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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: May 23, 2019

Decided on: July 22, 2019

+ CRL.M.C. 4055/2016

GAURAV AGGARWAL

..... Petitioner

Through: Mr. Ramesh Gupta, Senior Advocate
with Mr. Neeraj Kumar Gupta,
Advocate.

versus

STATE

..... Respondent

Through: Mr. Kewal Singh Ahuja, APP for the
State with SI Mohd. Kafeel, PS
Mukherjee Nagar.

Mr. Manoj Tiwari, Advocate along
with Mr. R.K. Tiwari and Mr. G.K.
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

J U D G M E N T

1. The petitioner herein was brought before the court of Metropolitan Magistrate to face trial as an accused on the basis of report ("charge sheet") under section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.), presented on 03.07.2002, upon conclusion of investigation into first information report (FIR) No.560/2001 of Police Station Mukherjee Nagar on allegations of his involvement in certain acts of commission and omission constituting offences punishable under sections 279 and 338 of the Indian Penal Code, 1860

(IPC). The Metropolitan Magistrate having taken cognizance and issued process, secured the presence of the petitioner and eventually put him on trial on the basis of notice under Section 251 of Cr. PC, issued and served on 12.09.2002. The proceedings in the criminal case (No.789/2002) came to an end on 21.08.2013 with the order recorded by the Additional Chief Metropolitan Magistrate (ACMM) holding the petitioner guilty and convicting him for offences under sections 279 and 338 IPC on the basis of “*plea of guilt*”, this being followed by award of punishment in the form of fine of Rs.500/- on each count, the default sentence being simple imprisonment for five days. Noticeably, the fine was deposited on the same day on behalf of the petitioner (he himself not being present) by his surety.

2. The petitioner challenged the legality, correctness and propriety of the aforesaid order dated 21.08.2013 in the court of sessions invoking its revisional jurisdiction by filing a petition (Criminal Revision No.24/2015). The Additional Sessions Judge, however, was not impressed. He concluded that there was no error committed by the trial court, the order passed leading to conviction and sentencing as above being reasoned and speaking, there being no grounds for any interference.

3. The petition at hand was filed invoking the inherent power of this court under Section 482 Cr.P.C. seeking to assail the legality and propriety of the above mentioned proceedings of the ACMM and the view taken by decision dated 12.07.2016 of the revisional court.

4. Before coming to the issues that arise for consideration, it is necessary to take note, *albeit* briefly, of the background facts.

5. It appears that on 03.11.2001, a motor vehicular accident occurred at about 11:10 a.m. in the vicinity of Kali Mandir, Dheerpur, near Radha Swami Satsang Bhawan within the jurisdiction of Police Station Mukherjee Nagar. The incident involved two motor vehicles, one a car bearing registration No.DL-1CG-4764 (hereinafter, “the car”) and, the other, a motorcycle bearing registration No.DL-8SR-0502 (hereinafter, the “motorcycle”). The car statedly was driven by the petitioner herein (the accused) in a rash (or negligent) manner, it having emerged at the scene on Burari road from the direction of Kingsway Camp. On the other hand, the motorcycle was driven by a boy named Divik Kashyap @ Mikki, then aged 17 years, he carrying along, on the pillion, his tutor Manoj along with his two and a half years old cousin Nikle. The motorcycle had come to the place of collision from the side of Burari as the tutor Manoj was to be dropped at Parmanand colony. It is alleged that on account of rash (or negligent) driving of the car by the petitioner, it collided against the motorcycle as a result of which all the three persons travelling thereon fell down and suffered injuries. The accident statedly was seen by one Pateshwar Prasad who was working as a painter in a private property close to the place of collision. One of the injured persons along with the child were taken to the trauma centre while the other person injured was shifted to another hospital separately. Eventually, both Mikki and Manoj were brought to the casualty of Lok Nayak hospital

at about 12:05 p.m. on 03.11.2001 and were medically examined against medico-legal certificate (MLC) nos.24411 and 24412 respectively. The MLCs would show that Mikki was discharged on 09.11.2001 while Manoj was discharged on 10.11.2001. The injuries of each of them were opined to be grievous in nature.

6. The FIR was registered on the basis of statement of Pateshwar Prasad, the eye witness, initially for offences under sections 279 and 337 IPC. Upon completion of the investigation, the charge sheet which was laid before the Metropolitan Magistrate, however, sought prosecution for offences under sections 279 and 338 IPC, there being no clarity as to the nature of injuries suffered by the child who was also a passenger on the pillion on the motorcycle.

