PRESENTATION ON REMEDIES, RELIEFS, SENTENCING AND PUNISHMENTS

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We all know that one of the cardinal principles of criminal justice system is that an accused is presumed to be innocent unless proven otherwise. In Indian system, it is said, if two views are possible one pointing towards the guilt of the accused and other towards his innocence, the view favourable to the accused should be accepted.

"Every saint has a past, every sinner has a future" - **J J Krishna Iyer.**

"Theory of reformation through punishment is grounded on the sublime philosophy that every man is born good, but circumstances transform him into a criminal" - **K. T. Thomas J.**

SENTENCE:-

A sentence is a decree of punishment of the court in Criminal procedure. The sentence can generally involve a decree of imprisonment, a fine and / or other punishments against a defendant convicted of a crime. Those imprisoned for multiple crimes will serve a consecutive sentence (in which the period of imprisonment equals the sum of all the sentences served sequentially, or one after the next), a concurrent sentence (in which the period of imprisonment equals the length of the longest sentence where the sentences are all served together at the same time)

PUNISHMENT:-

Punishment is a method of protecting society by reducing the occurrence of criminal behaviour. Punishment can protect society by deterring the potential offenders, preventing the actual offender from committing further offences and by reforming and turning him into a law abiding citizen.

The following are the some of the rights available to the accused, sentencing and punishment.

I. SUSPENSION OF SENTENCE:-

"Suspension" means to take or withdraw sentence for the time being. It is an act of keeping the sentence in abeyance at the pleasure of the person who is authorised to suspend the sentence, and if no conditions are imposed, the person authorised to suspend the sentence has the right to have the offender re-arrested and direct that he should undergo the rest of the sentence without assigning any reason. This position is given in the Law commission 41st Report P.281 Para 29.1; and also in cases like **Ashok Kumar**

Vs. Union of Inida (AIR 1991 SC 1792); State of Punjab V. Joginder Singh (AIR 1990 SC 1396).

2. Section 389 (1) and (2) of Cr.P.C deals with a situation where convicted person can get a Bail from appellate court after filing the criminal appeal. Section 389 (3) deals with a situation where the trial court itself can grant a bail to convicted accused enabling him to prefer an appeal. Since we are concerned with the power of the trial court to suspend the sentence, section 389 (3) must be taken into account.

Section 389 (3) is applicable only in the following conditions:-

1. the court must be the convicting court,
2. The accused must be convicted by the court,
3. The convict must be sentenced to imprisonment for a term Not exceeding three years,
4. the convict must express his intent to present appeal before the appellate court,
5. The convict must be on bail on the day of the judgment,
6. There should be right of appeal **(Mayuram Subramanian Srinivasan Vs. CBI (2006) 5 SCC 752)).**

Trial Court's Power U/sec. 389 (3) of Cr.P.C:-

1. Trial Court has power to release such convict on bail.
2. Trial court has power to refuse the bail if there are "Special Reasons"
3. Trial Court has power to release such convict for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate court.

3. Thereafter, it is provided that " the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended". So what is important to take note of, is that first the Trial Court has to decide whether there are special reasons to refuse the bail. If the trial court does not find any special reasons for rejection of the bail, then the convict has to be released on bail for enabling him to present appeal to the appellate court.

Features of section 389 (3):-

1. The convict shall not be released on bail " as of right" but he will have to satisfy that he is "eligible" to be released on bail:
2. If the trial court is satisfied that there are "Special reasons " for not releasing the convict on bail, then the Trial Court can very well do:
3. The sole purpose of this provision is to enable the convict to present appeal to the appellate court:
4. No maximum period is prescribed for releasing the convict on bail;

5. Under this section 389 (3) suspension of sentence is "deemed" suspension;
6. Suspension of sentence is by-product of the accused being released on bail;
7. The trial court has no power to suspend the sentence and then order the release of the convict on bail.

