

SUPREME COURT OF INDIA

Mukesh

Vs.

State for NCT of Delhi

SLP(Crl.)No.3119-3120/2014

(Dipak Misra,J., R.Banumathi and Ashok Bhushan,JJ.,)

03.02.2017

ORDER

1. Hearing resumed.

2. Put up for further hearing at 10.30 a.m. on 4 th February, 2017.

3. After the argument for the accused persons by Mr. M.L. Sharma and Mr. A.P. Singh, learned counsel were advanced, we thought it appropriate to hear the learned friends of the Court and, accordingly, we have heard Mr. Raju Ramachandran and Mr. Sanjay R. Hegde, learned senior counsel. It is worthy to note here that Mr. Hegde, learned senior counsel argued on the sustainability of the conviction on many a ground and submitted a written note of submission. Mr. Ramachandran, learned senior counsel, inter alia, emphasized on the aspect of sentence imposed by the trial court which has been confirmed under Section 366 Cr.P.C. While arguing with regard to the imposition of the capital punishment on the accused persons, one of the main submissions of Mr. Ramachandran was that neither the trial court nor the High Court has followed the mandate enshrined under Section 235(2) of the Code of Criminal Procedure. Section 235(2) Cr.P.C. reads as follows:-

"235. Judgment of acquittal or conviction.-

(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law." Referring to the procedure adopted by the trial court, it was urged by Mr. Ramachandran that the learned trial Judge had not considered the aggravating and mitigating circumstances, as are required to be considered in view of the Constitution Bench decision in *Bachan Singh vs. State of Punjab*¹, and further there has been a failure of the substantive law, inasmuch as there

has been weighing of the mitigating or the aggravating circumstances in respect of each individual accused. Learned senior counsel contended that Section 235(2) Cr.P.C. is not a mere formality and in a case when there are more than one accused, it is obligatory on the part of the learned trial Judge to hear the accused individually on the question of sentence and deal with him. As put forth by Mr. Ramachandran, the High Court has also failed to take pains in that regard. To bolster his submission, he has commended us to the authority in *Santa Singh vs. The State of Punjab*². In the said case, Bhagwati, J. dealt with the anatomy of Section 235 Cr.P.C., the purpose and purport behind it and, eventually, came to hold that:-

"Law strives to give them social and economic justice and it has, therefore, necessarily to be weighted in favour of the weak and the exposed. This is the new law which judges are now called upon to administer and it is, therefore, essential that they should receive proper training which would bring about an orientation in their approach and outlook, stimulate sympathies in them for the vulnerable sections of the community and inject a new awareness and sense of public commitment in them. They should also be educated in the new trends in penology and sentencing procedures so that they may learn to use penal law as a tool for reforming and rehabilitating criminals and smoothening out the uneven texture of the social fabric and not as a weapon, fashioned by law, for protecting and perpetuating the hegemony of one class over the other. Be that as it may, it is clear that the learned Sessions Judge was not aware of the provision in section 235(2) and so also was the lawyer of the appellant in the High Court unaware of it. No inference can, therefore, be drawn from the omission of the appellant to raise this point, that he had nothing to say in regard to the sentence and that consequently no prejudice was caused to him."

4. Thereafter, the learned Judge opined that non-compliance goes to the very root of the matter and it results in vitiating the sentence imposed. Eventually, Bhagwati, J. set aside the sentence of death and remanded the case to the court of session with a direction to pass appropriate sentence after giving an opportunity to the appellant therein to be heard in regard to the question of sentence in accordance with the provision contained in Section 235(2) Cr.P.C. as interpreted by him. In the concurring opinion, Fazal Ali, J., ruled thus:-

"The last point to be considered is the extent and import of the word "hear" used in Section 235(2) of the 1973 Code. Does it indicate, that the accused should enter into a fresh trial by producing oral and documentary evidence on the question of the sentence which naturally will result in further delay of the trial? The Parliament does not appear to have intended that the accused should adopt dilatory tactics under the cover of this new provision but contemplated that a short and simple opportunity has to be given to the accused to place materials if necessary by leading evidence before the Court bearing on the question of sentence and a consequent opportunity to the prosecution to rebut those materials. The Law Commission was fully aware of this anomaly and it accordingly suggested thus:

"We are aware that a provision for an opportunity to give evidence in this respect may necessitate an adjournment; and to avoid delay adjournment, for the purpose should, ordinarily be for not more than 14 days. It may be so provided in the relevant clause."

5. It may not be practicable to keep up to the time-limit suggested by the Law Commission with mathematical accuracy but the Courts must be vigilant to exercise proper control over the proceedings so that the trial is not unavoidably or unnecessarily delayed."

