CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 210/21

In the matter between:

CENTRE FOR CHILD LAW	Applicant
and	
DIRECTOR OF PUBLIC PROSECUTIONS, JOHANNESBURG	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MINISTER OF SOCIAL DEVELOPMENT	Third Respondent
MINISTER OF HEALTH	Fourth Respondent
MINISTER OF BASIC EDUCATION	Fifth Respondent
MINISTER OF POLICE	Sixth Respondent

Neutral citation:	*Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* [2022] ZACC 35
Coram:	Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mlambo AJ, Mhlantla J, Theron J, Tshiqi J and Unterhalter AJ
Judgment:	Mhlantla J (unanimous)
Heard on:	3 March 2022
Decided on:	29 September 2022

Summary: Drugs and Drug Trafficking Act 140 of 1992 — constitutionality of section 4(b) — order of constitutional invalidity confirmed

Section 28 of the Constitution — best interests of the child — criminalisation of the use and/or possession of cannabis by a child — less restrictive means

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ORDER

On application for confirmation of the order of constitutional invalidity granted by the High Court of South Africa, Gauteng Local Division, Johannesburg:

1. The order of the High Court, declaring section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 to be inconsistent with the Constitution and invalid to the extent that it criminalises the use and/or possession of cannabis by a child, is confirmed.
2. The operation of the order in paragraph 1 is suspended for a period of 24 months to enable Parliament to finalise the legislative reform process.
3. During the period of suspension referred to in paragraph 2, no child may be arrested and/or prosecuted and/or diverted for contravening section 4(b) of the Drugs and Drug Trafficking Act insofar as it criminalises the use and/or possession of cannabis by a child.
4. A child apprehended for the use and/or possession of cannabis may be referred to civil processes, including those found in the Children's Act 38 of 2005 and the Prevention of and Treatment for Substance Abuse Act 70 of 2008.
5. Where a court has convicted a child of a contravention of section 4(b) of the Drugs and Drug Trafficking Act for the use and/or possession of cannabis, the criminal record containing the conviction and sentence in question, of that child in respect of that offence may, on application,

be expunged by the Director-General: Justice and Constitutional Development or the Director-General: Social Development or the Minister of Justice and Correctional Services, as the case may be, in accordance with section 87 of the Child Justice Act 75 of 2008.

6. If administrative or practical problems arise in the implementation of paragraph 5 of this order, any interested person may approach the High Court for appropriate relief.

7. The second respondent must pay the applicant's costs in this Court.

JUDGMENT

MHLANTLA J (Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ concurring):

> "Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development."[1]

[1] As a point of departure, I emphasise that this case does not concern the legalisation and condonation of the use and/or possession of cannabis by a child. None of the parties before this Court, nor the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court), argued that a child should be permitted by law to use and/or possess cannabis. Rather, this matter concerns the repercussions of the use and/or possession of cannabis by a child. In other words, the question to be answered is this: is the criminal justice system the appropriate mechanism to respond to the use

[1] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 1.

and/or possession of cannabis by a child or are social systems, designed to protect and promote the rights of the child more suitable? This is the prism through which the issues may, and indeed must, be distilled and determined.

[2] A child is precious and deserves special protection under the law. The drafters of our Constitution recognised this, and that is why the rights of the child are enumerated in section 28 of the Constitution. Section 28(2) states that "[a] child's best interests are of paramount importance in every matter concerning the child". Beyond the Constitution, international law also places strong emphasis on the rights of the child as well as her best interests. The crisp question to be asked then becomes: is it in the best interests of the child to continue to criminalise the use and/or possession of cannabis by a child?

[3] It is through this lens, then, that we have to consider whether to confirm an order from the High Court declaring section 4(b) of the Drugs and Drug Trafficking Act[2] (Drugs Act) constitutionally invalid, to the extent that it criminalises the use and/or possession of cannabis by a child.[3]

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[2] 140 of 1992.

[3] Section 4(b), prohibiting the use and possession of drugs, provides the following:

> "No person shall use or have in his possession any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless—
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> (i) he is a patient who has acquired or bought any such substance—
>
> (aa) from a medical practitioner, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder; or
>
> (bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, dentist or practitioner,
>
> and uses that substance for medicinal purposes under the care or treatment of the said medical practitioner, dentist or practitioner;
>
> (ii) he has acquired or bought any such substance for medicinal purposes—
>
> (aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;
>
> (bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or

Parties

[4] The applicant is the Centre for Child Law, a registered law clinic at the University of Pretoria. The applicant became involved in this matter after being invited by the High Court to be amicus curiae to assist the Court. The first respondent is the Director of Public Prosecutions, Johannesburg, who was the applicant in the High Court proceedings. The second to sixth respondents, who were joined as respondents in the High Court proceedings, are: the Minister of Justice and Correctional Services; the Minister of Social Development; the Minister of Health; the Minister of Basic Education; and the Minister of Police, respectively.

[5] None of the respondents are opposing the confirmation application. Only the Minister of Justice and Correctional Services (Minister) and the applicant participated in the proceedings before this Court. As indicated, the applicant was invited to participate as amicus curiae in the High Court. It brought this application after a period of more than 12 months had lapsed since the High Court order and when it became clear

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(cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian,

with the intent to administer that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;

(iii) he is the Director-General: Welfare who has acquired or bought any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(iv) he, she or it is a patient, medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to administer, supply, sell, transmit or export any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation;

(v) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to supply, sell, transmit or export any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation; or

(vi) he has otherwise come into possession of any such substance in a lawful manner."

that none of the respondents would approach this Court for confirmation of the declaration of invalidity. The applicant argues that it has standing in terms of section 172(2)(d) of the Constitution[4] to bring this application because it has "sufficient interests". I agree that the applicant has standing.

Background

[6] This matter stems from a special review concerning four children who tested positive for cannabis during a school-sanctioned drug test. Each child was alleged to have been in possession of cannabis, thereby committing an offence in terms of Schedule 1 of the Child Justice Act.[5] They were brought before the Magistrates' Court for the district of Krugersdorp. Agreements were concluded between the State and the parents, which, amongst others, required the children to participate in diversion programmes.[6] These agreements were also made orders of court.

[7] It later transpired that these children had not complied with the diversion programme as envisaged by the court order. As a result, they were referred to the Department of Social Development, where they were assessed by probation officers. The probation officers recommended that the children be subjected to a compulsory residential diversion programme at the Walter Sisulu Youth Care Centre or the Mogale Leseding Child and Youth Care Centre in Krugersdorp, for an unspecified period. The probation officers' recommendations were placed on record at the Magistrates' Court, and were implemented through a court order.

[4] Section 172(2)(d) states: "Any person or organ of state with sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[5] 75 of 2008.

[6] In terms of section 41 of the Child Justice Act, a prosecutor may divert a matter involving a child who has committed a Schedule 1 offence, and may select any level of diversion as set out in section 53(3) of the Child Justice Act.

Litigation history

High Court (review application)

[8] The order subjecting the children to compulsory residential diversion programmes was referred to the High Court on urgent review. On 5 February 2019, the High Court held that section 41 of the Child Justice Act did not permit compulsory residence for a Schedule 1 offence.[7] The High Court further held that the Magistrates' Court did not comply with section 58(2) of the Child Justice Act,[8] and the orders of the Magistrates' Court were set aside. The four children were immediately released from the respective centres. The High Court further remarked that the matter raised questions about the legality of the proceedings, in the light of this Court's judgment in *Prince*.[9]

The 7 February 2019 addendum

[9] The acting senior Magistrate of Krugersdorp, Mr Khan, drew the attention of the High Court to a special diversion project managed by the Senior Prosecutor, Johannesburg, referred to as the "Drug Child Programme". He raised concerns that there were other children who were detained under similar circumstances to the children who were released by the High Court in the review. However, he was unable to identify the children. Mr Khan requested the High Court to issue an order that would have the effect of assisting the unidentified children under this programme. On 7 February 2019, the High Court issued a *rule nisi* calling upon all affected parties to show cause why the order directing the correctional facilities to conduct an audit of all children kept at these facilities in terms of section 41 of the Child Justice Act should not be made final.

