Hearing on Sentence and Possibility of Bail For the Same

-Sarfraz Nawaz,

SDJM (M), North Salmara, Abhayapuri

Sentence Hearing under Section 235(2), CrPC

Under the CrPC of 1898, a convict had no opportunity to be heard at the post-conviction stage on the quantum of sentence. It was the Law Commission which in its 41st report recommended for insertion of a new provision which may afford a convict the right of hearing before the sentence is passed.

Sections 235(2) and 248(2) were subsequently inserted in the new CrPC of 1973 which provide a convict with an opportunity of getting himself heard to determine the mitigating circumstances and decide the appropriate punishment in given case.

The Constitution Bench of the Supreme Court in **Bachan Singh v. State of Punjab, AIR 1980 SC 898** put the object of 'right of hearing' in section 235(2) in the following words: *"Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry…"*

The case of **Santa Singh v. State of Punjab, AIR 1976 SC 2386** has made it categorically clear that non-compliance of the mandate under section 235(2) goes to the very root of the matter and it results in vitiating the sentence imposed. Eventually the Supreme Court in **Santa Singh (supra)** set aside the sentence and remanded the matter back to the Sessions Court to pass an appropriate sentence after following the command under section 235(2).

In **Santa Singh (supra),** the Supreme Court clarified the meaning of "hear" in Section 235(2), CrPC and observed:

"We have set out a 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 sentence. This material may be placed before the court by means of affidavits, but if either party disputes the correctness or veracity of the material sought to be produced by the other, on opportunity would have to be given to the party concerned to lead evidence for the purpose of bringing 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 factors bearing on the question of sentence, and if necessary, to lead evidence for the purpose of placing such material before the court. ……. We are, therefore, of the view that 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. 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."

In the case of **Allauddin Mian v. State of Bihar**, **AIR 1989 SC 1456**, the Supreme Court has highlighted the purpose that Section 235(2), CrPC serves. First, it satisfies the rule of natural justice in as much as it gives accused an opportunity of being heard on the question of sentence; and Secondly, it assists the Court to determine the sentence to be awarded.

In **Allauddin Mian (supra)**, the Supreme Court held that 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. The aforesaid proposition was also reiterated in **Malkiat Singh v. State of Punjab, (1991) 4 SCC 341.**

Now, a question may arise here in connection with the mandate of S. 309, CrPC. The third proviso to S. 309(2), CrPC mandates that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed against him. Does this conflict with the Supreme Court's directions in **Allauddin Mian (supra)?**

This conundrum was answered by the Supreme Court in **State of Maharashtra v. Sukhdev Singh, (1992) 3 SCC 700.** The Supreme Court clarified that the third proviso to Section 309(2) CrPC prescribed no power for adjournment of sentencing hearings, the proviso must be read in the context of the general policy of expeditious inquiry and trial manifested by the main part of the section. That section emphasises that an inquiry or trial once it has begun should proceed from day to day till the evidence of all the witnesses in attendance has been recorded so that they may not be unnecessarily vexed. The underlying object is to discourage frequent adjournments. But that does not mean that the proviso precludes the court from adjourning the matter even where the interest of justice so demands. The proviso may not entitle an accused to an adjournment but it does not prohibit or preclude the court from granting one in such serious cases of life and death to satisfy the requirement of justice as enshrined in Section 235(2) of the Code. Expeditious disposal of a criminal case is indeed the requirement of Article 21 of the Constitution; so also a fair opportunity to place all relevant material before the court is equally the requirement of the said Article. Therefore, if the court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the court, the above extracted proviso cannot preclude the court from doing so.

In **Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1**, the Supreme Court held that in the event the procedural requirements under Section 235(2) CrPC are not met, the appellate Court can either remit the case back to the trial court or adjourn the matter before the appellate forum for hearing on sentence after giving an opportunity to adduce evidence. On the other hand, the Supreme Court also noted that any deficiency in non-compliance of Section 235(2) CrPC can be cured by providing the opportunity at the appellate stage itself so as to curtail the delay in the proceedings.

There were conflicting decisions of the Supreme Court on Section 235(2)- on one hand **Alladdin Mian (supra)** and **Malkait Singh (supra)** held that sentencing the convict on the day of determination of his guilt was not in accordance with law. On the other hand, **Vasanta Sampat Dupare v. State of Maharashtra, (2017) 6 SCC 631** held that the

mere non-conduct of the pre-sentence hearing on a separate date would not *per se* vitiate the trial if the accused has been afforded sufficient time to place relevant material on record.

Eventually, in **'X' v. State of Maharashtra, (2019) 7 SCC 1,** a 3 Judges Bench of the Supreme Court after a thread bare discussion of the aforementioned judgments and principles observed that the guidelines in **Allauddin Mian (supra)** were directory in nature. The Supreme Court held:

"*There cannot be any doubt that at the stage of hearing on sentence, generally, the accused argues based on the mitigating circumstances in his favour for imposition of lesser sentence. On the other hand, the State, the complainant would argue based on the aggravating circumstances against the accused to support the contention relating to imposition of higher sentence. The object of Section 235(2) CrPC is to provide an opportunity for the accused to adduce mitigating circumstances. This does not mean, however, that the trial court can fulfil the requirements of Section 235(2) CrPC only by adjourning the matter for one or two days to hear the parties on sentence. If the accused is ready to submit his arguments on this aspect on the very day of pronouncement of the judgment of conviction, it is open for the trial court to hear the parties on sentence on the same day after passing the judgment of conviction. In a given case, based on facts and circumstances, the trial court may choose to hear the parties on the next day or after two days as well.*

In light of the above discussion, we are of the opinion that as long as the spirit and purpose of Section 235(2) is met, inasmuch as the accused is 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 day as the pre-conviction hearing. Depending on the facts and circumstances, a separate date may be required for hearing on sentence, but it is equally permissible to argue on the question of sentence on the same day if the parties wish to do so."

