REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

SUO MOTU WRIT PETITION (CRL.) NO.1 OF 2022

IN RE: FRAMING GUIDELINES REGARDING POTENTIAL MITIGATING CIRCUMSTANCES TO BE CONSIDERED WHILE IMPOSING DEATH SENTENCES

J U D G M E N T

S. RAVINDRA BHAT, J.

1. This order is necessitated due to a difference of opinion and approach amongst various judgments, on the question of whether, after recording conviction for a capital offence, under law, the court is obligated to conduct a *separate* hearing on the issue of sentence.

2. Section 235 of the Code of Criminal Procedure, 1973 (hereinafter, "CrPC" or "Code") 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."*

Section 235, as it exists in the statute today, was Section 309 of the erstwhile Code (of 1898). It was introduced on account of the recommendations of the 48th Report of the Law Commission of India, on *Some Questions Under the Code of Criminal Procedure Bill, 1970* (dated July 1972).

Additionally, Section 309 of the CrPC is also relevant. It reads as follows:

> *"309. Power to postpone or adjourn proceedings.*
> *(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once*

> *begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.*
> *(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody: Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:*
> *Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing: 1*
> *Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.*
> *Explanation 1.- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.*
> *Explanation 2.- The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."*

3. In *Bachan Singh v. State of Punjab*[1] this court, in its majority judgment, upheld the constitutionality of the death sentence, on the condition that it could be imposed in the "rarest of rare" cases. The court was conscious of the safeguard of a separate hearing, on the question of sentence, and articulated such a safeguard as a valuable right, which insures to a convict, to urge why in the circumstances of his or her case, the extreme penalty of death ought not to be imposed. This court, in *Bachan Singh*, observed as follows:

> *"151. Section 354 (3) of the CrPC, 1973, marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the Penal Code, were normal sentences. Now according to this changed legislative policy which is patent on the face of Section 354 (3), the normal punishment for murder and six other capital*

[1] 1983 (1) SCR 145

offences under the Penal Code , is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception. The Joint Committee of Parliament in its Report, stated the object and reason of making this change, as follows:

'A sentence of death is the extreme penalty of law and it is but fair that when a Court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence.

Accordingly, Sub-section (3) of Section 354 of the current Code provides:

"When the conviction is for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

152. In the context, we may also notice Section 235 (2) of the Code of 1973, because it makes not only explicit, what according to the decision in Jagmohan's case was implicit in the scheme of the Code, but also bifurcates the trial by providing for two hearings, one at the pre-conviction stage and another at the pre-sentence stage. It requires that:

"If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provision of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

The Law Commission in its 48th Report had pointed out this deficiency in the sentencing procedure:

"45. It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. One such deficiency is the lack of comprehensive information as to characteristics and background at the offender.

The aims of sentencing:- Themselves obscure become all the more so in the absence of information on which the correctional process is to operate. The public as well as the courts themselves are in the dark about judicial approach in this regard.

We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to co-operate in the process."

By enacting Section 235 (2) of the new Code, Parliament has accepted that recommendation of the Law Commission. Although Sub-section (2) of Section 235 does not contain a specific provision as to evidence and provides only for hearing of the accused as to sentence, yet it is implicit in this provision that if a request is made in that behalf by either the prosecution or the accused, or by both, the Judge should give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence. "Of course,", as was pointed out by this Court in Santa Singh v State of Punjab AIR 1976 SC 2386 "care would have to be taken by the Court to see that this hearing on the question of sentence is not turned into an instrument for unduly protracting the proceedings. The claim of due and

proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings."

153. We may also notice Sections 432, 433 and 433A, as they throw light as to whether life imprisonment as currently administered in India, can be considered an adequate alternative to the capital sentence even in extremely heinous cases of murder.

154. Sections 432 and 433 of the Code of 1973 continue Sections 401 and 402 of the Code of 1898, with necessary modifications which bring them in tune with Articles 72 and 161 of the Constitution. Section 432 invests the "appropriate Government" as (defined in Sub-section (7) of that section) with power to suspend or remit sentences. Section 433 confers on the appropriate Government power to commute sentence, without the consent of the person sentenced. Under Clause (a) of the section, the appropriate Government may commute a sentence of death, for any other punishment provided by the Indian Penal Code.