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[7] *The State v LM; The State v KM; The State v EM; The State v KS,* unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No 97/2018; 98/2018; 99/2018; 100/2018 (5 February 2019) (review judgment).

[8] Section 58 of the Child Justice Act deals with "failure to comply with diversion order" and section 58(2) states that the Magistrate must inquire into the reasons for the child's failure to comply with the diversion order and make a determination whether or not it is due to the child's fault.

[9] *Minister of Justice and Constitutional Development v Prince (Clarke and Others Intervening); National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* [2018] ZACC 30; 2018 (6) SA 393 (CC); 2018 (10) BCLR 1220 (CC).

[10] On 14 February 2019, the *rule nisi* was extended to 6 March 2019 and the Director of Public Prosecutions and any affected parties were ordered to file affidavits and written submissions. The Director of Public Prosecutions, in his submissions, contended that section 54(3) of the Child Justice Act should be interpreted to include compulsory residence and asked the High Court to reconsider its order of 5 February 2019 dealing with compulsory residence. This prompted the Court to approach the Centre for Child Law, the applicant, and requested it to participate in the proceedings as amicus curiae and to make submissions on the issue.

[11] The applicant, in its submissions, raised the question of the constitutionality of section 4(b) of the Drugs Act in so far as the children were concerned. As a result of these submissions, the High Court invited the Minister to join as a respondent and to file written submissions on this issue and on any issue that had arisen from the submissions filed. In his submissions, the Minister requested the joinder of the Minister of Social Development, the Minister of Health, the Minister of Basic Education and the Minister of Police. The Director of Public Prosecutions supported the request, and the respective Ministers were joined to the High Court proceedings.

High Court (constitutional challenge proceedings)

[12] Ultimately, these proceedings led to the High Court delving into the question of the constitutionality of section 4(b) of the Drugs Act to the extent that it criminalises the use and/or possession of cannabis by a child.[10]

[13] The purpose of the hearing was to ensure that the outcome of the review judgment applied to all other children in similar circumstances, and to address the alleged constitutional defect. The High Court considered two issues: (a) the applicability to a child of the "crime" of contravening section 4(b) of the Drugs Act; and (b) whether the section is constitutional. The applicant argued that section 4(b) is

[10] Between the review judgment and the High Court judgment, the High Court took several steps in an attempt to audit the centres to determine how many children are held in residences under diversion programmes. For the purposes of this application, it is not necessary to consider this information.

unconstitutional, and that a child-oriented approach should be followed to respond to drug use amongst children. All the respondents supported the view that section 4(b) of the Drugs Act is unconstitutional insofar as it applies to a child. They also supported the argument that the Prevention of and Treatment for Substance Abuse Act[11] (PTSAA) and the Children's Act[12] are more appropriate mechanisms to deal with cannabis related offences.

[14] On 31 July 2020, the High Court delivered a judgment which, amongst other issues, considered the effect of *Prince* on children. [13] In *Prince,* this Court confirmed an order of constitutional invalidity which declared the legislation criminalising the use and/or possession of cannabis in private by an adult for their own consumption unconstitutional. The High Court held that because *Prince* does not apply to a child, the child is left in a position where she is treated as a criminal and criminally prosecuted for behaviour for which adults are not criminally liable.[14] The criminality of the act is no longer based on deviant behaviour, but rather on age and timing, which is constitutionally indefensible.[15] This has become known as a "status offence" – an offence that criminalises actions only for a certain group of persons, most commonly because of their religion, sexuality, age or race.[16]

[15] The High Court considered international law and regional instruments – which recommend that State parties abolish status offences as these violate the rights of the child – and held that, at the level of international and regional law, status offences infringe several fundamental rights of children and must be abolished.[17]

[11] 70 of 2008.

[12] 38 of 2005.

[13] *S v LM* 2021 (1) SA 285 (GJ) (High Court judgment).

[14] Id at para 35.

[15] Id at para 36.

[16] Id at paras 37 and 48.

[17] Id at para 40.

[16] The High Court then considered status offences within the context of the constitutional rights and protections enjoyed by a child. When considering whether status offences are unconstitutional, the High Court held that it had to conduct this analysis under the rubric of the best interests of the child, as entrenched in section 28(2) of the Constitution.[18]

[17] In the context of section 9 of the Constitution,[19] the High Court applied the three-stage test enunciated in *Harksen*[20] to determine whether the right to equality had been infringed. On the first step, the High Court held that it was clear that the provision singles out the child on the prohibited ground of age and that this amounts to unfair discrimination. The High Court further held that, although there is a legitimate governmental purpose to protect the child from the use and abuse of harmful substances, putting her through the criminal justice system, as far as the use of cannabis is concerned, is not an effective and appropriate manner of doing so.[21] As there are less restrictive means to achieve this end, the High Court held that on the equality ground alone, the section should be declared unconstitutional.[22] The High Court held that

[18] Id at para 54.

[19] Section 9 provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[20] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

[21] High Court judgment above n 13 at paras 58-9.

[22] Id at para 60.

criminalising cannabis related offences when they concern a child, under the guise of deterrence, can have a profound and disproportionate negative effect on her. Therefore, the criminalisation of these offences is not in the best interests of the child.[23] The High Court also considered the right not to be detained except as a measure of last resort, and held that the arrest of the child would deprive them of their freedom in circumstances that are arbitrary and capricious.

[18] Having found that the rights of the child were infringed, the High Court conducted the limitation analysis. It held that there are less restrictive means available to achieve the aim, including prevention, early intervention, treatment and rehabilitation processes and mechanisms provided for in the Children's Act and the PTSAA – which are available to children both within and outside of the child justice system.[24]

[19] In the result, the High Court declared section 4(b) of the Drugs Act to be inconsistent with the Constitution to the extent that it criminalises the use and/or possession of cannabis by a child. The High Court also issued a moratorium pending the law reform, that no child may be arrested and/or prosecuted and/or diverted for contravening the impugned provision.

In this Court

[20] The matter comes before this Court in the form of confirmation proceedings. In terms of section 167(5) of the Constitution, this Court makes the final decision as to whether any Act of Parliament is constitutional and this Court must confirm any order of constitutional invalidity made by the Supreme Court of Appeal and High Court, before that order has any force. Thus, this matter is properly before us. In confirmation proceedings, this Court must conduct its own evaluation and analysis and satisfy itself

[23] Id at para 66.

[24] Id at paras 69 and 72.

that the impugned provision does not pass constitutional muster before confirming the order of invalidity.[25]

Issues

[21] The following issues arise before this Court: (a) whether this Court should follow the same approach as in *Prince* in considering the constitutional validity of section 4(b) of the Drugs Act to the extent that it criminalises the use and/or possession of cannabis by a child; (b) the impact of the criminalisation on a child; and (c) whether this places limitations on a child's rights and, if so, whether the limitation is justified in terms of section 36 of the Constitution.

This Court's approach in Prince

[22] I commence by setting out this Court's approach in *Prince*, as all the parties before this Court considered the validity of the impugned provision through the lens of *Prince*. The applicant submitted that, as the law stands after this Court's ruling in *Prince*, the criminalisation of the possession and/or use of cannabis by children effectively creates a status offence for children, and this falls foul of the constitutional provisions of equality and violates the State's international law obligations. The Minister agreed with the applicant that the impugned section creates an unfair distinction between adults and children, the result of which is a status offence for children. The Minister recognised that, unlike their adult counterparts, the criminalisation may lead to children having a criminal record and being subjected to social stigma.

