



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

THE MAMABOLO CASE – VIDEO TRANSCRIPT

CHAPTER: FREEDOM OF EXPRESSION

THANDI MATTHEWS

Another unique feature of our Constitution is our right to freedom of expression, which is also not an absolute right. But something that is a common theme in your judgments are the values that we need to uphold as an open and democratic society. One of the first cases that you dealt with respect to freedom of expression, the Mamabolo case, you write, *'The primary function of the judiciary today is to protect a just rather than an unjust legal order. Yet criticism, however robust and painful, is as necessary as ever. It is not just the public that has the right to scrutinise the judiciary, but the judiciary has the right to have its activity subjected to the most rigorous critique.'*

My question in relation to the Mamabolo judgment, is about critique of the judiciary. When is it respectful and when is it not? Thank you.

JUSTICE ALBIE SACHS

Yes. I read it in the newspaper the other day a certain Mr Mamabolo had been appointed to some senior position. And I'm thinking, is this the same guy who now has an important legal decision named after him?

CHAPTER: 'SCANDALISING THE COURTS'

And it came to us on appeal from a decision in the High Court. A judge there, I forget the name of the judge. He was an old guard judge, a white judge from the pre-Constitution era. And he had issued an order and Mr Mamabolo - I'm not sure what department he was in then - indicated that it was impossible to fulfil the order or something to that effect.

I don't remember the details and the judge was very offended. And he said, *'You can't do that. This is an order of the court.'* And he said that that official would be sent to jail for contempt of court. And the offense was called *'scandalising the courts.'* It was very quaint, feudal sounding. A term was used, taken over from English law, so the Dutch common law, provided for the law of persons and family

law and criminal civil law and so on. But the English common law governed procedure and the functioning of the courts, the way it worked in South Africa after the conquest and so on, then it became indigenised in South Africa, both of them. So, we've still got this quaint thing called '*scandalising the courts*'. And Mr Mamabolo says, '*Hey, what's going on here?*' in polite legal language. '*I wasn't given a hearing. I'm sent to jail. And we have freedom of speech in our Constitution.*'

CHAPTER: JUDGES IN OUR OWN CASE AS JUDGES

So, we now have to consider the matter and it's complicated. Why? Because we're judges and we have to ourselves determine what are the limits of criticism of the judiciary. So, we are judges in our own cause as judges, and we all agree that to sentence him to jail without a hearing is not correct.

And we all agree that judges have got to accept criticism, it can be stupid, unjust criticism... it goes with the job. People are upset, they're angry, they come out of court, they mutter. In the judgment I wrote I spoke about that in the apartheid era *Thou shalt not criticise the judiciary. Thou shalt not say that judges are biased in death penalty cases*. And Barend van Niekerk, a very brave young Afrikaans-speaking Professor was subject to a heavy fine for contempt of court for writing an article, a careful article, saying that the statistics show bias in the imposition of the death penalty.

CHAPTER: MY DAD THE LITIGATOR

My dad Solly Sachs, a Trade Union Leader. I think he had twenty-five cases in court. He was a great litigator. He won them all except for the first and the last. And he was fined for contempt of court after being convicted of some small offense, he goes out to the workers and he said, '*What can you expect? We live in a capitalist society and the magistrates are in the hands of the capitalists.*' It was taken on appeal and there was a Judge Ramsbottom in Johannesburg then, the same judge who defended Mandela's right to practice law even though he'd been convicted of breaking the law. And this judge found a way of saying, '*You know, people use intemperate language. They've just come out of court, and we shouldn't use a sledgehammer to break a nut*' ... that sort of thing. So, it was a Solly Sachs case. There was a case of Ben Kies, the first black advocate in Cape Town who used to edit a newspaper called *Torch* that, by the way, often criticised people like me vehemently. And there was a case where a white jury had acquitted a farmer found guilty of a charge of beating a black worker to death with a hosepipe, and he called it *Hosepipe justice*. He was found guilty. It was taken on appeal. And the top court said, '*You can criticise-- fair criticism of the judiciary is okay, but, to accuse them of racism and the jury of racism is not okay.*' And that's why I was saying in those days justice, in fact,

was unfair. Now justice has to be fair. And we are now defending what we hope will be fair justice, and we've got to take it on the chin.

The majority decision penned by Justice Kriegler was that there are limits. The judiciary has no defence. The argument is *no purse, no sword*. They depend upon public opinion and the respect of the public. And if you undermine the judiciary and lose the respect of the public, you're undermining the judicial function. And I found that a little bit unconvincing that maintaining of the reputation of the judiciary.

CHAPTER: CRITIQUING THE INSTITUTIONS OF POWER

To me, the threat to the judiciary had to be more of what we lawyers call proximate and direct. If a particular judicial officer hearing a matter is intimidated, that's more than scandalising the courts. That's now interfering with the administration of justice. If the speech being used then would pervert a particular case and particular outcome, then there could be the sanction, whether we call it scandalising the courts or not.

~~No~~ So, I would have narrowed down the basis of the critique, but with a very strong emphasis on the importance that the value is not only the right of the public to speak, it's good for the judges, it's good for the judiciary to be challenged and critiqued and to be held to the highest possible standards.

So, it's a very strong pro-freedom of speech, pro-freedom of critiquing the institutions of power that I underlined in my decision there.

THANDI MATTHEWS

I think the point that you make about us coming from our apartheid past where our judiciary was so instrumental to the oppression of the majority of our country.

That is why it is important to receive critique. But just to close, you know, in my favourite paragraph from that judgment you say, *'If respect for the judiciary is to be regarded as integral to the maintenance of the rule of law, such respect will be spontaneous, enduring, and real to the degree that it is earned, rather than to the extent that it is commanded.'*

Thank you.

JUSTICE ALBIE SACHS

Did I say that? Wow! Oh, clever, Albie! And it's true-- that you earn it, you don't command it. And that's much more enduring and much more significant than if people are scared that they'll be punished if they cross the line.

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