JUDGEMENT

THE STATE VERSUS SAYED AND ANOTHER CASE 041/2713/2008.

The accused are charged with nineteen counts brought in terms of the Prevention of Organized Crime Act 121 of 1998(POCA), the Sexual Offences Act 23 of 1957, and the Immigration Act 13 of 2002.

Count one is an alleged contravention of section 2 (1)(f) of POCA-managing an enterprise.

Count two is an alleged contravention of section 2(1)(e) of POCA-conducting or participating in an enterprise.

Count three is an alleged contravention of section 10 of the Sexual Offences Act-procurement of a female to have unlawful carnal intercourse

Count four is an alleged contravention of section 20(1)(a) of the Sexual Offences Act-living on the earnings of prostitution- for the period prior to 26th April 2007.

Count five is an alleged contravention of section 20(1)(a) of the Sexual Offences Act – living on the earnings of prostitution –for the period 28th May 2007 – 24th June 2007.

Count six is an alleged contravention of section 2 of the sexual Offences Act – keeping a brothel- for the period prior to 26th April 2007.

Count seven is an alleged contravention of section 2 of the Sexual Offences Act- keeping a brothel-for the period 28th May 2007-24th June 2007.

Counts eight and nine were not put and therefore may be regarded as having been withdrawn

Count ten is an alleged contravention of 12A (1) of the Sexual Offences Act-facilitating prostitution for the period up to 26th April 2007

Count eleven is an alleged contravention of section 12 A (1) of the Sexual Offences Act-facilitating prostitution for the period from 28th May 2007 to 24th June 2007.

Count twelve is an alleged contravention of section 20(1)(c)of the Sexual Offences Act-receiving remuneration for the commission of an act of indecency for the period up to 26th April 2007

Count thirteen is an alleged contravention of section 20(1) (c) of the Sexual offences Act –receiving remuneration for the commission of an act of indecency for the period from 28th May 2007 to 24th June 2007.

Count fourteen is an alleged contravention of section 17 of the Sexual Offences Act-permitting the premises to be used for the purpose of prostitution for the period up to 26th April 2007

Count fifteen is an alleged contravention of section 17 of the Sexual Offences Act-permitting the premises to be used for the purposes of prostitution for the period 28th May 2007 to 24th June 2007

Count sixteen is an alleged contravention of section 49(3) of the Immigration Act-illegal employment of foreigners- for the period up to 26th April 2007

Count seventeen is an alleged contravention of section 49(3) of the Immigration Act-illegal employment of foreigners for the period 28th May 2007 to 24th June 2007

Count eighteen is an alleged contravention of section 49(6) of the Immigration Act for the period up to 26th April 2007-aiding and abetting foreigners

Count nineteen is an alleged contravention of section 49(6) of the Immigration Act for the period 28th May 2007 to 24th June 2007-aiding an abetting foreigners.

Count twenty is an alleged contravention of section 6 of POCA for the period prior to 26th April 2007 and up to 24th June 2007-acquiring, using or possessing the proceeds of illegal activities

Count twenty one is an alleged contravention of section 4 of POCA –money laundering-for the period prior to 26 April 2007 and up to 24th June 2007.

It is incumbent in terms of section 2(4) of POCA for the prosecution to obtain prior consent of the National Director of Public Prosecutions (NDPP), to charge a person with

committing an offence in terms of subsection (1) of this section. The accused were arrested/charged on 26th April 2007 whereas the authority of the NDPP was signed on 12th January 2009-see exhibits A and B. The accused only pleaded on 11th December 2008.

