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BABASAHEB MARUTI KAMBLE

v.

STATE OF MAHARASHTRA

(Review Petition (Criminal) No. 388 of 2015)

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In

(Special Leave Petition (Criminal) No. 458 of 2015)

NOVEMBER 01, 2018

[A. K. SIKRI, ASHOK BHUSHAN AND

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INDIRA BANERJEE, JJ.]

Sentence/Sentencing: Death sentence – Award of, by courts below – Special Leave Petition filed thereagainst – Dismissed in limine *with one word – Review petition filed against the dismissal of SLP – Held: When death sentence is rare, there has to be an independent*

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examination by this Court also, 'unbound by the findings of the trial court and the High Court' – Such approach is the 'time-honoured practice of this Court' – Thus, special leave petition filed in those cases where death sentence is awarded by the courts below, should not be dismissed without giving reasons, at least qua death sentence – Order dismissing the Special Leave Petition is recalled –

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Constitution of India – Art. 137.

Allowing the Review Petition, the Court

HELD: 1.1 In the instant case, since the special leave petition filed by the review petitioner was dismissed *in limine*

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with one word and without giving any reasons, the review petition is allowed and the order dismissing the Special Leave Petition is recalled. [Para 16][1165-D-E]

1.2 When it comes to providing hearing in cases where the judicial mind is to be applied in choosing the sentence between

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life imprisonment and death, this requirement assumes greater importance. It has been held in *Bachan Singh's* case that since death sentence can be awarded only in the 'rarest of rare cases', the Court is supposed to give 'special reasons' when it choses to award death sentence. The reasoning process has to undertake the exercise of considering mitigating as well as aggravating

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circumstances and after weighing those circumstances with objective assessment, a decision has to be taken in this behalf. Such an exercise inherently calls for recording of reasons for awarding death sentence. The legislature has added another dimension in order to obviate any possibility of error, by making a specific provision to the effect that in those cases where the Session Judge inflicts death penalty, it has to be affirmed and approved by the High Court. [Para 11][1165-D-F]

1.3 Keeping in view all the factors, particularly, when death sentence is rare, this Court has emphasised time and again that in such cases there has to be an independent examination by this Court also, 'unbound by the findings of the trial court and the High Court'. Such approach is the 'time-honoured practice of this Court'. [Para 12][1163-G]

Mohammed Ajmal Mohammad Amir Kasab alias *Abu Mujahid v. State of Maharashtra* **(2012) 9 SCC 1 : [2012] 8 SCR 295 - relied on.**

1.4 While undertaking the exercise as to whether the death penalty is to be given imprimatur by this Court, even after the approval thereof by the High Court, case law of this Court amply demonstrates that proper exercise of sentence discretion calls for consideration of various factors like the nature of offence, circumstances-both extenuating or aggravating, the prior criminal record, if any, of the offender, the age of the offender, his background, his education, his personal life, his social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of his rehabilitation in the life of 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. [Para 13][1163-G-H; 1164-A-B]

1.5 A cumulative effect of all the circumstances does suggest that special leave petition filed in those cases where death sentence is awarded by the courts below, should not be dismissed without giving reasons, at least qua death sentence. There may be cases where at the Special Leave Petition stage itself, the Court may find that insofar as conviction is concerned there is no

A **scope for interference at all as such a conviction for offence under Section 302 is recorded on the basis of evidence which is impeccable, trustworthy, credible and proves the guilt of the accused beyond any shadow of doubt. At the same time, if death penalty is to be affirmed even while dismissing the Special Leave Petition *in limine*, it should be by a reasoned order on the aspect of sentence, at least. [Para 15][1165-B-D]**

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Rajesh Kumar v. State Through Government of NCT of Delhi **(2011) 13 SCC 706**; *Dayanidhi Bisoi v. State of Orissa* **(2003) 9 SCC 310**; *Mohd. Arif Alias Ashfaq v. Registrar, Supreme Court of India and Others* **(2014) 9 SCC 737 : [2014] 11 SCR 1009 – referred to.**

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Case Law Reference

(2011) 13 SCC 706	**referred to**	**Para 10**
[2012] 8 SCR 295	**relied on**	**Para 12**
(2003) 9 SCC 310	**referred to**	**Para 14**
[2014] 11 SCR 1009	**referred to**	**Para 14**

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CRIMINAL APPELLATE JURISDICTION: Review Petition (Criminal) No. 388 of 2015 in Special Leave Petition (Criminal) No. 458 of 2015

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From the Judgment and Order dated 06.01.2015 of the Supreme Court of India in S.L.P. (Crl.) No. 458 of 2015.