[23] The issue before this Court in *Prince* was whether sections 4(b) and 5(b) of the Drugs Act, read with various sections of the Medicines and Related Substances Act,[26] limit the right to privacy and if so, whether that limitation is reasonable and justifiable

[25] *Phillips v Director of Public Prosecutions* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 8.

[26] 101 of 1965.

in an open and democratic society based on human dignity, equality, and freedom.[27] The right to privacy, as outlined in section 14 of the Constitution, was accordingly the central right at issue in *Prince*. Zondo ACJ considered the scope and content of the right to privacy and held that the impugned provisions, which criminalised the cultivation, possession or use of cannabis by an adult in private, limits the right to privacy.[28] He undertook the analysis contained in section 36 of the Constitution and concluded that the limitation was not reasonable and justifiable. The scope of *Prince* extends beyond use and/or possession of cannabis, and includes cultivation of cannabis.[29]

[24] *Prince* therefore legalised the use, possession and cultivation of cannabis by an adult in private for his or her personal consumption. It is important here to distinguish between legalisation and decriminalisation. In *Prince*, the statutory provision was held to be invalid, and Parliament is in the process of enacting legislation specifically aimed at legalising the use and cultivation of cannabis in private by an adult. Therefore, it can be said that *Prince* carved out a legal space for an adult to use, possess and cultivate cannabis for their own consumption in private – this is a limited sphere in which the legalisation of cannabis is recognised. By contrast, decriminalisation does not permit the use and/or possession of cannabis, but has the consequence that the use and/or possession does not result in a criminal conviction and punishment.

[25] As indicated above, the current matter is not about allowing a child to use and/or possess cannabis. The right recognised in *Prince* is limited to adults only. That is not an oversight by this Court. It is implausible to claim that a child has a right to the personal consumption of cannabis in private. There are valid reasons to protect children from the use of drugs and the recognition of the right of a child to use cannabis would

[27] *Prince* above n 9 at para 40.

[28] Id at para 58.

[29] Id at para 86. This Court held that—

> "the prohibition of the performance of any activity in connection with the cultivation of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy entrenched in the Constitution and is constitutionally invalid."

be inconsistent with the need to protect children and, indeed, with the constitutional imperative in section 28(2) of the Constitution that a child's best interests are of paramount importance in every matter concerning the child.

[26] The constitutional problem in this case is not one of a status offence. To legalise the private possession and use of cannabis by adults does not require that the use and/or possession of cannabis by a child should also be recognised. The use and/or possession of cannabis by a child may have adverse effects to which we do not want to expose our children. Therefore, the constitutional attack on the validity of section 4(b) of the Drugs Act as it applies to the use and/or possession by children of cannabis cannot be founded upon the simple proposition that to do so would result in a status offence based on age.

[27] This matter is about the consequences of the use and/or possession of cannabis by a child, and whether those consequences should be located in the criminal justice system or in social systems. Unlike the use and/or possession of cannabis by an adult (in private, for personal use, as was dealt with in *Prince*), if this Court confirms the order of constitutional invalidity, there can still be legal consequences for children for the use and/or possession of cannabis, albeit outside of the criminal justice system. As alluded to above, our focus in this matter is on decriminalisation, not legalisation. This is the first difference between *Prince* and this matter.

[28] Another important distinguishing feature between *Prince* and this matter is that *Prince* concerned adults, while this matter concerns children. The reasoning in *Prince* should not be imported into this judgment without cognisance of the difference between a child and an adult. This Court has recognised that a child deserves special protection

from the law.[30] It cannot be disputed that a child has a right to privacy.[31] The right to privacy applies to "everyone".[32] However, different rules apply to children in respect of this right. The principle that children accused of committing offences should be treated differently to adults "is now over a century old".[33] This is because the law is oftentimes designed to treat a child and an adult differently.

[29] The final difficulty with importing the reasoning in *Prince* into this matter is that *Prince* legalised the use and/or possession of cannabis by an adult in *private.* An adult who uses and/or possesses cannabis in public can still face a criminal sanction. The High Court in this matter, when it declared section 4(b) of the Drugs Act unconstitutional, did not differentiate in the order between the private and public spheres. Accordingly, the effect of the High Court order is that it diverges from *Prince.* In terms of this order, it is still illegal for a child to use and/or possess cannabis (whether in public or private); however, that child cannot be arrested and/or prosecuted and/or sent to a diversion programme for contravening the impugned provision. The High Court concluded that there are other methods to deal with a child caught in those circumstances.

[30] In my view, going beyond the private arena when it pertains to the use and/or possession of cannabis by a child is necessary because this matter is not about protecting the child's right to privacy in order to use and/or possess cannabis in private. It is about choosing the most appropriate manner in which to respond to a child using and/or possessing cannabis, and this applies to the private and public spheres. Therefore, in this matter, we are not dealing with an extension of *Prince* to encompass children and

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[30] *Teddy Bear Clinic* above n 1 referring to *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 63.

[31] In *Centre for Child Law v Media 24 Limited* [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC) at para 49, this Court held that "[t]he analysis of the right to privacy is even more pressing when dealing with children . . . ".

[32] *Teddy Bear Clinic* above n 1 at para 38 where this Court confirmed that "children enjoy each of the fundamental rights in the Constitution that are granted to 'everyone' as individual bearers of human rights".

[33] *Brandt v S* [2004] ZASCA 120 at para 14.

thus this case cannot be determined through the lens of a status offence, as the High Court did.

[31] Now that I have identified the difficulties in determining this matter within the realm of *Prince*, it is prudent to consider whether there is another way in which to approach the question before this Court.

[32] In my view, the proper approach to considering the constitutionality of the impugned section is by recourse to the best interests of the child principle rather than through the right to equality.

Impact of criminalisation on the child

Applicant's submissions

[33] The applicant suggests that we determine whether the criminal sanction imposed by the impugned provision is the most appropriate measure to respond to the use and/or possession of cannabis by a child, in light of a child's rights under sections 10 and 28 of the Constitution, as well as South Africa's international law obligations towards the child. This approach is not bound by *Prince*, but rather centred around the child and her best interests.

[34] The applicant submits that the criminalisation of the use and/or possession of cannabis by a child does not, in effect, protect the child from exposure to drugs and the dangers of drug abuse. It submits that incarceration, as a natural consequence of criminalisation, runs the risk of exposing a child to more serious forms of drug abuse and does very little to teach children how to cope once they have been exposed to drugs. According to the applicant, it is also evident that criminalisation has proven to be an ineffective deterrent and/or preventative measure. Contrary to serving the public good, criminalisation negatively impacts a child's constitutionally enshrined rights to dignity, health care and social services, as well as their overarching best interests. Ultimately, the applicant submits that a child should not be subjected to the criminal justice system

for the use and/or possession of cannabis, as doing so only serves to negatively impact the child and does not serve her interests.

Minister's submissions

[35] The Minister agrees with the applicant that subjecting a child to the criminal justice system and imposing custodial penalties on her for the use and/or possession of cannabis is an ineffective form of protection, as there is no evidence demonstrating the efficacy of criminalisation as a deterrent. In fact, criminalisation may exacerbate the child's exposure to drugs. Additionally, the Minister submits that criminalisation has the effect of relegating the child to the status of a criminal and not a victim. The Minister accepts that the criminalisation has no legitimate basis and there are other means that could be utilised to address the issue without resorting to the criminal justice system.

[36] Although the Minister of Social Development, the Minister of Health, the Minister of Basic Education, as well as the Minister of Police (Ministers) did not participate in the proceedings before this Court, their affidavits in the High Court proceedings, setting out their stance relating to the criminalisation, were filed in this Court. From these affidavits, they support the submissions made by the Minister of Justice and agree that the impugned section should be declared invalid. The Ministers agree that criminalisation has not yielded an overwhelmingly positive impact, in that criminalisation has proven to be neither an effective deterrent mechanism, nor an appropriate measure to address the use, possession and/or abuse of cannabis by children. The Minister of Education further stated that criminalisation may force children out of the education system, either through removal and detention and/or diversion or by incentivising children to drop out.

