive behind it. Shortly after the murder two people were arrested, one of whom was a 15 year old boy who had worked on the Terreblanche's farm as a stable hand. Pursuant to s 63(2) of the Child Justice Act 75 of 2008 proceedings against both accused were commenced in the Child Justice Court, Ventersdorp. Section 63(5) of the Child Justice Act explicitly provides that '[n]o person may be present at any sitting of a child justice court, unless his or her presence is necessary … or the presiding officer has granted him or her permission to be present'. The default position is thus that proceedings in a child justice court are to be held *in camera* unless the presiding officer dictates otherwise. Pursuant to this section Media 24 brought an application requesting access to the proceedings.

The case is reported as *Media 24 Limited v National Prosecuting Authority* 2011 (2) SACR 321 (GNP). The main contentions of the applicants were that the matter was of 'profound public interest', that by holding the proceedings *in camera* the right to freedom to receive and impart information would be significantly limited, and further would undermine the principle of open justice. The *amicus curiae* (Media Monitoring Africa) contended to the contrary that freedom of expression and the vital function that the media fulfil in promoting the public's right to receive information, protecting the principle of open justice and the constitutional values of openness, responsiveness and accountability were not the only considerations relevant to an application pursuant to s 63(5). The child's right to privacy, dignity, a fair trial and to have his or her best interests considered paramount were equally important (at para 10). The *amicus* further argued that the court's discretion should only be exercised in extraordinary and exceptional circumstances (at para 10).

The court accepted at the outset that as a general rule, absent exceptional and extraordinary circumstances, the rights of the child dictate that the public and media should be excluded from proceedings (at paras 11-14). The court held that exceptional or extraordinary circumstances mean something out of the ordinary or unusual (at para 13). It further held that such exceptional circumstances must be determined on a case-by-case basis (at para 13). The court confirmed that s 63(5) also expressly endows a court with a discretion that must be exercised with reference to the provisions of s 39 of the Constitution

(at para 14), lending credence to the notion that the media and/or public may be allowed access in exceptional and extraordinary circumstances. In exercising this discretion, the court must discern what is in the public interest and what is interesting to the public. Here the court cited with approval the English case *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417 (CA).

The court accordingly found that the public's right to access information that engages the public interest and the right to open justice on the one hand, and the child's rights to privacy, dignity, a fair trial and the best interests consideration on the other, must be carefully weighed in accordance with the precepts of s 36 of the Constitution (at para 21). The court found on the facts of the case, in particular the myth that the death of Terreblanche was somehow linked to Julius Malema singing the song 'Kill the boer' 'gravitated to the presence of exceptional circumstances' (at para 24). The court accordingly found that on the particular facts of this case, the public's right of freedom to receive and impart information outweighed that of the minor accused's rights (at para 26). However, the court found that the rights which the media represent must still be balanced against the rights of the child, even where such exceptional circumstances are present (at para 26). The court accordingly made an order that no members of the public may gain entry to the proceedings. Instead the court ordered that select members of the media may follow the proceedings, however that they are to remain seated in an adjacent room and watch the proceedings through a closed circuit television system. Moreover, that when the accused testifies, his face is to be obscured so as to ensure his anonymity.

The case is significant in that it illustrates the lengths the courts will go to in ensuring that children's rights are protected in criminal justice. It is illustrative of the 'change in judicial mindset' that is needed when dealing with issues pertaining to child justice (*S v M* (above)).

Sentencing children and the constitutional injunction of s 28(1)*(g)*

S v BF 2012 (1) SACR 298 (SCA)

The recent case of *S v BF* is important for two reasons; firstly, in its restatement of the sentencing principles applicable to child offenders it correctly comes to the conclusion that cumulative sentences must be viewed in light of the constitutional injunction of s 28(1)*(g)* of the Constitution. Secondly, and more importantly, the judgment leaves an impression that the Minimum Sentence Act still finds application for 16 and 17 year olds, which is patently incorrect as it evidenced below.

