**Chandran Vs. State of Kerala**

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**SooperKanoon Citation** : sooperkanoon.com/729084

**Court** : Kerala

**Decided On :** Sep-27-2005

**Reported in** : 2005(4)KLT962

**Judge** : K. Padmanabhan Nair and; V. Ramkumar, JJ.

**Acts** : Indian Penal Code (IPC) - Sections 84, 302, 306, 354, 354(3), 363, 376, 392 and 498A; Code of Criminal Procedure (CrPC) - Sections 209, 225 to 237, 235, 235(2), 309, 309(2), 313, 360 and 465

**Appeal No.** : Crl. A. No. 1053 of 2003

**Appellant** : Chandran

**Respondent** : State of Kerala

**Advocate for Def.** : P.M. Habeeb, Public Prosecutor

**Advocate for Pet/Ap.** : C.M. Nazer, State Brief

**Disposition** : Appeal allowed

**Judgement** :

K. Padmanabhan Nair, J.

1. The sole accused in Sessions Case No. 111 of 2002 on the file of the III Additional Sessions Judge (Ad hoc) Fast Track-I, Thrissur is challenging the conviction and sentence imposed on him under Section 302 of the Indian Penal Code in this appeal. The appellant was found guilty of the offence punishable under Section 302 I.P.C., convicted and sentenced to undergo imprisonment for life. Set off was also allowed.

2. The prosecution case is as follows: The appellant's wife and children deserted him about 2 1/2 years prior to the date of the incident and were living separately. The appellant believed that his mother was instrumental for the separation of his wife and children from him. He became enmical towards his mother. On account of that enmity, he committed the murder of his mother, Kousalya, a 70 year old woman, at about 11p.m. on 27-5-2001 in the building bearing No. 111/2001 of Puthur Panchayat which belonged to the deceased. The appellant was also residing in that house. At about 11 p.m. on 27-5-2001, the appellant beat the deceased mother with wooden sticks (M.0.1 series) and also kicked her. She died of the injuries sustained. On the early hours of next day, the appellant came out of his house, walked through the street and told each and every person met on the road that he killed his own mother. One Gopi and Sidharthan who heard the claim of the appellant went to the house of P.W.1 and told him that the accused told them that he committed the murder of his own mother. All the three went together to the house of Kousalya, the mother of the accused. They saw blood on the verandah. When they looked inside the house, they saw the dead body of Kousalya lying in the drawing room with injuries. P.W.1 went to the police station at 10 a.m. on 28-5-2001 and gave Ext.Pl F.I. Statement. P.W.13, A.S.I, of Police who was on duty recorded Ext.P1 and registered Ext.Pl(a) F.I.R. Further

investigation of the case was conducted by P.W.14, the Circle Inspector of Police, Ollur. He went to the house of the deceased, prepared Ext.P3 inquest. He prepared the scene mahazar. He arrested the accused at 6.15 p.m. on that day itself. After inquest, the dead body was taken to Medical College Hospital, Thrissur for post mortem examination. P.W.9 conducted autopsy on the dead body of Kousalya and issued Ext.P5 post mortem certificate. When the investigation of the case was over, P.W. 14 filed the final report. The accused who was arrested on 28-5-2001 was under judicial custody.

3. The records show that on 28-6-2002, Advocate Sri K. Gopinathan was appointed as counsel on State Brief to defend the accused. But the judgment of the learned Sessions Judge shows that Advocate Sri K.K. Rajeevan appeared for the accused. It is not discernible from the records of the case as to when the appointment of Sri K. Gopinathan was terminated and Sri K.K. Rajeevan was appointed.

4. When the accused was produced before the learned Sessions Judge, charges were framed after hearing both sides. Charges were read over and explained to the accused. He understood the same and pleaded not guilty.

