Santa Singh vs State Of Punjab on 17 August, 1976

Equivalent citations: 1976 AIR 2386, 1977 SCR (1) 229, AIR 1976 SUPREME COURT 2386

Author: P.N. Bhagwati

Bench: P.N. Bhagwati, Syed Murtaza Fazalali

PETITIONER:
SANTA SINGH

Vs.

RESPONDENT:
STATE OF PUNJAB

DATE OF JUDGMENT17/08/1976

BENCH:
BHAGWATI, P.N.
BENCH:
BHAGWATI, P.N.
FAZALALI, SYED MURTAZA

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1976 AIR 2386 1977 SCR (1) 229
1979 SCC (4) 190
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RF 1977 SC1747 (4)
RF 1977 SC1926 (16)
R 1980 SC 898 (152)
RF 1989 SC1247 (16)
F 1991 SC 345 (7)

ACT:
Code of Criminal Procedure (Act 2 of 1974), ss. 235 and 465--Scope of

HEADNOTE:
The appellant was convicted by the Sessions Court under s.IPC, and sentenced to death. On the date of the judgment his advocate was not present. The trial court did not give the accused an opportunity to be. heard in regard

to the sentence as required by s. 235(2), Cr.P.C., 1973. The appellant also did not insist on his right to be heard. The conviction and sentence. were, confirmed by the High Court. Even in the High Court the accused did not complain that the trial court had committed a breach of s. 235(2).

On the question whether the sentence is vitiated because of the violation of s. 235(2),

HELD: The matter should be remanded to. the trial court for giving an opportunity to the appellant on the question of sentence.

Per Bhagwati, J: (1) Under s. 235(1) the court must, in the first instance, deliver a judgment convicting or acquitting the accused. If the accused is acquitted, no further question arises. If the accused is convicted, at that stage, he must be given an opportunity to be heard in regard to the sentence, and it is only after hearing him that the court can pass sentence. [232 D-E]

(2) Section 235(2) is a new provision in consonance with the modern trends in penology and sentencing procedures. Sentencing is an important stage in the process of administration of criminal justice, and should not be consigned to a subsidiary position. Many factors have to be considered before a proper sentence is passed such as the nature of the offence; the circumstances-extenuating or aggravating--of the offence; the prior criminal record, if any, of the offender; his age; his record of employment; his background with reference to education; home life. sobriety and social adjustment; his emotional and mental condition; the prospects for his rehabilitation; the possibility of his return 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. The material relating to these factors may be placed before the court by means of affidavits. The hearing contemplated by s. 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 the various factors bearing on the question of sentence, and if they are contested by the other side, then to produce evidence for the purpose of establishing those factors. Otherwise, the hearing would be devoid of meaning and content. The Court must however be vigilant to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting 1he proceedings. [232 E; G 233 F; 235 A-B]

Ediga Anammo v. State of Andhra Pradesh [1974] 3 S.C.R. 329 referred to.

(3) If the trial court had, instead of sentencing the appellant to death, imposed on him the sentence of the imprisonment, he would not be, aggrieved by the breach of

(2) 235 because, even after hearing the appellant, the. trial court could not have passed a more favourable sentence. But the trial court imposed death sentence and the possibility cannot be ruled out that if the 230 appellant has been given an opportunity to produce material and make submissions on the question of sentence, he might have been able to persuade, the trial court to impose the lesser penalty. [235 D-E]

(4) Since the section is a new provision it is quite possible that many lawyers and judges might be unaware of it. In the present case obviously the trial court as well as the appellant's advocate in the High Court were aware of it. No inference can, therefore, be drawn against the appellant that he had nothing to say from his omission to raise this point in the High Court. [236 A]

(5)(a) Non-compliance with the requirement of the section cannot be described as a mere irregularity curable under s. 465. It amounts to by_passing an important stage of the trial so that the trial cannot be said to be that contemplated by the Code. Such deviation constitutes disobedience of an express provision of the Code as to the mode of trial and hence cannot be regarded as a mere irregularity. [236 H]

Subramania Iyer v. King Emperor (1901) 28 I.A. 257 referred to.

(b) The; violation goes to the root of the matter and the resulting illegality is of such a character that it vitiates the sentence. [237 B]

Pulukuri Kotayya v. King Emperor, (1947) 74 I.A. 65 and Magga v. State of Rajasthan, [1953] S.C.R. 973 referred to.

