Ajay Pandit @ Jagdish Dayabhai ... vs State Of Maharashtra on 17 July, 2012

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Bench: Dipak Misra, K.S. Radhakrishnan

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 864 OF 2006

Ajay Pandit @ Jagdish Dayabhai Patel & Anr. … Appellant (s)

Versus

State of Maharashtra … Respondent(s)

J U D G M E N T

K.S. Radhakrishnan, J.

1. Death sentence has been awarded by the High Court of Bombay to Ajay Pandit @ Jagdish Dayabhai Patel for double murder, in separate incidents, one for the murder of Nilesh Bhailal Patel and another for the murder of Jayashree. The Bombay High Court heard both the appeals – Criminal Appeal No. 46 of 2000 and Criminal Appeal No. 789 of 2001 together and rendered a common judgment on 22nd December, 2005 confirming the order of conviction and enhancing the

sentence of life imprisonment to death and ordered to be hanged till death against which this appeal has been preferred.

2. The accused Ajay Pandit @ Jagdish Dayabhai Patel was a dentist by profession, known as Doctor Jagdish Patel at his Dhabasi Mohalla, District Kheda, Gujarat. He possesses a degree in Dental Hygienist and Dental Mechanic (D.H.D.M.) from the Gujarat University. Professional income was not sufficient for him to lead a lavish and luxurious life, he had other evil and demonic ideas in mind, to make quick and easy money. Self publicity was given of his make-belief contacts with the officials of the American Embassy by which he lured the vulnerable into his net, for sending them to America for better prospects in life. Several persons fell in his net like Nilesh and Jayashree and few others narrowly escaped from the clutches of death.

3. We may first deal with the facts arising out of the judgment of the Bombay High Court in Criminal Appeal No. 46 of 2000 in which the High Court, convicted the accused under Section 419 of the Indian Penal Code (for short 'the IPC) and sentenced to suffer R.I. for one year, under Section 420 of the IPC, R.I. for two years and fine, under Section 302 of the IPC life imprisonment with fine which was converted to death.

4. Doctor Jagdish Patel – the accused had developed contacts with a family of one Dilip Manilal Patel and he used to visit their house at Bhayandar and Kandivali since 1993. During those visits, the accused used to boost that he had contacts with the officials of the American Embassy which kindled hopes in the minds of Dilip Patel and his family members and they decided to send Nilesh Bhailal Patel, cousin brother of Smt. Sarala Patel, wife of Dilip Patel, to America using the accused's alleged influence in the American Embassy. A deal was struck and the accused demanded an amount of Rs.2,50,000/- for realization of their dream. Negotiations took place and the amount was reduced to Rs.1,10,000/- as an initial payment, and the balance was to be paid after getting Nilesh employment in America. Dilip Patel in October 1993 paid Rs.60,000/- to the accused and the balance amount of Rs.50,000/- was paid by Mahendra Bhailal Patel, brother of the deceased - Nilesh to the accused. Noticing that even after payment of money, the accused was not fulfilling his promises, various meetings and phone calls took place between the accused and the family of Nilesh. The accused reiterated his promise and later asked Dilip Patel to send Nilesh to Bombay Central Railway Station on 8.2.1994 with return ticket of the accused. The accused had also requested Dilip Patel a further amount of Rs.3500/- towards medical expenses and also for arranging visa. Dilip Patel had assured the accused that he himself would be coming to Bombay with the required amount. As promised, Dilip Patel reached Bombay in the afternoon of 8.2.1994 and found the accused waiting at Bhulabhai Desai Road near the American Consulate. The accused told Dilip Patel that the necessary papers had been submitted to the Consulate and asked to leave the place. Dilip Patel accordingly left the place and that was the last time, Dilip Patel saw Nilesh in the company of the accused that was around 3 o' clock. In the evening of 8.2.1994 at about 5 o' clock, Dilip Patel received a phone call from the accused stating that the formalities had been completed and Nilesh would be coming home late in the night. Dilip Patel reached home but not Nilesh. Dilip Patel contacted the accused in the morning of 9.2.1994 and he was informed by the accused that Nilesh was waiting upto 5.30PM on the previous day at Bombay Central Railway Station and that he would be back. Dilip Patel contacted the accused on several occasions to know whereabouts of Nilesh.

