



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

THE DE LANGE CASE – VIDEO TRANSCRIPT

CHAPTER: FREEDOM AND SECURITY VERSUS ARBITRARY DEPRIVATION OF LIBERTY

THANDI MATTHEWS

The De Lange Case. It had to do with freedom and security of the person versus the arbitrary deprivation of liberty. Can you speak to us a bit about that case?

JUSTICE ALBIE SACHS

Yes, it was related to insolvency inquiries and you've got people who just go bankrupt that try very hard and they just can't manage. You've also got a lot of crooks, and they've stowed stuff away, and they go bankrupt, and the creditors suffer, and lots of people suffer. So, you have an Insolvency Act, and it gives people authority to investigate, to find out what happened and to ask questions. People were just silencing, refusing to answer. To compel them to answer, they could be committed to be locked up, custodial sentence, prison, if they didn't answer until they started to answer.

CHAPTER: WAS LOCKING UP RECALCITRANT WITNESSES IN BANKRUPTCY PROCEEDINGS
CONSTITUTIONAL?

The question was, was this compatible with our new constitutional order? And I think we decided it wasn't by a majority. The old hands on our Court, Kriegler and Didcott, who'd seen lots of crooks getting away with lots of rubbish said, '*No, it is a justifiable intrusion.*'

One of the issues was not only the right everybody had not to be arbitrarily deprived of freedom, but there should be no 'detention without trial.' Could that be used in this case? Was it 'detention without trial'?

CHAPTER: I WANTED TO SCREAM 'NO, NO, NO, NO, NO!'

And I wanted to scream out, '*No, no, no, no, no!*' I got those words into the Constitution. I'd been detained without trial. Detention without trial had been the basis of the crackdown by the security police on our movement, on the resistance movement, on people claiming their rights and that

effectively shifted control over liberty from the courts, prosecutions, trials, to the security police. They could just have you locked up. It was the 90-day law, the 180-day law, and the Terrorism Act. Endless people being locked up, detained without trial. But it didn't only lead to unjust outcomes. It provided a basis for torture. You were out of the public eye. It wasn't just the cruelty to those of us who were in prolonged solitary confinement, but it completely perverted the criminal justice system. And they would get witnesses, line them up, and witnesses would say, I was tortured, and I told lies... Then, they get another one and another one and another one. You'd see sitting in the court, the very torturers were there when the witnesses were testifying. So it just subverted everything. So, that phrase was put in. I think it's the only constitution in the world that says, '*No detention without trial.*' It had a very specific South African provenance and meaning.

CHAPTER: PROTECTING THE IMPERMEABILITY OF 'NO DETENTION WITHOUT TRIAL'

And to my mind, if you said detention without trial covers this case of recalcitrant witnesses being locked up, they have lawyers, they can be visited by their family, they can get out of it when they come clean and they tell their stories and so on, you might start justifying detention without trial by saying well it's a reasonable limitation on that. I didn't want any limitation on detention without trial to be seen as justifiable because it was so intrinsically subversive of any form of due process of law. But I couldn't say all that in terms of my own kind of life experience, but I did indicate that it wasn't appropriate to use that provision in our Constitution in dealing with witnesses who refused to tell the story of how they went bankrupt and became insolvent. Because then you would start saying, well, it's justifiable in certain circumstances; mental health people are detained under the Mental Health Act if they are a risk to themselves or to others-- there can be many circumstances where you hold people against their will. I didn't want anything that could be used to undermine the impermeability, the intractability, the total firmness of '*No detention without trial.*' So, I remember that case, but my contribution was a very minimal one in the actual reasoning. I supported the main outcome, but I remember it with a certain degree of intensity myself.

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