5. On the side of prosecution, P.Ws. 1 to 15 were examined. Exts. P1 to P8 proved and marked. M.Os. 1 to 11 identified.

6. P.W. 1 is a neighbour. His house is situated about 10-70 meters away from the house of the deceased. It was P.W.1 who gave Ext.P1 First Information Statement. He came to know about the incident from P.Ws. 2 and 3. P.W.2 Sidharthan was cited and examined to prove the extra judicial confession alleged to have been made by the accused. He supports the prosecution case. P.W.3 was also cited and examined to prove an extra judicial confession. He turned hostile and did not support the prosecution case. P.W.4 is residing near the house of the deceased. She was examined to prove an extra judicial confession as well as the fact that she heard the cries of the deceased on the night on which she died. She supports the prosecution case. P.W.5 is the wife of the accused. She was cited and examined to prove the motive. She supports the prosecution case. P.W.6 is the brother-in-law of the accused. He was examined to prove that on the date of the incident, the accused went to the house of P.W.6, picked up a quarrel with P.W.6 and left that house at about 11 p.m. He supports the prosecution case. P.W 7 is an attestor to Ext.P5 inquest. He proved the same. P.W.8 is the Doctor who examined the accused and issued Ext.P4 wound certificate. He proved the same. P.W.9 is the Doctor who conducted the post mortem examination on the dead body of Kousalya and issued Ext.P5 post mortem certificate. He proved the same. P.W. 10 is an attestor to Ext.P6 scene mahazar. He proved the same. P.W.11 is the Secretary of Puthur Grama Panchayat. He issued Ext.P7 ownership certificate. P.W.12 is the Village Officer who prepared Ext.P8 plan. P.W. 13 is the A.S.I, of Police Ollur Police Station who recorded Ext.P1 F.I. Statement and registered Ext.P1(a) F.I.R. He proved those documents. P.W. 14 is the Circle Inspector who conducted the major part of the investigation, seized the articles and arrested the accused. P.W.15 completed the investigation and filed the Final Report.

7. After the prosecution evidence was over, the learned Sessions Judge questioned the accused and straightaway posted the case for defence evidence without hearing the case under Section 232 Cr.P.C. No defence evidence was adduced. The learned Sessions Judge found the appellant guilty, convicted and sentenced him to undergo imprisonment for life. The appellant was not heard on the question of sentence on the ground that the sentence proposed to be imposed on the appellant is the lesser of the two sentences prescribed for such an offence and in view of the principle laid down in Ram Deo Chauhan v. State of Assam (AIR 2001 SC 2231), it is not necessary to hear the accused. The accused was convicted and sentenced to undergo imprisonment for life. That conviction and sentence are under challenge in this appeal.

8. We heard Advocate Sri C.M. Nazer, the learned Counsel who is appointed on State Brief and Sri P.M. Habeeb, the learned Public Prosecutor for the respondent.

9. The learned Counsel appearing for the appellant has argued that there is absolutely no legal or acceptable evidence to connect the appellant to the offences alleged. It is argued that the appellant was convicted solely

relying on the extra judicial confession, alleged to have been made by him. It is argued that none of the statements alleged to have been made by the appellant will amount to a confession of guilt. The evidence of P.W.6 will show that the appellant left the house of P.W.6 after 11 p.m.

P. W.4 had deposed that she heard somebody knocking at the door of the house of the deceased at 12 midnight. It is argued that the charge against the appellant was that he committed the murder of his mother at 11 p.m. and the evidence of P.W.4 and P.W.6 proves beyond any doubt that at the alleged time of the murder of Kousalya, the appellant was not in his house.

10. We do not think it is necessary to consider the case on its merits because of the procedural illegalities committed by the learned Sessions Judge while disposing of the case.

