



IN THE HIGH COURT OF ORISSA AT CUTTACK

DSREF No. 1 of 2022

State of Odisha

Mr. B.P. Tripathy  
Additional Govt. Advocate

-Versus-

Sk. Asif Alli @ Md. Asif Iqbal ...  
& others

Condemned Prisoners/  
Accused persons

Mr. Sk. Zafarulla, Advocate

CRLA No.120 of 2023

Sk. Asif Alli @ Md. Asif Iqbal ...

Appellant

Mr. Sk. Zafarulla, Advocate

-Versus-

State of Odisha ...

Respondent

Mr. B.P. Tripathy  
Additional Govt. Advocate

AND

CRLA No.121 of 2023

Sk. Akil Ali ...

Appellant

Mr. Sk. Zafarulla, Advocate

-Versus-

State of Odisha ...

Respondent

Mr. B.P. Tripathy  
Additional Govt. Advocate



**CORAM:**  
**HON'BLE MR. JUSTICE S.K. SAHOO**  
**HON'BLE MR. JUSTICE R.K. PATTANAIK**

**ORDER**  
**02.05.2024**

Order No.

05. 1. Pursuant to the Court's order dated 30<sup>th</sup> April, 2024, the report along with the relevant papers annexed to it has been received today from the Senior Superintendent, Circle Jail, Cuttack at Choudwar, the same having been produced by Mr. Tripathy, learned AGA for the State. In compliance of the directions issued, the report reveals the details on the conduct of the appellants; criminal antecedent in respect of one of them; the appellants acquiring education while being in jail besides their medical condition.
2. While considering the submissions of Mr. Zafarulla, learned counsel for the appellants and Mr. Tripathy, learned AGA for the State, the Court has taken sou motu cognizance of the fact regarding the procedure followed by the Trial Court at the time of hearing on sentence. In fact, on perusal of the LCR, the Court finds that the learned court below delivered the judgment on 29<sup>th</sup> November, 2022 and on the same date, directed the sentences on the appellants. So to say, hearing on the question of sentence was held and concluded on 29<sup>th</sup> November, 2022 itself with the sentences being imposed.
3. A decision in Sou Motu Writ Petition (Crl.) No.1 of 2022 of the Apex Court in reference to framing of guidelines regarding potential mitigating circumstances to be considered while



imposing death sentences is cited at the Bar. In the decision (supra), the Supreme Court taking judicial notice of difference of opinion and approach on the question, whether, after recording conviction for a capital offence, the Court is obligated to conduct a separate hearing on sentence deemed it proper for a reference and decision by a larger Bench. While dealing with the reference, the Apex Court in the aforesaid decision observed as under:

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

21. The question of what constitutes ‘sufficient time’ at the Trial court stage, in this manner appears not to have been addressed in the light of the express holding in Bachan Singh. This, in the Court’s considered opinion, requires consideration and clarity. This court’s decision in Manoj Pratap Singh v. State of Rajasthan 2022 SCC OnLine SC 768 is an example, where ‘sufficient time’ for compliance with Section 235(2) CrPC was considered; it was concluded that the Trial court had ‘scrupulously carried out its duty in terms of Section 235(2)’ since the sentence was awarded 3 days after the conviction, after considering both the aggravating and mitigating circumstances.

22. After hearing the parties on the question of conviction in Manoj & Ors. v. State of Madhya Pradesh, this Court had adjourned the matter for submissions on sentencing, with directions eliciting reports from the probation officer, jail authorities, a trained psychiatrist and psychologist, etc., to assist



the accused in presenting mitigating circumstances. Noticing the lack of a uniform framework in this regard, the present *Suo Motu W.P. (CrI.) No. 1/2022* was initiated wherein this Court has indicated by its orders the necessity of working out the modalities of psychological evaluation, the stage of adducing evidence in order to highlight mitigating circumstances, and the need to build institutional capacity in this regard. The apprehensions relating to the absence of such a framework was also recorded in the final judgment of *Manoj & Ors. v. State of Madhya Pradesh*, wherein the importance of a separate hearing and the necessity of background analysis of the accused, was highlighted. It was suggested that the social milieu, the age, educational levels, whether the convict had faced trauma earlier in life, family circumstances, psychological evaluation of a convict and post-conviction conduct, were relevant factors at the time of considering whether the death penalty ought to be imposed upon the accused.”

4. Since there was lack of a uniform framework on sentencing aspect, the Apex Court initiated the reference with a purpose to work out the modalities vis-à-vis psychological evaluation, stage of receipt of evidence to highlight the mitigating circumstances and need and necessity to build institutional capacity in that regard. A decision in ***Dagdu Vrs State of Maharashtra (1977) 3 SCC 68*** has been referred to by the Apex Court while dealing with the reference, wherein, it rejected the interpretation of ***Santa Singh Vrs. State of Punjab (1976) 4 SCC 190*** as laying down that failure on the part of the court to hear a convicted accused on the question of sentence would necessitate remand and instead held that such an omission could be remedied by the higher court affording hearing to him on the quantum of sentence provided the same is real and effective, where, he would be allowed to adduce or submit all such data necessary in that regard. The Supreme Court further held therein that the Court may in