Analysis

[37] The parties before this Court and the High Court identified several adverse effects of criminalising the use and/or possession of cannabis by a child. One was that

the child is exposed to the harsh consequences of the criminal justice system. Effectively, criminalisation negates the inherent vulnerability of the child, an action which does not correlate with this Court's jurisprudence.[34]

[38] In *Teddy Bear Clinic*, Khampepe J cautioned against exposing children "to harsh circumstances which can only have adverse effects on their development".[35] There can be no denying that contact with the criminal justice system may negatively impact the child.[36] Most patently, criminalisation may result in the incarceration of the child. This is particularly undesirable as it could expose the child, once in custody, to serious forms of substance abuse and criminal conduct, as has been indicated by the parties.

[39] The child also runs the risk of incurring other harmful consequences from incarceration. She may obtain a criminal record, which carries implications for her future and prospects, including future employment opportunities. Criminalisation also exposes children to social stigma. In *Teddy Bear Clinic*, it was explained that "[w]hen that individual is publicly exposed to criminal investigation and prosecution, it is almost invariable that doubt will be thrown upon the good opinion his or her peers may have of him or her".[37]

[40] Further, in *Raduvha*,[38] Bosielo AJ held that criminalisation can have the effect of inflicting considerable trauma on children.[39] He said that "[u]nder any circumstances

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[34] *De Reuck* above n 30 at para 63.

[35] *Teddy Bear Clinic* above n 1 at para 1.

[36] Id at para 71. This Court held that:

> "As a matter of logic, what is bad for all children will be bad for one child in a particular case. Thus, if there is evidence that exposing children to the criminal justice system for engaging in consensual sexual behaviour has a negative impact on them generally, then it seems to me that a court may declare the scheme to be contrary to the best interests of the child in terms of section 28(2), and therefore invalid."

[37] Id at para 56.

[38] *Raduvha v Minister of Safety and Security (Centre for Child Law as amicus curiae*) [2016] ZACC 24; 2016 (2) SACR 540 (CC); 2016 (10) BCLR 1326 (CC).

[39] Id at para 57.

an arrest is a traumatising event. Its impact and consequences on children may be long-lasting if not permanent".[40] It follows that referring a child to the criminal justice system for the use and/or possession of cannabis undoubtedly inflicts avoidable trauma on the child.

Does the impugned section limit a child's rights?

[41] The impact of criminalisation is, as illustrated above, far-reaching. As I see it, the following constitutional rights are at play: a child's right to have her best interests treated as being of paramount importance in every matter concerning the child; a child's right not to be detained except as a measure of last resort; and a child's right to dignity.[41]

Children's rights in section 28 of the Constitution

[42] The right of a child for her interests to be treated as being of paramount importance applies to all aspects of the law which affect the child. It is an independent right and extends beyond section 28(1).[42] Before this Court, the Minister argues that legislation preventing a child from engaging in certain activities has been used as a measure to protect the child from activities or substances that can be harmful to her health and well-being. However, the argument continues, there is increasing recognition that when a child is subject to possible prosecution or incarceration they are exposed to various other risks. As a result, it is not in the best interests of the child to criminalise the use and/or possession of cannabis.

[43] Although the best interests of the child principle has been recognised in South African law since the 1940s,[43] the lodestar for the best interests of the child

[40] Id.

[41] See sections 28(1), 28(2) and 10 of the Constitution.

[42] *Minister of Welfare Population Development v Fitzpatrick* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17.

[43] *Fletcher v Fletcher* 1948 (1) SA 130 (A) at 134.

analysis is this Court's judgment in *S v M*.[44] In that judgment, Sachs J confirmed that the ambit of section 28 is undoubtedly wide and that "statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children".[45] Further, "[w]hat the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives".[46] Section 28 is also a mechanism for South Africa to respond to our international law obligations.[47] In *every* matter concerning the child, her rights must be considered. Section 28 sets out the rights of a child which must be considered in all matters concerning the child. The right is indeterminate, and this Court has recognised that the contextual nature and inherent flexibility of section 28 constitutes its strength.

[44] The best interests of a child principle is also reflected in international law.[48] The United Nations Convention on the Rights of the Child[49] (CRC) states that "in 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."[50] Similarly, the African Charter on the Rights and Welfare of the Child[51] (African Children's Charter) states that "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child

[44] *S v M (Centre for Child Law as amicus curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).

[45] Id at para 15.

[46] Id at para 20.

[47] Id at para 16.

[48] Section 39(1)(b) of the Constitution imposes a duty on courts, including this Court, to consider international law when interpreting the Bill of Rights. This obligation is also outlined in section 233 of the Constitution. International law in this context includes both binding and non-binding law, international agreements, customary law, the decisions of international tribunals and the reports of international specialised tribunals. See *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 35. Moreover, in *New Nation*, Madlanga J held that, when interpreting the Bill of Rights, "[a]n interpretation that is consonant with international law should be preferred over the one that is not". See *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC) at para 189.

[49] United Nations Convention on the Rights of the Child, 20 November 1989. The CRC was ratified by South Africa on 16 June 1995.

[50] CRC Art 3(1).

[51] African Charter on the Rights and Welfare of the Child. Ratified by South Africa on 7 January 2000.

shall be the primary consideration."[52] Some authors have argued that, by referring to the best interests of the child as being *the* primary consideration, as opposed to *a* primary consideration, the protection of this principle is stronger in the African Children's Charter.[53] However, our Constitution uses even stronger language in section 28(2),[54] and this has been met with approval in the international arena. The United Nations Committee on the Rights of the Child (UNCRC) has, for example, noted and endorsed this stronger protection in its most recent Concluding Observations for South Africa;[55] and the Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has referred with approval to this Court's interpretation of the protection of the right of the child to have her best interests treated as being of paramount importance.[56]

[45] The UNCRC has also written that the best interests of the child principle is an adaptable and flexible concept, which shall be applied in all matters dealing with the

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[52] The best interests of the child principle as espoused in Article 4(1) of the African Children's Charter has been defined as one of the bedrocks of the Charter. See Khoza "The Sen-Nussbaum Diagram of Article 11(3) of the African Charter on the Rights and Welfare of the Child: Facilitating the Relationship Between Access to Education and Development" (2001) *African Human Rights Law Journal* 7 at 11 and Boshoff "Protecting the African Child in a Changing Climate: Are Our Existing Safeguards Adequate?" (2017) 23 *African Human Rights Yearbook*.

[53] Gose *The African Charter on the Rights and Welfare of the Child* (Community Law Centre, Cape Town 2002) at 26; Lloyd "A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child" (2002) 2 *AHRLJ* 11 at 13-4; Khoza & Zuma "The *Pas de Deux* between Education and Recreation: Facilitating the Realisation of Articles 11 and 12 of the African Charter on the Rights and Welfare of the Child in Schools" (2020) 14 *PSLR* 381 at 399.

[54] Section 28(2) of the Constitution states that "[a] child's best interests are of paramount importance in every matter concerning the child".

[55] United Nations Committee on the Rights of the Child (UNCRC) *Concluding Observations on the Second Periodic Report of South Africa* CRC/C/ZAF/CO/2 (27 October 2016) at par 25.