7. The Metropolitan Magistrate who had issued the process put the petitioner on trial by serving a notice under section 251 Cr.P.C. on him on 12.09.2002, the relevant part thereof reading thus:-

“That on 3-11-2001, at about 1:40 AM at Kali Mandir, Dheerpur, near Radha Swami Satsang Bhawan, Delhi you were found driving vehicle No.Maruti car No.DL-1C-G-4764 in a rash and negligent manner so as to endanger human life and personal safety to others and thus you thereby committed offence punishable u/s 279 IPC and within the cognizance of this court.

Secondly, on the above mentioned date, time and place while driving in aforesaid manner you caused simple/grievous injuries on the person of Mikki and thus you thereby committed offence punishable u/s. 337/338 IPC and within the cognizance of this court.”

8. It may be mentioned here that the above notice was issued on a pre-prepared format, the portions underlined being the ones filled in by hand, reference to section 337 in the printed format having been scored off also by hand.

9. It is pertinent to note here that in the notice of accusations section 251 Cr.P.C., as quoted above, reference to injuries suffered by Manoj, or for that matter the child, were conspicuously missing. This, and the subsequent proceedings recorded till the conclusion by the impugned order dated 21.08.2013 reflects non-application of mind, the concerned Metropolitan Magistrate apparently not having gone through the charge sheet to ascertain as to who all were the victims of the offences which had been committed. The effect of failure to take stock of the case from such perspective would, as subsequent discussion shall show, add to the confusion and delay, leading to rudderless judicial process.

10. The petitioner pleaded not guilty to above notice under Section 251 Cr. PC and claimed trial, his plea having been duly recorded and the case thereafter taken to the stage of the prosecution evidence.

11. The order sheets (on the trial court record), in the wake of direction for production of prosecution evidence by order dated 12.09.2002 (on which date the notice under section 251 Cr.P.C. was served), reveal not only callous and casual approach by the concerned criminal court but also lack of interest on the part of the investigating/prosecution agency, the petitioner clearly also adding to the reasons for delay on account of absence on several occasions. No

witness was examined, rather the presence of the material witnesses not even secured, for seven years till 27.11.2009, some of the proceedings recorded in-between reflecting that the magistrate did not even ensure issuance of summons to the witnesses on a number of dates.

12. On 27.11.2009, Vijay Kumar Kashyap (father of Divik Kashyap, one of the injured persons) appeared. The proceedings do not indicate as to why Divik Kashyap himself was not present. They only note the submission of “*both parties*” that there was a possibility of some settlement. The Metropolitan Magistrate issued notice to the “*other injured*” (Manoj Kumar), to be served through investigating officer (IO) for the next date.

13. The case thereafter got derailed, firstly on account of presiding officer being on leave and later on account of absence of the petitioner this leading to issuance of non-bailable warrants against him on numerous dates.

14. On 26.04.2013, the eye-witness Pateshwar Prasad and Divik Kashyap (one of the victims) eventually appeared as witnesses before the trial Magistrate. The petitioner, however, was absent but granted exemption through counsel. Things moved with some alacrity on the said date, this being reflected by three order-sheets which were recorded on 26.04.2013, they reading as under:-

“26.4.2013

Present: Ld. APP for State

Accused absent. Cl. for the accused is present.

Complainant Pateshwar and victim Divik Kshyap are present.

At oral request, accused is exempted for today from personal appearance though his cl.

Both complainant and victim seeks adjournment on the ground that there is possibility of settlement.

Today, accused is absent. Still, in the interest of justice, put up for settlement on 04.05.2013.

*Sd/-
ACMM*

At 02.10 PM

*Present : Ld. APP for state
Sh. Manoj Tiwari, cl. for accused
Injured Divik Kshyap with cl. Sh.
Gurbachan Singh.*

Sh. Manoj Tiwari, cl for the accused has submitted that his vakalatnama is on record and he has instructions from his client to appear before the mediation centre and prays that matter be referred to mediation centre today itself. Injured has no objection to this effect. The offence punishable u/s 338 IPC is compoundable.

Let the matter be referred to mediation centre for today itself at 02:45 pm. Parties are directed to reappear before this court thereafter.

*Sd/-
ACMM*

26.4.2013

File taken up today on the receipt of settlement/ agreement arrived at Mediation Centre, Rohini District Courts, Delhi.

