



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

THE MAKWANYANE CASE – PART 1 - VIDEO TRANSCRIPT

CHAPTER: OUR FIRST CASE IN THE FIRST CONSTITUTIONAL COURT OF SOUTH AFRICA

JUSTICE ALBIE SACHS

It was our first case, capital punishment. Wow! Capital punishment.

There were 400 people on death row. That decision could save them from execution or send them to the gallows. South Africa led the world in judicial executions, about 100 every year.

Number one - South Africa! The Gallows in Central Prison in Pretoria had seven nooses so that they could hang seven people at one time. It's more cost efficient.

For us who'd been in the struggle, capital punishment ..., Vuyisele Mini, trade union leader in what was then Port Elizabeth, goes to the gallows singing one of his own freedom songs, *Pasop Verwoerd*. And all the black prisoners on death row would join in singing.

And Solomon Mahlangu, executed after a huge international campaign. Just a brilliant, brave, young and combatant of uMkhonto weSizwe.

CHAPTER: MY VERY FIRST CASE AS A YOUNG ADVOCATE – A DEATH SENTENCE CASE

When Nelson Mandela inaugurated the Court, the day we were sworn in on 14th February 1995, he started by saying, 'The last time I was in court it was to find out if I was going to be sentenced to death. Today I inaugurate South Africa's first Constitutional Court, on which our democracy depends.'

So capital punishment was something deep.

As a young advocate in Cape Town, the very first case I got - I'm 21, turning 22 - was a death sentence case. The idea was nobody should be executed if they haven't had legal defence.

So, the judges would appoint young advocates then, pro deo it was called, you get a small fee to defend the people facing the death sentence. I might have had, I think, 30 cases or 30 people facing the death sentence in my nine years as an advocate at the Cape Town Bar.

THANDI MATTHEWS

And were they all political cases?

JUSTICE SACHS

No, no, no, no. Most of them weren't. And some were political. So painful, but most were for murder. One was for rape. And the pressure on everybody. You feel my client's life depends upon my skill. You don't sleep. And what made it horrendous was the knowledge that what really mattered was not how horrible the crime was.

We had a terrible term that we used – it was called 'a swinger'. A swinger meant your client could very well get the death penalty. And if you were found guilty of murder, it was obligatory unless you could show extenuating circumstances.

CHAPTER: CAPITAL PUNISHMENT - FACTORS DEEPLY EMBEDDED IN APARTHEID

What do you think the two most important factors were indicating whether or not your client would be sentenced to death?

THANDI MATTHEWS

The ferocity of the crime.

JUSTICE SACHS

No.

THANDI MATTHEWS

The nature of the crime.

JUSTICE SACHS

No.

THANDI MATTHEWS

Your socio-economic circumstances.

JUSTICE SACHS

No...

THANDI MATTHEWS

I'm not sure.

JUSTICE SACHS

You give up?

THANDI MATTHEWS

Yes

JUSTICE SACHS

Number one, the race of the accused, the race of the victim. That was the most important thing.

White kills white? No swinger. Black kills black? No swinger. Black kills white? Swinger. That was the most important factor.

The second most important factor was the judge. And we had a Judge Herbststein in Cape Town. He never, in 25 years on the bench, sentenced one person to death. The law was the same, but that judge just had clearly an aversion to taking cold bloodedly the life of somebody through his power.

But we knew that in practice this one judge - his name began with an L in the Cape Town High Court - would sentence six people to death in a year. So, we saw how arbitrary the whole thing was. And the feeling was it was so embedded in white supremacy, not formally, not legally, it wasn't said, but it was seen basically as a weapon to terrorize black people. Don't touch white people. Don't touch white bodies causing death and don't touch white women. My guess is something like 90% of executions came into that particular category.

In any event, you can see from my emotion that the issue went deep, deep, deep into ourselves.

CHAPTER: A NEGOTIATED DECISION TO LEAVE IT TO THE CONSTITUTIONAL COURT TO DECIDE

Then [our constitutional] negotiators decided, we can't agree on this. You can't have a little bit of capital punishment - you either have it or you don't have it. So, it was decided our Bill of Rights will say nothing about capital punishment. It won't authorise it. It won't forbid it. And we leave it to the Constitutional Court to decide whether or not the Bill of Rights, looked at as a whole, would permit capital punishment.

So, we were really left at large without any express indications or pointers in the Constitution itself. Otherwise, we could have said, 'Sorry guys, this is a huge issue for Parliament to decide. Let the

people decide, through their representatives.' We couldn't say that. The agreement was the Court would decide whether or not it was permissible.

CHAPTER: DIGNITY AND A PERSONAL STORY

THANDI MATTHEWS

So that's actually something that I want to pick up with you on, is why was that decision made, that the Court would determine that outcome? I say this because we currently live in a society where crime is ravaging our society. Right? And often, this was also some of the complaints that we would get at the Human Rights Commission, was about the fact that tax resources are used in our prisons to support people, people are treated with dignity. Why are they treated with dignity?

