IN THE HIGH COURT OF ORISSA AT CUTTACK

DSREF No.4 of 2024

State of Odisha

Mr. Debashis Tripathy,
Addl. Govt. Advocate

-Versus-

1. **Prakash Behera**
2. **Nandakishor Sethy** ... **Condemned Prisoners/ Accused persons**

Mr. Satya Ranjan Mulia,
Advocate

Mr. Ramesh Ch. Maharana,
Advocate

CRLA No.1166 of 2024

1. **Prakash Behera**
2. **Nandakishor Sethy** ... **Appellants**

Mr. Satya Ranjan Mulia,
Advocate

Mr. Ramesh Ch. Maharana,
Advocate

-Versus-

State of Odisha ... **Respondent**

Mr. Debashis Tripathy,
Addl. Govt. Advocate

CORAM:
THE HON'BLE MR. JUSTICE S.K. SAHOO

THE HON'BLE MR. JUSTICE S.S. MISHRA

ORDER
18.06.2025

Order No.

06. This matter is taken up through Hybrid arrangement

(video conferencing/physical mode).

The condemned prisoners, namely, Prakash Behera and Nandakishor Sethy appear through virtual mode from Circle Jail, Angul. Mr. Dillip Kumar Das, Legal Aid Counsel is also present with the condemned prisoners to assist the condemned prisoners to understand the proceedings of this Court.

Mr. Satya Ranjan Mulia, learned counsel files the appearance memo for the appellants, which is taken on record.

Heard Mr. Debashis Tripathy, learned Additional Government Advocate for the State, Mr. Satya Ranjan Mulia, learned counsel along with Mr. Ramesh Chandra Maharana, learned counsel for the condemned prisoners in DSREF No.4 of 2024 and for the appellants in CRLA No.1166 of 2024.

The condemned prisoners, namely, Prakash Behera and Nandakishor Sethy (hereafter 'the appellants') faced trial in the Court of learned Additional Sessions Judge, Athmallik in C.T. (S) No.16 of 2018 for offences punishable under sections 302/449/363/364/394/201/34 of the Indian Penal Code (hereafter 'IPC') read with sections 25 and 27 of the Arms Act.

The learned Trial Court vide impugned judgment and order dated 27.09.2024 found the appellants guilty under sections 302/364/201/34 of IPC, however acquitted them of the charges under sections 363/394/34 of IPC and sections 25 and 27 of the Arms Act. No finding has been

given by the learned trial Court relating to the charge under section 449/34 of IPC. On the same day of pronouncing the impugned judgment of finding the appellants guilty of the charges as stated above, the hearing on the question of sentence was also held and concluded and on the very day, the sentences were imposed. The appellants were sentenced to death and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to undergo R.I. for one year for the offence under section 302 of IPC, sentenced to undergo imprisonment for life and to pay a fine of Rs.50,000/- (rupees fifty thousand), in default, to undergo R.I. for six months for the offence under section 364 of IPC and sentenced to undergo imprisonment for seven years and to pay a fine of Rs.25,000/- (rupees twenty five thousand), in default, to undergo R.I. for two months for the offence under section 201 of IPC and all the sentences were directed to run concurrently.

A decision in **Sou Motu Writ Petition (Crl.) No.1 of 2022** of the Hon'ble Supreme Court dated 19.09.2022 in reference to framing guidelines regarding potential mitigating circumstances to be considered while imposing death sentences reported in **2022 INSC 987** is cited at the Bar. In the said decision, the Hon'ble Supreme Court taking judicial notice of difference of opinion and approach on the question, whether, after recording the conviction for a capital offence, the Court is obligated to conduct a separate hearing on sentence, deemed it proper for a

reference and decision by a larger Bench. While dealing with the reference, the Hon'ble Supreme Court in the aforesaid decision observed as under:

> "20. The common thread that runs through all these decisions is the express acknowledgment that meaningful, real and effective hearing must be afforded to the accused, with the opportunity to adduce material relevant for the question of sentencing. What is conspicuously absent, is consideration and contemplation about the time this may require. In cases where it was felt that real and effective hearing may not have been given (on account of the same day sentencing), this Court was satisfied that the flaw had been remedied at the appellate (or review stage), by affording the accused a chance to adduce material, and thus fulfilling the mandate of Section 235(2).
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> 21. The question of what constitutes 'sufficient time' at the Trial court stage, in this manner appears not to have been addressed in the light of the express holding in Bachan Singh. This, in the Court's considered opinion, requires consideration and clarity. This court's decision in Manoj Pratap Singh v. State of Rajasthan 2022 SCC OnLine SC 768 is an example, where 'sufficient time' for compliance with Section 235(2) CrPC was considered; it was concluded

that the Trial court had 'scrupulously carried out its duty in terms of Section 235(2)' since the sentence was awarded 3 days after the conviction, after considering both the aggravating and mitigating circumstances.

22. After hearing the parties on the question of conviction in Manoj & Ors. -Vrs.- State of Madhya Pradesh, this Court had adjourned the matter for submissions on sentencing, with directions eliciting reports from the probation officer, jail authorities, a trained psychiatrist and psychologist, etc., to assist the accused in presenting mitigating circumstances. Noticing the lack of a uniform framework in this regard, the present Suo Motu W.P. (Crl.) No.1/2022 was initiated wherein this Court has indicated by its orders the necessity of working out the modalities of psychological evaluation, the stage of adducing evidence in order to highlight mitigating circumstances, and the need to build institutional capacity in this regard. The apprehensions relating to the absence of such a framework was also recorded in the final judgment of Manoj & Ors. v. State of Madhya Pradesh, wherein the importance of a separate hearing and the necessity of background analysis of the accused, was highlighted. It was suggested that the social milieu, the age,

educational levels, whether the convict had faced trauma earlier in life, family circumstances, psychological evaluation of a convict and post-conviction conduct, were relevant factors at the time of considering whether the death penalty ought to be imposed upon the accused."

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

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

the accused and hence, made the reference to a larger Bench.

The Hon'ble Supreme Court in the case of **Sundar @ Sundarrajan -Vrs.- State by Inspector of Police reported in 2023 LiveLaw (SC) 217** held as follows:-

> "77. The law laid down in ***Bachan Singh*** requires meeting the standard of 'rarest of rare' for award of the death penalty which requires the Courts to conclude that the convict is not fit for any kind of reformatory and rehabilitation scheme. As noted in **Santosh Kumar Satishbhushan Bariyar -Vrs.- State of Maharashtra**, this requires looking beyond the crime at the criminal as well:
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> > "66. The rarest of rare dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for

satisfying the second exception to the rarest of rare doctrine, the Court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the Court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be deciphered, but ***Bachan Singh*** sets the bar very high by introduction of the rarest of rare doctrine."

xxx xxx xxx

81. The duty of the Court to enquire into mitigating circumstances as well as to foreclose the possibility of reformation and rehabilitation before imposing the death penalty has been highlighted in multiple judgments of this Court. Despite this, in the present case, no such enquiry was conducted and the grievous nature of the crime was the only factor that was considered while awarding the death penalty.

82. During the course of the hearing of the review petition, this Court had passed an order directing the counsel for the state to get instructions from jail authorities on the following aspects: (i) the conduct of the petitioner in jail;

(ii) information on petitioner's involvement in any other case; (iii) details of the petitioner acquiring education in jail; (iv) details of petitioner's medical records; and (v) any other relevant information."