(c) When no opportunity has been given to the appellant in regard to the sentence to be imposed on him, failure of justice must be regarded as implicit in s. 465 and cannot have any application. [137 B]

Per Fazal Ali J. (1) The 48th Report of the Law Commission and the statement of objects and reasons of the 1973-Code of Criminal Procedure show that s. 235(2) is a very salutary provision. It contains one of the cardinal features of natural justice, namely, that the accused must be given an opportunity to make a representation against the sentence proposed to be imposed on him. It seeks to achieve a socio-econonmic purpose and is aimed at attaining the ideal principle of proper sentencing in a rational and progressive society. Section 235 is split up into two integral parts, (a) the stage which culminates in the passing of the judgment of conviction or acquittal; and (b) the stage which, on conviction, results in imposition of sentence on the accused. Both these parts are absolutely fundamental and non-compliance with any of the provisions would undoubtedly vitiate the final order passed by the Court. Section 235(2) is on the Court to stay its hands after passing a judgment oF conviction and hear the accused on the ques-

tion of sentence before passing sentence. [238 H; 239 E; C]

(2) There may lye a number of circumstances of which the Court may not be aware but which may be taken into consideration by the court while awarding the sentence, particularly a sentence of death. The accused must be given an opportunity of making his representation and placing such materials which have a bearing on the question of sentence. Parliament has not 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 bearing on the question of sentence, if necessary by leading evidence, before the .Court, and a consequent opportunity to the prosecution to rebut those materials. The Court must be vigilant to exercise proper control over the proceedings so that the trial is not unavoidably or unnecessarily delayed. [240 F-G]

(3) Non-compliance with the section is not a mere irregularity which can be cured by s. 465 of the Code. It is an illegality which vitiates the sentence. Having regard-to the object and the setting in which the new provision was inserted, there can be no doubt that it is one of the most fundamental parts of criminal procedure and non-compliance thereof will ex facie vitiate the order.

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Even if it be regarded as an irregularity the prejudice caused to the accused would be inherent and implicit because of the infraction of the rules of natural justice which have been incorporated in this provision, since the accused has been completely deprived of an opportunity to represent to the Court regarding the proposed sentence and this manifestly results in a serious failure of justice. [240 B-C]

[Both the learned Judges indicated that there must be a system of training judges in the application of socio-economic laws and in modern methods and techniques of decision-making and sentencing procedures]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 230 of 1976.

(Appeal by Special Leave from the Judgment and order dated 11.9.1975 of the Punjab & Haryana High Court in Crl. Appeal No. 392 of .1975 and Murder Reference No. 14/75). S.K. lain, for the Appellant.

O.P. Sharma, for the Respondent.

Judgment The Judgment of the Court was delivered by P.N. Bhagwati, J.S. Murtaza Fazal Ali, J. gave a separate Opinion.

BHAGWATI, J.--This appeal, by special leave, raises an interesting question of law relating to the construction of section 235(2) of the Code of Criminal Procedure, 1973. The appellant was tried before the Sessions Judge, Ludhiana for.committing a double murder, one of his mother and the other of her second husband. He was represented by a lawyer during the trial and after the evidence was concluded and the arguments were heard, the learned Sessions Judge ad- journed the case to 13th February, 1975 for pronouncing the judgment. It appears that on 13th February, 1975, the judgment was not ready and hence the case was adjourned to 20th February, 1975 and again to 26th February, 1975. The Roznamcha of the proceedings shows that on 26th February, 1975 the appellant was present without his lawyer and the learned Sessions Judge pronounced the judgment convicting the appellant of the offence under section 302 of the Indian Penal Code and sentenced him to death. It was common ground that after pronouncing the judgment convicting the appel- lant, the learned Sessions Judge did not give the appellant an opportunity to be heard in regard to the sentence to be imposed on him and by one single judgment, convicted the appellant and also sentenced him to death. The appellant preferred an appeal to the High Court and the case was also referred to the High Court for confirmation of the death sentence. The High Court agreed with the view taken by the learned Sessions Judge and confirmed the conviction as also the sentence of death. The appellant thereupon preferred the present appeal with special leave obtained from this Court. The appeal is limited to the question of sentence and the principal argument advanced on behalf of the appellant is that in not giving an opportunity to the appellant to be heard in regard to the sentence to be imposed on him after the judgment was pronounced convict- ing him, the learned Sessions Judge committed a breach of section 235 (2) of the Code of Criminal Procedure, 1973 and that vitiated the sentence of death imposed on the appel- lant. This argument is a substantial one and it rests on the true interpretation of section 235(2). This is a new provision and it occurs in section 235 of the Code of Crimi- nal Procedure, 1973 which reads as follows:

> "235 (,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."

