IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

ORDER

1. **State of Rajasthan v. Dr. Abdul Hameed**
   (D.B. Criminal Death Reference No. 1/2014)

2. **Dr. Abdul Hameed v. State of Rajasthan**
   (D.B. Criminal Appeal No. 1024/2014)

3. **Rayees Beg v. State of Rajasthan**
   (D.B. Criminal Appeal No. 1073/2014)

4. **Javed Khan @ Javed Junior v. State of Raj.**
   (D.B. Criminal Appeal No. 1092/2014)

5. **Latif Ahmed Baja & Ors. v. State of Raj.**
   (D.B. Criminal Appeal No. 1093/2014)

6. **Abdul Goni @ Asadulla @ Nasaruddin @ Nikka @ Umar @ Majid Khan @ Raja v. State of Raj.**
   (D.B. Criminal Appeal No. 1094/2014)

7. **State of Raj. v. Pappu @ Salim**
   (D.B. Cr. Misc. Application No. 1/2015
   in
   D.B. Criminal Death Reference No. 1/2014)

Date of Judgment: 30/04/2015

PRESENT
HON'BLE MR. JUSTICE KANWALJIT SINGH AHLUWALIA
HON'BLE MRS. JUSTICE NISHA GUPTA

Ms. Kamini Jayaswal with Mr. Mahesh Gupta, Mr. S.S. Hasan and Ms. Meenu Verma, for the accused.
Mr. Aladeen Khan, Public Prosecutor for State.
Mr. Govind Prasad Rawat, for Pappu @ Salim

Seven accused namely Dr. Abdul Hameed, Rayees Beg, Javed Khan @ Javed Junior, Latif Ahmed Baja, Mohammad Ali Bhatt @ Mehamood Keeley, Mirza Nisar Hussain @ Naja, Abdul Goni @ Asadulla @ Nasaruddin @ Nikka @ Umar @ Majid Khan @ Raja have preferred five appeals bearing D.B. Criminal Appeal No. 1024/2014 (Dr. Abdul Hameed v. State of Rajasthan), D.B. Criminal Appeal No. 1073/2014 (Rayees Beg v. State of Rajasthan), D.B. Criminal Appeal No. 1092/2014 (Javed Khan @ Javed Junior v. State of Rajasthan),

D.B. Criminal Appeal No.1093/2014 (Latif Ahmed Baja & Ors. v. State of Rajasthan) and D.B. Criminal Appeal No.1094/2014 (Abdul Goni @ Asadulla @ Nasaruddin @ Nikka @ Umar @ Majid Khan @ Raja v. State of Rajasthan) to assail their conviction for offences under Sections 302, 302 r.w. Section 120B, 307 r.w. Section 120B, Section 4 of Prevention of Damage to Public Property Act and Sections 4 & 5 of the Explosive Substances Act r.w. Section 120B IPC. Accused Dr. Abdul Hameed has been substantively convicted for offence under Section 302 IPC, whereas remaining accused have been convicted with the aid of Section 120B IPC. In the appeals preferred, accused have also questioned the order of sentence. It has been contended before us that if the conviction of the appellants is set aside, the order of sentence as a necessary corollary shall also stand quashed.

The trial court has also sent Death Reference No.1/2014 (State of Rajasthan v. Dr. Abdul Hameed) for confirmation of the death sentence awarded to Dr. Abdul Hameed.

D.B. Criminal Misc. Application No.1/2015 has been instituted on the letter sent by the trial court seeking permission of the High Court under Section 308 Cr.P.C. to prosecute the approver Pappu @Salim under Section 193 IPC.

Before we could commence with the hearing of the case and analyze the evidence, it has come to our notice that the trial court while awarding death sentence to accused Dr. Abdul Hameed has not followed the procedure prescribed under Section

235(2) Cr.P.C. as interpreted by the Hon'ble Apex Court in various judgments. The impugned judgment of conviction was delivered on 29.9.2014. After delivery of the judgment, on the said day itself the trial court heard the accused on the question of sentence and passed order of sentence awarding death sentence to Dr. Abdul Hameed. We reproduce the relevant portion of the order of sentence whereby death sentence has been awarded upon the appellant Dr. Abdul Hameed as under:-