Mr. Zwane for accused two has taken a point *in limine*, (at the address stage of the trial), that the NDPP did not read the docket and therefore could not have applied his mind properly and also that the above authorization is very wide referring the court to Moodley and Others v National Director of Public Prosecutions and Others 2008(1) SACR 560 (N). The prosecution in their supplementary heads of argument have contended that this point should have been raised at the outset of the trial and prior to pleading. Section 110 of the Criminal procedure Act (CPA) 51 of 1977 provides for precisely such an eventuality and where it is not timeously raised the court shall be deemed to have jurisdiction. Section 35(3) (o) of the Constitution 1996, gives every accused person the right of appeal to or review by a higher court. The accused would have to allege that her right to a fair trial had been infringed upon. Furthermore a court of appeal or review will generally refuse to give consideration to appoint not raised in the court below unless justice, fairness and reasonableness require it. See Harksen v Minister of Justice and Constitutional Development 2003 (1) SACR 489 CPD at 499 (f). In any event the prosecution argue in their supplementary heads that Moodley and Others v NDPP (supra) was overturned on appeal. See NDPP v Moodley and Others 2009 (1) SACR 461 (SCA). The court also clarified that 'once the prosecution is authorized in writing by the National Director there can be no reason, provided the accused has not pleaded, why the further prosecution....would not be lawful.' See also S v De Vries and Others 2008 (1) SACR 580 CPD at 591 g where Bozalek J remarked '(T)his brings me to the provisions of s2(4) of POCA. That section simply requires that racketeering charges in terms of section 2(1) of POCA be authorized in writing by the NDPP. It does not describe the form which such authorization should take.' At page 589 the learned judge remarked 'In my view, to require the NDPP to read the contents of an entire docket before making a decision whether to authorize charges under POCA is both unnecessary and impractical.' The *interim* application by Mr. Zwane challenging the jurisdiction of the court is dismissed for the above reasons.

The Evidence.

Only the Prosecution led evidence. Messrs. Mazibuko and Zwane have represented the accused respectively and confirmed their clients' pleas of not guilty to counts one to seven and ten to twenty one. No amplification of their pleas were made in terms of section 115 of the Criminal Procedure Act and the State was put to the proof of all the elements alleged. At the close of the prosecution case an unsuccessful section 174 application was made for the discharge of the accused who then elected to close their case without taking the stand or summoning any witnesses.

The accused were arrested on the 26th April 2007 together with several prostitutes, including three state witnesses at 82 Bartle Road, Umbilo, Durban, hence some of the charges pertain to the period up to and including this date. Having been released on bail the prostitutes/witnesses, namely Sakawduan Nuphu, Philiwan Limpibun, and Napalai Rataya, were warned not to return to number 82 by the court. However they ignored this condition, they claim because of the insistence of the accused that they continue working, and returned to the premises of number 82 where, the evidence clearly established a brothel was being operated. There the activities of the brothel continued, albeit at a reduced tempo because now no new clients were being entertained, until a spat which gave rise to the witnesses fleeing to the Thai embassy in Pretoria on the 24th June 2007. The second period of the charges is therefore for the period 28th May 2008 up to and including 24th June 2007.

A brothel is defined in section 1 of Act 23 of 1957 as 'includes any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose' and unlawful carnal intercourse 'means carnal intercourse otherwise than between husband and wife'. At no stage has the defence challenged the evidence tendered that number 82 was at all relevant times operating as a brothel. Neither has it challenged the evidence that at all relevant times accused numbers one and two, who are married, were not present there then. In fact

it was pertinently suggested that the accused were renting a single room there and were just tenants.

It is the evidence of the three Thai prostitute witnesses that they saw an opportunity to come to South Africa to make money in prostitution notwithstanding that they were aware of its illegality here. They had received reports from other Thai women who had done likewise that there was money to be made here and expressed such a willingness to travel to South Africa. Philawan had previously worked as a prostitute in Johannesburg and on her second trip to South Africa was accompanied by first-timer and former roommate in Thailand, Napalai and two other women. Whereas Sakawduan had paid forty thousand Baht for her ticket, both Philawan and Napalai were presented with their air travel tickets by 'a stranger'. Sakawduan arrived on 13th November 2006 and the other two witnesses either on the 12th or 13th April 2007-there being a divergence in their testimony on this point. Sakawduan told how accused number two met her at Oliver Tambo International airport before taking her passport 'to cover the costs of the flight to Durban as she now belonged to accused number two' to be met in Durban by accused number one who drove them to number eighty two Bartle road. Both Philawan and Napalai told the court that accused numbers one and two met them at Oliver Tambo airport where they were provided with tickets for the onward leg to Durban. Accused one and two deny having been in Johannesburg to meet and greet the witnesses. They also deny the evidence tendered that the witnesses were obliged to hand their passports and return tickets over to accused one and or two as security for compliance with the conditions of a so-called 'contract' in terms of which each woman would be obliged to generate sixty thousand Rand from prostitution before retaining any profit for themselves. Sakawduan generated the requisite sixty thousand Rand and her passport and return ticket were returned to her by accused two whereas the passports of the other two prostitute witnesses were only recovered when the police effected arrests on 26th April 2007. After their release –they claim that the accused paid their bail- the women were instructed to return to number eighty two, Bartle Road in contravention of their bail conditions and to continue with prostitution, but only receiving established clientele-no new clients. When a fight broke out on 23rd June 2007 between accused two and Napalai and after overhearing discussions about contract murders the three prostitute witnesses fled by bus