Meanwhile an attempt was made by the accused through one Tikabhai to inform Dilip Patel that Nilesh had already left for America.

5. Dilip Patel in November 1994 read in a local newspaper Sandhya Jansatta of a news item of an incident of attempt to murder and murder by administering some tablets to three persons by one Doctor by name Jagdish. Dilip Patel also read in Mid Day Evening Daily dated 5.11.1994 about arrest of Dr. Jagdish Patel – the accused. On the basis of this information, Dilip Patel approached Gamdevi Police Station on 13.11.1994 and narrated the entire story to the police. The statement was accordingly recorded and a photograph of the dead body of unidentified person found in Room No. 103 of the Hotel Aradhana at Nana Chowk in the evening of 9.2.1994 was also shown. In the evening of 8.2.1994, the accused had booked Room No. 103 on the first floor of that Hotel. The accused left the Hotel about 7.45PM in the evening of 8.2.1994 keeping the room locked and he did not return. On 9.2.1994, for the purpose of cleaning the room, it was opened with a duplicate key and the dead body of Nilesh was found. The dead body was sent for post-mortem but prior to that police completed other formalities, finger print experts also did their job, articles received were sent to the Forensic Laboratory, C.A. report was obtained. Till August 1994, there was no trace of the suspect and the investigation was continuing. In fact on 30.8.1994, case was classified as true but not detected. The accused was, however, arrested by Malabar Hill Police in C.R. No. 278/94 for murdering one woman - Jayashree and for the attempted murder of two other persons at Hotel Kemps Corner. The accused was identified by Dilip Patel, his wife Sarala Patel and Mahendra Patel – brother of the deceased - Nilesh. This was the brief background of the first case.

6. We will now refer briefly to the facts of the second case which came up before the Bombay High Court vide Criminal Appeal No. 789 of 2001. In the second case, Dr. Jagdish Patel had three persons in his net aspiring for better prospects in America. One Kaushikbhai Sanabhaiu Patel was leading a normal family life with his wife Jayashree at Labhvel, District Anand, in the State of Gujarat. One Jagdish @ Harishbhai Patel was the cousin brother of Jayashree. All the three were also dreaming better prospects in America. In fact, they had contacted Joy Travel Agency for the said purpose in October 1994. Kaushikbhai was told by the owner of Joy Travels that the expenses of sending one person to America would be around Rs.7,23,000/-. Kaushikbhai paid Rs.20,000/- to the travel agent for himself and Jagdish. While he was nurturing the idea of going to America, the accused seized that opportunity and got acquainted with Kaushikbhai and Jagdish. The accused promised that he would realize their dreams for which he demanded a huge sum. Kaushikbhai expressed his inability to the accused to pay such huge amount for a person to go to America and consequently withdrew his request. The accused, however, could prevail upon him by suggesting that he would arrange a loan for him for the time being through one Ramchandra and he only need to purchase the tickets. On the accused initiative, Ramchandra visited the house of Kaushikbhai on 1.11.1994 and gave Rs.4,00,000/- to him, as instructed by the accused, by way of loan.