*Present : Ld. APP for State
Cl. for the accused is present.
Complainant Pateshwar and injured Divik
Kashyap in person.*

Record of the file reveals that there is one more injured viz. Manoj in the present case. As far as the injured Divik Kashyap is concerned, the offence punishable u/s 338 IPC stands compounded vide Ex.P1 and statement of injured Divik Kashyap. As prayed by accused, be put up for exploring the possibility of settlement with injured Manoj for 29.5.2013. Injured Manoj be summoned through IO of the case. Date pronounced earlier stands cancelled.

*Sd/-
ACMM”*

15. The settlement agreement (Ex.P1) to which reference is made in the third order-sheet (quoted above) reflected that the parties, i.e., (the petitioner being the accused through counsel, on one hand, and injured Divik Kashyap with his father, on the other) had “*agreed to settle/compound*” the offence under section 338 IPC, subject to payment of Rs.2 lacs (by the former to the latter) by pay order No.532033 dated 25.04.2013 drawn on Karnataka Bank in his favour. The statement of Divik Kashyap affirming the compounding by him of the offence under section 338 IPC was separately recorded on 26.04.2013 (at page 67 of the trial court record), he also having acknowledged the receipt of the aforementioned instrument (referred to as “DD”).

16. Clearly, the parleys leading to the compromise between Divik Kashyap and the petitioner (the accused) had already taken place before the parties came before the court on 26.04.2013, the submission that there was a “*possibility of settlement*” being not entirely truthful, this being reflected by the settlement followed by the tender and

acceptance of the demand draft which had been issued on the previous date.

17. Be that as it may, in the proceedings of 26.04.2013 recorded by the ACMM, there is no explanation as to why statement of complainant Pateshwar Prasad (who had come before the court for the first time after the trial had commenced on 12.09.2002) was not recorded. The said person Pateshwar Prasad (described as complainant) had no personal stake in the matter. He was an eye-witness who was unconnected with the accused and the injured persons. It is not understood as to why he was also sent for the process of mediation and made a party to the settlement agreement (Ex.P1).

18. It is only after the offence under section 338 IPC had been compounded by one of the victims (Divik Kashyap @ Mikki) that the ACMM realized that the case involved another victim as well. On the request of the petitioner (through counsel), summons were issued to the said other victim Manoj, not for his evidence, but for “*exploring the possibility of settlement*”. The proceedings are totally silent as to whether Pateshwar Prasad had been given up or his evidence had been abandoned or as to why he remained unexamined. The ACMM forgot that the petitioner was on trial for two offences one punishable under section 279 IPC and the other under section 338 IPC (which concerned more than one victim). Divik Kashyap @ Mikki, one of the victims, may have compounded the offence under section 338 IPC in so far as it concerned him. But, he remained a crucial witness for the

trial for the offence under section 279 IPC as indeed in respect of offence under section 338 IPC *qua* the other victim(s). The proceedings are silent as to why his evidence in such regard was not taken on 26.04.2013.

19. On 12.07.2013, the summons issued to Manoj returned unserved. On the next date, *i.e.*, 21.08.2013 things again moved, the following proceedings being recorded at the instance of the counsel for the petitioner:-

“21.08.2013

Present: Ld. APP for state

Accused is absent.

However, Ld. Counsel sh. Manoj Tiwari for the accused is present and moved an application for exemption of the accused from personal appearance for today only.

Heard.

In view of the reasons mentioned in the application, accused is exempted from personal appearance for today only.

The summons issued to another injured namely Manoj have been returned back unserved despite being routed through IO.

However, at this stage, Ld. Counsel Sh. Manoj Tiwari has submitted that he has instructions on behalf of accused for pleading guilty for the offence u/s 279/338 IPC. The consequences of plea of guilty has been explained to the Ld. Counsel for accused but Ld. Counsel for the accused submits that the plea of guilt of the accused is voluntarily and without any force or undue influence. Ld. Counsel further submits that since accused has been exempted for today, he has instructions to make statement on behalf of accused for pleading guilty. Separate statement of Ld. Counsel for the accused

recorded to this effect at bar. In view of the plea of guilt, the accused Gaurav Aggarwal stands convicted for the offence punishable u/s 279/338 IPC.

Heard on the point of sentence.