to the safety of the Thai embassy in Pretoria. Because accused two is able to communicate in both Thai, (she is also of Thai origin) and English she acted as interpreter and would also answer clients' questions, both over the telephone-the services of the ladies were surreptitiously advertised in the local press as massage services apparently reflecting the cellular telephone number of accused two, and in person upon their arrival at the house. She was also the one who showed newcomers to the establishment the ropes. This included explaining where the 'tools of the trade' such as condoms were hidden and what rates should be charged - R200 for half an hour and R250 for a full hour. In addition the prostitutes were supplied with linen, towels and KY jelly by accused two who together with accused number one also provided food. Furthermore records had to be kept of earnings and these were checked each Sunday by accused two. Periodically these were destroyed on the instructions of accused two. The evidence was further that when clients arrived to choose a prostitute the two accused were invariably present and the takings which were always placed into a CD holder in the lounge were cleared daily by the accused. Accused one and two, the witnesses said had no other form of income and were mostly in the house and if present when the prostitute received money from a client would take the money themselves there and then.

The women were *ad idem* that accused one and two were their 'bosses' their 'managers' and accused two their 'supervisor'. They regarded themselves as 'employees' of the accused whom they even regarded as their 'parents'. In any event the accused, they believed, rented the whole premises and not just a single room as suggested and were also responsible for settling the water and electricity account each month. To substantiate this the State led the evidence of a municipal credit controller, Shunmugam Iyakannu who told the court that his records revealed that a B Sayed with identity number 7709145212 089 produced, to the municipal official, a lease agreement as required and requested on 7th May 2004 to be supplied with water and electricity for the period 5 October 2004 until it terminated on 1 October 2007. See exhibit N, pages five and six. The reference used is account number 83202668193 which is allocated to number 82 Bartle Road according to the records kept. The rates number for this property is 13934282 and according to the records-see pages one to three of Exhibit N- the registered owner for the period 2003 to 2008, when the enquiry was made, is a Mr. K Mudaly. This would tend to support te

claims by the women that the two accused were not simply tenants renting a single room in the house as they suggest. Section 15(1)(a) of the Electronic Communications and Transactions Act 25 of 2002 assists the State in the admission of data messages providing that the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence, on the mere grounds that it is constituted by a data message. The three requirements for its admissibility are that it must relevant and otherwise admissible, be proved to be authentic, and the original must be produced. Section 15(4) also assists in that it provides that ' (A) data message made in the ordinary course of business, ...is on its mere production .....admissible in evidence against any person and rebuttable proof of the facts contained in such record.....' Section 15(1)(b) prohibits its exclusion on the mere ground that it is not in original form. See Ndlovu v Minister of Correctional Services and Another (2006) 4 All SA 165 (W). Applying the above tests and standards the admissibility of the data messages has been established beyond reasonable doubt.

Failing to testify.

It is trite law that a court is entitled to find that the State has proved a fact beyond reasonable doubt if a *prima facie* case has been established and the accused fails to contradict it either by his testimony or by that of witnesses. In the absence of further evidence from the other side the *prima facie* proof may harden into conclusive proof and the party tendering it discharges his onus, which is in a criminal matter set at a standard of beyond reasonable doubt.

That is not however to say that in all cases where there is no contradicting evidence the *prima facie* evidence automatically becomes proof beyond reasonable doubt upon which a court may convict. Much depends on the nature of the evidence. Is it direct or circumstantial for example? See S v Theron 1968 (4) SA 61 (T). If the evidence given by the State, properly evaluated, fails to measure up to the required standard, the failure of

the accused to testify would not avail the State in proving its case, discharging its onus in the face of the presumption of innocence. The failure of an accused to testify, it has been recognized, is only a factor in deciding whether his guilt has been proved where the State has *prima facie* discharged the onus upon it. See S v Francis 1991 (1) SACR 198 (A).

