



THE S v M CASE – VIDEO TRANSCRIPT

CHAPTER: THE BEST INTERESTS OF THE CHILD

THANDI MATTHEWS

To close this section on children's rights was the M versus State case (S v M) that you dealt with, where you actually gave context to what is considered to be the best interests of the child. You made it very clear that children have an inherent dignity in their own right; they're not just extensions of their parents. Would you like to tell us about that case?

JUSTICE ALBIE SACHS

I remember the *M versus S case* (S v M) so well, when it started off, the full name was there. Then somebody said, '*...you know, this deals with the rights of children, and their names shouldn't be disclosed.*' So, it became not Mrs... But M. And it seemed to me to be the most hopeless case we'd ever had referred to us.

CHAPTER: HOW TO GET A CASE HEARD IN THE CONSTITUTIONAL COURT

There's a special procedure in the Constitutional Court. You can't just say, '*I want a case heard in the Constitutional Court.*' If you're the president you can, parliament can, and there are just a few particular officials who can go straight to the Court. Ordinary people, extraordinary people, people in general, have to apply to the Court for a hearing of a case, and they send in the documents and we ask the Court to set down the case for a hearing on the following issues. And then the Court reads the documents in advance, and we decide whether we'll hear it or not. But it's not just subjective, there are grounds. When we started, it had to be a constitutional matter. So, you don't just hear an ordinary divorce or murder case or company liquidation. It had to raise a constitutional question. That was number one.

Number two, it had to have reasonable prospects of success. It's not enough that it's a constitutional matter. There's got to be some substance there. It doesn't mean that because it's a powerful case you're going to win; there's got to be reasonable prospects of success.

And there were two elements in terms of the reasonable prospects. The one was the procedures; have you followed the right procedures; are you coming to the Court too quickly? Should you have tried something else before coming to the Court? And the other is the chances of winning the case on the evidence you produce?

CHAPTER: 'TELL ME WHAT YOU THINK'

We would get our law clerks to go through the applications and give us a little memo on whether we should hear the matter or not. And I give this case to my law clerks, and I'll say, *'...tell me what you think?'* And I'm thinking to myself, it's the worst application with the least chances of success of any of the cases that we've had. It doesn't raise a constitutional matter and there's no way she can possibly get what she wants. In any event, they write their little notes, their little memos.

Before I send out a note to my colleagues, I bumped into Kate O'Regan in the in the corridors of our new Court building. And I say, *'this is an absolutely hopeless case.'* And she says, *'Albie, you're thinking about the rights of the accused person.'* And the facts of the case were that Mrs. M had indulged in reckless credit fraud. She would go to supermarkets, buy stuff, buy stuff, buy stuff, pay with a card that had no money, then rush off with the goods ... and she was accosted.

She's brought before court. The magistrate says, *'Look, it's your first offense. Don't do this again. I'm giving you a suspended sentence.'*

She's on a suspended sentence and she does it again, and she's caught again. And now she's actually released on bail, and she does it a third time.

It's like compulsive behaviour. And she's saying, *'I've been sentenced to four years in jail. I've got three boys. We live in a very fragile area on the Cape Flats. There's no one else to look after them. I have to look after them. And I don't want to be separated from my boys, from my children. So, please make it a completely suspended sentence,'* something of that kind.

And I'm thinking where's the constitutional issue? It's just another case of somebody complaining about a sentence imposed. And I'm thinking, come on, you know, it's three times, not once, not twice, three times. You're just perpetuating it. And the general rule is, on appeal you don't interfere with the sentences by the judge or magistrate who's heard the matter. They're on the spot, they see the witnesses, they get a good feel... unless there's something shockingly wrong.

She had succeeded in getting one of the sentences knocked out. She went to the High Court and so that reduced her penalty from four years to, I think, two years imprisonment. But she said, *'Still, I'm going to be separated from my children.'*

So, Kate said, *'But Albie you're thinking about her. What about the children? What about their rights?'* Not her rights to be with the children, the children's rights to have their caregiver look after them.

I said, *'Okay, Kate, it's the rights of the child. It's a constitutional matter. We can hear the matter, but she's not going to get anywhere.'* I recommend we set it down.

