



THE BALOYI CASE – VIDEO TRANSCRIPT

CHAPTER: THE PRESUMPTION OF INNOCENCE IN PROSECUTIONS FOR VIOLATING A DOMESTIC VIOLENCE PROTECTION ORDER

JUSTICE ALBIE SACHS

Baloyi. Like me, he'd been in exile; in Zambia. A member of Umkhonto we Sizwe, the armed wing of the ANC. Like a number of our people who went into exile, he met a Zambian woman, local person, they married. When democracy came, he went back to South Africa. He stayed on in the army with his Zambian partner who was now his wife. There were problems in the marriage. It wasn't a case of the most violent beatings and so on. But clearly the evidence showed that he was behaving in a way that was totally incompatible with spousal relationships. He was rough with her.

TITLE: USING HER RIGHTS UNDER THE DOMESTIC VIOLENCE ACT

So, she used her rights under the Domestic Violence Act. She went to court; she got an order from the magistrate restraining him from beating her and subjecting her to any form of violence. She then claimed that he violated that order. So, she now goes back, under the Domestic Violence Act, to the police. The act says, if a woman makes that allegation or the spouse makes that allegation, or the domestic partner makes that allegation, the police can automatically arrest that person who's being charged; bring him in - if it's a him, it's usually a him - before a magistrate; and then he's guilty of an offence, unless he can show that he didn't violate the order.

TITLE: NOT GUILTY UNLESS PROVED BEYOND REASONABLE DOUBT

So, Sergeant Baloyi, or Lieutenant Baloyi... Mr Baloyi goes to his lawyer, and his lawyer says, this is clearly unconstitutional because there's a presumption of innocence. Nobody is guilty of a criminal offence unless their guilt is proved beyond a reasonable doubt. We'd had a number of cases. The law in the apartheid years put the onus on the accused all the time to prove innocence. So, the Free State High Court strikes down the law. It comes to us. So, this was maybe, 15 years ago, maybe more.

There wasn't the big public campaigning about gender-based violence that we have now. I think things have changed in the sense that it's now a big public issue. It's out there, that's important. Women have demonstrated, millions marched after the murder of that UCT student [Uyineni Mrwetyana]-- public consciousness is changing. So, I think it's important, and also the role of the Constitution, the law; not unimportant, but now what do we do?

The argument is that two rights, in the Constitution, to a fair trial are being violated. One is the right to silence, and the other is the presumption of innocence. Unconstitutional. Yet, take away some kind of drastic intervention, allow the ordinary, slow, plodding methods of law enforcement to function, and women just get beaten up.

TITLE: A PROFOUND CONSTITUTIONAL QUESTION

I'm asked to write the judgment for the Court. My colleagues feel strongly on the issue. They indicate that they want a strong judgment from the Court. They don't know how to deal with the constitutional issues. So, I decide to frame the case not simply in an issue of dealing with assault that has a gender dimension, but as a profound constitutional question. We're living in a state where it's declared a foundational value is non-sexism. The most flagrant form of male domination, the most direct, the most oppressive is gender-based violence. It's not just unfair to the particular woman concerned. There's something so pervasive about it. It's so much part and parcel, an ugly feature of our society, that it's a violent contradiction of the non-sexist vision that the framers of our Constitution had. So, that's the one dimension.

The other dimension is law enforcement. Overwhelmingly men involved in the cases, siding with the men, saying, *'Give him a chance, think of the family, try and get together again.'* So, the male domination comes through in the way the law is being applied. It's kind of a double tier of oppression that's denying women their right to be free in our society, and to feel free.

TITLE: INTERNATIONAL OBLIGATIONS

I do quite a lot of international research, and my positions are reinforced by international commitments we've made, particularly the CEDAW, the Convention for the Elimination of Discrimination Against Women. It was signed by South Africa. I said, it's not simply that you sign that you get the obligation. Your signing is a commitment that we are going to fulfil our constitutional obligations which fit in with our international obligations, because the most telling parts of CEDAW deal with violence - not the only part but the most telling parts. So, we're under those international obligations.

TITLE: INTIMATE VIOLENCE AS MORE THAN A CRIMINAL ACT

I find some very powerful statements in the US Supreme Court on gender-based violence, and how it's more than just a criminal act. I'm also very influenced by writings by Joanne Fedler from People Against Violence Against Women, I think it was called. I'd actually met Joanne through her sister who was deaf and a very active member of Disabled People of South Africa. Then I meet this very feisty law professor whose father was a great cartoonist. Nice, interesting family. And it's POWA, People Opposing Women Abuse. She writes with great poignancy about the problematic character of the intimate violence, and the complexity of it - because it's the father of your children, it's the person you've loved who's the source of the danger, of the injury to you - with great sensitivity. One of the problems is you send him to jail, who's going to pay for the school fees for the children? All those different issues are brought out.