155. With effect from December 18, 1978, the Cr. PC (Amendment) Act, 1978, inserted new Section 433A which runs as under:

"433A. Restriction on power of remission or commutation in certain cases.- Notwithstanding anything contained in Section 432, where a sentence of imprisonment foe life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

156. It may be recalled that in Jagmohan this Court had observed that, in practice, life imprisonment amounts to 12 years in prison. Now, Section 433A restricts the power of remission and commutation conferred on the appropriate Government under Section 432 and 433, so that a person who is sentenced to imprisonment for life or whose death sentence is commuted to imprisonment for life must serve actual imprisonment for a minimum of 14 years.

157. We may next notice other provisions of the extant Code (corresponding to Sections 374, 375, 376 and 377 of the repealed Code) bearing on capital punishment. Section 366 (i) of the Code requires the Court passing a sentence of death to submit the proceedings to the High Court, and further mandates that such a sentence shall not be executed unless it is confirmed by the High Court. On such a reference for confirmation of death sentence, the High Court is required to proceed in accordance with Sections 367 and 368. Section 367gives power to the High Court to direct further inquiry to be made or additional evidence to be taken. Section 368 empowers the High Court to confirm the sentence of death or pass any other sentence warranted by law; or to annul or alter the conviction or order a new trial or acquit the accused. Section 369 enjoins that in every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall,

when such court consists of two or more Judges, be made, passed and signed by at least two of them. Section 370 provides that where any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case shall be referred to a third Judge.
158. In this fasciculus of sections relating to confirmation proceedings in the High Court, the Legislature has provided valuable safeguards of the life and liberty of the subject in cases of capital sentences. These provisions seek to ensure mat where in a capital case, the life of the convicted person if at stake, the entire evidential material bearing on the innocence as guilt of the accused and the question of sentence must be scrutinised with utmost caution and care by a superior Court."

4. This court then considered the issue before it, from various perspectives, and observed further as follows:

"163. ...Now, Section 235 (2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354 (3) a bearing on the choice of sentence. The present legislative policy discernible from Section 235 (2) read with Section 354 (3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration "principally" or merely to the circumstances connected with particular crime, but also give due consideration to the circumstances of the criminal.

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165. Attuned to the legislative policy delineated in Section 354 (3) and Section 235 (2), propositions (iv) (a) and (v) (b) in Jagmohan, shall have to be recast and may be stated as below:
(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence,
(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code; the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

5. Bhagwati, J. who differed from the majority on the constitutionality of death sentence, also noticed the need for what in his opinion was a 'bifurcated hearing' on sentence, *after a court recorded* conviction. The minority opinion pertinently observes as follows:[2]

> *"80. ...These are undoubtedly some safeguards provided by the legislature, but in the absence of any standards or principles provided by the legislature to guide the exercise of the sentencing discretion and in view of the fragmented Bench structure of the High Courts and the Supreme Court, these safeguards cannot be of any help in eliminating arbitrariness and freakishness in imposition of death penalty... The first requirement that there should be a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence is met by the enactment of Section 235, sub-section (2), but the second requirement that the sentencing authority should be provided with standards to guide its use of the information is not satisfied and the imposition of death penalty under Section 302 of the Penal Code, 1860 read with Section 354, sub-section (3) of the Code of Criminal Procedure, 1973 must therefore be held to be arbitrary and capricious and hence violative of Articles 14 and 21."*
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> (emphasis supplied)

6. Plainly, therefore, the majority in *Bachan Singh* took note that convicts would be afforded a separate hearing, to urge why capital sentence ought not to be resorted to. The judgment noted the Law Commission's observation that courts should *"give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence."* The majority concluded:

> *"157-A. In this fasciculus of sections relating to confirmation proceedings in the High Court, the legislature has provided valuable safeguards of the life and liberty of the subject in cases of capital sentences. These provisions seek to ensure that where in a capital case, the life of the convicted person is at stake, the entire evidential material bearing on the innocence or guilt of the accused and the question of sentence must be scrutinised with utmost caution and care by a superior court.*
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> (emphasis supplied)

[2] Bhagwati, J.'s dissent in *Bachan Singh v State of Punjab*, (1982) 3 SCC 24.

This aspect – presence of 'valuable safeguards' - therefore, was an important consideration to uphold the validity of death sentence, in the rarest of rare cases.