This provision is clear and explicit and does not admit of any doubt. It requires that in every trial before a court of sessions, there must first be a decision as to the guilt of the accused. The court must, in the first instance, deliver a judgment convicting or acquitting the accused. If the accused is acquitted, no further question arises. But if he is convicted, then the court has to "hear the accused on the question of sentence, and then pass sentence on him according to law". When a judgment is rendered convicting the accused, he is, at that stage, to be given an opportunity to be heard in regard to the sentence and it' is only after hearing him that the court can proceed to pass the sentence.

This new provision in section 235(2) is in consonance with the modern trends in penology and sentencing proce- dures. There was no such provision in the old Code. Under the old Code, whatever the accused wished to submit in regard to the sentence had to be stated by him before the arguments concluded and the judgment was delivered. There was no separate stage for being heard in regard to sentence. The accused had to produce material and make his submissions in regard to sentence on the assumption that he was ulti- mately going to be convicted. This was most unsatisfacto- ry. The legislature, therefore, decided that it is only when the accused is convicted that the question of sentence should come up for consideration and at that stage, an opportunity should be given to the accused to be heard in regard to the sentence. Moreover, it was 'realised that sentencing. is an important stage in the process of adminis- tration of criminal justice as important as the adjudica- tion of guilt--and it should not be consigned to a subsidi- ary 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. In most of the countries of the world, the problem of sen- tencing the criminal offender is receiving increasing atten- tion and that is largely because of the rapidly changing attitude towards crime and criminal. There is in many of the countries, intensive study of the sociology of crime and that has shifted the focus from the crime to the crimi- nal, leading to a widening of the objectives of sentencing and, simultaneously, of the range of sentencing procedures. Today, more than ever before, sentencing is becoming a delicate task, requiring an inter-disciplinary approach and calling for skills and talents vary much different from those ordinarily expected of lawyers. This was pointed out in clear and emphatic words by Mr. Justice Frankfurter:

> "I myself think that the bench we lawyers who become judges--are not very competent, are not qualified by experience, to impose sentences where any discretion is to be exercised. I d9 not think it is in the domain of the training of lawyers to know what to do with a fellow after you find out he is a thief. I do not think legal training gives you any special competence. I, myself, hope that one of these days, and before long, we will divide the functions of criminal justice. I think the lawyers are people who are competent to ascertain whether or not a crime has been committed. The whole scheme of common law judicial machinery--the rule of evidence, the ascertainment of what is relevant and what is irrelevant and what is fair, the whole question of whether you can introduce prior crimes in order to prove intent--I think lawyers are peculiarly fitted for that task. But all the questions that follow upon ascertainment of guilt, I think require very different and much more diversified talents than the lawyers and judges are normally likely to posses."

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, society and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possi- bility 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 there- fore, the legislature felt that, for this purpose, a separate stage should be provided after convic- tion when the court can bear 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).

