Jordan, et al. v. State

13 BHRC 203; [2002] (11) BCLR 1117 (CC)

Country: South Africa
Region: Africa
Year: 2002
Court: Constitutional Court
Health Topics: Poverty
Human Rights: Freedom from discrimination, Right to liberty and security of person, Right to privacy, Right to work

Facts

On 20 August 1996 a police officer entered a brothel owned by the first appellant in Pretoria, paid R250 to the second appellant and a salaried employee, and received a pelvic massage by the third appellant, a prostitute. All three were charged with contravening s20(1)(aA) of the Sexual Offences Act 1957 (â€˜the Actâ€™) which criminalised providing sex for reward and ss2, 3(b) and 3(c) which penalised brothel-keeping. At first instance, they admitted that they had contravened the Act, but claimed that the relevant provisions were unconstitutional infringing their fundamental rights to equality, human dignity, freedom and security of the person, privacy and economic activity, as guaranteed by ss 8, 10, 11, 13 and 26 of the Constitution, and should be declared invalid. As the Magistrate's Court had no power to declare statutes unconstitutional, they found the appellants guilty. On appeal to the Pretoria High Court to have the provisions set aside it was held that s20(1)(aA) was unconstitutional, but that ss2, 3(b) and 3(c) of the Act were not. The Court ruled that the prohibition on keeping a brothel was justified on the grounds that it was designed to restrict the commercial exploitation of prostitutes, which amounted to "trading in the body of a human being". The Court went on to conclude that a third party managing a prostitute or prostitutes with their consent amounted to trafficking in human beings and that public abhorrence at this kind of exploitation permitted the state to limit the third partyâ€™s rights to freedom of trade, occupation and profession.

There were two issues before the Constitutional Court. Firstly, whether it should confirm the order made by the High Court declaring s20(1)(aA) to be unconstitutional and, secondly, whether it should uphold the appeal and find ss2, 3(b) and 3(c) of the Act as read with s1, to be unconstitutional. The appellants argued that the structure of the Constitution made it necessary to cluster the rights to dignity, privacy and freedom of the person under the global concept of autonomy. This was on the grounds that it was of extreme significance for all persons to be able to determine how to live their lives and the state should not be empowered to make judgments concerning the good or bad life, provided that the conduct in question did not harm others. The state argued inter alia that the High Court interpretation of s 20(1) (aA) was constitutionally incorrect since the section bore an extended meaning which included customers.

[Adapted from INTERIGHTS summary, with permission]

Decision and Reasoning

In dismissing the appeal, but declining the order of invalidity with regard to s 20(1)(aA), the Court held that:

1.Â Â Â Â Â Â Â Â Â Â Â Section 20(1)(aA) does not discriminate unfairly against women either directly or indirectly section applies to both male and female prostitutes and is therefore gender neutral. Nor can it be maintained that discrimination arises because there are more female prostitutes than male ones. The purpose of the section is to prohibit commercial sex, not to protect the person who pays for sexual favours. A man who pays for sex and the woman who receives the payment are equally guilty of criminal conduct and liable to the same penalties both at common law and under legislation. The fact that, in practice, only prostitutes tend to be prosecuted and not customers indicates a flaw in the application of the law rather than a constitutional defect.

2.Â Â Â Â Â Â Â Â Â Â Â The legislature has the responsibility to combat social ills and, where appropriate use, crim sanctions. In doing so, it must act consistently with the Constitution. Once the legislature has done so, courts must give effect to that legislative choice and may not enter into the debate as to whether the choice is better or worse than others. Measures intended to eliminate the harmful effects of prostitution and brothel-keeping

are clearly designed to protect and improve the quality of life as a justified restriction on the participantsâ€™ economic activity. The court is not entitled to set aside this legislation simply because it considers it to be ineffective or because there may be other and better ways of dealing with the problem. Indeed, it is generally accepted that states have a wide discretion in this area (Aldona Malgorzata Jany & Ors v Staatssecretaria van Justititie (ECJ Case C-268/99, 20 November 2001 applied).

3.Â Â Â Â Â Â Â Â Â Â Â With regard to the issues of privacy, autonomy and dignity, the situation may be contrasted the criminalisation of sexual behaviour by gay people which has been held to be discriminatory. Such measures intruded into "the sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community" and, in so doing, affected the sexuality of gay people "at the core area of private intimacy". These considerations are not present here (National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (1999 (1) SA 6; 1998 (12) BCLR 1517 (SA CC) distinguished). Instead, the legitimate state interest in proscribing prostitution and brothel keeping justifies limiting the participantsâ€™ right to privacy. A person who commits a crime in private, the nature of which can only be committed in private, cannot necessarily claim the protection of the right to privacy. Here, the prostitute invites the public generally to come and engage in unlawful conduct in private.