11. Chap. XVIII of the Code of Criminal Procedure which consists of Sections 225 to 237 deals with the procedure to be followed by a Sessions Judge in the trial of a Sessions case. Section 230 Cr.P.C. provides that if the accused refuses to plead, or does not plead, or claims to be tried or is not convicted under Section 229 of the Cr.P.C. the Judge shall fix a date for the examination of witnesses and may, on the application of the prosecution, issue process for compelling the attendance of any witness or the production of any document. Section 231 Cr.P.C. provides that on the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution. After the prosecution evidence is over, the accused is to be questioned under Section 313 Cr.P.C. All incriminating circumstances brought out against the accused shall be put to him. Thereafter, the Judge has to follow the procedure prescribed in Sections. 232 and 233 Cr.P.C. Section 232 Cr.P.C. reads as follows:-

'Acquittal.-- If after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.'

The Judge has to hear the prosecution and the accused. If he finds no grounds to acquit the accused he shall pass an order to that effect and proceed to next stage as provided under Section 233 Cr.P.C. Section 233 Cr.P.C. reads as follows:--

Entering upon defence.--

(1) Where the accused is not acquitted under Section 232 he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.'

If the court finds no ground to acquit the accused under Section 232 Cr.P.C. the learned Sessions Judge shall ask the accused to enter on his defence.

12. The effect of failure to follow the procedure under Sections 232 and 233 Cr.P.C. at the appropriate stage was considered by a Division Bench of this Court in Radnanandan v. State of Kerala (1990 (1) KLT 516). This Court held as follows:-

'Every accused is entitled to a fair trial which includes opportunity for adducing his own evidence also. That is his right if he is not acquitted under Section 232 on the ground that the Judge considers that there is no evidence that he committed the offence. In such a situation, it is mandatory that he should be called upon to enter on his defence and permitted to adduce oral and documentary evidence of his choice. On his

application, the court has the duty to issue process and secure witnesses, documents or things. The choice in this respect is solely on him. Calling the accused to enter on his defence is not an empty formality. Its omission will be fatal to the prosecution and the conviction will be bad.

Subject to those restrictions, the accused is having the unfettered right to have any witness, document or thing summoned. Entering on defence and adducing evidence marks a special stage in and is an essential part of a criminal trial. If that chance is denied, it cannot be said to be fair trial. The restrictions on the grounds of vexation, delay or defeating the ends of justice are not available in this case.'

(Emphasis supplied).

The position is made clear in Sivamaniv. State of Kerala (1992(2) KLT 227). This Court after considering the various authorities on the point held as follows:--

'Under the first Section (Section 232) after examining the accused, the Judge has to hear both sides 'on the point'. The point is whether the Judge can consider that there is no evidence in the case that the accused committed the offence. The manner of examination of the accused is provided in Section 313 of the Code. The commencing words in Section 233 of the Code, i.e., 'Where the accused is not acquitted under Section 232... 'would make it clear that an accused has to be directed to enter upon his defence if he cannot be acquitted under Section 232. An accused can be acquitted under Section 232 . only when 'there is no evidence that he committed the offence'. When can a Sessions Judge consider that 'there is no evidence that the accused committed the offence?' Some of the instances can be pointed out when a Sessions Judge can justifiably say that there is no evidence. In cases solely depending upon the ocular account of the witnesses, it might sometimes happen that all those witnesses, one by one, might turn hostile to the prosecution without giving any evidence in support of the prosecution. There may be a case where the only legal evidence on record in support of the prosecution case is the confession of a co-accused or the evidence of witnesses examined on behalf of a co-accused. In cases where there are more than one accused, it might happen that there may not be any evidence connecting one or more of them with the commission of the offence. There may also be cases where evidence connecting the accused with the crime is only rank heresay. But in a case where there is some evidence connecting the accused with the commission of crime, it is the duty of the Judge to pass on to Section 233 and not to appreciate that evidence and find out whether it was reliable or not, to pass an order under S .232 of the Code. The words 'no evidence' in Section 232 cannot be considered or interpreted to mean absence of sufficient evidence for conviction or absence of satisfactory or trustworthy or conclusive evidence in support of the charge. It is a salutary principle in a sessions trial that no final opinion as to the reliability, acceptability of the evidence should be arrived at by the Judge until the whole evidence is before him and has been duly considered. It is only after the accused is called upon to enter his defence under Section 233 and after the evidence, if any, adduced on behalf of the accused and hearing the counsel appearing for both sides, the Judge hearing the case after due consideration of the evidence decides whether the evidence adduced on behalf of the prosecution is reliable or trustworthy. Either the judgment or at least the proceedings paper should contain the minutes that consideration was made as envisaged under Section 232 of the Code at the appropriate stage. It is quite unnecessary to ask the accused whether they have any defence evidence before reaching that stage, though there is nothing illegal even if the accused was asked like that at such an early stage. The accused need be called upon to enter on his defence only when the trial proceeds to the next stage after Section 232.'