The right to remain silent is applicable to the different stages of a criminal prosecution from the pre-arrest stage through to the defence case See S v Dlamini 1973 (1) SA 144 (A) at 146 D-E. where Holmes JA remarked 'The proceedings at the 'mansion' (the court) cannot be divorced from the procedure in the 'gatehouse' (the police station).....' An arrested person and indeed it may be argued, even a suspect, (see v Thebus and Another 2003 (2) SACR 319 (CC) at para.57), cannot be compelled to make any self incriminating admission or confession. However it must be understood that the right to silence does not necessarily imply that there are no adverse consequences to exercising that right in some circumstances, for example where the State has made out a strong *prima facie* case which calls for an answer, particularly for an alleged contravention of a statutory offence such as contravening section 36 of Act 62 of 1955, (See Osman *infra*), or where the court would have the court draw a favourable conclusion as to his state of mind-see S v Shivute 1991 (1) SACR 656 Nm 661. In S v De Kock (244/2004) (2005) ZASCA 9 (18 March 2005) the Court was concerned with the accused's failure to give evidence and the inferences that may legitimately be drawn from such failure and said: 'the essential question before this court is whether the State had established a *prima facie* case against the appellant that necessitated an explanation. While an accused has the right to remain silent, a right now also entrenched in the Constitution, where the evidence for the State is such that it calls for an answer, and none is forthcoming, the State case will be found proved beyond a reasonable doubt. The classic statement of this principle is to be found in S v Mthetwa 1972 (3) SA 766 (A) at 769 D-F, per Holmes JA; 'Where....there is direct *prima facie* evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general *ipso facto* tends to strengthen the State's case, because thee is then nothing to gainsay it, and therefore less reason for doubting its credibility or

reliability;.....'. The above is consistent with the remarks of Madala J in Osman and Another v Attorney General, Transvaal, 1998 (2) SACR 493 CC at para. 22 on page 501:

> 'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.' '

The law.

Racketeering

Racketeering, as it is colloquially termed refers to involvement in ongoing criminal activity. The State need therefore only prove that certain conduct or property is capable of being linked to a pattern of illegal conduct. This means that criminal liability can be extended to many principal actors in organized crime who run the affairs of criminal operations without committing any actual offences. Burchell, Principles of Criminal Law 3rd ed 2005, writes that there are three common elements of racketeering based - offences required in the Act; *viz*;

The existence of an enterprise-not necessarily illegal. 'Enterprise' is defined in POCA as 'includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity'.

Pattern of Racketeering activity ' means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule1 and includes at least two offences referred to in Schedule 1 of which one occurred within ten years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1'. Burchell argues that the criminal activity should be not only continuous but also related to constitute a pattern.

Participation on the part of the accused in the conduct of the particular enterprise's affairs. The various types of racketeering offences set out in the Act all present some form of activity relating to property that has been derived from a pattern of racketeering activity which in turn is linked to its use or investment in an enterprise.

Money Laundering

The core element thereof is concealing the illegal or suspicious source of money, income or property in order to disguise its unlawful origin or criminal taint thereby conferring on it the appearance of legality. It is defined in the Financial Intelligence Centre Act (FICA) as ' an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activity or any interest which anyone has in such proceeds'. The actual offence of money laundering is contained in POCA. Such property must form part of the proceeds of unlawful activities. This is defined in POCA as any property or part thereof or any service, advantage, benefit or reward which was derived, received or retained directly or indirectly in connection with or as a result of unlawful activity carried on by any person, not necessarily the accused.

Property means 'money, or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof'.

Traps.

