



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

## THE KAUNDA CASE – VIDEO TRANSCRIPT

### CHAPTER: THE COURT HAD TO CONVENE URGENTLY

#### JUSTICE ALBIE SACHS

The third case was very remarkable. I'm not sure...I don't think we were woken up early as Judges, but we were told that the Court has to convene very, very urgently. And what's happened? Apparently, a plane left South Africa containing 20 or 30 alleged mercenaries flying to Equatorial Guinea, apparently with a view to staging a coup against the dictatorial president of Equatorial Guinea.

The plane stopped in Zimbabwe, Harare, to pick up fuel, and the Zimbabwean security people had been tipped off, they arrested about twenty or thirty people, black and white men...they're in jail. Their families now come rushing to Court. It's kind of weird. They're off on a mission to subvert international law, to kill the president of another country, for money, it's not even fighting for liberation of freedom or anything like that, just for money. And mercenaries had played a horrible role in Africa in the late period of decolonisation.

It was extraordinary... here were the wives and the sisters and sometimes the brothers, rushing to Court and saying, *'The Bill of Rights! The Bill of Rights! The Bill of Rights! Our people must be protected. They're going to be tortured! They're going to be assassinated! They won't get a fair trial!'*

### CHAPTER: TWO BIG ISSUES, AND A SWIFT RESPONSE

So there were two big issues before us as a Court - it all has to be done quite urgently - and the one is... they're outside of South Africa. Our Court has jurisdiction over South Africa, we deal with events taking part in South Africa. If we give an order to our law enforcement people, it's our law enforcement people. But they're (mercenaries) not in the hands of our law enforcement people. What do we do if they're now in the hands of people abroad?

And secondly, they knew what they were doing, they went on this venture, they were doing it just for money. Why should we protect them from the danger that they put themselves in at all in any way?

And again, it's one of those cases where, if you delay it too long because you're doing research and you're finding out about how other countries deal with issues like this, and you go deep into international law, if in the meanwhile, they've been handed over and executed or tortured. It's futile. There has to be some kind of swift response.

So, we're kind of divided. I think there were at least three judgments from different parts of the Court. What made it a bit easier for us was that the Deputy Minister of Foreign Affairs, Aziz Pahad, I think, said, to use the term they love using, *'we are seized of the matter, and we are making diplomatic representations to ensure that the people, whatever they've done, will be treated fairly in terms of the law.'*

We had some information from the International Commission of Jurists, if they went to Equatorial Guinea, the legal system there was notorious for railroading people. So, it wasn't just hearsay. It was based on reports of people who had actually been there. And the fact that Foreign Affairs was already taking a stand, in a way, made it less necessary to make an order on our part, particularly if our order was simply to Foreign Affairs to do what you can.

#### CHAPTER: A MURDEROUS MISSION VS OUR NORMS

But I know, I for one, felt it necessary to indicate that, on the face of it, this was a terrible mission, a murderous mission. It was part and parcel of a pattern on our continent of people who are essentially deeply racist, who would do anything for money, and had a certain disdain for people of other colours, [this then] became part and parcel of their willingness to do things of this kind.

But we don't determine our norms from the conduct and the standards of the people who are caught up there. Our norms are *our* norms. And there were two issues that I felt imposed a legal obligation on our state, not just *'wouldn't it be nice...or be correct or we think it would be better if.'*

The one was to ensure they were not sentenced to death. We'd taken such a strong stand in the Makwanyane case, and later on in the Mohammed case, about people being executed after a trial. The State owed its citizens, wherever they were in the world, to do whatever it could - a duty to prevent those citizens from being sentenced to death, in terms of court proceedings. That was one very clear issue. And the other is they had a right to a fair trial. And our authorities then were obliged to do whatever they could through Consular representation and so on, to ensure that whatever happened to them, they would get a fair trial. I think the proceedings in our Court themselves gave publicity, so they wouldn't be clandestinely moved and secretly murdered and tortured and so on.