7. In an earlier, two-judge bench decision in *Santa Singh v. State of Punjab*[3] this court had underlined the importance of a separate hearing on the issue of sentence:

> *"3. …Moreover it was realised that sentencing is an important stage in the process of administration of criminal justice — as important as the adjudication of guilt — and it should not be consigned to a subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the court… The reason is that a proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances — extenuating or aggravating — of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding upon the appropriate sentence, and, therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can hear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused. Hence the new provision in Section 235(2).*
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> *4. …We are, therefore, of the view that the hearing contemplated by Section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same. Of course, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing*

[3] *Santa Singh v. State of Punjab,* (1976) 4 SCC 190.

> *would have to be harmonised with the requirement of expeditious disposal of proceedings."*

8. In *Muniappan v. State of Tamil Nadu*,[4] a two-judge bench of this court held that Section 235(2) was not a formality which could be dispensed with, and required consideration after conviction was confirmed:

> *"2. …The obligation to hear the accused on the question of sentence which is imposed by Section 235(2) of the Criminal Procedure Code is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence. All admissible evidence is before the judge but that evidence itself often furnishes a clue to the genesis of the crime and the motivation of the criminal. It is the bounden duty of the judge to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view. The occasion to apply the provisions of Section 235(2) arises only after the conviction is recorded. What then remains is the question of sentence in which not merely the accused but the whole society has a stake. Questions which the judge can put to the accused under Section 235(2) and the answers which the accused makes to those questions are beyond the narrow constraints of the Evidence Act. The court, while on the question of sentence, is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction. The Sessions Judge, in the instant case, complied with the form and letter of the obligation which Section 235(2) imposes, forgetting the spirit and substance of that obligation."*

9. In *Mithu v. State of Punjab*[5], a five-judge bench of this court while deliberating on the mandatory imposition of death sentence on a convict committing murder while undergoing a life sentence under Section 303 of the Indian Penal Code, 1908 held as follows:

> "7. …*The majority* [in Bachan Singh] *concluded that Section 302 of the Penal Code is valid for three main reasons: Firstly, that the death sentence provided for by Section 302 is an alternative to the sentence of life imprisonment; secondly, that special reasons have to be stated if the normal rule is departed from and the death sentence has to be imposed; and, thirdly, because the accused is entitled, under Section 235(2) of the Code of Criminal Procedure, to be heard on the question of sentence. The last of these three reasons becomes relevant, only because of the first of*

[4] *Muniappan v. State of Tamil Nadu,* (1981) 3 SCC 11.
[5] *Mithu v. State of Punjab,* (1983) 2 SCC 277.

> *these reasons. In other words, it is because the court has an option to impose either of the two alternative sentences, subject to the rule that the normal punishment for murder is life imprisonment, that it is important to hear the accused on the question of sentence. If the law provides a mandatory sentence of death as Section 303 of the Penal Code does, neither Section 235(2) nor Section 354(3) of the Code of Criminal Procedure can possibly come into play. If the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death"*
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> (emphasis supplied)

The court thus reiterated that the accused was *entitled* to be heard on the question of sentence *before* its imposition. As Section 303 of the Indian Penal Code, 1908 denied the accused such opportunity, it was struck down.

10. In another judgment delivered by a two-judge bench i.e., *Allauddin Mian v. State of Bihar*[6], this court, noticing earlier decisions, and *Bachan Singh,* stated that:

> *"10. …The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found*
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> *guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr Garg was, therefore, justified in making a grievance that the trial court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31-3-1987, on the same day before the accused could absorb and overcome the shock of conviction they were asked if they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two*

[6] *Allauddin Mian v. State of Bihar,* (1989) 3 SCC 5.

> *accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high decree of concern for the statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made, as in this case, without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the court, the court's decision on the sentence would be vulnerable. We need hardly mention that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiori, therefore, the principle of fair play must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of sub-section (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. We think as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender."*
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> (emphasis supplied)

11. In *Anguswamy v. State of Tamil Nadu*[7], a two-judge bench had also expressed the same view. In *Malkiat Singh v. State of Punjab*[8], again, three judges endorsed the view that a separate hearing on the question of sentence should be afforded to the accused, after recording conviction. The court held that the hearing should be intended to afford an opportunity to place materials to show mitigating circumstances - and, for the prosecution, aggravating circumstances and that *"sufficient time must be given to the accused… on the question of sentence"*.

[7] *Anguswamy v. State of Tamil Nadu*, (1989) 3 SCC 33.
[8] *Malkiat Singh v. State of Punjab*, (1991) 4 SCC 341.