<u>So the order of trial court should be like this</u>:-

"The convicted is released on bail, since he intends to prefer appeal against the judgment and order of this court and there are no special reasons for refusing bail, for such period as will afford sufficient time to present the appeal within limitation period and obtain the orders of the Appellate court under Sub-Section (1) ; and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended"

<u>Difference in operations of Sub-Section (1) (3)</u>:-

1. Sub-Section (1) comes into play when appeal is pending But sub-section (3) comes into play when the convict expresses his intention to present appeal.
2. Sub-Section (1) tells "suspension " first and then talks of "Release on bail" or "Own bond" But Sub-section (3) tells "Release on bail" first and then "suspension" is then the "automatic" effect.
3. Sub-section (1) does not prescribe that the accused must be on bail BUT Sub-section (3) can be used only if the accused is on bail on the day of judgment.
4. Sub-section (1) gives option to release the convict on "bail" or "his own bond" BUT Trial Court vide Sub-section (3) does not have power to release the convict on "his own bond" . However trial Court can also relief the accused on his own bond if the accused is poor etc.
5. In nutshell, vide Sub-Section (1) suspension is cause and bail is effect and vide sub-section (3) bail is cause and suspension is effect.

<u>Suspension of Fine:</u>

1. Whenever an offender is ordered to pay fine, such payment should be made forthwith. Section 424 of the code, however, enables the court to suspend the execution of sentence in order to enable him to pay the amount of fine either in full or in installments. It deals with two types of cases which are like this.
2. Sub-section (1) provides that when an offender has been sentenced to fine only and to imprisonment in default of payment of fine and the fine is not paid forthwith, the court may order that the fine should be paid in full within 30 days, or in two or three installments the first of which should be

paid within 30 days and the other or others at an interval or intervals of not more than 30 days.

3. Sub-Section (2) refers to a case where there is no sentence of fine but an order of payment of money has been made by the court and for non payment of such amount, imprisonment is awarded. In such cases also, the court can grant time to pay amount. In either case, if the amount is not paid, the court may direct the sentence of imprisonment to be executed at once.
4. **Hon'ble Supreme court in Ravikant S.Patil Vs. Sarvabhouma Bagali (2007) 1 SCC 673) has held that:**

   Para- 15 "*It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non existent, but only non -operative. Be that as it may. In so far as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying the consequences if conviction was not stayed, that is the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction*".

II. Right of the accused against " Double Jeopardy" Art; 20 (2) of the constitution and Sec. 300 of Cr.P.C Art. 20 (2) of the constitution lays down that" no person shall be prosecuted and punished for the same offence more than once:-

The right of the accused against Double Jeopardy is the recognition of the latin maxim - **"Nemo debit bis vexari pro eadem causa"** that means no man shall be punished or put in Jeopardy or Peril twice for the same offence.

Article 20 (2) of Constitution of India bars prosecution and punishment after an earlier punishment for same offence. Where the complaint is permitted to be withdrawn and as a result the accused is acquitted. Trial of accused on fresh complaint for the same offence base on the same facts would

be barred by section 300 Cr.P.C **(Eciyo coconut oils Pvt. Ltd Vs. State of Kerala 2002 (2) crimes 147).** Second trial is barred when accused is convicted or acquitted. There is a difference between acquittal and discharge, discharge of the accused does not amount to acquittal and thus no bar on proceedings U/sec. 300 Cr.P.C in **Ranvir Singh Vs. State of Haryana, 2008 Crl.J2152 (2155) (P&H).**

III. <u>RIGHT OF THE ACCUSED AND APPLICATION OF THE PRINCIPLE OF "RES-JUDICATA' OR 'ISSUE -ESTOPPEL" TO CRIMINAL PROCEEDINGS</u>:-

The maxim Res- Judicata pro veritate accipitur, is no less applicable to criminal than to civil proceedings.

In Lalta Vs. The State of U.P., in AIR 1970 SC 133 the Apex court of India, held that when an issue of fact has been tried by a competent court on a former occasion and a finding of the fact has been reached in favour of the accused, such a finding would constitute an estoppel or res-judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even might be permitted by the terms of section 300 (2), code of Criminal Procedure, 1973. Section 300 does not preclude the applicability of this rule of issue -estoppel.

The same view has been affirmed in some other decisions.

The legal position is further been explained in **Muthuswamy Asari Vs. Jaya Mohan, 1982 Crl. L.J NOC 31 (Kerala)** where in it was held that this plea of res-judicata or issue -estoppel is entirely different from the plea of double jeopardy or Autrefois-acquit. This broader plea is available to the defence even when the narrower plea of double jeopardy is not available. The consequence is that when an issue of fact has been tried and decided by a competent court in a former trial in favour of the accused, it cannot be upset in subsequent trial even for a distinct offence.