7. Kaushikbhai, his wife - Jayashree and Jagdish then boarded the train to Bombay Central from Baroda Railway Station. Few of their relatives were present at the Railway Station, Baroda to see them off to Bombay. Accused reached Bombay Central Railway Station in the early hours of 2.11.1994 and all the three along with the accused went to the Hotel Kemps Corner and two Rooms Nos. 202 and 206 were booked in the name of the accused. The accused informed them that all the

requisite formalities had been completed and a Doctor, who was supposed to issue the medical certificate, would be coming at 4.30 pm on the same day to the hotel for medical check-up. The accused demanded money for completing other formalities, Rs.60,000/- was received from Kaushikbhai and Rs.40,000/- was received from Jagdish. A cheque drawn on Punjab National Bank, Anand for Rs.14,50,000/-, one promissory note of Rs.8,50,000/- and Rs.4,37,000/- were given to the accused by Kaushikbhai. Later, the accused gave one capsule and two tablets each to Kaushikbhai, Jayashree and Jagdish which they were asked to take before the medical check-up, which they did. Later, Jayashree went to Room No. 202 and Kaushikbhai and Jagdish remained in Room No. 206. Kaushikbhai and Jagdish started feeling drowsiness and a sleeping sensation and they lied down on the bed. The accused then administered an injection on the abdomen of Kaushikbhai who went fast asleep. Jagdish by that time was already fast asleep and that was the last time, they saw the accused. In the mid-night, Kaushikbhai regained consciousness, he felt some foul play and alerted the Hotel Manager and they went to the room of Jayashree and got the room opened, but Jayashree was found dead. Intimation was given to Malabar Hill Police Station and complaint of Kaushikbhai was recorded. Police arrested the accused in November 1994.

8. The trial court as well as the High Court had elaborately discussed the various steps taken by the investigating agency to unravel the truth and hence, we are not dealing with those facts in detail. The prosecution in the case of death of Nilesh examined 17 witnesses. PW1 to PW4 are the employees of the hotel and PW5 and PW6 are the relatives of the deceased – Nilesh. We have also gone through the evidence of other witnesses critically and it is unnecessary to repeat what they have said, since the trial court as well as the High Court had elaborately discussed the evidence given by those witnesses.

9. So far as the death of Nilesh is concerned, there was no eye witness to the incident and the guilt of the accused could be brought out by the prosecution only by circumstantial evidence. The direct evidence of PW5 and PW6 preceded the death of Nilesh. Therefore, it is necessary to deal with their evidence. PW5 is the sister of the deceased – Nilesh by name Sarala Dilip Patel. She had deposed that she knew the accused since 1991. Further, she had deposed that in January 1993, the accused made a proposal about sending the deceased – Nilesh to America for which he demanded Rs.3,50,000/-. The evidence clearly indicates what had happened from 1993 till the death of Nilesh. She stated that after Nilesh had gone to Bombay, his whereabouts were not known. She had also deposed that on 27.3.1994, her husband lodged a complaint at Kandivali Police Station since Nilesh was found missing. Further, they had also noticed the news item appeared in various newspapers about the arrest of the accused in respect of some other case. On 13.11.1994, her husband had again lodged a complaint as to missing of Nilesh. She had also narrated the steps they had taken on coming to know that her brother – Nilesh was missing. Evidence given by this witness is consistent with the case of the prosecution and there is no reason to disbelieve the version of this witness.

10. PW6 Dilip Patel, the husband of PW5 - had deposed that he knew the accused since 1991 and the accused had come with the proposal for sending Nilesh to America stating that he had good connections with the officials of the American Embassy. Details of the amounts paid for the said purpose was also given, in detail, in his deposition. The details of the various telephone calls he had with the accused before the incident as well as after the incident were minutely stated in his oral

evidence. PW6 had also deposed that he had also gone to Bombay with cash as directed by the accused. Further, he had also deposed that on 8.2.1994, Nilesh had left his house for Bombay and that PW6 had also gone to Bombay since the accused asked him to meet at Opera house at 11.30AM on 8.2.1994. PW6, it was stated, saw the accused and Nilesh near the bus stop of Blobe Radio. The accused told him that at about 3.00 pm on 8.2.1994 he had submitted the papers before the Embassy and asked PW6 to leave the place stating that Consulate would not like the presence of too many persons. PW 6, therefore, left the place leaving behind the accused and Nilesh. Nilesh did not return home, search was made and a complaint was lodged on 28.3.1994 at Kandivali Police Station. On 6.9.1994, notice was sent through advocate to Kandivali Police Station. PW 6 also stated that he had met accused at village Borsad Chaukadi and the accused gave evasive answers. Later, PW 6 came across a news item in Sandhya Jansatta wherein reference was made to one Dr. Jagdish who had committed murder and attempted to commit murder of few other persons. News item also appeared in other newspapers as well.