[56] African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) *General Comment No 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection* at 11 referring to this Court's decision in [56] *Centre for Child Law v Minister of Justice and Constitutional Development* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) (*Centre for Child Law*) at para 29 where this Court held that—

> "[t]he constitutional injunction that '[a] child's best interests are of paramount importance in every matter concerning the child' does not preclude sending child offenders to jail. It means that the child's interests are 'more important than anything else', but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment."

child.[57] Furthermore, the expression as worded in the CRC "means the child's best interests may not be considered on the same level as all other considerations",[58] but above all other considerations. In other words, viewing the best interests of the child as a primary consideration means that the (best) interests of the child are given priority in all circumstances.[59] This strong position, the UNCRC writes, "is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness".[60]

[46] The UNCRC has said that "the full application of the concept of the child's best interests requires the development of a rights-based approach . . . to secure . . . [the child's] human dignity."[61] Furthermore, it has said that this principle is a threefold concept – a substantive right,[62] a fundamental, interpretive legal principle,[63] and a rule of procedure.[64] Regarding the first ambit, it means that the child's best interests must be considered and weighed against all other factors in all matters dealing with the child, whenever a decision is being made about the child.[65] With respect to the second ambit, it means that, when interpreting legal provisions, we must do so in the light of what is in the best interests of the child.[66] Finally, concerning the third ambit, it means that the decision-making processes must consider the impact of such decisions on the child and that the "justification of a decision must show that the right has been explicitly taken into account".[67]

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[57] UNCRC *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (Art 3, para 1)* CRC/C/GC/14 (29 May 2013) at IV(A)(3).

[58] Id at IV(A)(4).

[59] Id at IV(A)(4).

[60] Id.

[61] Id at I(A).

[62] Id at I(A)(a).

[63] UNCRC *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (Art 3, para 1)* CRC/C/GC/14 (29 May 2013) at I(A)(b).

[64] Id at I(A)(c).

[65] Id at I(A)(a).

[66] Id.

[67] Id at I(A)(c).

[47] The UNCRC has also said that the best interests of the child must be appropriately integrated and consistently applied in judicial proceedings that impact the child.[68] Moreover, judicial decisions must show that a child's best interests have been a primary consideration.[69] And, of relevance to the matter at hand, the UNCRC has also underlined that "protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation . . . when dealing with child offenders".[70]

[48] Turning back to the domestic law, *S v M* tells us that the best interests of the child are not some sort of limitless trump cards, which are to be considered in isolation without an analysis that weighs this with other rights at play.[71] However, even with this caveat in place, *S v M* still mandates an approach to section 28(2) that considers the CRC, where the principle's origin may be traced.[72] Furthermore, in that judgment this Court also said that, while this principle, and the law in general, cannot shield the child from the "shocks and perils" of the child's environment, it can create conditions to protect the child.[73]

[49] The question then is: is it in the best interests of the child that the use and/or possession of cannabis remain criminalised? In my view, it cannot be said that imposing criminal sanctions on a child creates a legal framework for the protection of the child. Channelling a child through the criminal justice system as opposed to social systems – designed to protect children – can lead to exacerbated harm and risk. Cannabis use is a social problem, and an appropriate response, which recognises a child's rights in section 28, should be located in social systems as opposed to the criminal justice system.

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[68] Id at III(a), (b) and (c).

[69] Id.

[70] Id at IV(A)(2)(b).

[71] See *S v M* above n 44 at para 26.

[72] Id at para 16.

[73] Id at para 20.

[50] Further, the applicant as well as the Minister, concede that the criminalisation is inconsistent with the child-centred approach. Both parties agree that criminalisation of the use and/or possession of narcotic drugs and psychotropic substances, including cannabis, by the child has not proven to be an effective measure to address the issue of child drug abuse in any event.

[51] The best interests of the child are also of paramount importance when dealing with the adolescent child, and the principle must be heeded when implementing legislation and in decision-making processes.[74] Therefore, it is important to consider the rights of and special protection needed by the adolescent child because it would seem that the target audience of this judgment would be adolescent children. However, this should not be seen to mean that they need less protection; indeed, it may be that they need more, or at the very least a more specific protection. This, as the UNCRC has noted, is because reaching adolescence can mean exposure to a number of harmful things, including drug use or abuse.[75] Adolescents may find themselves in such situations, therefore "investment is needed in measures to strengthen the capacities of adolescents to overcome or mitigate those challenges [and] address the societal drivers".[76] If a State party fails to put such measures in place, as can be argued that South Africa has in the present case, that does not mean that children should be punished for this. What it does mean, however, is that when the legal gap is identified, all actors, such as the Legislature and the Judiciary, must remedy the situation, in line with South Africa's State party obligations, as soon as possible.

[52] The UNCRC has also noted that adolescents are more likely to be initiated into drug use and may be at a higher risk of drug-related harm than adults.[77] Therefore, State parties have a duty to "put in place prevention, harm-reduction and dependence

[74] Id at para 22.

[75] UNCRC *General Comment No 20 (2016) on the implementation of the rights of the child during adolescence* CRC/C/GC/20 (16 December 2016) at para 12.

[76] Id at para 12.

[77] Id at para 64.

treatment services" and, "[a]lternatives to punitive or repressive drug control policies in relation to adolescents are welcome".[78]

[53] It should be highlighted that, in order to calm any anxieties which may lead one to consider the illicit use of other narcotic drugs and psychotropic substances by the child, the UNCRC does not differentiate between any grades or variations of such narcotic drugs and psychotropic substances in this regard. The blanket approach to every situation involving the child and the illicit use of any variation of narcotic drugs and psychotropic substances adopted by the UNCRC is the same. That is, that the use and/or possession of narcotic drugs and psychotropic substances by the child must be decriminalised, and dealt with by putting in place prevention, harm-reduction and dependence treatment services, as well as alternatives to punitive or repressive drug control policies.[79] Be that as it may, the subject matter of the case at hand only involves cannabis; therefore, that is only as far as this judgment must and will go.

[54] It follows that there is a need, and an obligation, for decriminalisation and for the respondents to rather implement a non-punitive, rehabilitative alternative to prevent children from using cannabis.

[55] The next issue concerns the right not to be detained except as a measure of last resort, and for the shortest appropriate amount of time. The four children before the High Court in the special review proceedings were ordered to attend the compulsory residential diversion programmes for an indeterminate amount of time – this is a severe response to contravening section 4(b) of the Drugs Act. It is necessary to state that a compulsory residential diversion programme is not one of the diversion options available to a prosecutor in terms of section 53 of the Child Justice Act for Schedule 1 offences. This was confirmed by the High Court in the review judgment.[80] The Magistrates' Court therefore erred when it made an order subjecting the four children

[78] Id.

[79] Id.

[80] Review judgment above n 7 at para 13.

to residential diversion programmes. Unfortunately, this does not mean that the risk of a child being detained in future, whilst there are more appropriate responses available, has been adequately addressed. As long as detention is an option in terms of the Child Justice Act, which it is, there is a risk that this will impact upon a child's section 28(1)(g) right. This Court has confirmed that section 28(1)(g) requires that if there is an appropriate option other than imprisonment, that option should be chosen.[81] This is not to say that a criminal sanction is never permitted, it merely suggests that if there is an alternative to a criminal sanction, the alternative should be considered.

[56] This position accords with the provisions of both the CRC and the African Children's Charter.[82] The CRC stipulates that "[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".[83] The same protection is not so extensive in the African Children's Charter.[84] The African Children's Committee has stated:

> "Since all State Parties to the African Children's Charter are also State Parties to the CRC, the higher standards on child justice contained in the CRC instrument apply in any event. The 'last resort' and 'shortest period of time' principles entail that strict limitations on deprivation of liberty (pre-trial and as a sentence) should be put in place, and that alternatives to custody must be legislatively enshrined to ensure that custody is used as a last resort."[85]

[57] Linked to this is an important observation that the UNCRC has made in relation to the child justice system, which is that we need to adopt a systemic approach that closes the pathways into the child justice system, and this can be done through the

[81] *Centre for Child Law* above n 56 at para 32.

[82] CRC Art 37; African Children's Charter Art 17.

[83] CRC Art 37(b).

[84] African Children's Committee above n 56 at 24.