13. So the procedure to be followed is well settled. After questioning the accused under Section 313 Cr.P.C. and after hearing the prosecution and the accused under Section 232 Cr.P.C., if the Sessions Judge finds no grounds to acquit the accused, he is bound to call upon the accused to enter on his defence. The accused must be asked as to whether he intends to adduce evidence. If he intends to adduce evidence, a posting has to be given for adducing the evidence. It is not a concession given to the accused. It is a right conferred on him and that procedure has to be strictly followed. The record of questioning the accused in this case shows that no such question was put to the accused. No order contemplated under Section 232 Cr.P.C is seen

passed in the proceedings paper. It is true that the Sessions Judge is not expected to pass a reasoned order why he is not acquitting the accused under Section 232 Cr.P.C. but the proceedings paper must show that the Judge heard both sides and took a decision not to acquit the accused under Section 232 Cr.P.C. That procedure was not followed in this case.

14. Another illegality noted by us is that the accused was not heard on the question of sentence. Sub-section (2) of Section 235 Cr.P.C. provides that if the accused is convicted, the Judge shall unless he proceeds in accordance with the provisions of Section 360 hear the accused on the question of sentence and then pass sentence according to law. The learned Sessions Judge has relied on the decision of the Apex Court in Ram Deo Chauhan 's case (supra) to hold that when the court proposes to impose the lesser sentence of imprisonment for life, it is not necessary to hear the accused on the question of sentence. It is true that an observation to that effect is contained in the dissenting judgment.

15. Section 235(2) Cr.P.C. reads as follows:-

'235. Judgment of acquittal or conviction.--

(1) ...

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 hear the accused on the question of sentence, and then pass sentence on him according to law.'

In Santa Singh v. State of Punjab (AIR 1976 SC 2386), the Supreme Court had considered Section 235(2) Cr.P.C. It was held as follows:--

'The hearing contemplated by Section 235(2) is not confined 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.'

The Supreme Court held that non-compliance of the requirement of Section 235(2) Cr.P.C. is not a mere irregularity. The Apex Court after confirming the conviction set aside the sentence and remanded the case to the Sessions Court for complying with Section 235(2) Cr.P.C.

16. The matter again came up for consideration before a Bench consisting of three Judges in Dagdu v. State of Maharashtra : 1977CriLJ1206 . The larger Bench of the Apex Court after considering the principle laid down in Santa Singh's case (supra) held as follows:--

'The imperative language of Sub-section .(2) leaves no room for doubt that after recording the finding of guilt and the order of conviction, the Court is under an obligation to hear the accused on the question of sentence unless it releases him on probation of good conduct or after admonition under Section 360.'

It was further held as follows:--

'The mandate of Section 235(2) must, therefore, be obeyed in its letter and spirit.'

The Apex Court considered the procedure to be followed by the appellate court. It was held as follows:--

'The Court on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence.'

It was further held as follows:-

'...for a proper and effective implementation of the provision contained in Section 235(2) it is not always

necessary to remand the matter to the court which has recorded the conviction....Remand is an exception, not the rule, and ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases,'

The Apex Court confirmed the conviction, The Court gave an opportunity to the accused to produce materials before It and heard the counsel for the accused under Section 233(2) Cr.P.C.