11. PW 6 was cross-examined at length but the defence could not demolish his evidence or the evidence of other witnesses including that of PW5. Evidence, in this case, proved beyond reasonable doubt that it was the accused who lured Nilesh for sending him to America. Facts would clearly indicate that it was the accused who had extracted money giving false hopes. The deceased was also seen by PW 6 last, in the company of the accused. PW 6 had also made payment to the accused for medical expenses. PW 5 and PW 6, therefore, proved the chain and links from the stage of acquaintance with the accused till the stage of Nilesh being seen in the custody or company of the accused, for the purpose of sending Nilesh to America.

12. The prosecution had examined PW 1 to PW 4 to prove the subsequent events and the steps taken. PW 1 to PW 4 were all attached to Hotel Aradhana or guest house of Aradhana. PW 1 is an independent witness – Manager of the Hotel Aradhana. He narrated what had happened at his Hotel. PW 1 also saw the deceased in the company of the accused. He saw the accused taking Nilesh in Room No. 103 and later coming back alone leaving the hotel without handing over the key at the reception counter. Nothing had been brought out in the cross examination of these witnesses to contradict what he had stated.

13. Sister of the accused was also examined in this case as PW 14, she had narrated, in detail, the professional and other details of the

-accused. The evidence of the rest of the witnesses had also been elaborately dealt with by the High Court. Learned counsel appearing for the accused had also not seriously attacked the findings and reasoning given by the trial court as well as the High Court in ordering conviction and his thrust was on the quantum of sentence awarded, and later death penalty.

14. We have already indicated the modus operandi adopted by the accused in the second case was also almost the same. Few facts of this case have already been dealt in the earlier paragraphs of this judgment and hence, we may directly come to the evidence of the key witnesses in this case. Jayashree – the victim was poisoned by the accused at Hotel Kemps Corner. PW 1 and PW 5 were direct victims of the accused who fortunately survived. PW 1 was the husband and PW 5 was the

brother of Jayashree – the deceased. PW 1 and PW 5 had narrated, in detail, what transpired prior to the incident. The details of the money paid to the accused for sending them to America had been elaborately stated in their oral evidence and the same had been extensively dealt with by the trial court as well as the High Court, hence, we are not repeating the same. They were cross-examined, at length, by the defence. Nothing was brought out to discredit their version. There was no reason for these witnesses to depose falsely against the accused and they have no motive in doing so. Evidence of PW 1 and PW 5 are consistent and have not been shaken at all by the defence. No doubt has been created about the veracity of their testimony. PW 1 and PW 5 were the direct victims and were also the eye witnesses to the entire transaction and we have critically gone through the evidence adduced by PW 1 and PW 5 and nothing was brought out to discredit their evidence.

15. The prosecution examined sixteen witnesses – PW 2, PW 4, PW 14 were the staff members of the hotel Kemps Corner - they had narrated, in detail, the manner in which the accused booked the room, paid the amount, took the three witnesses to both the rooms. The hotel witnesses identified the accused in the court as well as in the identification parade. The prosecution examined PW 8 panch witnesses before whom the accused voluntarily gave statement u/s 27 of the Evidence Act which led to the discovery of huge cash amount, cheques, promissory notes and various articles like passports, rubber stamps etc.