Touching on this issue briefly Mr. Mazibuko has reminded the court of the inherent dangers and risks of accepting such evidence. The purpose and scope of section 252A of the Criminal Procedure Act is to *inter alia* avoid the conviction of people who are victims of unfair or improper trapping or undercover operations. In the present matter the 'victim' is one of the prostitutes, Philawan Limpibun, and not one of the accused. It is therefore apparent that section 252A is not applicable to he current set of facts under consideration. Even if the court is wrong in this regard it cannot be said that the evidence is inadmissible on the basis that it goes beyond providing an opportunity to commit an offence, thus impacting on the fairness of the trial. It has never been the defence of the accused that prostitution was not plied at number 82 Bartle road. On the contrary the defence suggests that their clients have in no way been associated with the goings on in that regard at the address referred to above.

Weighing up/ Evaluation.

The burden on the State is to prove the guilt of the accused beyond reasonable doubt, no more and no less. See S v Jackson 1998 (1) SACR 470 (SCA) at 476 e-f. It is sufficient for the State to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must in other words be morally

certain of the guilt of the accused, sufficient to disturb the presumption of guilt. See R v Mlambo 1957 (4) SA 727 (A) at 738A.

It is apparent that the State has succeeded in proving beyond reasonable doubt that at all relevant times a brothel was operating from the premises of 82 Bartle Road, Durban whilst accused numbers one and two were there resident. Not only do we have the evidence of the three Thai prostitutes but evidence was also led of a police trap during which Philawan Limpibun, known as Anna, agreed to have carnal intercourse with witness Mlungisi Mthembu for the fifth time for a fee. This witness has been described by Mr. Zwane as ' an independent witness, (who) gave a clear and unambiguous testimony and had nothing to gain other than telling the court what happen on several occasions he visited 82 Bartle Road, Umbilo.'

It is further apparent that the prostitutes were not there as independent 'operators'. Whilst by the nature of things they had to render their services to clients personally, behind the scenes they were provided with the entire wherewithal by someone else which the State alleges are the two accused. In its argument in this regard the prosecution reminded the court of the evidence of these ladies that they entered into 'contracts' with the accused which they first had to work off before reaping rewards for themselves. They were housed and fed by the accused and they took instructions from the accused as to how they should ply their trade. Notwithstanding that there may be discrepancies as to whether they were at liberty to visit the nearby shops unaccompanied or whether they did their own washing or paid the maid to do same, overall their version, mostly similar on material issues, has convinced the court that they were controlled and managed by the two accused who benefitted from the proceeds of prostitution by taking the money so generated.

Because the two accused have been shown to have repeatedly participated and involved themselves on an ongoing basis in living off the earnings of prostitution in contravention of section 20(1)(a) of Act 23 of 1957., they stand to be convicted

of an offence in terms of POCA. Count I is an alleged contravention of section 2(1) (f) of POCA whereas count 2 is an alleged contravention of section 2(1) (e) of POCA. Actual participation is required for the latter whereas in respect of the latter, knowledge, not participation is required. Subsection (f) is limited to a person who manages the activities of an enterprise and is aware of the enterprise's affairs through a pattern of racketeering, whereas with subsection (e) the manager or employee must partake in the conduct of racketeering. 'Manage' is not defined and therefore bears its ordinary meaning, which in this context means to be in charge of, run, supervise (staff), be the manager of (a sports team or a performer). See Eyssen v S (2008) ZASCA 97 at paragraph 5.

On the evidence tendered it appears as if both accused managed and or participated in the conduct, directly or indirectly of the affairs of the brothel as described above in contravention of section (e). It stands to reason then that they also bore knowledge of the enterprise's (brothel's) affairs in contravention of section (f). In the circumstances it would be a duplication of convictions and bring about an unfair result for the accused to be convicted of both counts one and two and accordingly they are convicted on count one only.

On contraventions under the provisions of the Sexual Offences Act 23 of 1957, in the absence of any explanation from the accused the deeming provisions of section 3 declare that the accused, having regard to the evidence led, are keepers of a brothel. Even if the court is wrong in its finding that the accused managed or assisted in the management of the brothel or received the takings paid by the clients to the prostitutes, subsection (a) provides that they shall be deemed to keep a brothel if they reside in a brothel unless he or she proves, (obviously on a balance of probabilities), that they were ignorant of the character of the house. The defence of both accused is that they were aware of the character of the house but distanced themselves from its other tenants and their business.