The salient facts of the case are as follows: On 6 July 1999, the appellant – then 14 years of age – broke into the premises of the

complainant with the intention to commit theft (at para 3). During the course of the crime, the occupants of the house were threatened with a knife and firearm, and the appellant raped E, a 15-year-old girl and his co-accused raped E as well as L, an 18-year-old girl (at para 3). The appellant was sentenced in 2000 to an effective 25 years' imprisonment. The only question on appeal identified by the court was *inter alia* whether or not the court *a quo* had misdirected itself in imposing a lengthy custodial sentence on a child offender who was 14 years and 10 months old at the time of the commission of the offences (at para 2).

In interrogating the sentence of the appellant the court found that the court *a quo* had misdirected itself. It did so, firstly, in overlooking the provisions of s 51(6) of the Minimum Sentence Act, as the appellant was 14 years and 10 months old at the time of the commission of the offence, and not as the court *a quo* had repeatedly mentioned, 16 years of age. The court concluded that '[t]his fact alone should have prevented the trial court from applying the provisions of the minimum sentence legislation. It is a material misdirection; the appellant could not have been a borderline case' (at para 9). Secondly, the court *a quo* had failed to attach the appropriate weight to the constitutional injunction contained in s 28(1)*(g)* of the Constitution that a child should not be detained except as a measure of last resort, in which case only for the shortest appropriate period of time, and had overstated the interests of society and the seriousness of the offence (at paras 10-13). The court concluded that the sentence imposed was shockingly and disturbingly inappropriate, particularly the cumulative effect thereof, justifying an interference with the sentence by the court (par 14). The court accordingly set aside the sentences of the appellant and replaced them with 10 years' imprisonment on count one and twelve years' imprisonment on count two, both of which were to run concurrently (at para 16).

Whilst the court's application of s 28(1)*(g)* of the Constitution cannot be faulted, it is disconcerting that the Supreme Court of Appeal judgment leaves the incorrect impression that minimum sentences are still applicable to children aged 16 and 17 years. Although the facts of the matter relate to a 14 year old, and not a child under the age of 18 years but over the age of 16 years, it is nevertheless expected that a court subsequently dealing with an appeal from such sentence will take into account a Constitutional Court judgment that has declared the relevant law unconstitutional.

The Constitutional Court judgment in question was *Centre for Child Law v Minister of Justice* 2009 (2) SACR 477 (CC), in which the court held that s 51(1) and (2) of the Minimum Sentence Act were unconstitutional insofar as they related to children who commit an offence whilst under

the age of eighteen (see S Terblanche 'Recent cases: Sentencing' (2010) 23 *SACJ* 162-163). It is perplexing that *S v BF* makes no reference to the Constitutional Court judgment, which is surely relevant to any appeal of a child sentenced to a minimum sentence.

S v CKM & 2 Similar Cases (Centre for Child Law as Amicus Curiae) unreported, available at www.centreforchildlaw.co.za

Does the constitutional injunction provided for in s 28(1)*(g)* of the Constitution have an impact on residential sentences other than those of imprisonment? This was one of the questions posed in the recent unreported case of *S v CKM*.