Shekhar Naphade, Sr. Adv., Ms. Shreya Rastogi, Abhikalp Pratap Singh, Siddharth Dharmadhikari, Ms. N. Susan Thomas, Yash S. Vijay, Ms. Amaraya Kanjilal, Ms. Liz Mathew, Advs. for the Petitioner.

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Ms. Deepa M. Kulkarni, Nishant R. Katneshwarkar Advs. for the Respondent.

The Judgment of the Court was delivered by

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A. K. SIKRI, J. 1. This Review Petition is filed by the petitioner who has been convicted for offences under Sections 302, 376(2)(f) and 342 of the Indian Penal Code (for short, 'IPC'). He was awarded death penalty for the offence punishable under Section 302, IPC by the trial court vide its judgment dated September 27, 2013 in Sessions Case No.

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87 of 2012. For offence under Section 376(2)(f) of IPC, the petitioner was sentenced to life imprisonment and for the offence under Section 342 of IPC, the trial court awarded simple imprisonment for two months.

2. Since sentence of death was imposed on the petitioner, the Sessions Judge made a Reference to the High Court for confirmation of death sentence. The petitioner also challenged his conviction and sentences imposed by filing Criminal Appeal No. 80 of 2014 before the High Court. The said appeal as well as Reference were heard together by the High Court. The High Court upheld the conviction under the aforesaid provisions and also confirmed death sentence of the petitioner vide its judgment dated July 09/10, 2014. Against that judgment, the review petitioner preferred Special Leave Petition (Criminal) No. 458 of 2015. The special leave petition came up for preliminary hearing on January 06, 2015 which was dismissed by passing the following order:

> "Delay condoned.
> Dismissed."

3. Present review petition is filed seeking review of the aforesaid order of dismissal *in limine*.

4. Mr. Shekhar Naphade, learned senior counsel appearing for the petitioner submits that in a case where conviction is followed by death sentence, and the special leave petition is filed thereagainst, such petition should not be dismissed *in limine* and in case the Supreme Court still finds it fit to do so, some reasons need to be recorded.

5. Learned senior counsel has referred to the provisions of Article 137 of the Constitution which provide for review of judgments or orders by the Supreme Court and reads as under:

> "137. Review of judgments or orders by the Supreme Court.—Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."

6. He submits that the scope of review in criminal cases is broader than in civil cases and unless some reasons are recorded while dismissing the special leave petition, the remedy of review would become illusive. He also referred to the judgment of this Court in ***Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid*** *vs.* ***State of Maharashtra***[1]

[1] (2012) 9 SCC 1

A where the Court succinctly stated the approach that is needed in dealing with the cases of death sentence, with the following observations:

> "5. We may also state here that since it is a case of death sentence, we intend to examine the materials on record first hand, in accordance with the time-honoured practice of this Court, and
> B come to our own conclusions on all issues of facts and law, unbound by the findings of the trial court and the High Court."

