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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE STATE APPELLANT

AND

RENÉ HORN RESPONDENT

CORAM : CORBETT, KUMLEBEN, JJA et BOSHOFF, AJA

HEARD : 22 MARCH 1988

DELIVERED : 17 MAY 1988

J U D G M E N T

KUMLEBEN, JA

On 16 August 1985/.....

On 16 August 1985 three members of the

South African Police visited, incognito, a so called

Escort Agency where they engaged the services of
three of its members for a night's entertainment.

They went with their partners to a dwelling unit of
some sort at a caravan park, called "Hennops Pride",
in the Pretoria district. There other police personnel
awaited them, ostensibly as their hosts. They were
in fact also part of a pre-arranged police trap. In
the course of the evening each of the women agreed
to have sexual intercourse with her partner for reward.
Money changed hands. At a stage when the women had
undressed and each was fulfilling her side of the
bargain, or was about to do so, the trap was sprung.

In/.....

In due course the three women, one of whom

is the present respondent, were charged in the court

of the magistrate at Pretoria with the contravention of

sec 20(1)(a) of the Immorality Act, 23 of 1957 ("the

Act"). It was alleged that at the aforesaid time and

place they had unlawfully and knowingly lived wholly

or partially on the earnings of prostitution, to wit,

by receiving money for the purposes of sexual inter-

course. They pleaded not guilty. The facts on which

the State sought to rely were admitted and some

amplificatory evidence, led at the instance of the

magistrate, was not challenged. The defence raised

was one of law. It was argued on behalf of the accused

that the penal provisions of sec 20(1)(a) are directed

at persons who parasitically live on the earnings of

prostitution,/...

prostitution, that is, on the earnings of a prostitute,

and not at the prostitute herself. Thus, so it was

contended, on the assumption that the evidence of

what took place that night proved the women to have

been prostitutes, they had nevertheless not committed

the offence. This argument was rejected by the magistra-

te who found them guilty as charged. However, the

appeal of the appellant (respondent in this Court) to

the Transvaal Provincial Division of the Supreme Court

was upheld and her conviction and sentence were set aside.

The Court (Spoelstra J and Roux J), acting in terms of

sec 304(4) of the Criminal Procedure Act 51 of 1977, re-

viewed the convictions and sentences of the other two

accused and set them aside as well. The State in turn,

with leave, appealed in terms of sec 311(1) of the

Criminal/.....

Procedure Act and thus the question of law which now

falls to be decided by this Court is whether the conduct

of a prostitute in plying her trade constitutes an

offence by her in terms of sec 20(1)(a) of the Act. It

reads as follows:

"Any person who -

(a) Knowingly lives wholly or in part on

the earnings of prostitution; ...

shall be guilty of an offence."

The words "living on the earnings of prostitution"

aptly describe someone, other than the prostitute, who

derives a livelihood from her trade. As Wessels J said

in Seligman v Rex 1908 T.S. 390 at 393 of sec 21(1)(a)

of Ordinance 46 of 1903 (Transvaal), which was identi-

cally worded save that "any person" read "every male person"

"The section refers to anybody who takes
money from a prostitute for the purpose
of furthering prostitution. That, after
all, is the test of the whole question -

was/...

was the money paid by the prostitute for the purpose of furthering her trade, and was it received by the accused for the purpose of aiding and abetting her in her trade and helping her to carry it on? If he receives money from a prostitute for that purpose, he must be said to live on the proceeds of prostitution".

But it can also be said - though perhaps less readily - that the prostitute herself in plying her trade lives on its earnings. The critical words constituting the offence are therefore not in themselves unambiguous. Their meaning must consequently be sought in the contextual setting in which they appear. And in this regard as has been recently affirmed in Santam Insurance Ltd v Taylor 1985(1) SA 514(A) 526 I - 527 C that in certain instances "the historical perspective can be of great assistance in resolving problems of interpretation."

(See/.....

(See too Jaga v Dönges, N.O. and Another; Bhana v

Dönges N.O. and Another 1950(4) SA 653(A) at 662 G — H.)

The ancestry of sec 20(1)(a) is both in-
structive and significant. The Transvaal Ordinance,
to which I have referred, read as follows:

"Every male person who
(a) knowingly lives wholly or in part
on the earnings of prostitution; ...
shall be guilty of an offence ..."

The corresponding pre-Union enactments of the Cape,
Orange Free State and Natal are identically worded, save
that in the last-mentioned the offence was not restric-
ted to a "male person"; its provisions applied to "every
person." They are sec 33(1)(a) of Act 36 of 1902 (Cape),
sec 13(1)(a) of Ordinance 11 of 1903 (Orange Free State)
and sec 15(1)(a) of Act 31 of 1903 (Natal). (These four
enactments of the provinces were repealed by the Act.)

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The first three manifestly did not have the prostitute in mind. The reference to a male person puts this beyond doubt since a prostitute is a "female given to indiscriminate lewdness" - The New Webster Encyclopedic Dictionary of the English Language page 669. (The use of the word "prostitute" in reference to a male person - usually preceded by the word "male" - is now recognised but was not current at the time the Act was promulgated - see Supplement to the Oxford English Dictionary Vol III s.v. "Prostitute.") The decisions interpreting and applying these three subsections consistently ascribed to them the meaning reflected in the quoted passage from Seligman's case. (See, for instance, Lawrence v Rex 1908 T.S. 716; Lindenstein v Rex 1908 T.S. 430; Rex v Roothman 1921 A.D. 298; Rex v Scholtz 1942 CPD 118). To judge from the two reported decisions on the Natal provision, it, despite its wider wording, was similarly construed. This one infers from the fact that in neither of those two cases was the prostitute charged. (See Epselman

v Chief/.....

v Chief Constable, Pietermaritzburg 1918 NPD 294 and

Ryan v Rex 1939 NPD 204).