The Supreme Court in **A.R. Antuley Vs. R.S. Nayak., AR 1988 Supreme Court 1531** Further explained the legal position. It was held there in that this code ought to recognize the distinction between finality of judicial order qua the parties and the review ability for application to other cases. Between the parties even a wrong decision can operate as res-judicata. The doctrine of res-judicata is applicable even to criminal traite.

IV. <u>RIGHT OF THE ACCUSED NOT TO SUFFER IMPRISONMENT FOR PERIOD LONGER THAN MAXIMUM</u>:-

Ordinarily when a person is accused of an offence or when a person is accused of more offences than one, the sentences of imprisonment imposed on him are directed to run concurrently, but even on assumption that the sentence of imprisonment may be consecutive, the under trial prisoners concerned have already suffered incarceration for the maximum period for which they could have been sent to jail on conviction. There is absolutely no reason why they should be allowed to continue to remain in jail for a moment longer, since such continuance of detention would be clearly violative not only of human dignity but also of their fundamental right under Article 21 of the constitution.

V. RIGHT OF ACCUSED TO BE HEARD ON QUESTION OF SENTENCE IN WARRANT CASES;

The relevant provision as to the right of the accused to be heard on question of sentence in warrant cases exclusively triable by a court of Session is provided in Section 235 (2) of the Code of Criminal Procedure, whereas in cases pending trial before Judicial Magistrate can be located in Section 248 (2) of the same code.

This provision of hearing on question of sentence is mandatory. Non – compliance with the provisions of section 235 (2) of the code of Criminal Procedure, is not an irregularity, but is an illegality which vitiates the sentence.

PRE- SENTENCE HEARING:-

Therefore, the sentence awarded has to satisfy many conflicting demands. It has to satisfy the victims of the crime and the society in general that the culprit has been adequately and appropriately punished. It should leave an impression on the offender that he is punished for the offence he has committed and shall remind him that commission of crime won't do any good to him and that if he commits or repeats the commission of the offence and continue crime as his career, he will be caught and punished, and thereby deter and prevent him from committing or repeating the commission of the offence. The punishment imposed also should bring home the reformation of the offender and restore him to the society as its prodigal member. The punishment also shall take care of reparation of the victims by providing adequate and reasonable compensation. Thus, exploration of the modern penology made the task of Judges in exercising their discretion to choose and impose sentence complex and complicated. Thus, there shall be material or evidence before the court relating to crime, socioeconomic, psychological and

personal aspects of the offence, and in some cases of the victim, to arrive at a just and adequate sentence order.

Information relating to these aspects may be found to some extent from the material gathered by the investigating agency during the investigation and proved by the prosecution, and also from the evidence produced during trial. But is is a known experience that this material so produced before the court is hardly adequate to assist the court to meet the punitive dilemma in arriving at an appropriate sentence. The consideration of these aspects relates to post conviction stage. It is also a fact that the counsel appearing for the accused feels shy to seek permission of the court to adduce evidence or to advance arguments on behalf of the accused touching the aspects of the sentence, with an apprehension that the court may take it as the accused accepting the guilt and is under an expectation of conviction.

On the other hand, if an opportunity is provided after conviction dealing with aspects relating to the sentence to be imposed on the convict, the same will afford an opportunity both for the prosecution and also to the accused to place relevant material and evidence before the court, which will make the task of the court easy and meaningful, and the same will be of immense help for the court to arrive at just and adequate sentence.

Thus, there should be a stage, after convciton of the accused and before passing sentence order, in criminal proceedings, dealing with an inquiry purely relating to the aspects of the sentence.

POSITION PRIOR TO 1973:-

There was no provision dealing with the post-conviction and pre-sentencing stage, in the criminal procedure code, 1898.