At the time that the Makwanyane judgment was up for deliberation, my uncle was killed in Gugulethu. He was 33 years old. He had just set up a practice in Gugs. He had two children, a three year and a one-year-old. Despite all the pain and the trauma, our family took a decision. We oppose the death penalty.

JUSTICE SACHS

What ...do you remember what year it was?

THANDI MATTHEWS

97, I think.

JUSTICE SACHS

And Thandi, I'm not surprised, knowing your family, that you would get beyond the simple anger and rage and see that it's not just to be kind or nice or forgiving or soft. It's building the society that you want, with the values, and you don't behave like the killer.

CHAPTER: THE DRAMA OF THE CASE

JUSTICE SACHS

And, the drama, the drama of the case. Normally when government's involved in litigation, it defends the existing law and sends counsel to defend the existing law, even if the particular president or prime minister or whatever it is doesn't agree with it. That's the law you defend. But in this case, Mandela felt very passionately against capital punishment, and it was Kader Asmal who told me afterwards - he'd been on the constitutional committee with me and happily for history, Kader was a little bit indiscreet. He mentioned two things relevant to me. The one was that former President De

Klerk, now Vice President, bitterly opposed my appointment to the Court and Mandela was absolutely adamant and Kader said, 'I never thought I would ever feel sorry for De Klerk in my life, I didn't like him - I felt sorry for him.' Madiba was so rude to him on that occasion. And the other occasion where he just overrode De Klerk completely was on capital punishment. De Klerk said we're a government of national unity, agreed in the Constitution for the first five years, and we want capital punishment. If we can't agree on that, we keep silent. Mandela said: 'No, I'm sending George Bizos to oppose capital punishment.'

CHAPTER: THREE DRAMATIC DAYS – ALL EYES ON THE COURT

George didn't make the main case. The main case was made by Wim Trengrove on behalf of the Legal Resources Centre. We had three days. Very dramatic, journalists from all over the world in this small, maybe 30 spectators, crowded place, low ceilings. We filed in and Arthur begins in a very stately way...

Trained by his years at the bar – as a Jewish boy sent to Michaelhouse to learn the style and manners and all the rest. Very articulate, looking Lincolnesque, he had a figure similar to Abraham Lincoln in many ways. He invites counsel to start and to lead the argument. My memory is, before counsel got into the second or third sentence, Ismail Mahomed is firing questions, and then next John Didcott, deep, booming, powerful voice. Then the others come in. Laurie Ackermann had a way of leaning forward to get everybody to keep quiet and then coming out with a very beautifully sculpted statement of question. In a sense, the most cunning of all was Johann Kriegler sitting quietly, and lobbing his question out there, very pertinent. I'm used to fighting for my voice, so I kind of push my way in. Sydney Kentridge, very quiet, waiting for his moment, speaking not just as somebody from the Johannesburg Bar, he's become one of the top three or four barristers in England. Everybody listens to Sydney. He doesn't waste words, every word is rich, lovely voice, and nicely framed.

And who were left out? Tholie comes in, Tholie Madala. Kate and Yvonne. It was Kate's nightmare that all these men will be making a huge row, pushing sharp elbows and she's going to be silent. That's when we decided we had to have microphones. It made a huge difference. Kate could press the microphone, the light would be on, it would be her chance to speak, and her questions came out beautifully phrased, very thoughtful, in a kind of soft voice. It was something new in the atmosphere of the Court, it was so educative. And Yvonne as well. When Yvonne is puzzled, she looks puzzled. You see it in the expression in her eyes, and she just wants counsel to deal with the question that's been troubling her a little bit, 'what is your response?' Put in a very kindly and direct way.

We also took a decision before our very first case that we don't discuss the case amongst ourselves in advance. We didn't want to be influenced by each other.

We hear all the arguments. It's over three days and finally then, Arthur thanks counsel for the support they've given. Thanks the public for sitting quietly and listening, the Court is now adjourned, and judgment is reserved. All rise. We all rise and we leave.

We're kind of excited now. We had a long oval table then, so Arthur sat at the top end, but no fixed seating for the rest of us. We just sat down wherever we wanted.

Arthur decided we'd go round the table Not even round the table... [just asked if] anybody had any views. Straight away, hands go up. Until then, we didn't know what our colleagues felt. It's giving our very first responses. It turned out that each of us felt that capital punishment was inconsistent with our new constitutional vision. It only became clear going round the table. We developed that workshop style. Maybe that was the advantage of not having only former judges on the Court. We were used to workshops, free speech, open debate, discussion, backwards and forwards. That democratic quality was a part and parcel of our struggle for democracy in the country, but also in our own ranks... hearing different voices. Arthur was very good at making sure everybody had a chance. We'd go round the table, sort of, several times and Arthur said, 'Okay, I've got a sense of the views of the team, and I'll come up with a draft.' He came out with his draft.

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