17. The effect of non-compliance of Section 235(2) Cr.P.C. again came up for consideration in Karam Ali v. State of U.P, : 1978CriLJ177 , A Bench of two Judges by judgment dated 24-10-1977, held that the trial court should have postponed the proceedings after passing the order of conviction and given opportunity to the accused to produce evidence of circumstances which may lead the court to pass a lesser sentence,

18. Section 309 Cr.P.C. was amended by Act 45 of 1978, Third proviso to Section 309 was inserted by Act 45 of 1978 with effect from 18-12-1978; The third proviso reads as follows:-

'309, Power to postpone of adjourn proceedings

(1)...

(2)...

Provided....

Provided further....

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,

Explanation 1....

Explanation 2....

In Muniappan v. State of TM : 1981CriLJ726 a two Judge Bench of the Supreme Court held as follows;-

'The obligation to hear the accused on the question of sentence which is imposed by Section 235(2) 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,'

In Suryamoorthi v. Govindamamy : 1989CriLJ1451 which was decided on 13/4/1989, a Bench of two Judges considered 8,235(2) of the Code, The appeal was filed by P.Ws. 1 and 2 in a murder case against a judgment of acquittal passed by the Sessions Judge and confirmed by the High Court. The Apex Court found the respondents l, 4 and 7 guilty of an offence under Section 392 I.P.C. and convicted them, Since they Wife convicted for the first time by the Apex Court, the convicted accused were given an opportunity of being heard under Section 233(2) Cr.P.C, and posted the case after 10 days for hearing on the question of sentence. None of the earlier decisions were brought to the notice of the Supreme Court,

19. In Allauddin Mian v. State of Bihar : [1989]2SCR470 decided on 13.4.1989 a Bench consisting of two Judges considered the effect of non-compliance of Section 235 (2) Cr.P.C. It was held that the provision is mandatory, It was held as follows;-

'The requirement of hearing the accused is intended to satisfy the rule of natural justice, It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence, This is all the more necessary since the Courts are generally required to make

the choice from a wide range of discretion in the matter of sentencing, To assist the Court in determining the correct sentence to be imposed the legislature introduced Sub-section (2) to Section 233, The said provision therefore satisfied a dual purpose; It satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the Court to choose the sentence to be awarded, Since the provision is Intended to give the accused an opportunity to place before the Court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed, It is clearly mandatory and should not be treated as a mere formality.'

It was further held as follows:-

'... as a general rule the trial court should after recording the conviction adjourn the matter to a future date and call upon both the prosecution and 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 Apex Court modified the sentence and reduced the same as Imprisonment for life. The 3rd proviso to Section 309 Cr.PC. was not brought to the notice of the Supreme Court either in Suryamoorthi's case (supra) or in Allauddin Mian's case (supra).

20. The effect of non-compliance of Section 235(2) Cr.P.C. again came up for consideration before the Apex Court in Malkiat Singh v. State of Punjab : [1991]2SCR256 . A Bench consisting of three Judges of the Supreme Court indicated the need to adjourn the case to a future date after convicting the accused, It was held as follows:-

'On finding that accused committed the charged offences, Section 235(2) of the Code empowers the Judge that he shall pass sentence on him according to law on hearing him, Hearing contemplated is not confined merely to oral hearing but also Intended to afford an opportunity to the prosecution as well as the accused to place before the court facts and material relating to various factors on the question of sentence, and if interested by either side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. Therefore, sufficient time must be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be.'

The impact of '3rd proviso to Section 309 Cr.P.C.' was not brought to the notice of the Court.

21. In State of Maharashtra v. Sukhdeo Singh : 1992CriLJ3454 a Bench of two Judges considered the implication of 3rd proviso to Section 309 Cr.P.C. and Section 235(2) of Cr.P.C. It was held as follows:-

'This 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 on 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'.