Per O'Regan J and Sachs J (dissenting) (Langa DCJ, Ackerman J and Goldstone J concurring):

4.Â Â Â Â Â Â Â Â Â Â Â Extending the definition of a crime, even to avoid what may otherwise constitute unfair discrimination, should only be done in exceptional circumstances. Avoiding discrimination by deciding to either abolish the prohibition altogether or extending its scope to include excluded classes should only generally be undertaken by the legislature and not the courts. This is certainly the case here, given the wide range of potential responses to prostitution, including non-criminalisation. In these circumstances, it would be contrary to our constitutional values to give an extended definition to s 20(1)(aA). To do so would not just be an unnecessary intrusion on the legitimate sphere of the legislature, but also be destructive of the principle of legal certainty.

5.Â Â Â Â Â Â Â Â Â Â Â However, at the same time, making the prostitute the primary offender directly reinforces a of sexual stereotyping which conflicts with the principle of gender equality. Whilst the offence of the customer is one of complicity and the difference having little impact in formal legal terms, it does 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 flows only from the crime committed by the prostitute who remains the primary offender. This distinction has been espoused both as a matter of law and social practice. The female prostitute has been the social outcast, the male patron has been accepted or ignored. The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it and therefore such discrimination has the potential to impair the fundamental human dignity and personhood of women (para 65).

6.Â Â Â Â Â Â Â Â Â Â Â Whilst it is accepted that there is a manifest overlap between the rights to dignity, freedom privacy, and each reinforces each the other, it is not useful for the purposes of constitutional analysis to posit an independent right to autonomy. It is not appropriate to base constitutional analysis on a right not expressly included in the Constitution.

7.Â Â Â Â Â Â Â Â Â Â Â In determining what constitutes unfair discrimination it is important to look not only at the impugned legislation which creates the distinction but also the larger social, political and legal context (dicta of Wilson J in R v Turpin (1989) 39 CRR 306 (Can) applied). The evidence suggests that many women turn to prostitution because of dire financial need and that they use their earnings to support their families and pay for their children's food and education. This is not an excuse or a justification, but to suggest that male patrons who are able to use their economic means to obtain sexual gratification are somehow less blameworthy partners in the eyes of the criminal law, appears markedly unfair. The Constitution itself makes plain that the law must further the values of the Constitution. It is no answer then to a constitutional complaint to say that the constitutional problem lies not in the law but in social values, when the law serves to foster those values.

8.Â Â Â Â Â Â Â Â Â Â Â Even though it is accepted that prostitutes have few alternatives to prostitution, their dignity diminished not by s20(1)(aA) but by their engaging in commercial sex work. Any invasion of dignity, going beyond that ordinarily implied by an arrest or charge, that occurs in the course of arrest or incarceration cannot be attributed to the legislation, but rather to the manner in which it is being enforced.

9.Â Â Â Â Â Â Â Â Â Â Â Similarly, provided the law passes the test of constitutionality, any invasion of the prostitute

freedom and personal security follows from her breach of the law, and not from any intrusion on her right by the state.

10.Â Â Â Â Â Â Â Â Â Â One of the considerations with regard to the right to privacy is the nature of the relationship concerned: an invasion of the relationship between partners, or parent and child, or other intimate, meaningful and intensely personal relationships will be a strong indication of a violation close to the core of privacy. By contrast, a prohibition on commercial sex will not ordinarily encroach upon intimate or meaningful human relationships since central to the character of prostitution is that it is indiscriminate and loveless. By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character - therefore her expectations of privacy are relatively attenuated. However, s20(1)(aA) does amount to an infringement of privacy and all rights of privacy are not surrendered simply because they receive money for their sexual services. But the invasion is not extensive and can be justified.

Per O'Regan J and Sachs J (Ngcobo J, Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ, Skweyiya AJ, Langa DCJ, Ackerman J and Goldstone J concurring):

11.Â Â Â Â Â Â Â Â Â Â In relation to the constitutionality of ss2, 3(b) and 3(c), all open and democratic societies are confronted with the need to determine the scope for pluralist tolerance of unpopular forms of behaviour. What is central to the character and functioning of the state is that the dictates of the morality it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution.

12.Â Â Â Â Â Â Â Â Â Â If criminalising prostitution itself has been accepted in open and democratic societies as prom the quality of life, so too has criminalising brothels. Indeed, the suppression of brothels has far greater acceptance than the criminalisation of prostitution. Though such suppression is by no means universal, the common theme is that in open and democratic societies the question is regarded as essentially one of legislative choice.

13.Â Â Â Â Â Â Â Â Â Â The argument in favour of providing constitutional protection for the existence of brothels turns the contention that the fundamental rights of prostitutes to freedom and security of the person can better be protected in brothels than out on the streets. The reasons for holding that it is open to the legislature in its judgment to seek to suppress prostitution as an economic activity so as to improve the quality of life, apply with equal if not stronger force to the prohibition of brothels. Similarly if the rights to dignity and freedom of individual prostitutes are not limited by the Act, even less so are such rights challenged in the case of brothel keepers. The same considerations apply to privacy. The reduced rights which prostitutes have, become even more attenuated as far as brothel keepers are concerned. Here the legislature must have a wide discretion. The issues of controlling and regulating sexual activity are complex and therefore in the light of the proper interpretation of the sections, the High Court was correct in concluding that ss2, 3(b) and (c) do not infringe the Constitution.

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Decision Excerpts