[85] Id at 24-5.

decriminalisation of minor offences.[86] Indeed, in the post-*Prince* era, it cannot be said that possession and/or use of cannabis, at least in private, is any sort of offence, major or minor. What must happen is that we must try to ensure that the child is dealt with, without resorting to judicial proceedings. Wherever appropriate, children should be moved away from the judicial system, and their rights must always be fully respected and protected.[87] Alternative measures must be implemented. It is at the State's discretion what alternative measures should be implemented.[88]

[58] In the light of the general and specific guidance offered by international law on the issue at hand, it is perturbing that, within the current status quo, it appears that the alternatives to imprisonment to deal with the use and/or possession of cannabis by the child – such as those encapsulated in the Children's Act – are not being used. Manifestly, this means that the deprivation of liberty of the child is currently the first course of action where a child is found using or in possession of cannabis. From the discussion above, the only conclusion to be drawn is that the current approach is not in line with the approach adopted in the Constitution and under international law.

[59] Although the best interests of the child are of paramount importance, this right can be limited by a reasonable and justifiable limitation.[89] After considering the right to dignity, I will proceed to determine whether the limitation of the best interests of the child is reasonable and justifiable.

A child's right to dignity

[60] In *Teddy Bear Clinic*, this Court recognised that a child's right to dignity is of particular importance and the exercise thereof is not held in abeyance until she reaches

[86] UNCRC *General Comment No 24 (2019) on children's rights in the child justice system* CRC/C/GC/24 (18 September 2019) at para 12.

[87] Id at paras 13(a) and 14.

[88] Id at para 17.

[89] *De Reuck* above n 30 at para 55.

a certain age.[90] It is therefore a right that accrues to the child at birth and accompanies her throughout her childhood. The child is an individual bearer of rights, and not a mere extension of her parents.[91] This extends to the right to dignity, as this Court held in *S v M*:

> "Every child has 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."[92]

[61] Section 3(b) of the Child Justice Act makes it clear that one of the "guiding principles" for the interpretation of the Act is that "[a] child must not be treated more severely than an adult would have been treated in the same circumstances". Although we are not tasked with applying the provisions of the Child Justice Act, in this instance a child is treated severely than an adult which impacts on the child's right to dignity.

[62] In this matter, the High Court remarked:

> "It follows then that criminalising children for cannabis-related offences, even under the guise of prevention and/or deterrence, will have a profound disproportionate negative effect on them. The criminalisation, moreover, is a form of stigmatisation which is both degrading and invasive. Children accused of such offences risk being labelled and excluded by their peers in circumstances where as a society we have accepted this type of behaviour".[93]

[63] I agree with the High Court that a child is vulnerable to being stigmatised by her peers and loved ones. This has a direct impact on her sense of self-worth as well as her

[90] *Teddy Bear Clinic* above n 1 at para 52.

[91] Id at para 40 and *S v M* above n 44 at para 18.

[92] *S v M* above n 44 at para 18.

[93] High Court judgment above n 13 at para 64.

worth in a social context. Imposing a criminal sanction for the use and/or possession of cannabis on a child, therefore, infringes on her right to dignity.

Reasonable and justifiable limitation?

[64] The Minister submits that the fact that a child can be criminally prosecuted and incarcerated for the use and/or possession of cannabis, absent any legitimate justification, infringes on a child's section 28 rights. The Constitution makes provision for the limitation of rights in section 36.[94]

[65] Section 36 of the Constitution envisages a balancing exercise. In *Makwanyane*,[95] Chaskalson P confirmed that the balancing of rights is done on a case by case basis and that there can be no absolute standard to be applied in determining reasonableness and necessity.[96] A court is required to "engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list".[97] In this matter we are not balancing two competing rights – we are balancing different aspects of section 28 of the Constitution. On the one hand, there is the need to protect a child against exposure to cannabis and, on the other, the need to protect a child against the imposition of harsh criminal sanctions.

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[94] Section 36 of the Constitution provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[95] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[96] Id at para 104.

[97] *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 at para 32.

[66] In undertaking the section 36 limitation analysis, the first factor to be considered is the nature of the right. In the previous section, I canvassed the nature of the rights in sections 28 and 10 of the Constitution. Without a doubt these rights are fundamental to the protection and development of the child and their importance in a section 36 limitation analysis should not be understated. I now proceed to consider the next factor, that is, the importance of the purpose of the limitation.

Importance of the purpose of the limitation

[67] None of the parties condone the use and/or possession of cannabis by children. They agree that a child-oriented approach should be followed when a child is caught using and/or in possession of cannabis. Criminalisation stems from the public denunciation of the use and/or possession of cannabis. Since *Prince,* this position has changed for adults, and it is no longer seen as "unacceptable behaviour".

[68] The main purpose of the limitation is, however, to protect children from exposure to cannabis. The objective – protection of the child – is a legitimate purpose. The enquiry, however, does not end here because it is necessary to ask whether the limitation does in fact meet its purpose and whether there are less restrictive means to achieve the said purpose.

The nature and extent of the limitation

[69] In *Raduvha,* this Court recognised that an arrest is a traumatising event for a child and stated the following:

> "It is trite that an arrest is an invasive curtailment of a person's freedom. Under any circumstances an arrest is a traumatising event. Its impact and consequences on children might be long-lasting if not permanent."[98]

[98] *Raduvha* above n 38 at para 57.

[70] In *S v M,* this Court further held that the enjoyment of the right to a childhood includes the right to be "free from violence, fear, want and avoidable trauma".[99] In my view, the criminalisation can result in avoidable trauma, especially in the context of the availability of less restrictive means located in social systems.

[71] This Court in *Raduvha* said further:

> "It is a known fact that our detention centres, be it police holding cells or correctional centres, are not ideal places. They are not homes. They are bereft of most facilities which one requires for raising children. It is worse for children. The atmosphere is not conducive to their normal growth, healthy psycho-emotional development and nurturing as children."[100]

[72] Section 28(1)(g) of the Constitution states that every child has the right not to be detained except as a measure of last resort and, if she is detained, she has a right to be detained "only for the shortest appropriate period of time". This is clearly not the current practice – children have been subjected to residential diversion programmes for undetermined periods. For example, the four children whose conviction prompted this application were all ordered to attend a compulsory residential diversion programme without an order of court specifying the duration of their stay. The matter was remanded for approximately six months and, according to the acting senior Magistrate in Krugersdorp, the recommendation is normally a compulsory residential programme for three months. By the time the High Court set aside the orders subjecting the children to a compulsory residential programme, they had already served approximately three months. This is a disproportionate response. The High Court in this matter confirmed that a compulsory residential diversion programme is not one of the options available to a prosecutor in terms of section 53(3) of the Child Justice Act.[101] However, this

[99] *S v M* above n 44 at para 19.

[100] *Raduvha* above n 38 at para 68.

[101] Section 53(3) lists the options available under "level one diversion", which applies to Schedule 1 offences. The list includes:

> "(a) an oral or written apology to a specified person or persons or institution;

confirmation is not sufficient on its own to justify the criminalisation. Other than the available options for diversion as contained in section 53(3), a child can still be subjected to the following: arrest,[102] detention in an appropriate child and youth care

(b) a formal caution, with or without conditions;

(c) placement under a supervision and guidance order;

(d) placement under a reporting order;

(e) a compulsory school attendance order;

(f) a family time order;

(g) a peer association order;

(h) a good behaviour order;

(i) an order prohibiting the child from visiting, frequenting or appearing at a specified place;

(j) referral to counselling or therapy;

(k) compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose;

(l) symbolic restitution to a specified person, persons, group of persons or community, charity or welfare organisation or institution;

(m) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored;

(n) community service under the supervision or control of an organisation or institution, or a specified person, persons or group of persons identified by the probation officer;

(o) provision of some service or benefit by the child to a specified victim or victims;

(p) payment of compensation to a specified person, persons, group of persons or community, charity or welfare organisation or institution where the child or his or her family is able to afford this; and

(q) where there is no identifiable person, persons or group of persons to whom restitution or compensation can be made, provision of some service or benefit or payment of compensation to a community, charity or welfare organisation or institution."