7. Mr. Naphade also referred to the provisions of Order XXII Rule 7 of the Supreme Court Rules which provide for summoning of the trial court record for deciding the appeals and reads as under:

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> "7. (1) If the petitioner is in jail and is not represented by an advocate-on-record, he may present his petition for special leave to appeal together with the certified copy of the Judgment and any written argument which he may desire to advance to the officer in charge of the jail, who shall forthwith forward the same
> D to the Registrar of this Court. Upon receipt of the said petition, the Registrar of the Court shall, whenever necessary call, from the proper officer of the Court or the Tribunal appealed from, the relevant documents for determination of the petition for special leave to appeal.
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> E (2) As soon as all necessary documents are available the Registrar shall direct engagement of an Advocate from the panel of Supreme Court Legal Services Committee, or assign a Panel Advocate at the cost of the state and thereafter place the petition and complete documents for hearing before the Court. The fee of the advocate so engaged shall be such, as may, from time to time, be fixed by
> F the Chief Justice.
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> (3) After the hearing of the petition or the appeal, as the case may be, is over, the Registrar, the Additional Registrar or the Deputy Registrar shall issue to the Advocate, engaged at the cost of the State, a certificate in the prescribed form indicating therein the
> G name of the said Advocate engaged at the cost of the State concerned and the amount of fees payable to the said advocate.
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> (4) The State concerned shall pay the fees specified in the certificate issued under sub-rule (3) to the Advocate named therein within three months from the date of his presenting before it his

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claim for the fees supported by the certificate. If the fees are not paid within the period abovesaid, the Advocate shall be entitled to recover the same from the State concerned by enforcement of the certificate as an order as to costs under the Supreme Court (Decrees and Orders) Enforcement Order, 1954.

Explanation.—For the purposes of this rule, the term "State" shall include a Union Territory."

8. His argument was that though normally such record is summoned only after the special leave petition is granted, but in those cases where death sentence is imposed, the court should summon the record when it is making the final order even at the stage of special leave petition, keeping in view the spirit of the principles laid down in paragraph 5 of the ***Kasab's*** case.

9. We have given our thoughtful consideration to the aforesaid submissions of the learned senior counsel for the petitioner. We find considerable force in, at least, some of the submissions made by Mr. Naphade.

10. In cases where an accused is convicted for offence under Section 302, IPC, minimum sentence that is to be awarded is the life imprisonment. However, in rarest of rare cases, the Sessions Court may award death sentence as well. As per the provisions of Section 235 of the Code of Criminal Procedure, it is mandatory for the sessions court to give a proper hearing to the accused on the question of sentence as well. The necessity and importance of such a hearing is explained in ***Rajesh Kumar vs. State Through Government of NCT of Delhi***[2] wherein after referring to various earlier judgments, this Court summed up in the following manner:

"44. In *Santa Singh* [(1976) 4 SCC 190 : 1976 SCC (Cri) 546] this Court noted that in most countries of the world problem of sentencing the criminal offender is receiving increasing attention and it is so in view of rapidly changing attitude towards crime and criminal. In many countries, intensive study of sociology of the crime has shifted the focus from the crime to the criminal, leading to a widening of the objectives of sentencing and simultaneously of the range of the sentencing procedures.

[2] (2011) 13 SCC 706

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45. Bhagwati, J. (as His Lordship then was) giving the judgment in *Santa Singh*[(1976) 4 SCC 190 : 1976 SCC (Cri) 546] pointed out and which was later on accepted in *Bachan Singh* v. *State of Punjab* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] that proper exercise of sentencing discretion calls for consideration of various factors like the nature of offence, the circumstances—both extenuating or aggravating, the prior criminal record, if any, of the offender, the age of the offender, his background, his education, his personal life, his social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of his rehabilitation in the life of 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. After referring to all the aforesaid facts, the learned Judge opined as under: (*Santa Singh case* [(1976) 4 SCC 190 : 1976 SCC (Cri) 546] , SCC p. 195, para 3)

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> "*3*. … These are factors which have to be taken into account by the court in deciding upon the appropriate sentence, and, therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can hear 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)."

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46. After analysing the aforesaid aspects, the learned Judge in *Santa Singh case*[(1976) 4 SCC 190 : 1976 SCC (Cri) 546] posed the question: What is the meaning and content of expression "hear the accused"? By referring to various aspects and also the opinion expressed by the Law Commission in its Forty-eighth Report, Bhagwati, J. (as His Lordship then was) opined that the hearing contemplated under Section 235(2) is not confined merely to 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. However, there was a note of caution that in the name of such hearing, the court proceedings should not be unduly protracted.