But, on the interpretation of section 235(2), another question arises and that is, what is the meaning and content of the words "hear the accused". Does it mean merely that the accused has to be given an opportunity to make his submissions or he can also produce 17--1003 SCI/76 material bearing on sentence which has so far not come before the Court? Can he lead further evidence relating to the question of sentence or is the hearing to be confined only to. oral submissions ? That depends on the interpreta- tion to be placed on the word 'hear'. 'Now, the word 'hear' has no fixed rigid connotation. It can bear either of the two rival meanings depending on the context in which it occurs. It is a well settled rule of interpretation, hal- lowed by time and sanctified by authority, that the meaning of an ordinary word is to be found not so much in strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which it is used and the object which is intended to be attained. It was Mr. Justice Holmes who pointed out in his inimitable style that "a word is not a crystal, transparent and unchanged: it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used". Here, in this provision, the word 'hear' has been used to give an opportunity to the accused to place before the court various circumstances bearing on the sen- tence to be passed against him. Modern penology, as pointed out by this Court in Ediga Annamma v. State of Andhra Pradesh(1)' "regards crime and criminal as equally material when the right sentence has to be picked out". It turns the focus not only on the crime, but also on the criminal and seeks to personalise the punishment so that the reformist component is as much operative as the deterrent element. It is necessary for this purpose that "facts of a social and personal nature, sometimes altogether irrelevant, if not injurious, at the stage of fixing the guilt, may have to be brought to the notice of the court when the actual sentence is determined". We have set out large number of factors which go into the alchemy which ultimately produces an appropriate sentence and full and adequate material relating to these factors would have to be brought before the court in order to enable the court to pass an appropriate sen- tence. This material may be placed before the court by means of affidavits, but if either party disputes the cor- rectness or veracity of the material sought to be produced by the other, an opportunity would have to be given to the party concerned to lead evidence for the purpose of bring- ing such material on record. The hearing on the question of sentence, would be rendered devoid of all meaning and content and it would become an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties and particularly to the accused, to produce material in regard to various fac- tors beating on the question of sentence, and if necessary, to lead evidence for the purpose of placing such material before the court. This was also the opinion expressed by the Law Commission in its Forty Eighth Report where it was stated that "the taking of evidence as to the circum- stances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to cooper- ate in the process." The Law Commission strongly recommend- ed that 'if a request is made in that behalf bY either the prosecution or the accused, an opportunity for leading "evidence on the question" of sentence "should be given". We are, therefore, of the view that the hearing. (1) [1974] 3 S.C.R. 329.

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 beating 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 would have to be harmonised with the requirement of expeditious disposal of proceedings. Now there can be no doubt that in the present case the requirement of section 235(2) was not complied with, inas- much 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. Since the appellant was. convicted under section 302 of the Indian Penal Code, only two options were available to the Sessions Court in the matter of sentencing the appellant:

> either to sentence him to death or to impose on him sentence of imprisonment for life. It the Sessions Court had, in- stead of sentencing him to death, imposed on him sentence of life imprisonment, the appellant could have made no griev- ance of the breach of the provision of section 235(2), because, even after hearing the appellant, the Sessions Court would not have passed a sentence more favourable to the appellant 'than the sentence of life imprisonment. In such a case, even if any complaint of violation of the requirement of section 235 (2) were made, 'it would not have been entertained by the appellate court as it would have been meaningless and futile. But, in the _present case, the Sessions Court chose to inflict death sentence on the appel- lant and the possibility cannot be ruled out that if the accused had been given opportunity to produce material and make submissions on the question of sentence, as contemplat- ed by section 235(2), he might have been able to persuade the Sessions Court to impose the lesser penalty of life imprisonment. The breach of the mandatory requirement of section 235(2) cannot, in the circumstances, be ignored as inconsequential and it must be held to vitiate the sentence of death imposed by the Sessions Court.
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> It was, however, contended on behalf of the State that non-compliance with the mandatory requirement of section 235(2) was a mere irregularity curable under section 465 of the Code of Criminal Procedure. 1973 as no failure of jus- tice was occasioned by it and the trial could not on that account be held to be bad. The State leaned heavily on the fact that the appellant did not insist on his right to be heard under section 235(2) before the Sessions Court, nor did he make any complaint before the High Court that the Sessions Court had committed a breach of section 235(2) and this omission on the part of the appellant, contended the State, showed that he had nothing to say in regard to the question of sentence and consequently, no prejudice was suffered by him as a result of non-compliance with section 235(2). This contention is, in my opinion, without force and must be rejected. It must be remembered that section 235(2) is a new provision intro-

duced for the first time in the Code of Criminal Procedure, and 1973 and it is quite possible that many lawyers and judges might be unaware of it. Before the Sessions Court, the appellant was not represented by a lawyer at the time when the judgment was pronounced and obviously he could not be aware of this new stage in the trial provided by section 235(2). Even the Sessions Judge was not aware of it, for it is reasonable to assume that if he had been aware, he would have informed the appellant about his right to be heard in regard to the sentence and given him an opportunity to be heard. It is unfortunate that in our country there is no system of continuing education for judges so that judges can remain fully informed about the latest developments in the law and acquire familiarity with modern methods and tech- niques of judicial decision-making. The world is changing fast and in our own country, vast social and economic changes are taking place. There is a revolution of rising expectation amongst millions of human beings who have so far been consigned to a life of abject poverty, hunger .and destitution. Law has, for the first time, adopted a posi- tive approach and come out openly in the service of the weaker sections of the community. It has ceased to be merely an instrument providing a framework of freedom in which men may work out their destinies. It has acquired a new dimension, a dynamic activism and it is now directed towards achieving socio-economic justice which encompasses not merely a few privileged classes but the large masses of our people who have so far been denied freedom and equality-social as well as economic--and who have nothing to hope for and to live for. 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 per- petuating 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.