The salient facts of the three cases appear from the judgment of the court (Bertelsmann and Tolmay JJ). The first case involved a child anonymised as CKM. CKM appeared before the Mankweng Magistrate's Court for the first time on 9 September 2009. He was charged together with two others with assault, for allegedly having hit one FT on 5 September 2009, with no allegations of injuries sustained. CKM was fourteen years old at the time. He pleaded guilty and was convicted as charged. The magistrate sentenced CKM to detention in a reform school. The magistrate decided such sentence on the strength of the recommendation in the probation officer's report, which was in turn based on CKM failure to successfully complete a diversion programme. CKM lacked parental supervision and had developed into a difficult child. CKM had no previous convictions. The second case involved a child anonymised as IMM. IMM appeared before the same magistrate as CKM on a charge of assault with the intent to commit grievous bodily harm. IMM was convicted and sentenced to a reform school. The last case involved a child anonymised as FTM. FTM appeared before the same magistrate as CKM and IMM on a charge of housebreaking with the intent to commit an unknown crime. Similarly to CKM the magistrate, on the strength of the probation officer's report, sentenced him to a reform school. The recommendations were based on FTMs failure to successfully complete a diversion programme and that he was a 'troubled and troublesome child'. All three children were sent to the Ethokomala Reform School in Mpumalanga, from which they allegedly escaped repeatedly and to which they were allegedly re-admitted after being apprehended from time to time. On the last occasion they were apprehended after having escaped and were taken to the Polokwane Secure Care Centre, an awaiting trial facility. They were assigned to this centre administratively, without a court order and without having being charged with any offence in respect of which they were awaiting trial. Their transfer to the centre was arranged by the probation officer responsible for the pre-sentencing reports.

The judgment of the high court dealt with three issues, namely the retrospectivity of the Child Justice Act, reform schools as a sentencing option and placement of children administratively in secure care facilities. Of importance to this case comment is the second issue – reform schools as a sentencing option.

The court sought to engage with the suitability or otherwise of child and youth care centres (as reform schools are now called) as a sentencing option in the specific cases before it. The court's analysis is inadvertently cross-cutting: dealing with both a magistrate's decision in imposing such sentence and the probation officers' duties during the compiling of their pre-sentence reports. It is worthwhile to note that probation officers have an important part to play in sentencing child offenders. They work at the coalface, having an intimate knowledge of the social factors relevant to the matter at hand. This results in the courts placing considerable weight on their reports in order to make determinations of just and equitable sentences. In its analysis of the sentence imposed on the children the court held that a commonality existed between the sentencing of a child to a child and youth care centre (reform school) and to a correctional services centre (prison). It held as follows (at para 14):

> 'It is obvious that the referral to a reform school, which amounts to an involuntary, compulsory admission to a facility where the convicted child is obliged to participate in various programs, represents a serious invasion of the child's rights to freedom of movement and decision making. Such a sentence should therefore not be imposed lightly or without compelling reasons.'

In light of this reasoning the court found that when such a sentence is considered a court must be guided by the principles of sentencing, particularly that a child has the right not to be detained except as a measure of last resort, in which case the child may only be detained for the shortest appropriate period of time (at para 30; see also *Centre for Child Law v Minister of Justice* (above)). On the facts of the particular cases the court found that the sentences were wholly inappropriate and set them aside. It follows from the court's reasoning that probation officers are enjoined to consider all alternatives to detention and place such alternatives before a court. Custodial sentences (whether in correctional services centres or child and youth care centres) should be recommended only as a last resort and, where appropriate, for the shortest period of time. The recommendation of a custodial sentence should further be reserved for child offenders who commit the most serious of crimes and even then only when facts justify such recommendations. Detention should never be used as a mechanism of simply restoring structure, discipline or education to a 'troubled or troublesome' child who has had the misfortune of being the product

of a poor social upbringing or who lacks adequate parental control. Rather, such children should be dealt with as children in need of care and protection (see s 50 of the Child Justice Act: Referral of children in need of care and protection to children's court) and should diverted from the criminal justice system.

Child victims and witnesses

The last segment of this case review seeks to explore the impact children's rights have had, within the criminal justice system, on victims and witnesses. A case in which the provisions of the Criminal Procedure Act dealing with child victims and witnesses came to the fore is that of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC).