[102] Section 20 of the Child Justice Act states that a child may not be arrested for an offence referred to in Schedule 1, however there is a caveat that a child can still be arrested for a Schedule 1 offence if there are "compelling reasons justifying the arrest", which may include:

"(a) Where the police official has reason to believe that the child does not have a fixed residential address;

(b) where the police official has reason to believe that the child will continue to commit offences, unless he or she is arrested;

(c) where the police official has reason to believe that the child poses a danger to any person;

(d) where the offence is in the process of being committed; or

(e) where the offence is committed in circumstances as set out in national instructions referred to in section 97(5)(a)(ii)."

In accordance with paragraph (d) it can therefore be justified to arrest a child who is caught in the process of using cannabis.

centre or, if there is no space available in such centre, a police cell or lock-up before a child's first appearance;[103] and a sentence of imprisonment.[104]

[73] If a child is convicted for the use and/or possession of cannabis – a Schedule 1 offence – that child will have a criminal record. Even if the child is channelled through diversion programmes in terms of the Child Justice Act, she will still have a criminal record. As stated above, a child is treated severely than an adult would have been treated in the same circumstances. Children, whose best interests are clearly of paramount importance and who are a vulnerable group in society, are afforded less protections by the law than adults. The extent of the limitation on children's rights is far-reaching and I agree with the High Court that criminalisation has a disproportionate effect on children.

Relationship between the limitation and its purpose

[74] It is necessary to mention the submissions of the various Ministers in their affidavits before the High Court. The Minister of Social Development submitted that while section 4(b) serves as a deterrent against the use of cannabis by children, it is not an effective and appropriate manner of addressing the problem of drug use and/or abuse by children. The Minister of Basic Education argued that there is no evidence suggesting that the criminal justice system is the correct deterrent for the use and/or possession of cannabis by children. The Minister of Police also argued that section 4(b) of the Drugs Act can act as a deterrent; however, the criminalisation is certainly not an effective and appropriate manner of addressing the problem of drug use and/or abuse by children. The State parties therefore agreed that, even if criminalisation can serve as a deterrent, it is not the most appropriate deterrent.

[103] Section 27of the Child Justice Act.

[104] Section 77(3) of the Child Justice Act provides that a child who is 14 years or older may only be imprisoned for a Schedule 1 offence if the child "has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment". Although this section states that imprisonment for a Schedule 1 offence should only be imposed in exceptional circumstances, imprisonment is still possible.

[75] Generally, a measure, penal or otherwise, which serves no legitimate purpose is irrational. By necessary implication, such a measure will not pass constitutional muster. In *Prinsloo*,[105] Ackermann J said—

> "the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."[106]

[76] From this, it is apparent that the Constitution does not sanction punishment where such punishment would not serve a legitimate purpose. The efficacy of a deterrent should not be considered in isolation, but alongside its *appropriateness*. Harsh criminal penalties can, in certain circumstances, be effective in deterring certain behaviour, but a rights-centred approach, especially when dealing with a child, also considers the appropriateness of the response to such behaviour.

[77] It is not necessary, however, for this Court to consider the efficacy of criminalisation as a deterrent because there is no evidence before this Court that criminalisation is an effective deterrent to prevent such behaviour. The Minister of Basic Education even went so far as to argue before the High Court that the criminal justice system can lead to more exposure to drugs for children as opposed to deterring the use of cannabis.

[78] In the result, the criminalisation of the use and/or possession of cannabis by a child does not serve the intended purpose of protecting the child.

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[105] *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC).

[106] Id at para 25.

Less restrictive means available

[79] If effective means exist, other than criminalising a child for the use and/or possession of cannabis, the Constitution requires that route to be followed.[107] Section 28(1)(g) explicitly states that a child enjoys a right not to be detained, except as a measure of last resort. In *Raduvha*, this Court recognised that "[t]he Constitution demands that our criminal justice system should be child-sensitive".[108] A further step is asking whether our criminal justice system is the appropriate response to certain conduct involving a child.

[80] When considering potentially less restrictive means, it is important to remember that this exercise is undertaken to determine the alternative options available to respond to a *child* who is apprehended for the use and/or possession of cannabis. Cameron J said in *Centre for Child Law*:

> "The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.
>
> These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. *And, most vitally, they are generally more capable of rehabilitation than adult*s."[109] (Emphasis added.)

[81] The Court went on to state:

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[107] *Teddy Bear Clinic* above n 1 at para 95.

[108] *Raduvha* above n 39 at para 59.

[109] *Centre for Child Law* above n 56 at paras 26-7.

> "We distinguish [between adults and children] because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility."[110]

[82] The Minister has, in his submissions before this Court, comprehensively set out all the less restrictive means available when a child is caught using and/or in possession of cannabis. This Court is grateful for these submissions. The various less restrictive means are also recognised by the High Court in its judgment.[111] I will now set out these measures to illustrate that there are other appropriate measures to respond to a child apprehended for using and/or being in possession of cannabis.

Children's Act

[83] The preamble to the Children's Act states unambiguously that the legislation is enacted to protect children's rights as contemplated in section 28 of the Constitution. It is, therefore, the primary piece of legislation dealing with the numerous rights of the child and providing for her protection within society. The Act further requires that all levels of the State cooperate as "competing social and economic needs exist".[112]

[84] Section 53(2)(b) of the Children's Act provides that anyone acting in the best interests of the child may approach the Children's Court for an appropriate order. The powers of that Court are extensive, including the provision of prevention or early intervention services.[113] The Children's Court can, amongst others,[114] make supervisory orders placing the child and/or parent or care-giver under the supervision

[110] Id at para 28.

[111] High Court judgment above n 13 at paras 68-79.

[112] See section 4 of the Act.

[113] See section 45(1) of the Children's Act for the list of matters the Children's Court may adjudicate.

[114] See section 46 of the Children's Act for the list of orders that the Children's Court may make.

of a social worker,[115] make an order subjecting the child, a parent or care-giver to early intervention services,[116] or make a child protection order, which can include a variety of social responses to protect the child.[117] Section 144(1) states that the purpose of prevention and early intervention programmes is, amongst others, to provide for psychological, rehabilitation and therapeutic programmes for children[118] and to divert children away from the child and youth care systems and the criminal justice system.[119]

[85] The Children's Act is protective in the sense that it recognises the need for support structures for the child – whether that is support in the form of a parent and/or care-giver or social services. Instead of criminalisation, the Children's Act approaches the problem by asking: what can the State do to support this child in preventing further use and/or possession of cannabis? A response situated in the Children's Act does not subject the child to arrest, detention, imprisonment or, at best, diversion which still leaves a child with a criminal record.

[86] In appropriate circumstances, a child can also be declared a child in need of care and protection in terms of section 150(1)(d) of the Children's Act if she is a child who "is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency". In terms of section 156(1)(j), a court can make an order that a child be admitted as an inpatient or outpatient to an appropriate facility if the child needs treatment for addiction. Section 156(4) provides that a child that is not in need of care and protection can still be subjected to an order of court for treatment, as long as the order does not include a placement. This approach is child-centred and focused on rehabilitation, rather than punishment.

[115] Section 46(1)(f).

[116] Section 46(1)(g)(i).

[117] Section 46(1)(h).

[118] Section 144(1)(e).

[119] Section 144(1)(h).