6. The said decision was considered by a three-Judge Bench in *Dagdu and Others vs. State of Maharashtra*³. The three-Judge Bench referred to the law laid down in *Santa Singh* (supra) and opined that the mandate of Section 235(2) Cr.P.C. has to be obeyed in letter and spirit. However, the larger Bench thought that *Santa Singh* (supra) does not lay down as a principle that failure on the part of the Court which convicts an accused, to hear him on the question of sentence must necessarily entail a remand to that Court in order to afford the accused an opportunity to be heard on the question of sentence. Chandrachud, J. (as His Lordship then was) speaking for the Bench ruled thus:-

"The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court."

6. It is seemly to note here that Mr. Ramachandran has also commended us to a three-Judge Bench decision in *Malkiat Singh and Others vs. State of Punjab*⁴ wherein the three-Judge Bench ruled that sufficient time has to be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be.

7. Learned senior counsel has also drawn our attention to a two-Judge Bench decision in *Ajay Pandit alias Jagdish Dayabhai Patel and Another vs. State of Maharashtra*⁵, wherein the matter was remanded to the High Court. Mr. Ramachandran has drawn our attention to paragraph 47 of the said authority. It reads as follows:-

"Awarding death sentence is an exception, nor the rule, and only in the rarest of rare cases, the court could award death sentence. The state of mind of a person awaiting

death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) CrPC."

8. Having considered all the authorities, we find that there are two modes, one is to remand the matter or to direct the accused persons to produce necessary data and advance the contention on the question of sentence. Regard being had to the nature of the case, we think it appropriate to adopt the second mode. To elaborate, we would like to give opportunity before conclusion of the hearing to the accused persons to file affidavits along with documents stating about the mitigating circumstances. Needless to say, for the said purpose, it is necessary that the learned counsel, Mr. M.L. Sharma and his associate Ms. Suman and Mr. A.P. Singh and his associate Mr. V.P. Singh should be allowed to visit the jail and communicate with the accused persons and file the requisite affidavits and materials.

9. At this juncture, Mr. M.L. Sharma, learned counsel has submitted that on many a occasion, he has faced difficulty as he had to wait in the jail to have a dialogue with his clients. Mr. Sidharth Luthra, learned senior counsel has submitted that if this Court directs, Mr. M.L. Sharma and Mr. A.P. Singh, learned counsel and their associate Advocates can visit the jail at 2.45 p.m. each day and they shall be allowed to enter the jail between 3.00 p.m. to 3.15 p.m. and can spend time till 5.00 p.m. Needless to say, they can commence their visits from 7th February, 2017, and file the necessary separate affidavits and documents. After the affidavits are made ready by the learned counsel for the accused persons, they can intimate about the same to Mr. Luthra, who in his turn, shall intimate the same to the Superintendent of Jail, who shall make arrangement for a Notary so that affidavits can be notarized, treating this as a direction of this Court. Needless to say, while the learned counsel will be discussing with the accused persons, the meeting shall be held in separate rooms inside the jail premises so that they can have a free discussion with the accused persons. Needless to say, they can reproduce in verbatim what the accused persons tell them in the affidavit. The affidavits shall be filed by 23rd February, 2017.

10. We may hasten to add that after the affidavits come on record, a date shall be fixed for hearing of the affidavits and pertaining to quantum of sentence if, eventually, the conviction is affirmed. The learned counsel for the prosecution, needless to say, is entitled to file necessary affidavits with regard to the circumstances or reasons for sustenance of the sentence. Additionally, the prosecution is given liberty to put forth in the affidavit any refutation, after the copies of the affidavits by the learned counsel for the accused persons are served on him. For the said purpose, a week's time is granted. Needless to say, the matter shall be heard on sentence, after affidavits from both the sides are brought on record. The date shall be given at 2.00 p.m. on 6th February, 2017. For the present, the matter stands adjourned to 4th February, 2017, for hearing. Let a copy of the order be handed over to

11. Mr. Sidharth Luthra by 4th February, 2017, who shall get it translated in Hindi and give it to the Superintendent of Jail, who in his turn, shall hand over it to the accused persons and, simultaneously, explain the purport and effect of the order.

12. The Superintendent of Jail is also directed to submit a report with regard to the conduct of the accused persons while they are in custody.

¹(1980)2 SCC 0684

²(1976) 4 SCC 0190

³(1977) 3 SCC 0068

⁴(1991) 4 SCC 0341

⁵(2012) 8 SCC 0043