GAHC030002962020

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/8/2020

Zothanpuia
Council Veng

VERSUS

State of Mizoram
Aizawl

Advocate for the Petitioner : Mr C Lalfakzuala (Amicus Curiae)

Advocate for the Respondent : Ms Linda L Fambawl (PP/Addl. PP, Mizoram)

BEFORE
HONOURABLE MR. JUSTICE NELSON SAILO
HONOURABLE MRS. JUSTICE MARLI VANKUNG

Date of hearing : 25.01.2022.

Date of Judgment : 31.01.2022.

J U D G M E N T & O R D E R (CAV)

(Nelson Sailo, J)

Heard Mr. C. Lalfakzuala, learned Amicus Curiae appearing for the appellant and Mr. C. Zoramchhana, learned Public Prosecutor appearing for the State. This is an appeal preferred

by the appellant from jail against the Judgment & Order dated 02.11.2012 passed by the Addl. District & Sessions Judge – I, Aizawl in Criminal Trial No. 2570/2011, convicting the appellant under Sections 376 and 302 of the Indian Penal Code (IPC) and imposing upon him a sentence of Rigorous Imprisonment (R.I) for 10 years with fine of Rs. 5,000/- with a default clause for his conviction under Section 376 (1) IPC and a sentence of Rigorous Imprisonment (R.I) for life with fine of Rs. 5,000/- with default clause for his conviction under Section 302 IPC.

[2.] The learned Amicus Curiae has drawn our attention to the grounds taken in the appeal which is to the effect that he has no complaint against the sentence imposed upon him and he completely accepts the judgment passed by the Trial Court. He has however stated that due to his ill-health, the sentence imposed upon him may be shortened/reduced. The learned Amicus Curiae submits that under the given circumstance, the only grievance which the appellant can make is that he was not afforded reasonable and adequate opportunity of hearing as required under Section 235 of the Cr.PC before he was handed down the sentence. Referring to the said provision, he submits that the Trial Court after hearing arguments and points of law (if any), is to give a judgment in the case and in case the accused person is convicted, the Trial Court, unless it proceeds in accordance with the provisions of Section 360 Cr.PC, should hear the accused person on the question of sentence and then pass sentence on him according to law. He submits that in the present case, from a bare perusal of the impugned judgment & order, it can be seen that the learned Trial Court did not afford adequate opportunity of hearing to the appellant and that he was sentenced on the same day of his conviction. The learned Amicus Curiae submits that it is settled law as laid down by the Apex Court that the sentencing court must approach the question seriously

and must endeavor 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. In support of his submission, the learned Amicus Curiae relies upon the case of *Allaudin Mian & Others Vs. State of Bihar*, *(1989) 3 SCC 5*. He therefore submits that it is a fit case for remanding the matter back to the Trial Court for sentence hearing in terms of the relevant provisions of law and as per the law laid down by the Apex Court.

[3.] Mr. C. Zoramchhana, learned Public Prosecutor also by referring to the appeal preferred by the appellant from jail submits that the only grievance of the appellant is that due to his ill health, he has prayed for reduction of the sentence imposed upon him. He submits that the appellant has already been imposed with the minimum sentence under Section 302 IPC and therefore, there is no scope for reducing the sentence. The learned Public Prosecutor submits that the appellant may however approach the appropriate Government under Section 432 or 433 of the Cr.PC which deals with the power of the State Government to suspend, remit or commute sentence. He further submits that the appellant in fact had made confessional statement before the Judicial Magistrate and the Judicial Magistrate who had recorded the confessional statement was also examined during the Trial. Besides, the appellant has also admitted the charge made against him under Section 302 IPC. He also submits that the steps that can be taken by an Appellate Court in considering an appeal are provided under Section 386 of the Cr.PC. Unless the Appellate Court interferes with the findings of the Trial Court, there is no scope for altering or reducing the sentence when the minimum punishment prescribed has already been imposed. In the present case as well, the appellant was imposed with the minimum sentence by the learned Trial Court and

under the circumstance, remanding the matter back to the Trial Court for giving an opportunity of hearing to the appellant would only be an empty formality. Under the circumstance, he submits that the appeal being without merit, the same should be dismissed.

[4.] We have heard the submissions made by the learned counsels for the rival parties and we have perused the materials available on record. As may be noticed, the appellant was convicted under Section 302 IPC and under Section 376(1) IPC. On being convicted, he was sentenced to Rigorous Imprisonment for 10 years and with fine under Section 376 (1) IPC and Rigorous Imprisonment for life with fine and with a default clause under Section 302 IPC.

[5.] The appeal preferred by him from jail is to the effect that he has accepted the conviction and sentence imposed upon him but due to his ill-health, he has prayed for reduction of the term of his sentence. It may be seen that under Section 376 (1) of the IPC, the minimum sentence provided prior to the amendment which became effective from 03.02.2013 was 7 years imprisonment and which could be extended to imprisonment for life or for a term which may extend to 10 years. The crime was alleged to have been committed on 05.12.2011 i.e, before the amendment of Section 376 (1) IPC and therefore, it can be seen that the appellant has not been given the minimum sentence under Section 376 (1) IPC.