In **JAGMOHAN SINGH V. STATE OF UTTAR PRADESH (AIR 1973 SC 947 (959))** Constitutional validity of death sentence is questioned on the ground that no procedure is laid down by law for determining whether the sentence of death or something less is appropriate in the case. Negativing this contention, the Supreme Court held as follows;

"The sentence follows the conviction, and it is true that no formal procedure for producing evidence with reference to the sentence is specifically provided. The reason is that relevant facts and circumstances impinging on the nature and circumstances of the crime are already before the court. Where counsel addresses the court with regard to the character and standing of the accused, they are duly considered by the court unless there is something in the evidence itself which belies him or the public prosecutor for the state challenge the facts. If the matter is relevant and essential to be considered, there is nothing in the criminal procedure code which prevents additional evidence being taken. It must, however, be stated that it is not the experience

of criminal courts in India that the accused with a view to obtaining a reduced sentence ever offers to call additional evidence."

While emphasizing the importance of post -conviction stage, when the judge shall hear the accused on the question of sentence, **Mr. Justice V.R Krishna Iyer, in Ediga Annamma Vs. State of Andhra Pradesh (AIR 1974 SC 799 (803))** held as follows;

"Modern penology regards crime and criminal as equally material when the right sentence has to be picked out, although in our processual system there is neither comprehensive provision nor adequate machinery for collection and presentation of the social and personal date of the culprit to the extent required in the verdict on sentence. However, in the criminal procedure code, 1973 about to come in to force, parliament has wisely written into the law a post – conviction stage when the Judges shall "hear the accused on the question of sentence and then pass sentence on him according to law (Sentence 235 and Section 248).

In any scientific system which turns the focus, at the sentencing stage, not only on the crime but also the criminal, and seeks to personalise the punishment so that the reformatory component is as much operative as the deterrent element, it is essential that facts of a social and personal nature, sometimes altogether irrelevant if not injurious at the stage of fixing the guilt, may have to be brought to the notice of the court when the actual sentence is determined".

In its 48th Report, the law commission, while recommending the insertion of a provision, which would enable the accused to make a representation against the sentence to be imposed, after the judgment of the conviction had been passed, observed as follows:-

"It is now being increasingly recognized that a rational and consistent sentencing policy require the removal of several deficiencies in the present system. One such deficiency is the lack of comprehensive information as to characteristics and backgrounds of the offender.

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-operative in the process."

These recommendations of Law commission were considered and keeping in view, among others, the principle that an accused should get a fair trial in accordance with the accepted principles of natural justice, sub-section (2) of section 235 and sub-section (2) of section 248 are enacted in the code of criminal procedure 1973, providing for the hearing of the accused, after conviction.

Position under criminal procedure code 1973:-

Section 235 is a new provision dealing with hearing of the accused on question of sentencing, after passing the order of conviction in trials before the court of sessions, which reads as follows;

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 provision of section 360, hear the accused on question of sentence, and then pass sentence on him according to law.

Section 248 deals with the hearing of the accused before passing sentence, after he is convicted in trial of warrant cases by Magistrates and it reads thus:-

1. if, in any case under this chapter in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal.
2. Where, in any case under this chapter, the Magistrate find the accused guilty, but does not proceed in accordance with the provisions of Sec. 325 or Sec. 360, he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law.

In every trial before a court of session or in a warrant case before magistrate's court, the court must, first decide as to the guilt of the accused and deliver a Judgment convicting or acquitting the accused. If the accused is acquitted, it will be the end of the trial.

But if the accused is convicted, then the court has to "hear the accused on question of sentence, and then pass sentence on him according to law" Thus, when a Judgment is rendered convicting the accused, the accused at that stage, shall be heard in regard to the sentence and only after hearing him, the court shall proceed to pass the sentence.

Supreme Court, in **SANTA SINGH Vs. STATE OF PUNJAB CASE (AIR 1976 (4) SCC 190),** dealt with the scope and meaning of the words "hear the accused" and held as follows:

"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 given 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 in to an instrument for unduly protracting

the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of the proceedings".

CONSEQUENCES OF NON-COMPLIANCE:-

Non-Compliance of the requirement of the hearing of the accused contemplated under these provisions of law is not a mere irregularity, curable under section 465 Cr.P.C but it is an illegality which vitiates the sentence.

Supreme court of India, in **SANTA SINGH'S CASE (AIR 1976 (4) SCC 190.** dealing with the non-compliance of section 235 (2), held as follows:

"The next question that arises for consideration is whether non compliance with section 235 (2) is merely an irregularity which can be cured by section 465 or it is an illegality which vitiates the sentence. Having regard to object and the setting in which the new provision of section 235 (2) was inserted in the 1973 code there can be no doubt that it is one of the most fundamental part of the criminal procedure and non-compliance thereof will ex-facie vitiate the order. Even if it be regarded as an irregularity the prejudice caused to the accused would be inherent and implicit because of the infraction of the rules of natural justice which have been incorporated in this statutory provision, because the accused has been completely deprived of an opportunity to represent to the court regarding the proposed sentence and which manifestly results in a serious failure of the justice".