12. Other more recent three-judge decisions have also ruled that same day sentencing in capital offences violate the principles of natural justice, and is opposed to Section 235 (2). In *Dattaraya v. State of Maharashtra*[9], this court observed, *inter alia*, that:

> *"132. For effective hearing under Section 235(2) of the Code of Criminal Procedure, the suggestion that the court intends to impose death penalty should specifically be made to the accused, to enable the accused to make an effective representation against death sentence, by placing mitigating circumstances before the Court. This has not been done. The trial court made no attempt to elicit relevant facts, nor did the trial court give any opportunity to the petitioner to file an affidavit placing on record mitigating factors. As such the petitioner has been denied an effective hearing.*
> *133. Contrary to the dictum of this Court, inter alia, in Dagdu [Dagdu v. State of Maharashtra, (1977) 3 SCC 68 : 1977 SCC (Cri) 421] and Santa Singh [Santa Singh v. State of Punjab, (1976) 4 SCC 190 : 1976 SCC (Cri) 546] the petitioner was not given a real, effective and meaningful hearing on the question of sentence under Section 235(2) CrPC. The death sentence imposed on the petitioner is liable to be commuted to life imprisonment on this ground."*

13. In *Bhagwani v. State of Madhya Pradesh*[10] also iterated the need to have a separate hearing, on the question of sentence:

> *"16. A bifurcated hearing for convicting and sentencing is necessary to provide an effective opportunity to the accused [Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498]. Adequate opportunity to produce relevant material on the question of death sentence shall be provided to the accused by the Trial Court [Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2019) 12 SCC 460]."*

14. In *Manoj & Ors. v. State of Madhya Pradesh*[11] this court highlighted that in the absence of guidelines or a framework, the scope of the opportunity afforded to the accused to be heard on sentencing, was not in keeping with the spirit of the law laid down in *Bachan Singh* regarding Section 235(2):

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[9] *Dattaraya v. State of Maharashtra,* (2020) 14 SCC 290.
[10] *Bhagwani v. State of Madhya Pradesh,* 2022 SCC OnLine SC 52 (Criminal Appeal Nos. 101-102/2022).
[11] *Manoj & Ors. v. State of Madhya Pradesh,* (2022) SCC OnLine SC 677 (Criminal Appeal Nos. 248-250/2015).

> *"221. However, despite over four decades since Bachan Singh there has been little to no policy-driven change, towards formulating a scheme or system that elaborates how mitigating circumstances are to be collected, for the court's consideration. Scarce information about the accused at the time of sentencing, severely disadvantages the process of considering mitigating circumstances. It is clarified that mere mention of these circumstances by counsel, serve no purpose - rather, they must be connected to the possibility of reformation and assist principled judicial reasoning (as required under S. 235(2) CrPC). Constrained by this lack of assistance, this court (as mentioned above) in Rajesh Kumar [Rajesh Kumar v. State (2011) 13 SCC 706] has even gone so far as to hold that the very fact that the state had not given any evidence to show that the convict was beyond reform and rehabilitation was a mitigating circumstance, in itself.*
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> *239. It is unfortunate to note that both the trial Court, and High Court, failed to provide an effective sentencing hearing to the accused, at the relevant stage, which is a right under Section 235(2) CrPC recognised by this court in several cases. In fact, it was argued by the accused that the trial court in contravention of this court's judgments, had proceeded to hear on sentencing almost immediately, depriving the accused of the opportunity to put forth their case for a less stringent sentence. The trial court order on sentencing, records in passing - the plea of 'young age' and 'socio-economic factors' as mitigating circumstances, but reflects, at best, a mechanical consideration of the same. Swayed by the brutality of the crime and "shock of the collective and judicial conscience", the High Court affirmed imposition of the death penalty solely on the basis of the aggravating circumstances of the crime, with negligible consideration of mitigating circumstances of the criminal. This is in direct contravention of Bachan Singh."*

15. However, this court, also in three-judge combinations, has on a reading of these very judgments – i.e., *Santa Singh, Muniappan, Allaudin Mian, Anguswamy, Malkiat Singh*, etc., arrived at a different conclusion - that same-day sentencing does not necessarily fall foul of Section 235(2) of the CrPC. This contrary line of cases are based on the premise that the court *may* adjourn for a separate hearing, but the absence of it would not in itself vitiate the sentence.