Taking into account the fact that in the present case, the judgment was delivered on 27.09.2024 and on the very day, hearing on the question of sentence was also held and the sentences to the appellants have been imposed, in the considered view of this Court, there has been no proper and meaningful hearing as such which is necessary in order to do complete justice. In fact, there appears to be no opportunity afforded to the appellants to submit any such material in support of the mitigating circumstances during and in course of hearing on the question of sentence. The Trial Court's order dated 27.09.2024 on hearing the question of sentence does not reveal as to if any such exercise was undertaken affording the appellants to submit material with regard to the mitigating circumstances. The Trial Court while hearing on sentence, as it is further made to reveal from its order dated 27.09.2024, has not considered or for that matter, discussed in detail the mitigating circumstances vis-à-vis the appellants before imposing the sentences though reasons are assigned in the body of the judgment. Law is well settled that hearing on the question of sentence has to be real and effective and not a mere formality; if a meaningful hearing is not taken up by a Court while

considering the sentence to be imposed and inflicted upon the convict, it is likely to cause severe prejudice to him. Either there is a need for considering the mitigating circumstances already on record received as evidence during trial or besides such evidence, further opportunity should be provided to a convict to bring on record all such circumstances favourable to him at the time of hearing on sentence. While addressing the apprehensions relating to absence of a framework at the time of considering sentence, the Hon'ble Supreme Court in the case of **Manoj and Others -Vrs.- State of Madhya Pradesh reported in (2022) SCC Online SC 677** held the importance of a separate hearing and the necessity of background analysis of the convict with reference to the social milieu, age, educational qualification and whether, he has faced any trauma in life, family circumstances, psychological evaluation and post-conviction conduct being the relevant factors while taking a call, whether, death penalty should be imposed or otherwise.

Being satisfied that the learned Trial Court has not acted properly while hearing on the question of sentence with respect to the appellants in the manner it was expected to and that the law envisages with the aggravating and mitigating circumstances to be either on record or with such further opportunity to furnish the necessary information or data thereon, this Court is of the humble view that in view of the settled position of law discussed herein before, for a purposeful and meaningful

hearing on sentence, the appellants should be afforded an opportunity at present inviting from them such data to be furnished in the shape of affidavits and also to direct the Jail Authority to do the needful in that regard. The Court is hence of the view that there is a need for a direction to the Senior Superintendent, Circle Jail, Angul to collect all such information on the past life of the convicts, psychological conditions of both the appellants and also their conduct post-conviction obtaining reports accordingly by taking service and necessary assistance from the Probation Officer and such other officers including a Psychologist or Jail doctor or any Medical Officer attending the prison. Such an exercise is considered to be absolutely expedient in order to advance the cause of justice, the intent and purpose being to provide a fair amount of opportunity for the appellants to bring on record all such mitigating circumstances to be weighed against the aggravating circumstances since a balance is to be struck while taking a final decision on sentence in juxtaposition to the sentences imposed by the Trial Court. Hence, it is ordered.

The appellants shall submit all such materials on mitigating circumstances by filling affidavits stating therein the particulars for consideration of the Court on or before 30th June, 2025. It is directed that the Senior Superintendent, Circle Jail, Angul shall exercise his good office and ensure collection of detailed information with reports on the past life, psychological conditions and post-conviction conduct of the appellants and such other

matters to be relevant at the final hearing by taking able assistance of the officials concerned. It is further directed that all the materials shall reach this Court on or before 30th June, 2025.

At the end, it is clarified that this Court has not expressed anything on merits of the appeal as the appellants should not pre-judge and be on any such apprehension for the above exercise being undertaken, which is in relation to the sentencing aspect to be examined finally, while disposing it off with the death reference.

A free copy of the order be immediately supplied to the learned counsel for the respective parties for its early compliance.

(S.K. Sahoo)
Judge

(S.S. Mishra)
Judge

DSREF No.4 of 2024 & CRLA No.1166 of 2024

07. Heard in part.

Put up on 23.06.2025 at 2.00 p.m. for further hearing.

The learned counsel for the State shall ensure the appearance of the appellants through virtual mode from

Circle Jail, Angul. Mr. Dillip Kumar Das, Legal Aid Counsel shall also remain present virtually with the appellants.

(S.K. Sahoo)
Judge

(S.S. Mishra)
Judge

RKM