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47. This Court held in *Santa Singh* [(1976) 4 SCC 190 : 1976 SCC (Cri) 546] that non-compliance with such hearing is not a mere irregularity curable under Section 465 of the 1973 Code. This Court speaking through Bhagwati, J. (as His Lordship then was) emphasised that this legal provision under our constitutional values has acquired a new dimension and must reflect "new trends in penology and sentencing procedures" so that penal laws can be used as a tool for reforming and rehabilitating the criminals and smoothening out the uneven texture of the social fabric and not merely as a weapon for protecting the hegemony of one class over the other (see p. 197, para 6 of the Report).

48. In *Muniappan* v. *State of T.N.* [(1981) 3 SCC 11 : 1981 SCC (Cri) 617] Chandrachud, C.J. delivering the judgment again had to consider the importance of Section 235(2) and Section 354(3) CrPC in our sentencing procedure. The learned Chief Justice held that the obligation to hear the accused on the question of sentence under Section 235(2) of the 1973 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 learned Chief Justice made it clear that the Judge must make a genuine effort to elicit from the accused all items of information which will eventually bear on the question of sentence. All such items of information that would furnish a clue to the genesis of the crime and the motivation of the criminal are relevant and the learned Chief Justice emphasised that in such an exercise,

> "it is the bounden duty of the Judge to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view".

49. The learned Chief Justice further said that in the sentencing procedure it is not only the accused but the entire society is at stake and therefore the questions the Judge puts and the answers the accused gives may be beyond the narrow constraints of the Evidence Act. In the words of the learned Chief Justice the position of the Court in an exercise under Section 235(2) is as follows: (*Muniappan case* [(1981) 3 SCC 11 : 1981 SCC (Cri) 617] , SCC pp. 13-14, para 2)

A "*2*. … The court, while on the question of sentence, is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction."

50. To the same effect is the judgment of Ahmadi, J. (as His Lordship then was) in *Allauddin Mian* v. *State of Bihar* [(1989) 3 SCC 5 : 1989 SCC (Cri) 490] . Explaining the purpose of Section 235(2), this Court in *Allauddin Mian* [(1989) 3 SCC 5 : 1989 SCC (Cri) 490] held that Section 235(2) satisfies a dual purpose; first of all it satisfies rules of natural justice by according to the accused an opportunity of being heard on the question of sentence. Under such sentencing procedure the accused is given an opportunity to place before the court all relevant materials having a bearing on the question of sentence. The Court opined that it is a salutary principle and must be strictly observed and is not a matter of mere formality. This Court further held that in such hearing exercise the accused should be given a real and effective opportunity to place his antecedents, social and economic background, etc. before the court, for the court to take a fair decision on sentence as otherwise the sentence would be vulnerable.

51. The Court therefore opined: (*Allauddin Mian case* [(1989) 3 SCC 5 : 1989 SCC (Cri) 490] , SCC p. 21, para 10)

> "*10*. … 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."

52. Therefore, it is clear from the purpose of Section 235(2) as explained in the aforesaid cases, that the object of hearing under Section 235(2) being intrinsically and inherently connected with the sentencing procedure, the provision of Section 354(3) which calls for recording of special reason for awarding death sentence must be read conjointly with Section 235(2) of the 1973 Code. This Court is of the opinion that special reasons can only be validly recorded if an effective opportunity of hearing as contemplated

> under Section 235(2) CrPC is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence. These two provisions do not stand in isolation but must be construed as supplementing each other as ensuring the constitutional guarantee of a just, fair and reasonable procedure in the exercise of sentencing discretion by the court.
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> 53. These changes in the sentencing structure reflect the "evolving standards of decency" that mark the progress of a maturing democracy and which is in accord with the concept of dignity of the individual—one of the core values in our Preamble to the Constitution. In a way these changes signify a paradigm shift in our jurisprudence with the gradual transition of our legal regime from "the rule of law" to the "due process of law", to which this Court would advert to in the latter part of the judgment."