So far as section 465 of the Code of Criminal Procedure, 1973 is concerned, I do not think it can avail the State in the present ease. In the first place, non-compliance with the requirement of section 235(2) cannot be described as mere irregularity in the course of the trial curable under section 465. It is much more serious. It amounts to by- passing an important stage of the trial and omitting it altogether, so that the trial cannot be aid to be that contemplated in the Code. It is a different kind of trial conducted in a manner different from that prescribed by the Code. This deviation

consti- tutes disobedience to an express provision of the Code as to the mode of trial, and as pointed out by the Judicial Com- mittee of the Privy Council in Subramania Iyer v. King Emperor(1), such a deviation cannot be regarded as a mere irregularity. It goes to the root of the matters and the resulting illegality is of such a character that it vitiates the sentence. Vide Pulukurti Kotayya v. King Emperor(2) and Magga & Anr. v. State of Rajasthan.(3) Secondly, when no opportunity has been given to the appellant to produce material and make submissions in regard to the sentence to be imposed on him, failure of justice must be regarded as implicit. Section 465 cannot, in the circumstances, have any application in a case like the present. I accordingly allow the appeal and whilst not interfer- ing with the conviction of the appellant under section 302 of the Indian Penal Code, set aside the sentence of death and remand the case to the Sessions Court with a direction to pass appropriate sentence after giving an opportunity to the appellant to be heard in regard to the question of sentence in accordance with the provision of section 235 (2) as interpreted by me.

FAZAL ALI, J.--I entirely agree with the judgment pro- posed by my learned brother Bhagwati, J., and I am at one with the views expressed by him in his judgment, but I would like to add a few lines of my own to highlight some impor- tant aspects of the question involved in this appeal. In this appeal by special leave which is confined only to the question of sentence an interesting question of law arises as to the interpretation of the provisions of s. 235(2) of the Code of Criminal Procedure, 1973---hereniafter after referred to as 'the 1973 Code'. In the light of the arguments advanced before us by the parties the question may be framed thus:

"Does the non-compliance with the provi-

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sions  of    s. 235(2) of the 1973 Code vitiate the
sentence passed by    the Court?"
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In order to answer this question it may be necessary to trace the historical background and the social setting under which s. 235(2) was inserted for the first time in the 1973 Code. It would appear that the 1973 Code was based on a good deal of research done by several authorities includ- ing the Law Commission which made several recommendations for revolutionary changes in the provisions of the previous Code so as to make the 1973 Code in consonance with the growing needs of the society and in order to solve the social problems of the people. Apart from introducing a number of changes in the procedure, new rights and powers were conferred on the Courts or sometimes even on the ac- cused. For instance, a provision for anticipatory bail was introduced to enable the, accused to be saved from

(1) (1901) 28 I.A. 257.

(2) (1947) 74 I.A. 65.

(3) [1953] S.C.R. 973 at pp. 983-984.

unnecessary harassment. In its 48th Report the Law Commis- sion,. while recommending the insertion of a provision which would enable the accused to make a representation against the sentence to be imposed after the judgment of conviction had been passed, observed as follows:

> "It is now being increasingly recognised that a rational and consistent sentencing policy re- quires the removal of several deficiencies in the present system. One such deficiency is the lack of comprehensive information as to characteristics and background of the offender."
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> "We are of the view that the taking of evi-
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> dence as to the circumstances relevant to sentenc- ing should be encouraged, and both the prosecution and the accused should be allowed to co-operate in the process."

In the aims and objects of 1973 Code which have been given clause by clause, a reference to this particular provision has been made thus;

> "If the judgment is one of conviction, the accused will be given an opportunity to make his representation, if any, on the punishment proposed to be awarded and such representation shall be taken into consideration before imposing the sen- tence. This last provision has been made because it may happen that the accused may have some grounds to urge for giving him consideration in regard to the sentence such as that he is the bread-winner of the family of which the Court may not be made aware during the trial."