But the Court has found that in the above said case, the requirements of Section 235(2) of the Code could be said to have been satisfied in letter and spirit.

22. In Ram Deo Chauhan's case (supra) the petitioner was convicted and sentenced to death by the trial court. The conviction and sentence were confirmed by the High Court and the Supreme Court. Thereafter the accused filed a petition to review the judgment. Two grounds were raised in the review petition. The first

ground raised was that the petitioner was a juvenile at the relevant point of time. The second ground raised was that there was violation of the provision contained in Section 235(2) Cr.P.C. as the case was not adjourned for hearing on the question of sentence after convicting the accused. The matter was heard by a Bench consisting of three Judges. The majority held that the grounds raised are not sufficient to allow the review petition. In the dissenting judgment while considering the contention that there was violation of the provisions of Section 235(2) Cr.P.C. it was observed that Section 235(2) will not be violated if the sentence of life imprisonment is awarded for that offence without hearing the accused on the question of sentence. It was also observed that the normal rule is that after pronouncing the verdict of guilt, the hearing should be made on the same day and sentence shall be pronounced on the same. The majority view was as follows:--

'The mandate of the Legislature is clear and unambiguous that no adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed upon him. In a case punishable with death of imprisonment for life, there is no difficulty for the Court where the sentence proposed to be imposed is alternative sentence of life imprisonment but if it proposes to award the death sentence, it has discretion to adjourn the case in the interests of justice as held in Sukhdev Singh's Case. I have no doubt in holding that despite the bar of third proviso to Sub-section .(2) of Section 309, the Court in appropriate cases, can grant adjournment for enabling the accused persons to show cause against the sentence proposed on him particularly if such proposed sentence issentence of death. We hold that in all cases where a conviction is recorded in cases triable by the Court of Session or by Special Courts, the Court is enjoined upon to direct the accused convict to be immediately taken into custody, if he is on bail, and kept in jail till such time the question of sentence is decided. After the sentence is awarded, the convict is to undergo such sentence unless the operation of the sentence awarded is stayed or suspended by a competent Court of jurisdiction. Such a course is necessitated under the present circumstances prevalent in the country and is in consonance with the spirit of law. A person granted bail has no right to insist to remain at liberty on the basis of the orders passed in his favour prior to his conviction.'

So there was no decision in the above said case to the effect that in a case it is proposed to impose imprisonment for life only, the accused need not be heard at all.

23. In Gurudev Singh v. State of Punjab (2003) 7 SCC 258) the Apex Court had occasion to consider the principle laid down in Ram Deo Chauhan's case (supra).

It was held as follows:--

'It was held that the mandate of the legislature is clear that no adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed upon him. Nevertheless, the court can in appropriate cases grant adjournment for the aforesaid purpose, if the proposed sentence is a sentence of death. From the material on record, it does not appear that any request was made to the learned Sessions Judge for adjournment. In the circumstances, we see no substance in the contention that the sentence imposed was vitiated for non-compliance with Section 235(2) of the Code of Criminal Procedure, 1973.'

24. In Motilal v. State of M.P. : 2004CriLJ907 it was held as follows:--

In Ram Deo Chauhan v. State of Assam (AIR 1992 SC 2100) a Bench of three learned Judges had occasion to consider the question in the light of the amendment made by introducing the third proviso to Sub-section (2) of Section 309 Cr.P.C. and observed that the plea made as to the sentence and conviction being recorded on the same day resulting in contravention of Section 235(2) C.P.C. cannot be accepted and that though the normal rule be that after pronouncing the verdict of guilt the hearing should be made on the same day and sentence should also be pronounced on that day itself, 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 third proviso to Section 209 Cr.P.C. would be no bar for affording such time and if for any reason the court was inclined to adjourn the case after pronouncing the verdict of guilt in grave offences, the

person convicted should be committed to jail till the verdict on the sentence is pronounced.'