11. When it comes to providing hearing in cases where the judicial mind is to be applied in choosing the sentence between life imprisonment and death, this requirement assumes greater importance. It has been held in ***Bachan Singh's*** case that since death sentence can be awarded only in the 'rarest of rare cases', the Court is supposed to give 'special reasons' when it choses to award death sentence. The reasoning process has to undertake the exercise of considering mitigating as well as aggravating circumstances and after weighing those circumstances with objective assessment, a decision has to be taken in this behalf. Such an exercise inherently calls for recording of reasons for awarding death sentence. The legislature has added another dimension in order to obviate any possibility of error, by making a specific provision to the effect that in those cases where the Session Judge inflicts death penalty, it has to be affirmed and approved by the High Court.

12. Keeping in view all the aforesaid factors, particularly, when death sentence is rare, this Court has emphasised time and again that in such cases there has to be an independent examination by this Court also, 'unbound by the findings of the trial court and the High Court'. Such approach is the 'time-honoured practice of this Court', as observed in ***Kasab's*** case.

13. Again, while undertaking the exercise as to whether the death penalty is to be given imprimatur by this Court, even after the approval thereof by the High Court, case law of this Court amply demonstrates

A that proper exercise of sentence discretion calls for consideration of various factors like the nature of offence, circumstances—both extenuating or aggravating, the prior criminal record, if any, of the offender, the age of the offender, his background, his education, his personal life, his social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the B possibility of his rehabilitation in the life of 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.

14. The accepted practice of this Court to afford hearing in the cases where death penalty is challenged, has also been acknowledged C in ***Dayanidhi Bisoi vs. State of Orissa***[3] and re-enforced by the Constitution Bench judgment in ***Mohd. Arif Alias Ashfaq vs. Registrar, Supreme Court of India and Others***[4]. In ***Mohd. Arif*** case, this Court made departure from the rule of hearing the review petitions in chambers by making an exception to this rule and held that when review petition is D filed seeking review of the order of this Court affirming death penalty, such a review petition should be heard in the open court and by a Bench of three-Judges. Relevant portion of the said judgment is reproduced below:

> "34. We feel that this oral hearing, in death sentence cases, E becomes too precious to be parted with. We also quote the following observations from that judgment: (*P.N. Eswara Iyer case* [*P.N. Eswara Iyer* v. *Registrar, Supreme Court of India*, (1980) 4 SCC 680] , SCC p. 692, para 29-A)
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> > "*29-A*. The possible impression that we are debunking the value F of oral advocacy in open court must be erased. Experience has shown that, at all levels, the bar, through the spoken word and the written brief, has aided the process of judicial justice. Justicing is an art even as advocacy is an art. Happy interaction between the two makes for the functional fulfillment of the court system. No judicial 'emergency' can jettison the vital G breath of spoken advocacy in an open forum. Indeed, there is no judicial cry for extinguishment of oral argument altogether."

[3] (2008) 9 SCC 310
[4] (2014) 9 SCC 737

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35. No doubt, the Court thereafter reminded us that the time has come for proper evaluation of oral argument at the review stage. However, when it comes to death penalty cases, we feel that the power of the spoken word has to be given yet another opportunity even if the ultimate success rate is minimal."

15. A cumulative effect of all the aforesaid circumstances does suggest that special leave petition filed in those cases where death sentence is awarded by the courts below, should not be dismissed without giving reasons, at least qua death sentence. There may be cases where at the Special Leave Petition stage itself, the Court may find that insofar as conviction is concerned there is no scope for interference at all as such a conviction for offence under Section 302 is recorded on the basis of evidence which is impeccable, trustworthy, credible and proves the guilt of the accused beyond any shadow of doubt. At the same time, if death penalty is to be affirmed even while dismissing the Special Leave Petition *in limine*, it should be by a reasoned order on the aspect of sentence, at least.

16. In the instant case, since the special leave petition filed by the review petitioner was dismissed *in limine* with one word and without giving any reasons, we allow this review petition and recall the order dated January 06, 2015. As a consequence, SLP(Criminal) No. 458 of 2015 is restored to its original number.

Nidhi Jain Review Petition allowed.