

PRESS RELEASE

09 October 2002

Ellen Jordan v the State

The decision handed down by the Constitutional Court this morning in the case of *Ellen Jordan v the State* highlights the divisions in our society in regard to views on sex work. The Court was very evenly divided. 6 judges ruled that the criminalisation of sex work itself is constitutional, as is the criminalisation of brothels. 5 of the judges dissented and held that the prohibition on sex work itself in section 20(1)(aA) of the Sexual Offences Act is unconstitutional because it violates the right to equality.

SWEAT (Sex Worker Education and Advocacy Taskforce) is disappointed with the judgment. We had hoped that the court would recognize sex workers' rights and provide the legislature with a clear direction regarding new laws for the sex industry. However, the court has clearly stated that whether the interests of society would be better served by legalizing prostitution than by prohibiting it is a question which the legislature should decide, not the court.

Judge Ncgobo held at paragraph 30 of the decision that:

“Much of the argument in this case, and of the evidence placed before this Court, was directed to the question whether the interests of society would be better served by legalising prostitution than by prohibiting it. In a democracy those are decisions that must be taken by the legislature and the government of the day, and not by courts. Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not to its desirability. Nothing in this judgment should be understood as expressing any opinion on that issue.”

The South African Law Commission is already looking at laws around adult prostitution. We hope that through a fully consultative process, the Commission will consider not only the rights aspects around sex work but also practical implications of criminalising the sex industry. These practical concerns include difficulties in providing health services to sex workers in a criminalised environment and reducing sex workers' vulnerability to violence and exploitation.

The majority of the Constitutional Court accepted that section 20(1)(aA) is directed at the prostitute only and not the customer. They held that penalising the sex worker only does not constitute unfair discrimination on the grounds of gender:

“The section penalises “any person” who engages in sex for reward. The section clearly applies to male prostitutes as well as female prostitutes. The section is therefore gender-neutral. Penalising the prostitute only does not therefore amount to direct discrimination. Nor does it amount to indirect discrimination. The section makes a distinction between the prostitute and the customer. There is a qualitative difference between the prostitute who conducts the business of prostitution and is therefore likely to be a repeat offender, on the one hand, and the customer who seeks the service of a prostitute only on occasion and thus may or may not be a repeat offender.”

On the other hand the minority Judgment of Justice O’Regan and Sachs reflect a more nuanced view of the reasons why women engage in sex work, the discrimination that sex workers face and the double standards of a criminal prohibition that criminalizes the supply and not the demand:

“As partners in sexual intercourse, they both consent to and participate in the action which lies at the heart of the criminal prohibition. There are only three differences between them. The first is that the one pays and the other is paid. The second is that in general the one is female and the other is male. The third is that the one’s actions are rendered criminal by section 20(1)(aA) but the other’s actions are not. Moreover, the effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping which is itself in conflict with the principle of gender equality. The differential impact between prostitute and client is therefore directly linked to a pattern of gender disadvantage which our Constitution is committed to eradicating. In all these circumstances, we are satisfied that, as in *Walker’s* case, this is a case where an apparently neutral differentiating criterion producing a markedly differential impact on a listed ground results in indirect discrimination on that ground.

The offence of the customer becomes an offence of conspiracy or complicity. The difference between being a principal offender and an accomplice or co-conspirator may have little impact in formal legal terms. It does, however, carry a difference in social stigma and impact. In imposing a direct criminal liability for the prostitute, the law chooses to censure and

castigate the conduct of the prostitute directly. The indirect criminal liability on the client, assuming there is such, flows only from the crime committed by the prostitute who remains the primary offender. The primary crime and the primary stigma lie in offering sexual intercourse for reward, not in purchasing it.

The female prostitute has been the social outcast, the male patron has been accepted or ignored. She is visible and denounced, her existence tainted by her activity. He is faceless, a mere ingredient in her offence rather than a criminal in his own right, who returns to respectability after the encounter. In terms of the sexual double standards prevalent in our society, he has often been regarded either as having given in to temptation, or as having done the sort of thing that men do. Thus, a man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion. A woman who is a prostitute is considered by most to be beyond the pale. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women.”

The Constitutional Court’s ruling means that until government changes the laws relating to the sex industry, selling sex and brothel keeping will remain a crime. Although it is not a priority crime, police will continue to use resources enforcing the Sexual Offences Act. The sex industry will also continue to exist underground and sex workers will remain vulnerable to violence and exploitation and it will remain difficult to ensure fair and safe working conditions for sex workers.

Issued by:

SWEAT
Helen Alexander
Legal Advocacy Co-ordinator
021 448 7875
082 377 8496

WOMEN’S LEGAL CENTRE
Michelle O’Sullivan
Director
021 424 0870
083 440 1231