

South Africa v. Jordan and others

Summary of Judgment

The appellants in this case, a brothel-owner, a brothel employee and a prostitute or sex worker, were convicted in the Magistrates' Court of contravening the Sexual Offences Act, 1957. They appealed to the High Court, arguing that the relevant provisions were unconstitutional. The High Court found that the section of the Act which criminalises carnal intercourse for reward (the prostitution provision) was unconstitutional but dismissed the appeal in respect of the sections of the Act which criminalise keeping or managing a brothel (the brothel provisions). The appellants then appealed to this Court, arguing that the brothel provisions should be found to be unconstitutional. They also argued that the High Court order invalidating the prostitution provision should be confirmed. The state opposed the appeal on the brothel provisions and also opposed confirmation of the order invalidating the prostitution provision. A number of amici curiae were admitted by the Court and argued for the invalidation of all the provisions.

The Constitutional Court unanimously upholds the High Court's finding that the brothel provisions are valid but divides six to five in holding the prostitution provision valid. The judgments have been written Ngcobo J for the majority and by O'Regan and Sachs JJ for the minority. Both judgments make it clear that the decision as to how to regulate prostitution is a matter primarily for the Legislature. Open and democratic societies around the world have chosen from a wide range of options to regulate prostitution. It is for Parliament, within the constraints of the Constitution, to decide which of these options suits South Africa best.

All the judges conclude that the prostitution provision does not infringe the rights to human dignity and economic activity and that if it does limit the right to privacy, such limitation is justifiable. They differ on the question of whether the prostitution provision constitutes unfair gender discrimination. Ngcobo J finds that it criminalises male and female prostitution and is therefore not directly discriminatory; nor does it constitute indirect discrimination because (a) there is a qualitative difference between the person who conducts business as a prostitute and a customer; and (b) under the common law and statute the customer is liable to prosecution as an accomplice to the offence committed by the prostitute and liable to the same punishment.

O'Regan and Sachs JJ find that the prostitution provision constitutes unfair discrimination: by making the prostitute the primary offender and regarding the patron at most as an accomplice, the law reinforces sexual double standards and perpetuates gender stereotypes in a manner impermissible in a society committed to advancing gender equality.

The Court accordingly unanimously upholds the constitutionality of the brothel provisions and by a majority refuses to confirm the High Court order invalidating the prostitution provision. The convictions and sentences imposed upon the three appellants in the Magistrates' Court are accordingly reinstated.

(Source: <http://concourt.law.wits.ac.za>)