POWER OF AAPPELLATE COURTS:-

Now, after the introduction of these provisions dealing with pre-sentence hearing in criminal trials, the sessions and warrant case trials shall be considered as consisting of two parts one dealing with pre-conviction stage, and another dealing with post-conviction stage, and therefore, even in a case where the appellate court set aside the sentence imposed by a criminal court for non-compliance of these provisions, the case can be remitted back for re-trial of the post – conviction stage and there is no need to order a de nova trial.

In **SANTA SINGHS's case (AIR 1976 (4) SCC 190)** Santhasingh, the appellant before the Supreme Court was convicted and sentence to death for an offence under section 302 of IPC on the same day (on 26th February 1975) in a single judgment, and the sessions Judge did not give hearing to the appellant in regard to the sentence to be imposed on him. On appeal, the Supreme Court found the sentence, imposed on Santhasingh, without hearing him on sentence as required under section 235 (2), is illegal and therefore, while confirming the conviction of Santhasingh under section 302 of IPC, set aside the sentence of death and remanded the case to the Sessions court with

a direction to impose appropriate sentence, after giving an opportunity to the appellant and hearing him in regard to the question of sentence, in accordance with the provisions of section 235 (2), as interpreted in the Judgment.

But Supreme Court, in **DAGDU VS.STATE OF MAHARASHTRA (AIR 1977 SC 1206)** held that *in every case where it is found that section 235 (2) is not complied, it is not necessary to remand the case to the trial court in order to afford to the accused, an opportunity to be heard on the question of sentence. If the accused makes a grievance of non -compliance of this provision is made for the first time before the Appellate Court, it would be open to that court to remedy the breach by giving an opportunity of hearing the accused on the question of sentence, and perhaps it must inevitably happen where the conviction is recorded for the first time by a higher court.*

Supreme Court also further held that *remand is an exception, not the rule, and ought therefore to be avoided as for as possible in the interests of expeditious and fair, disposal of cases.*

In **TARLOK SINGH VS.STATE OF PUNJAB (AIR 1977 SC (1747)),** Supreme Court felt that it is more appropriate for the Appellate court to give an opportunity to the parties in terms of section 235 (2) to produce the material they wish to adduce instead of going through exercise of sending the case back to the trial court, since the same will save time and help produce prompt justice.

Nature of hearing:-

The "hearing" contemplated under these provisions is not confined to oral submissions by the prosecution or the accused. The same entitles both the parties to produce evidence, oral or documentary, it they choose to do so, and if the circumstances warrant abduction of such an evidence.

The Supreme Court in **DAGDU VS. STATE OF MAHARASHTRA (1977 Crl. L.J 1206 (1222))** held as follows:-

"That opportunity has to be real and effective which means that the accused must be permitted to adduce before the court all the data which he desires to adduce on the question of sentence."

Supreme Court, in **RAJENDRA PRASAD VS. STATE OF U.P (1979 CRL.L.J. 792 (818),)** held:

"Where the accused is convicted for an offence under section 302 of IPC, the court should call upon the Public Prosecutor at the stage of S.235 (2) to state to the court whether the case is one where the accused as a matter of justice should be awarded the extreme penalty of law or the lesser sentence of imprisonment for life. If the public prosecutor informs the court he is of the opinion that the case is not the one where extreme penalty is called for and if the Session Judge agrees with the submission, the matter should end there.

If on the other hand the Public Prosecutor states that the case calls for extreme penalty prescribed by law, the court would be well advised to call upon the Public Prosecutor to state and establish, if necessary, by leading evidence the facts for seeking extreme penalty prescribed by law.