The State is further assisted by the presumptions contained in section 21 of Act 23 of 1957. This reads:

'Subsection (1) Whenever in any prosecution under this Act the question is in issue whether any carnal intercourse between a male and female was unlawful, such male and female shall be deemed to have been unmarried at the time of such intercourse unless the accused proves the contrary. (This should be read with the definition of unlawful carnal intercourse in section 1 where it reads 'means carnal intercourse otherwise than between husband and wife')

Subsection (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 on the earnings of prostitution.'

In the case of R v V 1950 (4) SA 64 (SR) at 65 the court observed that 'to procure' means to 'obtain a woman, to cause or bring about her availability for intercourse'. In the context of the matter at hand this is exactly what the accused did by fetching the prostitutes, whether from Johannesburg or Durban airports and by accommodating them and making them available to paying clients for purposes of carnal intercourse for reward, the proceeds of which they lived off.

The evidence has established the commission of the crimes as contained in and set out in counts three to seven, ten to fifteen, and twenty to twenty one by the two accused as charged.

In respect of counts sixteen to nineteen the State relies in the main on the testimony of Nonawetu Mayvis Makupula employed by the Department of Home Affairs as a senior administration officer at the Durban regional office from December 2006 to date. She attempted to explain the workings of the department insofar as work permits issued to foreigners is concerned. Her evidence was unfortunately not of the standard that the court would have expected of an officer in her grading and rank but she did confirm what would currently be logical in the prevailing situation in South Africa, namely that no work permits would be granted to foreigners for purposes of prostitution. This means that it would therefore be unnecessary to examine the status of each of the prostitute witnesses

to determine whether the granting of any such employment would change their status from legal to illegal. In terms of section 42 (1) of the Immigration Act 13 of 2002 *'no person shall aid, abet, assist, enable or in any manner help-*

(a) an illegal foreigner: or

(b) a foreigner in respect of any matter, conduct or transaction which violates such foreigner's status, when applicable, including but not limited to .....(iii) entering into an agreement with him or her for the conduct of any business or the carrying out of any profession or occupation'.

The evidence has established that the accused, acting with a common purpose, on diverse occasions, entered into agreements, (clearly illegal but this is irrelevant for current purposes), with prostitutes to ply their trade at number 82 Bartle Road, for the financial benefit of the accused initially. The accused are therefore guilty of contravening counts eighteen and nineteen. These agreements, termed 'contracts' by the witnesses for lack of a better description and in ignorance of the legal requirements of a contract of employment allowed for the use of the residence as a brothel subject to the control and instructions of the accused, particularly accused number two. The prostitutes were not entitled to receive remuneration even though it could loosely be stated that they 'worked 'for the accused. The monies which their clients paid to them for services rendered went to the accused. The requirement that the employer agrees to pay a fixed or ascertainable remuneration to the employee is absent here. See Workplace Law, ninth edition, John Grogan, at page 31. At the end of a period, after they had generated a certain amount of money for the accused, said to be sixty thousand Rand, any earnings would be for their own account.

Section 213 of the Labour Relations Act 66 of 1995 defines an 'employee' as-

'(a) any person excluding an independent contractor who works for another person or for the State and who receives, or is entitled to receive, any remuneration: and

(c) any other person who in any manner assist/s in carrying on or conducting the business of an employer'

The definition of 'employee' in the Basic Conditions of Employment Act 75 of 1997 is cast in identical terms.

According to Dube v Classique Panel beaters 1997 BLLR 868 (IC) at paragraph 37 (I)t is immediately apparent that the terms of the definition do not refer directly to a contract of employment. Despite this, the courts have interpreted the definition narrowly, so as to apply it only to persons engaged in terms of a common-law contract of employment. (See Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A).) Much of the jurisprudence concerned with interpreting the definition, viewed as it has been through the lens of the law of contract, has accordingly sought to establish a touchstone by which an employment contract can be defined.' The reason is obvious in labour law issues where jurisdiction needs to be established firstly. Here the evidence has not established beyond reasonable doubt, applying whatever test or guide is available, that the accused 'employed' the prostitutes in contravention of the Immigration Act The accused are acquitted on counts sixteen and seventeen.

In summary the two accused are convicted as charged on counts 1, 3-7, 10-15, 18-19, 20-21, and acquitted on counts 2, and 16-17. Counts 8-9 can be regarded as having been withdrawn.