[6.] Further, as pointed out by the learned Amicus Curiae, the Trial Court if it decides to convict an accused, has to give him or her an opportunity of hearing on the sentence contemplated in terms of the provision of Section 235 Cr.PC. Section 235 Cr.PC may be abstracted below for ready perusal –

"***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."

[7.] In appreciating the above abstracted provision, the Apex Court in *Allaudin Mian & Others (supra)* at paragraph No. 10 of the judgment held as follows:-

"***10***. *Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the Judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the Judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. That sub-section reads as under:*

> *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 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. 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 March 31, 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 accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high degree 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. In the present case, as pointed out earlier, we are afraid that the learned Trial Judge did not attach sufficient importance to the mandatory requirement of sub-section (2) of Section 235 of the Code. The High Court also had before it only the scanty material placed before the learned Sessions Judge when it confirmed the death penalty."

[8.] From the above abstract, it may be seen that the Apex Court, as a general Rule, has held that 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. However, in the instant case, the learned Trial Court proceed to pronounce the sentence immediately after convicting the appellant on the same day.

[9.] The Apex Court in *Santa Singh Vs. State of Punjab (1976) 4 SCC 190*, held that hearing contemplated by Section 235 (2) of the Cr.PC 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 various factors bearing on the question of sentence and if they are contested by other side, then to produce evidence for the purpose of establishing the same. At the same time, care would have to be taken by the Court to see that 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 harmonized with the requirement of expeditious disposal of proceedings.

The non-compliance with the mandatory provisions of Section 235 (2) cannot be treated as a mere irregularity curable under Section 465 of the Code of Criminal Procedure, 1973. It is much more serious. It amounts to bypassing an important stage of the trial and omitting it altogether so that the trial cannot be said to be that contemplated in the Code. This deviation constitutes disobedience to an express provision of the Code as to the mode of trial. It goes to the root of the matter and the resulting illegality is of such a character that it vitiates the sentence.

[10.] In a recent judgment of a 3 (three) Judges Bench of the Supreme Court delivered on 12.04.2019 in connection with *Criminal Appeal No. 680 of 2007 (Accused 'X' Vs. State of Maharashtra)*, one of the issue that was considered was the implications of non-compliance of Section 235 (2) of the Cr.PC during the sentencing process before the Trial Court. The Apex Court after taking into account various decisions of the same Court on the issue, including the case of *Allaudin Mian & Others (supra)* and *Santa Singh (supra)* was of the opinion that as long as the spirit and purpose of Section 235 (2) Cr.PC is met, i.e., the accused afforded a real and effective opportunity to plead his case with respect to

sentencing, whether simply by way of oral submissions or by also bringing pertinent material on record, there is no bar on the pre-sentencing hearing taking place on the same date as the pre-conviction hearing. Depending on the facts and circumstances, a separate date may be required for hearing or sentence, but it is equally permissible to argue on the question of sentence on the same date if the parties wish to do so. In its conclusion amongst others, the Apex Court thus held that non-compliance of Section 235 (2) Cr.PC can be rectified at the appellate stage as well, by providing meaningful opportunity. If such 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.

[11.] Coming back to the present case, it may be noticed that the Trial Court has in the impugned judgment & order simply stated that it heard the counsel for the defence who prayed for taking the lenient view and as for the appellant, he prayed to the Court for showing mercy upon him. Further, while awarding the sentence to the appellant for his conviction under Sections 376 (1) and 302 IPC, no praticular reason was given. As already noticed earlier, the Trial Court has also not awarded the minimum sentence as prescribed under Section 376 (1) IPC so as to enable this Court to assess the correctness of the quantum of punishment challenged as was observed by the Apex Court in paragraph No. 48 of its judgment in *Accused 'X' Vs. State of Maharashtra (supra)*.

[12.] Therefore, upon due consideration, we are compelled to remand the case back to the learned Trial Court for giving the appellant an opportunity of hearing on the sentence being contemplated in view of his conviction under the relevant sections of law. It is therefore

directed that upon receipt of a copy of this order, the learned Trial Court shall issue notice to the appellant and the Public Prosecutor/Addl. Public Prosecutor by fixing a convenient date for sentence hearing in terms of the law laid down by the Apex Court. Only after giving such opportunity, the learned Trial Court shall proceed to pass the order of sentence as found to be appropriate. The entire exercise should be completed within 3 (three) months. Thus, the impugned judgment and order dated 02.11.2012 so far as it relates to the sentence stands interfered with and the appeal accordingly stands disposed of.

[13.] A copy of this Order be communicated to the learned Trial Court as well as the appellant in jail through the Special Superintendent, Central Jail, Aizawl.

[14.] For the valuable assistance rendered by Mr. C. Lalfakzuala, the learned Amicus Curiae, he shall be paid a remuneration of Rs. 9,500/- (Rupees nine thousand five hundred) only by the Mizoram State Legal Services Authority.

JUDGE **JUDGE**

Comparing Assistant