16. PW 6 was a Doctor who examined PW 1 and PW 5 and found they were under the influence of sedatives and in a drowsy condition. We have also gone through, critically, the oral evidence and the documents produced in this case and found no reason to take a different view from that of the trial court and the High Court on conviction. We have also gone through the statement under section 313 Cr.P.C. made by the accused in both the cases which was of total denial of the crime. The accused, a professional, wanted to make quick and easy money and in that process lured people giving false hopes of sending them to America utilizing his alleged contacts with the American Embassy. The accused, though educated, brought discredit to his profession and to the dentist community in general. Education and professional standing had no influence on the accused and his only motto was to make quick money and for achieving the same, he would go any extent and the Dentist turned killer gave no value to the human life. The Dentist took away the life of two human beings as if he was uprooting two teeth.

17. Nilesh – the deceased, victim in the first case was an unmarried boy of 25 years and yet to become mature enough to know the world around him. All the hopes dashed on the eventful day when he was murdered in a brutal manner not only by inflicting injuries by deadly weapon on vital parts of the body but also injuries on the testis causing him immense suffering and pain.

18. Jayashree, the deceased - victim was administered excessive tablets by the Dentist turned killer and Jayashree died of that in the night of that fateful day. The medical evidence clearly indicates that Kaushikbhai, Jayashree and Jagdish had taken one capsule and two tablets. The accused had advised them to take the tablets prior to medical check-up so that they must get favorable medical certificates. Kaushikbhai and Jagdish started feeling drowsiness. Kaushikbhai was about to regain consciousness but the accused gave an injection on his abdomen. Kaushikbhai tried to avoid the injection but could not resist due to drowsiness and injection was administered due to which he

went fast asleep. Unfortunately, Jayashree succumbed to the poison administered and died. The Bombay High Court noticing the ghastly manner in which the accused had murdered Nilesh as well as Jayashree and poisoned PW 1 and PW 5, considered it as a rarest of rare case warranting death sentence.

19. The High Court heard the arguments of the advocate for the accused as well as the prosecutor on the point as to whether the High Court could enhance the sentence of the accused from life to death. Having noticed that the High Court has the power to enhance the sentence from life imprisonment to death, the High Court issued a notice on 1.12.2005 to the accused to show cause why the sentence of life imprisonment be not enhanced to death sentence. The operative portion of the order reads as follows:

> "We have heard the arguments of learned advocate for the petitioner as well as learned APP for the State for quite some time on two occasions. In exercise of suo-moto powers and on the basis of judgment of the Supreme Court, it will be necessary to hear the accused as to why his sentence should not be enhanced from life imprisonment to death. Therefore, the accused be produced by the Kalyan District Prison Authorities before this Court on 12th December 2005.
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> Learned counsel to inform the Jailor, Kalyan District Prison authorities that the matter is kept on 12th December 2005."

20. The accused was produced before the Court on 12th December 2005 but the advocate representing the accused was absent. Consequently, the matter was adjourned to 13.12.2005. On 13.12.2005, the accused as well as his advocate were present and the Court on 13.12.2005 recorded the following statement of the accused which reads as follows:

> "(Accused understands English. He gives the statement in English. We are recording the same in his own language.) I am not involved in the case. The travel agent should also have been implicated in this case. I am not involved. I am not guilty. (Repeatedly the accused was informed by us about the nature of the show cause notice given. He made the aforesaid statement and he does not want to say any more.
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> Matter adjourned to 22nd December, 2005 at 3.00 for Judgment. Accused to be produced on that day."

21. Mr. Sushil Karanjakar, learned advocate appearing for the accused submitted that the High Court has not followed the procedure laid down under Section 235(2) of the Code of Criminal Procedure (for short 'the Cr.P.C.) before enhancing the sentence of life imprisonment to death. Learned counsel pointed out that having regard to the object and the setting in which the new provision of Section 235(2) was inserted in the 1973 Code, there can be no doubt that it is one of the most fundamental parts of the criminal procedure and non-compliance thereof will ex facie vitiate the order. In support of his contention, learned counsel placed reliance on the judgment of this Court in Santa Singh v. State of Punjab; (1976) 4 SCC 190 and a recent judgment in Rajesh Kumar v.