(Emphasis supplied).

25. The matter was again considered in Kamalakar Nandram Bhavsar v. State of Maharashtra : 2004CriLJ615 . The accused in the above said case were charged for the offences punishable under Sections 306 and I.P.C. The trial court acquitted the accused. The High Court reversed the decision, convicted the appellants for the offence punishable under Section 306 I.P.C. and sentenced them to undergo rigorous imprisonment for 10 years. For the off : 2004CriLJ615 ence punishable under Section 498A I.P.C. they were convicted and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 5,000/- and in default of payment of fine to undergo rigorous imprisonment for six months. It was argued that there was violation of the provisions of Section 235(2) of the Code. A two-Judge Bench of the Supreme Court considered Santa Singh's case (supra) and Dagdu 's case (supra). The Court applied the principle laid down in Dagdu 's case (supra). It was held as follows:--

' We are of the opinion that this law laid down by a three-Judge Bench of this Court applies squarely to the facts of this case. Therefore, having come to the conclusion that the conviction by the High Court of Appellants 1,3,4 and 5 is justified, we affirm the same under Sections 306 and 498-A of the Code of Criminal Procedure but postpone the awarding of sentence to give an opportunity to the learned Counsel for the appellants to represent before us in regard to the quantum of sentence.'

26. The effect of non-compliance of Section 235(2) of Cr.P.C. again came up for consideration in Surendra Pal Shivbalakpal v. State of Gujarat : 2004CriLJ4642 . In that case the counsel appearing for the accused were heard in the presence of the accused. It was argued that the accused did not get an opportunity to adduce evidence. A two Judge Bench followed the principle laid down in Allauddin Mian 's case (supra). It was held as follows:--

'The appellant also placed reliance on the decision of this Court in Allauddin Mian v. State of Bihar : 1989CriLJ1466 where this Court emphasised the importance of questioning the accused before the sentence is imposed on him. In the instant case, the appellant was found guilty under Sections 363, 376 and 302 IPC and the judgment was pronounced on 19-6-2003 and the case was adjourned for hearing of the accused on the question of sentence to the next day and the question of sentence was elaborately considered and the order of sentence was pronounced on 20-6-2003, It is to be noted that the appellant and his counsel were present.'

The principle laid down in Ramdeo Chauhan's case (supra) was that the normal rule is that after pronouncing the verdict of guilt the hearing should be made on the same day and the sentence should also be pronounced on the same day. It was also held that after pronouncing the verdict of guilt in grave offences the person convicted should be committed to jail. Further it is to be noted that the principle laid down by a three Judge Bench in Allauddin Mian's case (supra) is applied in Surendra Pal Shivbalakpal's case (supra) by a two-Judge Bench after the decision of the Apex Court in Ram Deo Chauhan's case (supra).

27. In this connection, the provision contained in Section 354 Cr.P.C. is also relevant. It reads as follows:--

'354. Language and contents of judgment.--

(1) Except as otherwise expressly provided by this Code, every judgment referred to in Section 353.-

(a) ...

(b) ...

(c) ...

(d) ...

(2) ...

(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

(4) When the conviction is for an offence punishable with imprisonment for a term of one year or more, but the Court imposes a sentence of imprisonment for a term of less than three months, it shall record its reasons for awarding such sentence, unless the sentence is one of imprisonment till the rising of the Court or unless the case was tried summarily under the provisions of this Code.

(5) ...

(6) ...

The Sessions Judge is bound to give his reasons for awarding the sentence of imprisonment for life also. If the sentence imposed is capital punishment, then the Sessions Judge has to give special reasons. So the view taken by the learned Sessions Judge that in Ram Deo Chauhan's case (supra) it was held that it is not necessary to hear the accused on the question of sentence in case it is proposed to award the lesser sentence off imprisonment for life is not correct.