> *" सजा के प्रश्न पर सुना गया एवं विचार किया गया। विद्वान अधिवक्ता अभियुक्तगण का यह तर्क है कि उनको विचारण भुगतते हुए करीब 18- 19 वर्ष हो चुके हैं एवं परिवार के एकमात्र भरण पोषण कर्ता हैं, उनका यह प्रथम अपराध है। गरीब हैं। यह मामला आपवादिक मामलों में नहीं आता है। परिस्थितिजन्य साक्ष्य पर उन्हें दोषी घोषित किया है। अत: उन्हें भुगती हुई सजा पर छोड़ा जावे।*
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> *अभियुक्त डॉ. अब्दुल हमीद का यह तर्क है कि उसके विरूद्ध प्रत्यक्ष कोई साक्ष्य नहीं है, उसे अन्वीक्षा भुगतते हुए 18- 19 वर्ष हो गए हैं। उसका मामला आपवादिक मामलों में नहीं आता है। अत: उसे भुगती हुई सजा पर छोड़ा जावे। इसके प्रतिकूल विद्वान विशिष्ट लोक अभियोजक का तर्क है कि अभियुक्तगण ने भारत में आतंकवादी गतिविधियों को अंजाम देने के लिए आतंक फैलाने के लिए भय का वातावरण उत्पन्न करने के लिए राजस्थान रोड़वेज की बस में बम रखकर एवं बम रखने का षड़यंत्र कर 14 व्यक्तियों की मृत्यु कारित की एवं 37 व्यक्ति उसमें गंभीर रूप से घायल हुए हैं। इस परिस्थिति में अभियुक्तगण को मृत्युदण्ड दिया जावे।*
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> *उनका यह भी तर्क है कि मुल्जिमान का जीवित रहना समाज के लिए हितकर नहीं रह गया है। निर्दोष एवं निर्मम हत्या केवल आतंकवाद एवं दहशत फैलाने एवं देश की एकता एवं अखण्डता को अस्थिर करने के प्रयोजन से 14 व्यक्तियों की हत्या की है। यह दुर्लभतम मामलों में है। अत: मृत्युदण्ड से सभी अभियुक्तगण को दंडित किया जावे।*
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> *उभयपक्षों के तर्कों पर मनन किया व पत्रावली का ध्यानपूर्वक अवलोकन किया।*
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> *पत्रावली पर उपलब्ध रिकॉर्ड के अनुसार दिनांक 22. 05. 96 की आपराधिक घटना में 14 व्यक्तियों की हत्या से मृत्यु हो गई, 37 व्यक्तियों के साधारण एवं गंभीर प्रकृति की चोटें आई एवं घटना को जीवन पर्यन्त कष्ट देने वाली, मन मस्तिष्क को झकझोर देने वाली, भय एवं आतंक पैदा कर देने वाली, दुर्दान्त एवं कष्टकारक याद एवं स्मृति अभियुक्तगण के कृत्य के कारण पहुंची है। अभियुक्तगण ने अपने कृत्य से भारत की एकता, अखण्डता, सम्प्रभुता को चुनौती देने एवं देश में आतंक तथा दहशत फैलाने, लोगों के मन में अशांति एवं असुरक्षा की भावना पैदा करने के आशय से उच्च श्रेणी के विस्फोटक का उपयोग कर निर्दोष 14 व्यक्तियों की निर्मम एवं बरबर्तापूर्ण हत्या कारित की है। घटना के घायल 37 व्यक्तियों में से कुछ आहतों के श्रवण शक्ति को हमेशा हमेशा के लिए समाप्त कर दिया, कुछ आहतों को हाथ- पैरों से अपंग कर उनको जीवन पर्यन्त का कष्ट एवं अशांति दी है। अभियुक्त डॉ. अब्दुल हमीद ने आपराधिक षडयंत्र को अंजाम (अंतिम उद्देश्य) तक पहुंचाये जाने के लिए दु: साहसिक रूप से बस नंबर आर. जे. 07 पी. 1038 में बम*

रखकर महवा तक यात्रा की है, जो इस अभियुक्त डॉ. अब्दुल हमीद के अपराध को कारित करने के दृढ संकल्प को, दु: साहस को परिलक्षित करता है एवं एक ऐसे निर्मम हत्यारे के लिए जो मानवजाति के लिए खतरा बन गया है, समाज के लिए जिसकी सार्थक उपयोगिता नहीं रही है एवं उसका जीवन समाज के लिए खतरा हो गया है। अभियुक्त डॉ. अब्दुल हमीद ने देश में आतंक फैलाने के उद्देश्य से देश के विभिन्न हिस्सों में बम विस्फोट कर निरपराध लोगों की हत्या करने के सामान्य उद्देश्य को के अग्रसरण में तथा आपराधिक षडयंत्र की पूर्ति में बम विस्फोट का कार्य कर 14 व्यक्तियों की हत्या कारित की है एवं शेष 37 व्यक्तियों की हत्या का प्रयास किया है। अत: अभियुक्त डॉ. अब्दुल हमीद का यह कृत्य दुर्लभतम मामलों में आता है। अत: डॉ. अब्दुल हमीद के लिए उसके द्वारा किये गये अपराध के लिए मृत्युदण्ड ही एकमात्र उपयुक्त दण्डादेश है। अत: अभियुक्त डॉ. अब्दुल हमीद को धारा- 302 भारतीय दण्ड संहिता के आरोप में मृत्युदण्ड के दण्ड से दंण्डित किया जाना न्यायसंगत एवं विधि सम्मत पाया जाता है।"

We have also seen the record of the case. No opportunity was given to the accused to place relevant material before the trial court on the question of sentence. No opportunity was afforded to the accused Dr. Abdul Hameed to project mitigating circumstances in his favour.

