



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

THE MISTRY CASE – VIDEO TRANSCRIPT

CHAPTER: THE QUESTION OF SEARCH AND SEIZURE

JUSTICE ALBIE SACHS

This was a case of a pharmacist, Mr Mistry, whose commercial conduct was being questioned by the Dental Association, and they had sent inspectors to his premises, and they seized a number of items. I think the main issue was that he was using, allegedly, sample materials given to him - he was selling them to the public... something of that kind. The relevant statute empowered the sending of inspectors, medical inspectors, to premises to check up-- were they upholding the standards of the profession?-- and to do so without warning, and to seize objects there if they could be useful in the trial, the prosecution.

So it raised the whole question of search and seizure. It was something huge for South Africa, because now the Constitution, basically in the Bill of Rights, protected people, the privacy of the home, the person, people and so on. It was clear that we needed those protections.

CHAPTER: THE TOTAL, INTRUSIVE POWER OF POLICE DURING APARTHEID

One of the aspects of apartheid was the total power given to police - white, black, brown police - to invade the personal domains of black people. They could be stopped in the streets, '*Where's your pass?*', they could burst into your home at night, shine torches... There was nothing left for personal dignity and no safe area to be; in your body, in your person, and in your relationships. So, it was a very, very necessary thing.

But it was also intercepting phone calls and bugging chambers where we were dealing with clients— a whole range, a panoply of powers used by the security police to catch us and to stop us from continuing the freedom struggle.

CHAPTER: SETTING NEW STANDARDS FOR POLICE POWERS

So, it was really important and necessary to set standards that didn't just authorise - whether it's medical inspectors, whether it's police on the job, on the bicycle, in their cars and so on - just at will to go and search the persons, search the homes, search the premises, even commercial premises, of people doing their business. So that was very, very important.

At the same time, we had high levels of crime and people were alarmed. Democracy, sadly, didn't mean the end to violence, murder, sexual assault, thieving, embezzlement. So, if the police didn't have powers, then nobody would be safe. And we especially wanted people to feel that the new democracy made people feel safer, generally, and to feel the government is on their side; the government is not the enemy; the government is not the main source of intrusion into their lives. So this was the context. Poor Mr Mistry has to bear the burden of our whole history. You get a kind of intuitive sense that there's something wrong going on here. The act is just too wide, too sweeping; there isn't a proper balance.

CHAPTER: A THIRD DIMENSION COMES IN

Now, a third dimension comes in, and I discovered this doing my research preparing for that case. Regulatory inspection. You need that for factory inspectors, for safety. You need that for supermarkets that sell meat and chickens and fruit; for standards - absolutely important. And they can't go and get a warrant every time they want to just do the inspection. So, it became clear to me that regular inspections that can be unannounced, that should be unannounced for purposes of maintaining the standard of professions, of production, and so on; the balance is in favour of permitting open, unannounced entry. What was problematic in this case was that they suspected this guy. And so, they used the power given for regular inspections to seize evidence to nail him. Once the objective of the search was to collect evidence, then the balancing factors came in.

Now, it took me weeks of research, looking very much to North American jurisprudence on this - Canadian and United States - where search and seizure is a very, very big issue. I even spoke to Professor Sullivan, who'd written their main textbook on search and seizure in the United States, just to get some ideas.

CHAPTER: GETTING THE BALANCE RIGHT

It was really interesting to see how important it was in modern society to get that balance right. It's not just South Africa and not just Canada or America, it's everywhere. The balance between the inviolability of your home, your person, a space where what an American judge called 'the right to be left alone'. I don't like the right to be left alone if it means you end up isolated and you're disconnected from fellow human beings. But it's very important for each one of us all the time. I'd

been raided myself many times... a ring at the doorbell... when we put a doorbell on our bungalow here in Clifton, I insisted it mustn't just be a ring. If I hear a ring at four in the morning, I wake up with shock. I'm conditioned, like Pavlov's dogs, that it's a police raid, even though I'm speaking about stuff that happened sixty years ago. So, we have a nice kind of 'ding, ding, ding, ding dong' sound for the doorbell. That's what it means living in a constitutional democracy.

CHAPTER: AVOIDING A POLICE STATE – CRITERIA FOR THE FUTURE

I think in my judgment, I quoted from Robert Jackson, who'd been a prosecutor at Nuremberg and then became a Supreme Court judge in America. He spoke about the importance of avoiding a police state. The control of search and seizure is to prevent that from happening. And then, particularly pernicious in South Africa, where it was part and parcel of racial oppression, which denied the majority of the population dignity, inviolability, autonomy, space of their own; treated not as full human beings. So, all of these themes come into the judgment; and again, not directly relevant to Mr Mistry, but important to establish the criteria that would apply in the future.

CHAPTER: RANDOM SEARCHES VS REASONABLE SUSPICION

We hold that the regulations in the Act went too far when they gave these medical inspectors unfettered powers, not only to do regular inspections, that's fine, but to seize materials and use the materials in prosecutions. Once you want to get material for prosecution, then the balancing has to be done. And the balancing that's been developed in countries whose legal systems we know is that there has to be a reasonable suspicion of an offence having been committed; it's not just a whim. You can't have random searches because your nose tells you something wicked is going on. Then people are not safe in their homes. So, there has to be a reasonable suspicion, and the reasonable suspicion mustn't be of the person doing the search. It must be of a magistrate; an independent person; somebody outside of the process, who says, 'Okay.' And that protects all of us from arbitrary searches and seizures. Important themes to underline.

Then one thinks of airports; you stop, why? Because of the people going onto planes with explosives, willing to give their lives to further a particular cause. And so, a doctrine was developed in America of reasonableness, of having random searches or general security checking. And it depends on the society to decide. So, they have cases in America about: Can police come into schools to check for drugs or not?... and I don't want to go into all that... but you have cars that are stopped in the streets to check drunken driving. And that's again that modern societies allow random searches in that way. It's acceptable and people can understand that.

CHAPTER: ASSESSING THE LAW WITHIN THE CONSTITUTION

So, for me, it was a huge education in an area where you didn't have to have a template, you simply had to say in the apartheid era, '*...did the law allow or not allow?*' and you were stuck with that. Now, you can say, '*If the law allows it, but the law exceeds the Constitution, the law has to be reined in.*' In the case of Mr Mistry then, we said that the seizure of the materials had been unlawful, and I think we didn't order the return of the materials. So he won a bit of a pyrrhic victory; his name is in the law reports ,for better or for worse; but it was a case that I enjoyed very much as a Judge getting involved in. A little curious aspect of it was the person who had drafted the legislation was Zak Yacoob, who later on came onto the Court, and I heard him muttering once that he thought we got it all wrong.

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