It is against this background that sec 20(1)(a) is to be viewed and interpreted. Had the legislature, with the promulgation of the Act and the repeal of its predecessors, intended to change the essential character of the offence, in my view, it would not have done so by merely extending the range of persons to which the offence applied. The conduct of a woman living parasitically on the earnings of a prostitute is no less reprehensible than that of a man doing so: it was no doubt for this reason that it was decided that any discrimination between the sexes in this regard was unjustified. Mr Jordaan, who appeared for the appellant, in argument laid particular stress on the word "any" in the subsection and submitted that

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the reference to "any person" was an effective and unam-

~~biguous~~ biguous method of extending the scope of the offence to

include the prostitute herself. But this reasoning large-

ly begs the question, which, as I have said, is whether

it was intended to alter the nature of the offence or simp-

ly to extend the range of persons to which it would apply.

Counsel also drew attention to the fact that the Act, accor-

ding to its long title, was promulgated "(t)o consolidate

and amend the laws relating to brothels and unlawful carnal

intercourse and other acts in relation thereto" (counsel's

emphasis). But the interpretation of the subsection, for

which respondent contends, conforms to this purpose. The

corresponding sections of earlier enactments were consoli-

dated and, in the case of three of them, amended.

Two other subsections of the Act lend strong

support to the construction of sec 20(1)(a) relied upon

by respondent: They are subsecs 20(2) and 21(3) which

read as follows.

Sec 20(2):

"If it is made to appear to a magistrate by information on oath that there is reason to suspect that any house is used by a female for purposes of prostitution and that any person residing in or frequenting the house is living wholly or in part on the earnings of the prostitute, the magistrate may issue a warrant authorizing any police officer not below the rank of sergeant to enter and search the house and to arrest that person."

Sec 21(3):

"Whenever in any prosecution under this Act a person is proved to reside in a brothel or to live with or to be habitually in the company of a prostitute and has no visible means of subsistence, such person shall, unless he or she satisfies the court to the contrary, be deemed to be knowingly living wholly or in part/.....

part on the earnings of prostitution."

Sec 20(2) follows upon subsec (1), in which the offence is created, and is clearly intended to authorise and facilitate the arrest of a suspected offender. But the person in respect of whom the warrant may be issued ("that person") is the person ("any person") suspected of residing or frequenting a house "used by a female for purposes of prostitution," not the "female" (the prostitute) involved. Had the legislature intended her to fall within the ambit of subsec (1), the language of subsec (2) would have, I am sure, made provision for her arrest as well. Similarly sec 20(3), which places an onus in the stated circumstances upon an accused, ("a person"), in a prosecution for a contravention of sec 20(1)(a), of proving that he or she ("such person")

did/....

did not commit the offence, plainly has reference to a person other than "the prostitute" who lives on her earnings.

In argument Mr Engelbrecht, who with Miss Kilian appeared on behalf of the respondent, attached importance to the use of the word "knowingly" in sec 20(1)(a) which, as he correctly submitted, would be superfluous and inappropriate in reference to a prostitute plying her trade. However, the answer to this contention, which appears to me to be cogent, is that, on the supposition that appellant's interpretation is correct, "knowingly" would be pertinent to others living on the earnings of prostitution who in certain circumstances may do so unwittingly.

It was also contended on behalf of respondent

that/.....

that, if it were the intention to bring the prostitute

within the net of criminal liability, the requirement

that she should live on her earnings from prostitution

would be a redundant and irrelevant requirement. If

she was proved to be a prostitute, that fact should be

enough - so the argument ran - whether or not she lived

on her earnings from that source. But in point of fact

proof that she was paid for her services would inevi-

tably prove that she lived on such earnings. That this

is so appears from what was said in Seligman v Rex (supra)

in rejecting a similar argument advanced on behalf of a

pimp. At page 393 Wessels J observed:

"It would be ridiculous to say that if a prostitute paid money to a pimp, and the pimp spent it at a baker's or at a butcher's, then he would fall under sec. 21, sub-sec. 1(a), but that if he happened to put it on

a/.....

a totalisator, or devoted it to any other purpose but that of living, then he would not be guilty. Such a contention is wholly ridiculous."

By the same token the prostitute on receipt of the money must be taken to be living on such earnings, no matter how the money is spent or used. There is, however, merit in the submission that, if it were intended to make prostitution per se an offence, this would have been done explicitly.

In the result, for the reasons stated, I consider that on a proper interpretation of sec 20(1)(a) it was not intended that criminal liability should attach to the prostitute involved and that the decision of the Transvaal Provincial Division on appeal was correct. Mr Jordaan conceded, that, should the appeal be dismissed,

respondent/.....

respondent is entitled to an order of costs. Sec 311

of the Criminal Procedure Act, 51 of 1977, authorises

such an order in an appropriate case (see Attorney-

General, Natal v Ndlovu 1988(1) S.A. 905(A) at 918I).

The appeal is accordingly dismissed and the
appellant is ordered to pay the respondent's costs of
appeal.

M E Kumleben
M E KUMLEBEN
JUDGE OF APPEAL

CORBETT, JA) - concur
BOSHOFF, AJA)