28. In Yesudasan v. State of Kerala (1986 KLT 824) a Division Bench of this Court has held as follows:

'Non-compliance with Section 235(2) is not a mere irregularity in the course of the trial curable under Section 465. It is much serious. It will amount to by-passing an important stage of the trial and omitting it altogether. Non-compliance amounts to disobedience to an important express provision of the Code as to the mode of trial (Santa Singh v. State of Punjab (AIR 1976 SC 2386). Section 354 (3) of the Code marks a significant shift in the legislative policy underlying the Code of 1898 according to which both the alternative sentences were normal sentences. Now on the face of Section 354(3) the normal punishment for murder and six other capital offences under the Indian Penal Code is imprisonment for life or for a term of years and death penalty is an exception. Section 235(2) of the Code bifurcates the trial by providing for two hearings, one at the preconviction stage and the other at the present stage. Even though Section 235(2) does not contain specific provision as to evidence and provides only for hearing of the accused as to sentence, it is implicit that if a request is made in that behalf either by the prosecution or the accused or by both, the Judge should give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence. (AIR 1980 SC 898). That means that even though hearing the accused alone is provided under Section 235(2) in the matter of sentence, the prosecution is also entitled to be heard in the matter and in case of necessity both sides are entitled to let in evidence also though it cannot be a protracted affair. Even though the Judge has made up his mind to award life imprisonment alone in a murder case even before hearing either side on the question of sentence, both sides may desire to have their own say in the matter. The prosecution may desire to argue for capital sentence or place materials in support of it. The accused may desire to argue or place materials to persuade the court to make some observations or recommendations to the executive government. Anyhow 8.235(2) provides for hearing and Section 354(3) provides for stating reasons. These provisions will have to be complied with.'

The principle laid down in Yesudasan 's case (supra) is not reversed and is still in force. Hence the Sessions Judge is bound to follow the same. If the Sessions Judge forms an opinion that the case at hand is one which warrants imposition of capital sentence, he can grant sufficient .time to the accused to adduce evidence. In all other cases he should hear on the question of sentence also on the same day. So the conviction and sentence imposed on the appellant without hearing the appellant on the question of sentence is illegal, opposed to the very mandate of Section 235(2) Cr.P.C., unsustainable and liable to be set aside.

29. It is argued that the evidence adduced in this case shows that the accused was suffering from mental

illness, but the learned Sessions Judge did not consider that plea. It is argued that he underwent treatment in the Mental Health Centre, Thrissur. P.W.2 had deposed that two years prior to the date of the incident, the accused was taken to the Mental Health Centre, Thrissur. Some other witnesses had also given evidence to the effect that the conduct of the accused was not normal. That evidence is not sufficient to hold that his case will come within Section 84 of the Indian Penal Code. Since the accused was under judicial custody and he was defended by a State Brief, the trial court ought to have called for the records, if any, from the Mental Health Centre, Thrissur. In Kuttappan. v. State of Kerala (1986 KLT 364) this Court had held that when there is some material to suspect that the accused is suffering from unsoundness of mind, a duty is cast upon the investigating officer to place the records before the Court. That was also not done in this case. So we are of the view that it is only just and proper that the accused is given one more opportunity to adduce evidence in support of his plea of mental illness. For that purpose also, the case has to go back.

In the result, the Criminal Appeal is allowed. The conviction and sentence imposed on the appellant are hereby set aside. The case is remanded to the III Additional Sessions Court (Adhoc) Fast Track No. l, Thrissur. The learned Sessions Judge is directed to take SC. No. 111 of 2002 back to file and secure the presence of the accused who is now undergoing imprisonment and dispose of the case afresh from the stage of 232 Cr.P.C. in accordance with law. An opportunity shall be afforded to both sides to adduce further evidence, if any. Since the accused is under judicial custody, every endeavour shall be made to dispose of the case as expeditiously as possible. Office shall transmit the records forthwith.