16. In *Dagdu v. State of Maharashtra*[12], a three-judge bench of this court rejected the interpretation of *Santa Singh* as laying down that failure on the part

[12] *Dagdu v. State of Maharashtra*, (1977) 3 SCC 68.

of the court to hear a convicted accused, on the question of sentence, would necessitate remand to the trial court. Instead, it held that such an omission could be remedied by the higher court by affording a hearing to the accused on the question of sentence, provided the hearing was "*real and effective*" wherein the accused was permitted to "*adduce before the court all the data which he desires to be adduced on the question of sentence*". The court further held that:

> *"79. 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."*

This was in turn, followed by another three-judge bench in *Tarlok Singh v. State of Punjab*[13].

17. Another case, where a similar conclusion was arrived at, but on differing reasoning was *Ramdeo Chauhan v. State of Assam*[14], where in a review petition, a bench of three judges, upheld the death penalty by a 2:1 majority. In this case, the proviso to Section 309(2) of CrPC was considered, in relation to Section 235(2). The court observed that the previous rulings had not taken note of the second proviso[15] to Section 309 of the Code. The court held that the mandate of the proviso under Section 309 was not to adjourn the hearing for affording a separate proceeding on sentence, however in cases where death sentence was one of the choices of punishment, the court had discretion to adjourn the hearing for a separate proceeding on sentence:

> *"28. In a case punishable with death or imprisonment for life, there is no difficulty for the court where the sentence proposed to be imposed is an alternative sentence of life imprisonment but if it proposes to award the death sentence, it has discretion to adjourn the case in the interests of justice as held in Sukhdev Singh case [(1992) 3 SCC 700 : 1992 SCC (Cri) 705] . I have no doubt in holding that despite the bar of third proviso to sub-section (2) of Section 309, the court, in appropriate cases, can grant adjournment for enabling the accused persons to show cause against the*

[13] *Tarlok Singh v. State of Punjab*, (1977) 3 SCC 218.
[14] *Ramdeo Chauhan v. State of Assam*, (2001) 5 SCC 714.
[15] Inserted by Criminal Procedure Code Amendment Act, 1978.

> *sentence proposed on them particularly if such proposed sentence is a sentence of death."*

Thus, it was held that while the accused facing the possibility of death sentence was not *entitled* to an adjournment, nothing barred the court from granting the same.

18. Several decisions have since relied on *Dagdu*, and concluded that the action of the court sentencing an accused on the same day as conviction *in itself* would not vitiate the sentence. These cases (in three-judge combination) include: *B.A. Umesh v. High Court of Karnataka*[16]; *Vasanta Sampatha Dupare v. State of Maharashtra*[17]; *Mukesh v. State of NCT*[18]; *Mohd. Mannan v. State of Bihar*[19]; and most recently, *Shatrughna Baban Meshram v. State of Maharashtra*[20].

19. This court in *X v. State of Maharashtra*[21] (three-judge bench), extensively considered the precedents on the question of sentencing, and concluded the position of law as follows:

> *"40. As noted above, many cases have grappled with the question as to the choice between the two. The approach of this Court needs to be rationalised and understood in the light of cautionary approach discussed above. From the aforesaid discussion, the following dicta emerge:*
> *40.1. That the term "hearing" occurring under Section 235(2) requires the accused and prosecution at their option, to be given a meaningful opportunity.*
> *40.2. Meaningful hearing under Section 235(2) CrPC, in the usual course, is not conditional upon time or number of days granted for the same. It is to be measured qualitatively and not quantitatively.*
> *40.3. The trial court needs to comply with the mandate of Section 235(2) CrPC with best efforts.*
> *40.4. Non-compliance can be rectified at the appellate stage as well, by providing meaningful opportunity.*
> *40.5. If such an opportunity is not provided by the trial court, the appellate court needs to balance various considerations and either afford an opportunity before itself or remand back to the trial court, in appropriate case, for fresh consideration.*

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[16] *B.A. Umesh v. High Court of Karnataka,* (2017) 4 SCC 124.
[17] *Vasanta Sampatha Dupare v. State of Maharashtra,* (2018) 6 SCC 631.
[18] *Mukesh v. State of NCT,* (2017) 6 SCC 1.
[19] *Mohd. Mannan v. State of Bihar,* (2019) 16 SCC 584.
[20] *Shatrughna Baban Meshram v. State of Maharashtra,* (2021) 1 SCC 596.
[21] *X v. State of Maharashtra,* (2019) 7 SCC 1.