Prevention of and Treatment for Substance Abuse Act

[87] The objects of the PTSAA are to—

> "(a) combat substance abuse in a coordinated manner;
> (b) provide for the registration and establishment of all programmes and services, including community based services and those provided in treatment centres and halfway houses;
> (c) create conditions and procedures for the admission and release of persons to or from treatment centres;
> (d) provide prevention, early intervention, treatment, reintegration and after care services to deter the onset of and mitigate the impact of substance abuse;
> (e) establish a Central Drug Authority to monitor and oversee the implementation of the National Drug Master Plan;
> (f) promote a collaborative approach amongst government departments and other stakeholders involved in combating substance abuse; and
> (g) provide for the registration, establishment, deregistration and disestablishment of halfway houses and treatment centres."[120]

[88] It is therefore a comprehensive piece of legislation that is designed to approach substance abuse in a holistic manner. Section 28 of the PTSAA specifically applies to "[c]hildren abusing substances or affected by substance abuse" and it recognises that the PTSAA should be applied together with the Children's Act. In terms of sections 32, 33 and 35 of the PTSAA, a child can be admitted to a treatment centre to obtain the necessary assistance in rehabilitation and re-integration.

[89] The Minister submitted before the High Court that one of the many advantages of a response situated in the PTSAA is the cooperation that the Act requires of all State departments in their efforts to prevent and treat substance abuse. In other words, a village is involved.

[120] See section 2 of the PTSAA.

[90] As there are less restrictive means available to protect a child from cannabis use and/or exposure, it cannot be said that the limitation on a child's section 28 and section 10 rights is a reasonable and justifiable limitation. In the result, the impugned provision does not pass constitutional muster.

Conclusion

[91] Section 4(b) of the Drugs Act infringes a child's rights in sections 10 and 28 of the Constitution, and the provision does not pass constitutional muster under the limitation analysis. Accordingly, the declaration of invalidity made by the High Court must be confirmed. This conclusion is bolstered by South Africa's explicit international law obligations towards the child.

Remedy

Retrospectivity and expungement

[92] In accordance with the doctrine of objective constitutional invalidity, when this Court finds a law to be inconsistent with the Constitution, such a finding "does not invalidate the law; it merely declares it to be invalid".[121] As a natural consequence of the declaration of constitutional invalidity, the impugned law will, if it predates the Constitution, be invalid from the date the Constitution took effect and, if it was promulgated after the date the Constitution took effect, be invalid from that date.[122]

[93] Having regard to the default position, it is imperative to provide clarity on whether this Court's declaration of constitutional invalidity will apply retrospectively. Section 172 of the Constitution provides constraints for the retrospective application of declarations of constitutional invalidity by granting the Court the discretionary power to limit retrospectivity in circumstances where it is "just and equitable" to do so.[123]

[121] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 27.

[122] Id at paras 27-30.

[123] Section 172 of the Constitution provides:

[94] The question when it will be just and equitable to limit the retrospectivity of declarations of constitutional invalidity has been addressed on numerous occasions. Thus it is imperative to consider this Court's jurisprudential position.[124] With specific reference to criminal matters, regard must be had to *Bhulwana*,[125] where O'Regan J held:

> "Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the court will not grant relief to successful litigants. In principle too, the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants . . . . On the other hand, as we stated in *S v Zuma* (at para 43), we should be circumspect in exercising our powers under section 98(6)(a) so as to avoid unnecessary dislocation and uncertainty in the criminal justice process. As Harlan J stated in *Mackey v US* [1971] USSC 61; 401 US 667 (1971) at 691:
>
> > 'No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued

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"(1) When deciding a constitutional matter within its power, a court—

. . .

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[124] See *Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC); *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* [2016] ZACC 2; 2016 (3) SA 160 (CC); 2016 (4) BCLR 469 (CC); *Minister of Police v Kunjana* [2016] ZACC 21; 2016 (2) SACR 473 (CC); 2016 (9) BCLR 1237 (CC); *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Mvumvu v Minister of Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC) ; 2011 (5) BCLR 488 (CC) and *Centre for Child Law* above n 56.

[125] *S v Bhulwana*; *S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC).

> incarceration shall be subject to fresh litigation on issues already resolved.'
>
> As a general principle, therefore, an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity."[126]

[95] In keeping with precedent, it would not be just and equitable for the declaration of invalidity in this matter to apply retrospectively to the matters that have already been finalised.

[96] However, to alleviate the plight of those who have already been prosecuted and convicted under section 4(b) of the Drugs Act for the use and/or possession of cannabis as a child, an order that renders all such persons eligible for the immediate expungement of their criminal records upon application to the relevant authority is warranted. Should any administrative or practical challenges arise in the implementation of this order, the affected persons may approach the High Court for appropriate relief.

[97] As a concluding remark, I wish to emphasise the scope of this judgment. As much as the legal system sought to protect the child by criminalising such acts, there are more rights-centred approaches to responding to cannabis use and/or possession by a child. This judgment makes a finding that the criminalisation of the use and/or possession of cannabis by a child, whether in private or public, infringes on a child's rights. I am cognisant of the fact that there is an inherent risk with decriminalisation pertaining to a child and a potential scope for harm if the use and/or possession of cannabis by a child is not met with a social response. Therefore, I reiterate the need for a social response to cannabis use and/or possession by a child. In my view, the response should be wholly centred on rehabilitation, support and recognising the inherent vulnerability of the child and as such, the response should not be located within the criminal justice system.

[126] Id at para 32. This position has been endorsed by this Court in *Gaertner v Minister of Finance* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) at para 76 and *S v Ntsele* [1997] ZACC 14; 1997 (11) BCLR 1543 (CC) at para 14.

[98] This judgment does not permit a child to use and/or possess cannabis without consequence, such use and/or possession will be met with a social response. Further, the scope of this judgment is limited to the use and/or possession of cannabis by a child, and no finding is made on the appropriateness of criminalising the use and/or possession of other substances by a child. Nor do we decide any issue as to the criminal liability of children who might use their possession of cannabis to deal in cannabis or otherwise induce others to make use of cannabis. Nor do we opine on the question of the criminal law's response to adults who might use the possession of cannabis by children to further criminal purposes. Those issues are not before this Court and no evidence was led on any substance other than cannabis. Lastly, I deem it necessary to reaffirm that any adult who utilises or implores a child to be in possession of cannabis or to use cannabis can be held criminally liable.

Costs

[99] The applicant joined the proceedings in the High Court as amicus curiae and had no obligation to approach this Court for confirmation of the declaration of invalidity. That duty rested upon the State parties. However, the applicant was compelled to bring the application in this Court when it was evident that none of the State parties would pursue the confirmation proceedings. This was after more than 12 months had passed since the order of the High Court. The applicant is, therefore, entitled to its costs in this Court.

Order

[100] The following order is made:

1. The order of the High Court, declaring section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 to be inconsistent with the Constitution and invalid to the extent that it criminalises the use and/or possession of cannabis by a child, is confirmed.

2. The operation of the order in paragraph 1 is suspended for a period of 24 months to enable the Parliament to finalise the legislative reform process.
3. During the period of suspension referred to in paragraph 2, no child may be arrested and/or prosecuted and/or diverted for contravening section 4(b) of the Drugs and Drug Trafficking Act insofar as it criminalises the use and/or possession of cannabis by a child.
4. A child apprehended for the use and/or possession of cannabis may be referred to civil processes, including those found in the Children's Act 38 of 2005 and the Prevention of and Treatment for Substance Abuse Act 70 of 2008.
5. Where a court has convicted a child of a contravention of section 4(b) of the Drugs and Drug Trafficking Act for the use and/or possession of cannabis, the criminal record containing the conviction and sentence in question, of that child in respect of that offence may, on application, be expunged by the Director-General: Justice and Constitutional Development or the Director-General: Social Development or the Minister of Justice, as the case may be, in accordance with section 87 of the Child Justice Act 75 of 2008.
6. If administrative or practical problems arise in the implementation of paragraph 5 of this order, any interested person may approach the High Court for appropriate relief.
7. The second respondent must pay the applicant's costs in this Court.

For the Applicant:	R M Courtenay instructed by Centre for Child Law
For the Second Respondent:	H Rajah and N Buthelezi instructed by State Attorney, Johannesburg