appropriate cases have to adjourn the matter in order to provide the accused sufficient time to produce necessary data and to make his contentions on the question of sentence and that perhaps must inevitably happen when the conviction is recorded for the first time by a higher court. The decision in **Dagdu** (supra) is stated to have been followed by the Apex Court in **Tarlok Singh Vrs. State of Punjab (1977) 3 SCC 218**. Nevertheless, as earlier mentioned, the Apex Court while taking up the matter with a reference, in the light of conflict of opinion on the subject and taking notice of the decision in **Bachan Singh Vrs. State of Punjab (1982) 3 SCC 24**, wherein, stress was laid on fairness afforded to a convict by a separate hearing as an important safeguard to uphold imposition of death sentence in the rarest of rare cases by relying upon the recommendations of the 48<sup>th</sup> Law Commission Report and observing that in all cases where imposing of capital punishment is a choice of sentence, aggravating circumstances would always be on record and part of the prosecution evidence leading to conviction, whereas, the accused can scarcely be expected to place mitigating circumstances for the reason that the stage for doing so is after conviction, as it would place him at a hopeless disadvantage tilting the scales heavily against him, an opinion was formed to have a uniform approach on the question of sentence granting real and meaningful opportunity as opposed to a formal hearing to the accused and hence, made the reference to a larger Bench.

5. Taking into account the fact that in the present case, the judgment was delivered on 29<sup>th</sup> November, 2022 and on the same date, hearing on the question of sentence was held and



sentences to the appellants have been imposed, in the considered view of the Court, there has been no proper and meaningful hearing as such which is necessary in order to do complete justice. In fact, there appears to be no opportunity afforded to the appellants to submit any such material in support of the mitigating circumstances during and in course of hearing on the question of sentence. The Trial Court's order dated 29<sup>th</sup> November, 2022 on hearing the question of sentence does not reveal as to if any such exercise was undertaken affording the appellants to submit material with regard to the mitigating circumstances. The Trial Court while hearing on sentence, as it is further made to reveal from its order dated 29<sup>th</sup> November, 2024, has not considered or for that matter, discussed in detail the mitigating circumstances vis-à-vis the appellants before imposing the sentences though reasons are assigned in the body of the judgment. Law is well settled that hearing on the question of sentence has to be real and effective and not a mere formality; if a meaningful hearing is not taken up by a court while considering the sentence to be imposed and inflicted upon the convict, it is likely to cause severe prejudice to him. Either there is a need for considering the mitigating circumstances already on record received as evidence during trial or besides such evidence, further opportunity should be provided to a convict to bring on record all such circumstances favourable to him at the time of hearing on sentence. While addressing the apprehensions relating to absence of a framework at the time of considering sentence, the Apex Court in **Manoj and Others Vrs. State of Madhya Pradesh. (2022) SCC Online SC 677** held the importance of a separate hearing and the necessity of background



analysis of the convict with reference to the social milieu, age, educational qualification and whether, he has faced any trauma in life, family circumstances, psychological evaluation and post-conviction conduct being the relevant factors while taking a call, whether, death penalty should be imposed or otherwise.

6. Being satisfied that the Trial Court not to have had hearing on question of sentence with respect to the appellants in the manner it was expected to and law envisages with the aggravating and mitigating circumstances to be either on record or with such further opportunity to furnish the necessary information or data thereon, the Court is of the humble view that before considering the appeals on merit and irrespective of its outcome, in view of the settled position of law discussed herein before, for a purposeful and meaningful hearing on sentence, the appellants should be afforded an opportunity at present inviting from them such data to be furnished in the shape of affidavits and also to direct the Jail Authority to do the needful in that regard. The Court is hence of the view that there is a need for a direction to the Senior Superintendent, Circle Jail, Cuttack at Choudwar to collect all such information on the past life of the convicts, psychological conditions of both the appellants and also their conduct post-conviction obtaining reports accordingly by taking service and necessary assistance from the Probation Officer and such other officers including a Psychologist or Jail doctor or any Medical Officer attending the prison. Such an exercise is considered to be absolutely expedient in order to advance the cause of justice, the intent and purpose being to provide a fair amount of opportunity for the appellants to bring on record all



such mitigating circumstances to be weighed against the aggravating circumstances since a balance is to be struck while taking a final decision on sentence in juxtaposition to the sentences imposed by the Trial Court. Hence, it is ordered.

7. List the hearing of the matter on 13<sup>th</sup> May, 2024 for further hearing and in the meantime, the appellants shall submit all such materials on mitigating circumstances by filling affidavits stating therein the particulars for consideration of the Court. It is directed that the Senior Superintendent, Circle Jail, Cuttack at Choudwar shall exercise his good office and ensure collection of detailed information with reports on the past life, psychological conditions and post-conviction conduct of the appellants and such other matters to be relevant at the final hearing by taking able assistance of the officials concerned. It is further directed that all the materials shall reach this Court well before the next date. At the end, it is clarified that the Court has not expressed anything on merits of the appeals as the appellants should not pre-judge and be on any such apprehension for the above exercise being undertaken, which is in relation to the sentencing aspect to be examined finally, while disposing it of with the death reference. A free copy each of the above order be immediately supplied to the learned counsel for the respective parties for its early compliance.

**(S.K. Sahoo)**  
Judge

**(R.K. Pattanaik)**  
Judge