> *40.6. However, the accused need to satisfy the appellate courts, inter alia by pleading on the grounds as to existence of mitigating circumstances, for its further consideration.*
> *40.7. Being aware of certain harsh realities such as long protracted delays or jail appeals through legal aid, etc., wherein the appellate court, in appropriate cases, may take recourse of independent enquiries on relevant facts ordered by the court itself.*
> *40.8. If no such grounds are brought by the accused before the appellate courts, then it is not obligated to take recourse under Section 235(2) CrPC."*

This reasoning was further relied on in many decisions, more recently by this court in *Manoj Suryavanshi v. State of Chattisgarh*[22].

20. The common thread that runs through all these decisions is the express acknowledgment that *meaningful, real* and *effective* hearing must be afforded to the accused, with the opportunity to adduce material relevant for the question of sentencing. What is conspicuously absent, is consideration and contemplation about the *time* this may require. In cases where it was felt that real and effective hearing may not have been given (on account of the same day sentencing), this court was satisfied that the flaw had been remedied at the appellate (or review stage), by affording the accused a chance to adduce material, and thus fulfilling the mandate of Section 235(2).

21. The question of what constitutes 'sufficient time' at the trial court stage, in this manner appears not to have been addressed in the light of the express holding in *Bachan Singh*. This, in the court's considered opinion, requires consideration and clarity. This court's decision in *Manoj Pratap Singh v. State of Rajasthan*[23] is an example, where 'sufficient time' for compliance with Section 235(2) CrPC was considered; it was concluded that the trial court had "*scrupulously carried out its duty in terms of Section 235(2)*" since the sentence was awarded 3 days

[22] *Manoj Suryavanshi v. State of Chattisgarh*, (2020) 4 SCC 451.
[23] *Manoj Pratap Singh v. State of Rajasthan*, 2022 SCC OnLine SC 768 (Crl.A. Nos. 910 – 911/2022).

after the conviction, after considering both the aggravating and mitigating circumstances.

22. After hearing the parties on the question of conviction in *Manoj & Ors. v. State of Madhya Pradesh*, this court had adjourned the matter for submissions on sentencing, with directions[24] eliciting reports from the probation officer, jail authorities, a trained psychiatrist and psychologist, etc., to assist the accused in presenting mitigating circumstances. Noticing the lack of a uniform framework in this regard, the present ***Suo Motu* W.P. (Crl.) No. 1/2022** was initiated wherein this court has indicated by its orders the necessity of working out the modalities of psychological evaluation, the stage of adducing evidence in order to highlight mitigating circumstances, and the need to build institutional capacity in this regard. The apprehensions relating to the absence of such a framework was also recorded in the final judgment of *Manoj & Ors. v. State of Madhya Pradesh*, wherein the importance of a separate hearing and the necessity of background analysis of the accused, was highlighted. It was suggested that the social *milieu*, the age, educational levels, whether the convict had faced trauma earlier in life, family circumstances, psychological evaluation of a convict and post-conviction conduct, were relevant factors at the time of considering whether the death penalty ought to be imposed upon the accused.

23. In light of the above, there exists a clear conflict of opinions by two sets of three judge bench decisions on the subject. As noticed before, this court in *Bachan Singh* had taken into consideration the fairness afforded to a convict by a separate hearing, as an *important safeguard* to uphold imposition of death sentence in the rarest of rare cases, by relying upon the recommendations of the 48th Law Commission Report. It is also a fact that in all cases where imposition of capital punishment is a choice of sentence, aggravating circumstances would always be on record, and would be part of the prosecution's evidence, leading to

[24] By order dated 29.09.2021. Reference was also made to orders dated 05.08.2021 and 08.09.2021 passed by this Court in Diary No. 5964/2019.

conviction, whereas the accused can scarcely be expected to place mitigating circumstances on the record, for the reason that the stage for doing so is after conviction. This places the convict at a hopeless disadvantage, tilting the scales heavily against him. This court is of the opinion that it is necessary to have clarity in the matter to ensure a uniform approach on the question of granting real and meaningful opportunity, as opposed to a formal hearing, to the accused/convict, on the issue of sentence.

24. Consequently, this court is of the view that a reference to a larger bench of five Hon'ble Judges is necessary for this purpose. Let this matter be placed before the Hon'ble Chief Justice of India for appropriate orders in this regard.

.....CJI.
[UDAY UMESH LALIT]

.....J.
[S. RAVINDRA BHAT]

.....J.
[SUDHANSHU DHULIA]

New Delhi,
September 19, 2022.