**Opinion piece by Professor Ann Skelton**

**Children in prison with their mothers – South Africa leading the way**

This week the Department of Social Development brought home a three-year-old boy who had been living in a Mozambican prison with his mother, who was convicted of drug trafficking. A child in prison is, at first glance, anathema; a prison is no place for a child to grow up and to play. However, the early months and years of bonding between mother and child are important, and most legal systems recognise this by allowing for a child born in prison to remain with the mother for a limited time.

South Africa’s own law provides for children to remain with their mothers for two years – but this is not cast in stone. If a mother is to be released within a few months after the two-year cut-off date, it may be in the child’s best interests not to impose any separation at all. South Africa is a world leader in legal developments that will ensure that consideration be given to not send primary caregivers to prison at all. The precedent was set in the 2007 Constitutional Court case of S v M, where the University of Pretoria’s Centre for Child Law made submissions as a ‘friend of the court’.

The Court decided that, when a sentencing court is considering sending the primary caregiver of children to prison, they must stop and consider the impact that the caregiver’s imprisonment will have on the children. People’s kneejerk reaction to this tends to be: ‘But the caregiver should have known that his or her actions could result in a prison sentence. How can they “get off” just because he or she is a parent?’ Indeed, that was argued by the state at the time, but the court was having none of it. They said that the state’s argument was focussing on the wrong thing: The child is innocent of the crime, and yet will suffer if the parent goes to prison. However, the case of S v M did not result in a rule that says caregivers will never go to prison, only that the court must seriously consider the impact of imprisonment and, if possible, keep the offender out of prison by passing a non-prison sentence such as correctional supervision. If, after giving proper consideration to all the options, imprisonment remains the only appropriate sentence, the court must also be sure of how the children will be cared for in the caregiver’s absence.

The Constitutional Court relied partly on the African Charter on the Rights and Welfare of the Child – section 30 contains clauses encouraging the use of alternative sentences, rather than prison, when it comes to mothers of children. The UN Convention on the Rights of the Child does not contain such a section, but following S v M, the UN Committee on the Rights of the Child held a special day of discussion on ‘children of imprisoned parents’ at which the case was featured strongly. Since then, the idea that a sentencing court must consider the impact of the sentence of caregivers on their children has been included in several UN resolutions and the Bangkok Rules for the treatment of women prisoners. The African Committee of Experts on the Rights and Welfare of the Child issued its first General Comment on the subject, which quotes Justice Albie Sachs’ famous words from the S v M judgment: ‘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.’

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