Then it would be open to the accused to rebut this evidence either by oral submissions, or if need it, by leading evidence. Thereupon it is for for the Judge to determine what would be the appropriate sentence"

DUTY OF THE COURT:-

The Role of the Judge at the stage of hearing on sentence is no passive and he has to actively participate in the enquiry and make every endeavor to get all the facts and evidence, which have bearing in determining the sentence. The role of the court is stated in **EMMINS ON SENTENCING (At Page 79 (2nd Edtn))** in the following passage;-

"The procedure between conviction and sentence is markedly different from that which pertains to the trial itself. **The role of the judge or bench of magistrates changes from that of an umpire to one of a collector of information about the offence and the offender. Rules relating to the admissibility of evidence are some what relaxed,** and the combative or adversarial style of the opposing lawyers is less marked. The judge takes a more central and active role in the gathering of information, which comes from a variety of sources, in reaching the sentencing decision."

the mere putting a question asking the accused what he will say about the sentence, is not the compliance of the requirement of "hearing of the accused on sentence" in true spirit of Sec. 235 (2) Cr.P.C. The importance of the role participation of the Judge and the duty cast upon him during "hearing on sentence" under section 235 (2) Cr.P.C is elaborately discussed and appropriate directions are given in **MUNIAPPAN Vs. STATE OF TAMILNADU (AIR 1981 SC 1220))** in the following lines:-

"We are also not satisfied that the learned sessions Judge made any serious effort to elicit from the accused what he wanted to say on the question of sentence. All that the learned Judge says is that when the accused was asked on the question of sentence, he did not say anything".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.** All admissible evidence is before the Judge but that evidence itself often furnishes a clue to the genesis of the crime and the motivation of criminal. **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. The occasion to apply the provisions of section 235 (2) arises only after the conviction is recorded. What then remains is the question of sentence in which not merely the accused but the whole society has a stake. **Questions which the Judge can put to the accused under section 235 (2) and the answers which the accused makes to those questions are beyond the narrow constraints of Evidence Act.** The court, while on the question of sentence, is in an altogether different in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction".

Therefore, it is clear that mere putting a question formally and mechanically by the court to the accused asking him, what he will say about the sentence, is not the hearing contemplated to be given to the accused to determine the sentence to be imposed under Ss. 235 (2) Cr.P.C.

Here, it is appropriate to refer to the observations of **JUSTICE V.R. KRISHNAIYER, IN MOHAMMAD GIASUDDIN VS. STATE OF ANDHRA PRADESH (AIR 1977 SC 1926 (1928))** which reflects the deficiencies in Indian Judicial system in respect of sentencing.

"Before the trial court, there was a formal, almost pharisaic, fulfillment of the pre-sentencing provision in section 248 (2) Cr.P.C 1973. The opportunity contemplated in the sub-section has a penalogical significance of far-reaching import, which has been lost on the trial Magistrate. For he disposed of this benignant obligation by a brief ritual:

"I made of the accused that they were found guilty under Sec. 420 of IPC and the punishment contemplated thereof".

Reform of the black letter law is a time -lagging process. But judicial metabolism is sometimes slower to assimilate the spiritual substance of creative ideas finding their way into the statute book. This may explain why the appellate courts fell in line with the Magistrate's mechanical approach and confirmed the condign punishment of 3 years rigorous imprisonment. All the three tiers the focus was on the serious nature of the crime (cheating of young men by a government servant and his black guardly companion) and no ray of light on the 'criminal' or on the pertinent variety of social facts surrounding him penetrated the forensic mentation. The humane art of sentencing remains a retarded child of the Indian Criminal Justice System".

Adjournment before sentence:

Supreme Court, in **ALLAUDDIN MIAN VS. STATE OF BIHAR (AIR 1989 SC 1456 (1466))** and again in **MALKIAT SINGH VS. STATE OF PUNJAB (1991 4 SCC 341)** indicated the need to adjourn the case to a

future date after pronouncing the verdict of conviction and call upon the prosecution as well as the defense to place before it, the relevant material having bearing on the sentence and thereafter to determine the sentence to be imposed.

In these two decisions the proviso to sub-section (2) of section 309 of the Code of Criminal Procedure, 1973 was not considered. This proviso reads as follows:

"Provided also 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 on him"

In state of **Maharastra Vs. Sukdev Singh (AIR 1992 SC 2100 (2128)),** the Supreme Court considered the implication of this proviso and held as follows:

"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 S.235 (2) of the Code. Expeditious disposal of a criminal case is indeed the requirement of Art. 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 **RAM DEO CHAUHAN VS. STATE OF ASSAM (2001 AIR SCW 2159),** the Supreme Court after considering the above stated decisions held as follows:

"We therefore choose to use this occasion for reiterating the legal position regarding the necessity to afford opportunity for hearing to the accused on the question of sentence.