Counsel for Dr. Abdul Hameed has drawn our attention on the quorum clause of the judgment and order of sentence. The court has stated that accused Dr. Abdul Hameed himself is present. No counsel was made available to him. We would have appreciated, had the trial court before passing the order of sentence provided legal aid or Amicus Curiae to the accused before pronouncing the order of sentence.

The Hon'ble Apex Court in the case of **Ajay Pandit @ Jagdish Dayabhai Patel & Anr. v. State of Maharashtra [(2012) 8 SCC 43]** after taking note of

various judgments of the Supreme Court has held as under:-

"*35. 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.*
>
> *(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."*

36. The necessity of inserting sub-section (2) was highlighted by the Law Commission in its 41st Report which reads as follows:

> *"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.*** *" (emphasis supplied)*

37. 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).

38. 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 *(emphasis supplied). 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*** *(emphasis supplied). Awarding death sentence is always an exception, only in rarest of rare cases.*

39. 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*** *(emphasis supplied). 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 beheard.

40. Further, in Santa Singh, the Court also held as follows:

> *"**4. ...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.**" (emphasis supplied)*

41. 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:

> *"79. ...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:

> *"80. ... 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"*

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

> *"**2. ...The obligation to hear the accused on the question of sentence which is imposed by Section 235(2) of the Criminal Procedure Code is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The Judge must make a genuine effort to elicit from the accused all***

information which will eventually bear on the question of sentence. *" (emphasis supplied)*

43. 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:

> *"10. ...The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the* ***prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence*** *(emphasis supplied). 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."*

44. 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:

> *"18. ... 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."

45. 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.

46. 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.

47. 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.

48. 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."

In **Sangeet & Anr. v. State of Haryana [(2013) 2 SCC 452]** taking note of the sentencing policy referred to the case of **Jagmohan Singh v. State of U.P. [(1973) 1 SCC 20]** wherein it was held that the court while awarding death sentence has to balance all aggravating and mitigating circumstances of the crime. The court further noticed that in the case of **Bachand Singh v. State of Punjab [(1980) 2 SCC 684]**, consideration was given not only to relevant circumstances of crime but also to the circumstances of criminal. A perusal of the order whereby the appellant Dr. Abdul Hameed has been sentenced to death penalty reveal that no mitigating circumstances were considered by the trial court qua the criminal.

Consequently, following the mandate of law laid

in **Ajay Pandit's** case (supra), we set aside the order of sentence qua Dr. Abdul Hameed and remit the matter to the trial court to follow the procedure under Section 235(2) Cr.P.C. as explained in various judgments of the Hon'ble Apex Court which have been noticed in the case of **Ajay Pandit** (supra). The trial court while considering the question of sentence shall also take into consideration observations made by the Hon'ble Apex Court in **Sangeet's** case (supra) also. The trial court shall do the needful within three months and pass an order of sentence afresh within the aforesaid period.

We also remind the trial court that in case accused is not represented by any counsel, it will discharge its duty by providing legal aid or Amicus Curiae to the accused Dr. Abdul Hameed. As a matter of abundant caution, it is clarified that we have not disturbed the conviction of any other accused-appellants and kept all the questions and all the appeals alive and pending till the question of sentence qua accused Dr. Abdul Hameed is decided.

Hence, we decline the D.B. Criminal Death Reference No.1/2014 at this stage.

D.B. Criminal Appeals No.1024/14, 1073/14, 1092/14, 1093/14 and 1094/14

To await fresh order of sentence to be passed by the trial court qua accused Dr. Abdul Hameed, list these cases after three months.

Since we have not disturbed the conviction of the accused, we transpose the accused to the same situation as they were on the day conviction was recorded. We are informed on that day they were in

custody. Hence, they shall continue to remain in custody till the question of sentence qua co-accused Dr. Abdul Hameed and their appeals are decided.

D.B. Cr. Misc. Application No.1/2015

Shri Govind Prasad Rawat has caused appearance on behalf of Pappu @ Salim and prays for adjournment to file reply to the application.

List alongwith other connected matters after three months.

(NISHA GUPTA)J. (KANWALJIT SINGH AHLUWALIA),J.

Govind/-

All corrections made in the judgment/order have been incorporated in the judgment/order being emailed.

Govind Sharma, Sr.PA