TITLE: FEMINISING THE PERSPECTIVE

So, it's very raw. I cite quite a lot and I don't want to say just Fedler; my law clerks want to cut out Joanne Fedler because normally you just give the title and the initial of the writer. But I wanted Joanne; it's a woman writing. In that sense, I want to feminise the perspective even in the telling of the story. So, the setting then is the need for firm action, the duty on the state to intervene, and intervene robustly to protect people in extremely vulnerable situations with the potential of calamitous outcomes if there isn't intervention.

TITLE: REASONABLE LIMITATION OF THE RIGHT TO SILENCE

So, that part is fairly easy to establish. But then what to do about the right to silence and the presumption of innocence? The right to silence is easier to deal with - to say, well, in this case, the right to silence gives way. Normally, you can't be compelled to testify. Here, you can't be compelled to testify, but if you remain silent you're in trouble. So, there is kind of a compulsion on you to the extent that that limits the right to silence. It's a justifiable limitation in our open democratic society. Otherwise, you remain silent, you say nothing. Nothing can be done.

The presumption of innocence is more difficult. Nobody should be branded a criminal and sent to jail if the magistrate or the judge thinks well, maybe he's innocent. That was shocking to me. But is there a way that we can keep alive the essence of the drastic intervention without sending to jail somebody in relation to whom there's a suspicion he might not be guilty?

TITLE: BALANCING THE PROBABILITIES

So, I propose to my colleagues an order that would say, *'To the extent that the law puts the onus on the accused to prove that he's - on the balance of probabilities - that he's not guilty, that law goes too far and the minimum he must do is at least raise a reasonable doubt that his story is true.'* So, you've

got to read down the duty on him. He has to do something, he can't just remain silent, but he has to come up with a story in order to avoid being sent to jail. Or somebody sent to jail with a story that could be reasonably true. So, you're not going to send someone to jail if there is a reasonable doubt as to the guilt. That was the way then of saving what was constitutional in a very necessary measure without just striking it down, and then what could parliament do other than use a remedy of the kind that I'd mentioned? So, parliament, in that sense, would have no choice; they'd rather have that limited form of requirement on the accused than nothing at all.

TITLE: A PROFOUND BACKLASH AND SECONDARY VICTIMISATION

THANDI MATTHEWS

Well, I think, I mean that was in the context of a protection order. But what we are seeing now is that when allegations are made against powerful men when it comes to allegations of gender-based violence - and yes, I agree with you having the amount of attention on the issue has been good, but the backlash has also been equally as profound - many men are now implementing or instituting defamation claims against partners who may allege forms of gender-based violence. So, it's still, I think, a very tricky area of our law because on the one hand these processes do need to run through a court, but at the same time a lot of women don't have the economic power to go to court; they might not necessarily have the family support; it's a public declaration of exposing society to what's happening in your private sphere. And then, the secondary victimisation that many victims encounter when they go to police stations is also really problematic. So, we still need to, I think, develop that area of the law.

TITLE: IT'S NEVER, NEVER, NEVER OVER

JUSTICE ALBIE SACHS

Look, it's a constant battle, but you don't downgrade and negate the advances. The advances were made by women fighting for changes in the law by setting up - they had battered women's shelters; by educating the public; by creating men against violence against women; a whole range of things. They have achieved results and I think they've changed the whole public consciousness that before the consciousness was: Don't interfere, [these are] my neighbour's problems, keep out. Now, the consciousness is the opposite: These things are intolerable, they mustn't happen. And it doesn't mean that men aren't going to wriggle out and use counter mechanisms, but you've pushed them back. I mean, I'm a man, we're guys, we're people, we're human beings, we respond in different ways. And sadly, sadly masculinity becomes - a term often used - toxic amongst so many people. We

see young guys growing up being encouraged to pursue that culture of being brave, and strong, and fearless, and 'women like it' and all that kind of stuff. So, it's a constant, constant battle.

But the Constitution, to the extent that the Constitution is there, and the Court, the extent that they are there, are strongly favouring the need for determined action to be taken. And now that more and more women are on the bench, it's reinforcing, it's not just a few lone outliers like Yvonne and Kate raising the issues, and a few sympathetic men. This has become a new norm of what's required and expected, and that's an advance for our society, and that gives people the weapons then to take the battle further without saying, '*Yay, we won, it's over.*' Of course, it's never, never, never over.

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