Whether the Convict can be Allowed to be on Bail during Sentence Hearing?

This takes me to the next question. In the event that sentence hearing is adjourned to a later date, can a convict be released on bail in such a case? Or in the alternate, if he is already on bail, can he be allowed to remain on bail or does he need to be taken into custody?

At this juncture, I deem it fit to refer to Section 354(1)(c), CrPC which makes it evident that sentence is a necessary content of a judgment of conviction. On the other hand, Section 353(1), CrPC mandates that a Criminal Court shall pronounce its judgment immediately after the termination of trial or at a subsequent notified date. It is implicit in Section 353(1) that judgment (which includes the sentence) comes at a later stage after termination of trial. Or in other words, the trial terminates before the judgment is pronounced. This is also understood from Section 437(7) CrPC which suggests that if a Court has reasonable grounds to believe that the accused in its custody is not guilty of an offence, the Court shall release the accused on bail after conclusion of trial and before judgment is pronounced.

Thus, there is no room for doubt that the trial terminates before the delivery of judgment and imposition of sentence.

It is pertinent to mention here that Section 389, CrPC is the only enabling provision that deals with bail of a convict.

Section 389 Cr.PC provides for suspension of sentence pending appeal and release of appellant on bail. As per Sub-Section (1), the appellate court may order for suspension of sentence and release of the appellant on bail, if the appellant is in confinement, during pendency of the appeal by the convicted person against his conviction and sentence. Under Sub-Section (3), where the convicted person satisfies the court by which he is convicted that he intends to present an appeal, the court shall - where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years or where the offence for which the person has been convicted is a bailable one and he is on bail, order that the convicted person be released on bail unless there are special reasons for refusing bail, to enable such person to prefer an appeal. In such a situation, sentence of imprisonment as long as the accused is on bail, shall be deemed to be suspended.

However, a cursory glance at Section 389 and especially at Section 389(3), CrPC which is specially mandated for the trial Court reveals that the same can be invoked only post sentencing in case of non-bailable offences and that too in case where the quantum of sentence does not extend three years. In other words, even in a post sentencing scenario, the trial court can release the convict on bail, if he is sentenced to a term not exceeding three years and that too if he is on bail. If the convict is in custody, he shall remain in custody. If he is sentenced for a term exceeding three years and he is out on bail, he shall be taken into custody.

Section 389 is very significant to this discussion. Let me elucidate how.

Section 389 comes into effect post sentencing. If a necessary concomitant of a conviction is that the convict must be taken into custody, then Section 389(3) (which mandates that a convict who is on bail and who is sentenced for a term not exceeding three years can be released on bail) would fail.

Section 389(3) when it speaks of release of a person who is sentenced for a term not exceeding three years and who is on bail uses these two conditions conjunctively, meaning thereby that both must be fulfilled. If a person were to be necessarily taken into custody following conviction, then one of these conditions would never be satisfied and Section 389(3) would be rendered futile post his sentence even if he is sentenced to a term less than three years.

That being said, I see no fetters upon the trial court, in appropriate cases, to invoke Section 439(2), CrPC and direct any convict who was granted bail *(while he was still an accused)* to be arrested and taken into custody after his conviction and be kept there till he is sentenced. One must remember that even under Section 389(3), the trial Court may for reasons to be recorded refuse to release a convict on bail. Also, in cases where the minimum punishment would exceed three years, Section 389(3) would, anyway, have no application. In such cases, the trial Court can very well take the convict in custody and keep him there till he is sentenced.

Moving on to the issue of release of a convict on bail, I find it pertinent to point out here that there is nothing in the CrPC that enables a trial Court to release a convict who is in custody on bail in the intermediate period during which the hearing under Section 235(2), CrPC is carried out. Section 439, CrPC which is the only provision under which a Court of

Session can grant bail applies to a person who is accused of an offence and not one who is convicted of an offence.

Pertinently, in **Mukesh v. State (NCT of Delhi), (2017) 3 SCC 717, (Nirbhaya case),** the hearing under Section 235(2), CrPC was carried out and the convicts were allowed to file affidavits while they were in jail.

So, there is no statutory provision that enables a convict to get bail while he prepares for his hearing under Section 235(2), CrPC.

The only right to bail that an accused has in the period between conclusion of trial and pronouncement of judgment is under Section 437(7), CrPC- that is only for an accused in respect of whom a Court (other than a High Court or a Court of Session) has reasonable grounds to believe that he is not guilty of the alleged offences. It has no application for convicts.

Thus, in summing up, I find that if sentence hearing under Section 235(2), CrPC is adjourned to a later date, there is no statutory endorsement for release of a convict who is lodged in jail till the date of his sentence. However, if he is already on bail, he can be allowed to remain on bail. At the same time, the trial Court can, in appropriate cases, direct that he be taken into custody by invoking Section 439(2), CrPC.

****