The case, which originated in the North Gauteng High Court as *S v Mokoena; S v Phaswane* 2008 (2) SACR 216 (T), dealt with the constitutionality of ss 153(3) and (5) (dealing with the holding of criminal proceedings *in camera*), 158(5) (providing for a witness to give evidence by means of closed circuit television or similar electronic media), 164(1) (dealing with the giving of evidence without taking an oath or making an affirmation), and 170A(1) and (7) (providing for the appointment of intermediaries to assist children while testifying). In the high court, Bertelsmann J found that all the aforementioned sections were inconsistent with s 28(2) of the Constitution, accordingly declaring them unconstitutional. He further made a host of ancillary orders in which he sought to cure the deficiencies identified in the judgment. These orders are not canvassed in this note. Suffice to say that the Constitutional Court disagreed with such orders (at paras 175-201), and disagreed that the provisions were unconstitutional.

On the question of the constitutionality of s 170A(1) of the Criminal Procedure Act, the Constitutional Court was of the view that the object of this subsection is to protect child victims and witnesses from undergoing undue mental stress and suffering that may be caused by testifying in court. The phrase 'undue mental stress and suffering', which is not defined in the Criminal Procedure Act, has been given a narrow interpretation by some courts (see *S v Stefaans* 1999 (1) SACR 182 (C)), but the courts have come to accept that the giving of evidence in sexual offence cases exposes complainants to further trauma. The objective of preventing this trauma is consistent with the principle that the best interests of children are of paramount importance in criminal trials involving child witnesses, and therefore consistent with s 28(2) of the Constitution (at paras 95, 98). It is important to note that the court interpreted s 170A(1) as not requiring that the child should first be exposed to undue mental stress or suffering before an

intermediary may be appointed. Such an interpretation would be at odds with the objectives of both the subsection and s 28(2), and also of a 3(1) of the UN Convention on the Rights of the Child (at para 110). The Constitutional Court found that the correct procedure would be assessed prior to trial and where appropriate the prosecutor must apply for an intermediary to be appointed. This is the procedure that should be followed in all matters involving child complainants in sexual offence cases, and 'should become a standard pre-occupation of all criminal courts dealing with child complainants in all sexual offence cases' (at para 112). In applying the best interests principle, judicial officers must consider how the child's rights and interests are, or will be, affected if the child testifies without the aid of an intermediary. If the prosecutor does not raise the matter, the judicial officer must, of his or her own accord, raise the need for an intermediary to assist the child in giving evidence (at para 113). According to para 19(e) of the UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (ESOC Res 2005/20 of 22 July 2005), a court is obliged to draw the attention of the parent or guardian of the child victim to the availability of protective measures.

Moreover, the enquiry into the need for an intermediary should not be approached on the basis of a civil trial which attracts a burden of proof, as was done in *S v F* 1999 (1) SACR 571 (C). It is an enquiry which is conducted on behalf of the interests of a person who is not a party to the proceedings but who holds constitutional rights (i e, the child). What is required of the judicial officer is to consider whether, on the evidence presented and viewed in the light of the objectives of the Constitution and of s 170A(1), it is in the best interests of the child that an intermediary be appointed (paras 114-115). Section 170A(1) gives judicial officers a discretion to appoint intermediaries. The Constitutional Court was of the view that such discretion allows for individualised justice, and if s 170A(1) fails to meet the objective of s 28(2) of the Constitution, the fault lies not in the provision itself but in the manner in which it is interpreted and implemented. The solution is to make judicial officers and prosecutors aware of their constitutional obligations to ensure that the best interests of children are of paramount importance in criminal trials involving child complainants, so that they are protected as required by both the Constitution and the Criminal Procedure Act (at para 131).

Section 153(3) provides that criminal proceedings may be held *in camera* where a child is the complainant in a sexual offence case, upon the request of his or her parent or guardian. The word 'may' indicates that the judicial officer has a discretion to order that the public be excluded from the proceedings. The Constitutional Court held that it is desirable that the question whether proceedings should

be held *in camera* should be answered on a case-by-case basis. This gives force to the argument that presiding officers should have a discretion to assess whether, having regard to the nature of the evidence to be given and the age of the child, the proceedings should be held *in camera* or whether the child should testify *in camera*. The decision whether proceedings should be held *in camera* involves the weighing up of competing interests, namely, on the one hand, the right to open justice, and on the other, the protection of children and the identification of witnesses. According to the Court discretion is a tool which enables courts to mediate between these competing interests (at paras 146, 150). All of these considerations led to the Court's finding that ss 153(3) and (5) are not unconstitutional.