CHAPTER: THE CASE IS SET DOWN

So, we set the case down. People are appointed - social workers - to investigate the situation, to report back. She hires her own social workers. The Children's Rights Unit at the University of Pretoria became involved. They played a very, very big role in the way the case unfolded afterwards. And it takes time to get all these reports and time is passing. And eventually, after a year or two, we get a report that, in fact, she's holding down two jobs, not one. She's got a laundry, and she runs a bail service. She knows all about bail. She's on the Parent Teachers Association.

There's nobody else who can look after the children. The father is off the scene and there's no other close relative. And the state appointed official is kind of equivocal. And the social worker for her says, *'No purpose will be met by sending her to jail; not for her but for the children.'*

I was persuaded. Sending her to jail just to punish her, and the kids are going to be negatively affected. And that would do nothing for her, it will just lock her up with other crooks, and she'll be in their company and it deprives her of her self-reliance and so on.

So, I now take the matter a step further, and I deal with the principle of restorative justice. Not punitive justice... restorative justice: community service, counselling, paying back the people she defrauded. And I eventually come up with a recommendation that the whole sentence be suspended on condition that she does community service - not to be drafted by the Court, people on the spot have to do that – and that she pays back the money to all the people affected. And I just imagined them being like astonished that this woman comes and says, *'Sorry, I stole R250, here's the R250.'* But it would be meaningful to them. It's relinking her with the community. And some kind of counselling. There's clearly a compulsive thing happening there, and she needs that support. And then to do community service work that would be useful.

CHAPTER: RESTORATIVE JUSTICE, UBUNTU AND OUR BILL OF RIGHTS

And it becomes a very strong claim for restorative justice, not punitive justice. And emphasising it fits in very well with the theme of *Ubuntu* in South African public life. And it's an undergirding of our whole Bill of Rights concept. All my colleagues accept the rights of the child aspect has to be paramount. They all accept in a case where the primary caregiver faces imprisonment, the judicial officer has to inquire what will happen to the children, and if necessary make alternative arrangements. And in a case that's a 50/50, lean in favour of keeping the caregiver with the children... If it was like, one ghastly murder case, where children were involved, there had to be a punitive sentence, given the South African law, it wouldn't be appropriate. But even then, the magistrate can't say, *'Well, it's not up to me, it's up to the other children's officers. I just deal with sentencing the person concerned.'* The interests of the child required that.'

And so, I wrote very, very strongly about the rights of children. I had to make sure that the child doesn't sink or swim with the parents. That the child is an independent person with the right to learn about the world and explore their own bodies and the world, and a whole range of things.

CHAPTER: THE RIGHT OF A CHILD TO GROW UP AS A CHILD

And these were themes that had come to me in the late struggle days when we're looking to a future democratic South Africa. And our hope is invested in children; and our children had been harassed and shot and made to run and flee and denied opportunities; and part of our liberation was that our children now would have rights. They're not the property of their parents, or of the state, or anybody.

So, I wrote very, very strongly about the rights of the children in that sense; the right of a child to grow up as a child, become an adult... an adult in the world, associating with other people in the world, moving the gaze away from the lawbreaking parent to the children.

I think four of my colleagues said they can't let her go, it's such a repeated offence, she's been so persistent in it. But they can agree with the first aspect. If she's going to go to jail, the magistrate is now always obliged to look at the interests of the children and to ensure proper arrangements are made. And the concept of the best interests of the child, it's not an easy one. It's easy to say it's not the interests of the parents or the church or the school or the state, it's the interests of the child that matter. But you can't dictate the whole life journey of the child from the standpoint of the court.

And can you say the parent who's committed gruesome murders mustn't go to jail because that would be damaging to the child as the child will lose a parent?

When you say the interests of a child are paramount, it doesn't mean that they are overwhelmingly dominant and everything else has to fall away. It just means it's the first factor you take account of.

And it was very intellectually enriching for me to explore those realms of what's meant by the interests of the child, and in the context of South Africa, where our children had been subjected to so much brutality and hardship and exclusion.

CHAPTER: CITED AROUND THE WORLD

So the case is also being cited in many parts of the world. I know in Scotland they were very interested because there's quite a strong movement there of families of prisoners, and it's the families who need support - moral support, practical support, economic support - and particularly the children who too often suffer when the breadwinner is in jail. And the progressive-minded judicial officers and prosecutors in Scotland seized on this decision to promote and advance similar provisions in Scotland. And I believe it's also been picked up elsewhere.

THANDI MATTHEWS

And I think it would probably still be relevant even in the context of environmental justice claims, to consider the best interests of the child when we're thinking about how we protect the environment for future generations.

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