1. *When the conviction is under Section 302 of IPC (with or without the aid of section 34 or 149 or 120 B of IPC) if the sessions Judge does not propose to impose death penalty on the convicted person it is unnecessary to proceed to hear the accused on the question of*

sentence. Section 235 (2) of the Code will not be violated if the sentence of life imprisonment is awarded for that offence without hearing the accused on the question of sentence.

2. *In all other cases the accused must be given sufficient opportunity of hearing on the question of sentence.*
3. *The normal rule is that after pronouncing the verdict of guilty the hearing should be made on the same day and the sentence shall also be pronounced on the same day.*
4. *In cases where the Judge feels or if the accused demands more time for hearing on the question of sentence (especially when the Judge proposes to impose death penalty) the proviso to Section 309 (2) is not a bar for affording such time.*
5. *For any reason the court is inclined to adjourn the case after pronouncing the verdict of guilty in grave offences the convicted person shall be committed to jail till the verdict of the sentence is pronounced. Further detention will depend upon the process of law."*

VI. BENIFIT OF PROBATION OF OFFENDER'S ACT, 1958 :-

The recent trend of criminal justice system is to reform the criminal rather than to punish him. In India reformatory theory of punishment reflects in section 360 of the code of criminal procedure and section 3 and 4 of the Probation of offenders Act, 1958. As per section 3 of the probation of offenders Act, 1958 the court may release the convict on due admonition when he is found guilty of having committed an offence punishable under Section 379, 380, 381, 404 or 420 of Indian Penal Code or offence punishable with imprisonment for not more than two years, and no previous conviction is proved against him. Under section 4 of the said Act when any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court is of the opinion that it is expedient to release him on probation of good conduct, then the court may instead of sentencing him to any punishment release him on his executing bond, with or without sureties to appear and receive sentence when called upon during such period, not exceeding 3 years, and in the meantime to keep the peace and be of good behaviour. Therefore, benefit of Probation of Offenders Act should be given to convict in deserving cases.

VII. RIGHT OF THE ACCUSED CONVICT AS TO SET OFF THE PERIOD OF DETENTION UNDERGONE BY HIM (SECTION 428 OF THE CODE OF CRIMINAL PROCEDURE, 1973:-

Section 428, code of Criminal Procedure is a new provision. It confers a benefit on a convict reducing his liability to undergo imprisonment out of the sentence imposed for the period which he had already served as an under trial prisoner.

Section 428 of the Code permits the accused to have the period undergone by him in jail as an under trial prisoner set off against the period of sentence imposed on him irrespective of whether he was in jail in connection with the same case during that period.

VIII. PROTECTION AGAINST CONVICTION OR ENHANCED PUNISHMENT UNDER EX-POST FACTO LAW (ARTICLE 20 (1) OF THE CONSTITUTION:-

Substantive law imposing liability of penalty cannot be altered to the prejudice of the person supposed to be guilty with retrospective effect held in **Rao Shiv Bhadur Singh Vs. State of Vindhya Pradesh, AIR 1953 SC 394.**

IX. RIGHT TO APPEAL IN CASE OF CONVICTION (SECTIONS. 351, 374, 379, 380 OF Cr.P.C and Articles. 132 (1) and 136 (1) OF THE CONSTITUTION):-

Not withstanding anything in the criminal code, appeal to the court to which decrees or orders made in such court are ordinarily appealable Non-filling of appeal by co-accused cannot be treated as a factor against accused, it would not be in any event take away right of accused to file appeal **(VADAMALAI VS. SYED THASTHAKEET, AIR 2009 SC 1956).**

X. RIGHT TO FILE APPEAL AGAINST THE ORDER OF CONVICTION (SECTION 372, 373, 374 CR.P.C AND ARTICLE 132 (1), 134-A):-

the right of appeal is not a natural or inherent, it is a creature of statute (**SAJID ALI VS. STATE OF NCT, 2007 (2) CRIMES 268 (DEL)).** Right of appeal can neither be interfered with or impaired not it can be subjected to any condition (**Dilip S.Dhanukar Vs. Kotak Mahindra Co.Ltd. 2007 Crl. L.J. 2417 (2421) SC).**

XI. RIGHT TO BE RELEASED ON PAROLE OR FURLOUGH (SECTIONS 5 (A) AND 5 (B) OF THE PRISONERS ACT, 1894):-

The parole and furlough rules are part of the penal and prison system with a view to humanise the prison system. All fixed term sentences of imprisonment of above 18 months are subject to release on parole after a third of the period of sentence has been served. It is a provisional release from confinement but is deemed to be a part of the imprisonment.