I think the proceedings then, with lots of journalists from all over the world there, provided the protection. And that's one advantage of open Court hearings, that it brings things out into the open that otherwise could be done in a very hostile, negative, cunning, secretive way. I remember saying to Counsel for the mercenaries, *'Mr. So-and-so, your clients go into the lion's den and they complain that there's a lion there'* - just to bring out that they brought this all on themselves. It's not a predatory state grabbing them and subjecting them to some kind of potential penalty. But that wasn't in my judgment.

#### CHAPTER: A BLOW TO MERCENARYISM

Even if you're going to the lion's den, even if your motives are the most wicked possible, you're a human being and certain fundamental rights go there and the duties of the State are not to send a gunboat or paratroopers to rescue and bring them back, but to use what means you can, diplomatic means, to ensure... Put them on trial?... Yes. But no torture. No death sentence. And a fair trial. Part of the drama was it was Mark Thatcher, the son of Margaret Thatcher, who had financed the whole project... to make it even uglier in a way. And they were put on trial. And in the end, with these things there's lots of give and take.

Maybe, who knows, money changed hands and so on. But some of them, I think, served sentences. But I think it was a blow to mercenaryism. It was a big blow to mercenaryism in the country. And the publicity, I think, added to the blow. And we've got many other problems. And now the issue of mercenaries from big superpowers being involved and so on raises other international issues.

But at least as far as South Africa is concerned, there's a strong hatred of mercenary activity in our people and the people who wrote the Constitution. In looking at our history, we have so many plagues here, that's one plague that we don't have at the moment.

#### THANDI MATTHEWS

But Judge, can I ask you a question then, as a young person sitting before you, about justice and accountability? We are taught that the law serves justice, and yet those who have committed some of the worst crimes against humanity continue to live their lives as though nothing happened. Their children continue to live privileged lives - should they wish to immigrate, they can do that too. How do those of us who feel left behind continue to have faith in the law?

#### CHAPTER: WHAT IS JUSTICE?

#### JUSTICE ALBIE SACHS

It won't help you with your ambitions if this guy goes to jail. You might have a sense of, *they're hurt. I'm glad they're hurt.* But you're going to get your rights through opportunities and through pushing the way open to get ahead. And the satisfaction of knowing that somebody else is crying, I think is a very weak satisfaction. There is accountability. They come forward and tell the truth. That's a form of accountability, and it's an accountability that makes a lot of sense in the context of restorative justice. Justice can't be reduced simply to jail and locking people up, come on. Or cutting off their heads or hanging them or taking property away.

That's such a cruel, mechanical, limited idea of justice. Justice is acknowledgment of the wrong, acknowledgment by society, by the people concerned and so on...involved in that, and steps taken to make sure these things don't happen again. And for me, the justifiable anger and grievance of your generation, is not that Basson didn't go to jail, it's that the changes haven't been profound and quick and meaningful enough in this country, and that's where our focus must be.

And simply to project the disappointment and anger on locking them up, is actually almost evading the real hard issues. In that sense, locking people up is the easy way of dealing with the crimes of the past, but the least productive. And in this sense, I draw heavily on... I never did it theoretically or consciously before, but now I do it consciously... on *Ubuntu*, and the notion of *Ubuntu*. It kept African communities together in the worst days, and particularly important for the poorest of the poor, the most vulnerable of the most vulnerable, that *Ubuntu* is a powerful human interconnection, respect for each other.

#### CHAPTER: ACCOUNTABILITY AND A PERSONAL LIBERATION

And if somebody in the community does something wrong, your objective is not to expel them and to denounce them and brand them, but to bring them back into the community, to reconnect them with the community, to make them feel answerable and accountable in their future conduct. In the case of the man who put the bomb in my car, Henri, he came to see me in my chambers before he went to the Truth Commission.

And I've spoken about it many times, so I won't repeat the story. It was hugely emotional for me to meet him. This blind force that was the enemy, now he's Henri, a guy. And he helped our security forces, he made a contribution, he came forward, he told the truth. I, in that sense was happy for him that he didn't go to jail.

He became part of the new South Africa. Sadly, there were only two soldiers who went to the Truth Commission. There were lots of police who did that. I actually found it was liberating for me for him

to go forward and acknowledge what he'd done. Much more meaningful than sending him to jail.  
That wouldn't have done a thing for my arm or for my life in any positive way.

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