



A Curated Conspectus of the Life, Love, Law,
Literature and Laughter of Albie Sachs

THE BOTHMA CASE – VIDEO TRANSCRIPT

CHAPTER: A POIGNANT CASE OF SCHOOLGIRL RAPE REPORTED 40 YEARS LATER

THANDI MATTHEWS

Judge Albie, the last case that you wanted to speak about in relation to the theme of gender was the Bothma Case. What was so profound about that matter?

JUSTICE ALBIE SACHS

Bothma versus Els, that's what you'll read. I never met Bothma. I never met Els. But I remember that case so vividly. It was in my last year, after 15 years on the Court. It reached deep into me. The story there was... I don't know if it was Mrs Bothma – I think she was the woman concerned – who told the following story. She was a bright, successful 16/17-year-old schoolgirl in a rural area in South Africa. She lived in a rural area with a family - a white family who were not very well off – on a farm owned by a rich, white neighbour. Her parents decided to send her to spend weekends with the rich white neighbour and he had sex with her. Everything collapsed for her afterwards, from being top of her school, top marks in the school, [to failing] exams.

She's telling the story now 40 years later. 40 years have passed. She's telling the story because she had been in prison for fraud. She'd had two broken marriages, she was imprisoned for fraud and there's a psychologist helping her. She's telling this story to the psychologist for the first time. The psychologist said, *'You must report it. You must deal with it. A long time has passed and he's ruined your life.'*

CHAPTER: '40 YEARS HAVE PASSED... WE CAN'T PROSECUTE'

So, she goes to the police, she reports it, and they say, *'Sorry, it's a very sad story but 40 years have passed. You've got no witnesses, there's no evidence, it's just your word against his. He denies completely what you say. We can't prosecute.'* So she ends up with – I'm not sure if it's with the Legal Resources Centre at that stage - but she gets legal advice that she can institute a private prosecution.

You just have to prove that the state is not going to prosecute. You have to prove that the matter is of very strong interest to you. And then, you can use the court mechanisms with your own lawyer presenting the case. So she follows that process. The person she's complaining against - it's a civil matter now - she's suing for damages. It's a private prosecution for violation; in effect, child rape. And he goes to lawyers. The lawyers come to court and say, *'He can't get a fair trial. 40 years have passed. There's no evidence, there's no corroboration. He can't call the witnesses who were there at the time. He can't get corroboration. He can't get a fair trial. She should've reported the matter earlier, it's her own fault that she didn't raise the matter earlier.'*

CHAPTER: THE HIGH COURT DISMISSES THE APPLICATION

The High Court judge accepts that argument and dismisses the application for prosecution; says, there can't be a fair trial. So, the Legal Resources Centre now take the matter on appeal. One of the top advocates, Jeremy Gauntlett, is briefed to handle the matter on their behalf. I read through all the documents, the papers and so on. It's an extremely poignant case. If she's telling the truth, she's been living with this troubled life all this time. Her family contributed to it. This guy got away with it. She shouldn't be rendered powerless to get any result. [But] if she's not telling the truth, this guy is now in his 80s and he's being accused of this; it's hard for him to defend himself.

CHAPTER: A TRAGEDY RUNNING THROUGH THE WHOLE NARRATION

Reading the story, I get a strong sense of at least credibility, so it doesn't have that feel of something trumped up, that would be a manipulation. There's a sense of tragedy running through the whole narration all the way through. That's quite powerful with me.

I come to the conclusion that it was wrong for the judge to say that there can't be a fair trial. Maybe there can, maybe there can't, we don't know; he couldn't say per se. The critical issue then was a failure to report the matter earlier. *'Why did you wait so long?'* Ordinarily, that could be decisive of a case. But when your failure to report is directly connected to the very invasion of your dignity and personality, that caused the trauma from the beginning, then it's part and parcel of the issue.

CHAPTER: SIMILAR CASES AROUND THE WORLD

I discovered all around the world, there were cases now, particularly of childhood abuse being reported 20, 30, 40, 50 years later. *'Why didn't you report it earlier?'* was what the judges were always saying. [The reply was] *'It was somebody in authority over me. I thought it was my fault. I felt ashamed. I felt I'd get no support from anybody.'* And only now, in circumstances, these things are being discussed.

It's one of those judgments I poured a lot of research energy into, getting the language just right, and held that the judgment of the High Court was wrong. It didn't mean that he would automatically get a fair trial, but the matter should go to trial. And then, if it turned out in the course of the trial the magistrate says, *'We can't get the witnesses, we can't get corroboration. I'm dismissing the charge, not because I'm saying she's a liar, but there's just insufficient support.'* Okay. But it wasn't for the judge to say automatically, because she hadn't reported it in all this time, it's indicative of maybe a fabricated story, or she's lost a chance for a right to have a fair trial, or to have a trial to gain the remedies that she's seeking.

CHAPTER: IT'S NOT THE MONEY, IT'S THE ACKNOWLEDGEMENT

I never heard about the case afterwards. My guess - pure guess on my part - is that the other side would have settled and found some form of payment, which would have been something. It's not just the money. It's the acknowledgment of what had happened to her. It was the feeling that she was able to vindicate something of her story, and to give some positive meaning to her life that had been a very, very unhappy life.

Again, I felt very proud to be a member of a court with colleagues totally supportive of the approach that I adopted, and to feel that judges in various parts of the world had come to similar positions. There are some issues that... it's not only getting on to a kind of agenda, it's a consciousness and awareness on issues of the environment, and on rights for women. There's clearly been an expanding approach to issues like that. In that sense, she was the beneficiary of advances in thinking that were being acknowledged by judges throughout the world, and are very happy that the top South African court on constitutional matters could associate itself with that particular approach.

THANDI MATTHEWS

That trend continues today because I think the point that you make about an acknowledgment that the act happened, and that you made a valid claim, that you're not being dismissed. I think sometimes people also repress violence that happens to them. So, as you're telling the story about going to see a psychologist and these untold stories coming out, even if you're just getting an acknowledgment that it happened, sometimes that's all you need. I do think it is a judgment to be proud of, and a trend to support.

JUSTICE ALBIE SACHS

You know, it's funny, I'm feeling sad now. You know, we deal with all these cases and felt proud of the Court and the achievements of what we did. Yet, it's just a reminder of what patriarchy does and what it does in the world.

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