State through Government of NCT of Delhi; (2011) 13 SCC 706.

22. Mr. Shankar Chillarge, learned counsel appearing for the State, submitted that in the facts and circumstances of this case, the High Court was justified in according maximum sentence of death penalty, since on facts, it was found to be a rarest of rare case and the test laid down by this Court in Bachan Singh v. State of Punjab; (1980) 2 SCC 684 has been fully satisfied. Learned prosecutor submitted this is a case of double murder and attempt to commit murder of two others and the manner in which the same was executed was gruesome. Further, it was pointed out that the procedure laid down under Section 235(2) Cr.P.C. was fully complied with and there is no reason to upset the conviction/ sentence awarded by the High Court.

23. We heard the learned counsel on either side on this point at length. The original file made available to this Court did not contain the copy of show cause notice dated 1.12.2005 issued by the High Court as well as the full text of the order passed by the High Court on 13.12.2005 recording the statement of the accused. We passed an order on 11.04.2012 to produce the original files to examine whether the High Court had followed the procedure laid down under Section 235(2) Cr.P.C. Records were made available and we went through those records with great care. We have also perused the full text of the show cause notice dated 1.12.2005 issued by the High Court and the statement recorded by the High Court under Section 235(2) Cr.P.C. after summoning the accused.

24. We have to examine whether the High Court has properly appreciated the purpose and object of Section 235(2) Cr.P.C. and applied the same bearing in mind the fact that they are taking away the life of a human being.

25. Section 235 Cr.P.C. in its entirety is extracted for reference:

> " 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.
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> (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." The necessity of inserting sub-section (2) was highlighted by the Law Commission in its 41st Report which reads as follows:
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> "It is now being increasingly recognized 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 the characteristics and background of the offender. The aims of sentencing 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 the 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." The Law Commission in its Report had opined that the taking of evidence as to the circumstances relevant to

> sentencing should be encouraged in the process. The Parliament, it is seen, has accepted the recommendation of the Law Commission fully and has enacted sub-section (2).

26. The scope of the abovementioned provision has come up for consideration before the Apex Court on various occasions. Reference to few of the judgments is apposite. The courts are unanimous in their view that sub-section (2) of Section 235 clearly states that the hearing has to be given to the accused on the question of sentence, but the question is what is the object and purpose of hearing and what are the matters to be elicited from the accused. Of course, full opportunity has to be given to produce adequate materials before the Court and, if found, necessary court may also give an opportunity to lead evidence. Evidence on what, the evidence which has some relevance on the question of sentence and not on conviction. But the further question to be examined is whether, in the absence of adding any materials by the accused, has the Court any duty to elicit any information from whatever sources before awarding sentence, especially capital punishment. Psychological trauma which a convict undergoes on hearing that he would be awarded capital sentence, that is, death, has to be borne in mind, by the court. Convict could be a completely shattered person, may not be in his normal senses, may be dumbfound, unable to speak anything. Can, in such a situation, the court presume that he has nothing to speak or mechanically record what he states, without making any conscious effort to elicit relevant information, which has some bearing in awarding a proper and adequate sentence. Awarding death sentence is always an exception, only in rarest of rare cases.

27. In Santa Singh (supra), this Court has extensively dealt with the nature and scope of Section 235(2) Cr.P.C. stating that such a provision was introduced in consonance with the modern trends in penology and sentencing procedures. The Court noticed today more than ever before, sentencing has become a delicate task, requiring an inter-disciplinary approach and calling for skills and talents very much different from those ordinarily expected of lawyers. In Santa Singh, (supra) the Court found that the requirements of Section 235(2) were not complied with, inasmuch as no opportunity was given to the appellant, after recording his conviction, to produce material and make submissions in regard to the sentence to be imposed on him. The Court noticed in that case the Sessions Court chose to inflict death sentence on the accused and the possibility could not be ruled out that if the accused had been given an opportunity to produce material and make submissions on the question of sentence, as contemplated by Section 235(2), he might have been in a position to persuade the Sessions Court to impose a lesser penalty of life imprisonment. The Court, therefore, held the breach of the mandatory requirement of Section 235(2) could not, in the circumstances, be ignored as inconsequential and it can vitiate the sentence of death imposed by the Sessions Court. The Court, therefore, allowed the appeal and set aside the sentence of death and remanded the case to the Sessions Court with a direction to pass appropriate sentence after giving an opportunity to the accused to be heard. Further, in Santa Singh, the Court also held as follows:

> “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."

28. The above issue again came up before this Court in Dagdu & ors. v. State of Maharashtra; (1977) 3 SCC 68; wherein the three Judges Bench, referring to the judgment in Santa Singh, held as follows:

> "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." It further held as follows:
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> "....for a proper and effective implementation of the provision contained in Section 235(2), it is not always necessary to remand the matter to the court which has recorded the conviction....Remand is an exception, not a rule, and ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases"

29. Again in Muniappan v. State of Tamil Nadu; AIR 1981 SC 1220; this Court held as follows:

> "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."

30. Later, in Allauddin Mian & ors. v. State of Bihar; (1989) 3 SCC 5, this Court also considered the effect of non-compliance of Section 235(2) Cr.P.C. and held that the provision is mandatory. The operative portion of the judgment reads as follows:

> "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 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."

31. Later, three Judges Bench in Malkiat Singh v. State of Punjab; (1991) 4 SCC 341 indicated the necessity of adjourning the case to a future date after convicting the accused and held as follows:

> "On finding that the accused committed the charged offences, Section 235(2) of the Code empowers the Judge that he shall pass sentence on him according to law on hearing him. Hearing contemplated is not confined merely to oral hearing but also intended to afford an opportunity to the prosecution as well as the accused to place before the Court facts and material relating to various factors on the question of sentence and if interested by either side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. Therefore, sufficient time must be given to the accused or the prosecution on the question of sentence, to show 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."
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> 32. This Court in a recent judgment in Rajesh Kumar (supra) examined at length the evaluation of sentencing policy and the concept of mitigating circumstances in India relating to the death penalty. The meaning and content of the expression "hearing the accused" under Section 235(2) and the scope of Sections 354(3) and 465 Cr.P.C. were elaborately considered.

The Court held that the object of hearing under Section 235(2) Cr.P.C. being intrinsically and inherently connected with the sentencing procedure, the provisions of Section 354(3) Cr.P.C. which calls for recording of special reason for awarding death sentence, must be read conjointly. The Court held that such special reasons can only be validly recorded if an effective opportunity of hearing as contemplated under Section 235(2) Cr.P.C. is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence.

33. In our view, the principles laid down in the above cited judgments squarely applies on the question of awarding of sentence and we find from the records that the High Court has only mechanically recorded what the accused has said and no attempt has been made to elicit any information or particulars from the accused or the prosecution which are relevant for awarding a proper sentence. The accused, of course, was informed by the Court of the nature of the show-cause-notice. What was the nature of show cause notice? The nature of the show-cause-notice was whether the life sentence awarded by the trial court be not enhanced to death penalty. No genuine effort has been made by the Court to elicit any information either from the accused or the prosecution as to whether any circumstance exists which might influence the Court to avoid and not to award death sentence. Awarding death sentence is an exception, not the rule, and only in 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) Cr.P.C.

34. In such circumstances, we are inclined to set aside the death sentence awarded by the High Court and remit the matter to the High Court to follow Section 235(2) Cr.P.C. in accordance with the principles laid down. The conviction awarded by the High Court, however, stands confirmed. The High Court is requested to pass fresh orders preferably within a period of six months from the date of the receipt of the copy of this order. The appeal is allowed to that extent.

.....J. (K.S. Radhakrishnan) .....J. (Dipak Misra) New Delhi, July 17, 2012