XII. RIGHT OF THE ACCUSED UNDER-TRIAL OR CONVICT TO LIVE WITH HUMAN DIGNITY AND RIGHT TO MEET HIS RELATIONS:-

Under Article 21 of the Constitution of India, the right to 'life' includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

XIII. PROPER EXECTUION OF SENTENCE:-

The accused has right to proper execution of sentencing includes consulting president of India and begs pardon under Article 72, Governor under Article 161 of Indian Constitution.

XIV. REMISSION:

Remission of sentence means, waiver of the entire period of the balance of imprisonment. It is granted under special circumstances including the circumstances under which the offence had taken place and the manner of the disposal of the case through trial and appeals. When once remission is granted, it is not revocable.

Apart from granting, remission of sentences, in individual cases the government may grant remission generally to serve certain classes of persons as an act of policy of the State. Remissions may be by restricting the sentence to a period of imprisonment already undergone.

Commutation of sentence means, altering the sentence from one grade to lower grade. Rigorous imprisonment may be converted into simple imprisonment. Imprisonment can be converted into fine. Death sentence may be converted into life sentence and life sentence to a sentence of 14 years imprisonment. The sentence of 14 years may be reduced to any term of imprisonment.

Here also, the government needs to take the exigencies of the case before commuting the sentence. Before exercising the power of suspension, remission and commutation, the government will call for and obtain opinion of the presiding officer of the court which ordered or confirmed the conviction. The opinion may not be treated as recommendation or as a binding advice. The opinion may be taken into consideration only. The commutation once granted is not revocable.

In a decision "**Ram Deo Chauhan @ Raj Nath Chauhan Vs. State of Assam, AIR 2001 SC 2231 = (5) SCC-714= 2001 (4) Scale 116 = 2001 (4) Supreme 363" Remission of sentence does not mean acquittal.**

In a decision "**Subash Chander Vs. Krishna Lal AIR 2001 SC 1903 = 2001 (4) SCC 458 – 2001 (3) Scale 130 = 2001 Supreme 268 – 2001 Cr.LJ 1825".** Imprisonment for life means imprisonment for rest of the life of the convict unless appropriate government chooses to exercise its discretion to remit either the whole or part of the sentence under Sec. 401 of the Criminal Procedure Code.

To be entitled to remission in life sentence, the prisoner shall have undergone clear 14 years imprisonment excluding jail remissions. **Sec. 433-A Cr.P.C Union of Inidal Vs. Sadha Singh AIR 1999 SC 3833 = 1999 (8) SCC 375 = 2000 Cr.LJ 15.**

Sec. 472 Cr.P.C period during which the accused was under trial shall be excluded from the period of remission in sentence granted. **Joginder singh Vs. State of Punjab, 2001 (8) SCC 306.**

Grant of remission under Sec. 432 Cr.P.C vests absolutely with the appropriate Government. The government can grant remission to all convicts except those mentioned in Sec. 433-A. The Government may grant remission to certain classes of convicts and exclude some others. The classification made here shall be reasonable. Rape is not an offence excluded for purposes of remission under Sec. 433-A. However, a notification of the Government included persons convicted for rape are a class not entitled for the benefit of remission. The classification made between persons convicted for other general offences and persons convicted for rape is held reasonable and accordingly held valid. **2003 (4) ILD (SC) 131.**

Remission of sentence. **Joginder Singh Vs. State of Punjab & others, 2001 (8) SCC 306 = AIR 2001 SC 3703 = 2002 Cr. L.J 86.**

CONCLUSION:-

The Code of Criminal Procedure, 1973. Provides for wide discretionary powers to the Judge once the conviction is determined. The power used by court as mentioned supra, is not to be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation.

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