Sections 158(5) and 170A(7) provide that the court must provide reasons for refusing an application by the prosecutor for, on the one hand, testimony to be given by means of closed circuit television or similar electronic media (s 158) and, on the other, for the appointment of an intermediary (s 170). The subsections provide that reasons for such a refusal must be given in the case of child complainants below the age of 14 years. In the high court's view these subsections discriminated between children under the age of 14 years and children above that age.

To construe the respective subsections as not requiring a court to furnish reasons for refusing the respective applications in the case of children over the age of 14 years, as the high court did would, according to the Constitutional Court, render these subsections inconsistent with the Constitution (at para 158). Such a construction, however, ignores the principle of constitutional interpretation which requires courts, where possible, to construe a statute in a manner that promotes the Bill of Rights (at para 156). Therefore, a construction which will bring the provisions within constitutional bounds must be preferred to one which will not. The question then arose as to whether the relevant subsections are capable of being read in a manner consistent with the Constitution. The Constitutional Court held that the answer to this question is in the affirmative (at para 159).

The fact that these subsections require the court to give reasons for refusing an application for the use of closed circuit television or the appointment of an intermediary, in the case of a child under the age of 14 years, does not in itself exclude the need for reasons in the case of a refusal in respect of children over that age. According to the Constitutional Court the issue is one of emphasis rather than one of exclusion (at para 160). The subsections recognise the fact that younger children may need more protection than older children. They also recognise that vulnerability decreases with age. A proper

constitutional construction would be that a court is required to give reasons for the refusal of an application, in the case of children under 14 years, immediately upon refusal, and in the case of older children, at a later stage or at the end of the case (at para 161). Therefore the Constitutional Court found ss 158(5) and 170A(7) not to be unconstitutional.

Section 164(1) allows a court to allow a person, who does not understand the nature or the importance of an oath or a solemn affirmation, to give evidence without taking an oath or making an affirmation. In such a case the presiding officer is required to admonish the person to speak the truth. The high court was troubled by this requirement because it found that children may not necessarily be able to understand the concepts of truth and falsehood, but may nevertheless be perfectly capable of relating what happened to them. Yet, if they cannot differentiate between truth and falsehood, their testimony would be excluded.

In the view of the Constitutional Court, understanding what it means to tell the truth gives the assurance that the evidence can be relied upon. The evidence of a child who does not understand what it means to tell the truth is not reliable, and admitting such evidence would undermine the accused's right to a fair trial (at para 166). The risk of a conviction based on unreliable evidence is too great to permit the evidence of a child who does not understand what it means to tell the truth. The Court also acknowledged that the questioning of a child requires special skills, and that such skills may be employed to convey to a child what it means to speak the truth. The solution lies in the proper questioning of children, particularly younger children (at para 167). There are judicial officers who have acquired the skill of questioning children, but some have not. This illustrates the importance of using intermediaries where young children are called upon to testify. Properly trained intermediaries are key to ensuring the fairness of a trial (at para 168). The Constitutional Court consequently found that the requirement that persons who do not make an oath or affirmation, be admonished to speak the truth, is not in violation of s 28(2) of the Constitution.

The Constitutional Court handed down a supervisory order in this matter which required the Minister of Justice and Constitutional Development to provide a list of regional courts with an indication of the current readiness of each court regarding intermediaries, separate waiting rooms and CCTV equipment, and indicate any needs. Where needs were remaining, the Minister was required to indicate what steps were being taken to rectify this. The Minister subsequently complied with this order.