Para 6(d) of the statement of objects and reasons of the 1973 Code' runs thus:

> "6. Some of the more important changes in- tended to provide relief to the poorer sections of the community are :--
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> "(d) the accused will be given an opportunity to make representation against the punishment before it is imposed." The statement of objects and reasons further indicates that the recommendations of the Law Commission were examined carefully keeping in view, among others, the principle that "an accused person should get a fair trial in accordance with the accepted principles of natural justice". In these circumstances, therefore, I feel that the provisions of s.

235 (2) are very salutary and contain one of the cardinal features of natural justice, namely, that the accused must be given an opportunity to make a representation against the sentence proposed to be imposed on him.

Section 235 of the 1973 Code runs thus:

> "235(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."

A perusal of this section clearly reveals that the object of the 1973 Code was to split up the sessions trial or the warrant trial, where also a similar provision exists, into two integral parts--(i) the stage which culminates in the passing of the judgment of conviction or acquittal; and (ii) the stage which on conviction results in imposition of sentence on the accused. Both these parts are absolutely fundamental and non-compliance with any of the provisions would undoubtedly vitiate the final order passed by the Court. The two provisions do not amount merely to a ritual formula or an exercise in futility but have a very sound and definite purpose to achieve. Section 235 (2) of the 1973 Code enjoins on the Court that after passing a judgment of conviction the Court should stay its hands and hear the accused on the question of sentence before passing the sentence in accordance with the law. This obviously postulates that the accused must be given an opportunity of making his representation only regarding the question of sentence and for this purpose he may be allowed to place such materials as he may think fit but which may have bear- ing only on the question of sentence. The statute, in my view, seeks to achieve a socio-economic purpose and is aimed at attaining the ideal principle of proper sentencing in a rational and progressive society. The modern concept of punishment and penology has undergone a vital transformation and the criminal is now not looked upon as a grave menace to the society which should be got rid of but is a diseased person suffering from mental malady or psychological frus- tration due to subconscious reactions and is, therefore, to be cured and corrected rather than to be killed or de- stroyed. There may be a number of circumstances of which the Court may not be aware and which may be taken into consideration by the Court while awarding the sentence, particularly a sentence of death, as in the instant case. It will be difficult to lay down any hard and fast rule, but the statement of objects and reasons of the 1973 Code itself gives a clear illustration. It refers to an instance where the accused is the sole bread-earner of the family. In such a case if the sentence of death is passed and executed it amounts not only to a physical effacement of the criminal but also a complete socio-economic destruction of the family which he leaves behind. Similarly there may be cases, where, after the offence and during the trial, the accused may have developed some virulent disease or some mental infirmity, which may be an important factor to be taken into consideration while passing the sentence of death. It was for these reasons that s. 235(2) of the 1973 Code was enshrined in the Code for the purpose of making the Court aware of these circumstances so that even if the highest penalty of death is passed on the accused he does not have a grievance that he was not heard on his personal, social and domestic circumstances before the sentence was given. My learned brother has very rightly pointed out that our independence has led to the framing of numerous laws on various social concepts and a proper machinery must be evolved to educate not only the people regarding the laws which have been made for their benefit but also the Courts, most of whom are not aware of some of the recent and the new provisions. It is, therefore, the prime need of the hour to set up Training Institutes to impart the new judicial re- cruits or even to serving judges with the changing trends of judicial thoughts and the new ideas which the new judi- cial approach has imbibed over the years as a result

of the influence of new circumstances that have come into exist- ence.

The next question that arises for consideration is whether noncompliance with s. 235(2) is merely an irregular- ity which can be cured by s. 465 or it is an illegality which vitiates the sentence. Having regard to the object and the setting in which the new provision of s. 235(2) was inserted in the 1973 Code there can be no doubt that it is one of the most fundamental part of the criminal procedure and non-compliance thereof will ex facie vitiate the order. Even if it be regarded as an irregularity the prejudice caused to the accused would be inherent and implicit because of the infraction of the rules of natural justice which have been incorporated in this statutory provision, because the accused has been completely deprived of an opportunity to represent to the Court regarding the proposed sentence and which manifestly results in a serious failure of justice. There is abundant authority for this proposition to which reference has been made by my learned brother. The last point to be considered is the extent and import of the word "hear" used in s. 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 contem- plated 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 sen- tence 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 oppor- tunity 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."

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.

I, therefore, agree with the order of my learned Bhag- wati, J., that the appeal should be allowed on the question of the sentence and the, matter should be sent back to the Trial Court for giving an opportunity to the accused to make a representation regarding the sentence proposed.

V.P.S. Appeal allowed.