Ld. APP for the state prays for passing an appropriate sentence. On the other hand Ld. Counsel for the convict Gaurav prays for a lenient view as the convict has already compensated one of the victim in the sum of Rs.2,00,000/- and further on the ground that the second victim is not traceable. Ld. Counsel further prays for a lenient view on the ground that the convict is the sole bread earner for the family and is the first time offender.

I have heard the rival submissions. In my considered opinion considering the facts and circumstances of the case, the ends of justice shall meet if the convict is sentenced to pay a fine of Rs.500/- in default of payment of fine, to undergo SI for 5 days for offence punishable u/s 279 IPC and the convict is further sentenced to pay a fine of Rs.500/- in default of payment of fine, to undergo SI for 5 day for offence punishable u/s 338 IPC. Fine deposited on behalf of convict by surety Dinesh Sharma present in the court today.

Surety bond discharged. Bail bond cancelled. Documents if any be returned to the rightful owner. Superdarinama if any is also cancelled. File be consigned to record room after due compliance.”

20. It may be added that the separate statement of the counsel for the petitioner referred to in the above proceedings reads thus:-

“21.08.2013

*Statement of Sh. Manoj Tiwari, Adv. for the accused
Gaurav Aggarwal*

At bar

I am an Advocate for the accused Gaurav Aggarwal in the present case and my Vakalatnama is on record. I have instructions on behalf of accused Gaurav

Aggarwal to plead guilty for offence u/s 279/338 IPC for accused. The plea of guilty of accused is without any force or undue influence. The accused has already compensated the other injured in Mediation and has already paid a sum of Rs.2,00,000/- to the injured and I pray a lenient view for the accused in the present case.”

21. The petitioner, whose counsel had persuaded the ACMM to conclude the trial with the above mentioned proceedings on 21.08.2013, himself brought a revisional challenge in the court of sessions, terming the same to be illegal, erroneous and improper, his submissions having been summarized by the Additional Sessions Judge in the impugned order thus:-

- *“That the Ld. Trial court after exempting the personal appearance of the revisionist, on the said day could not have even permitted the counsel of revisionist to plead guilty on behalf of the revisionist or act thereupon.*
- *That moving of the application from personal exemption of the revisionist, otherwise reflects that the counsel was never authorized to plead guilty on behalf of the revisionist and as such the Ld. Trial Court could not have considered or acted upon the same. The Ld. Counsel for the revisionist had not filed any written document authorizing him to plead guilty on behalf of the revisionist.*
- *That the Ld. Trial Court ought not to have taken into consideration the oral plea of guilt which was not even unqualified of the counsel for the revisionist and Ld. Trial court could not have considered or acted upon the same.*

- *That the Ld. Trial Court could not have taken into consideration that the revisionist has pleaded not guilty to the charge/notice framed u/s 279/338 IPC against the accused and thereafter, no prosecution witness even for the name sake had been examined for 11 years and till the date of passing of the impugned order.*
- *That the Ld. Trial Court had not appreciated the fact that once an accused pleads not guilty to notice/charge framed, unless and until some evidence is led pointing to the guilt of the accused and his statement is recorded, even the plea of guilt could not have been recorded and as such the Ld. Trial Court could not have considered or acted upon the same.*
- *That the Ld. Trial Court had not recorded the statement of complainant Pateshwar and injured Divik Kashyap on the said date on merits of the case nor the prosecution examined them as witness on the aspect of offence under section 279 IPC. The proceedings reflects that the said two persons never intended to depose falsely against the revisionist. That the plea of guilt for offences u/s 279 and 338 IPC by a counsel is no plea of guilt, in the eyes of law by the revisionist and as such the Ld. Trial Court could not have considered or acted upon the same.*
- *That the Ld. Trial Court has not appreciated the fact that the other injured Manoj was not appearing and was not produced by IO for deposing as witness on many dates solely for the reason that the accident was not caused by the revisionist at all and it was also the knowledge of the injured.*
- *That Ld. Trial Court has committed grave irregularity by not taking into consideration that Divik who was driving the two wheeler was per se negligent being 16 years in age, and in the challan his age to cover up, was wrongly mentioned as 19 years.*

- *That Ld. Trial Court instead of recording plea of guilt of counsel for revisionist, ought to have acquitted the revisionist as the injured person and the complainant were not interested to appear as a witness and face consequences for deposing falsely.*
- *That there are clear, illegal, glaring defects of serious nature in impugned order and manifest error on the point of law in the order of Ld. Trial Court as such the same is liable to be set aside.”*

(emphasis supplied)

22. As mentioned above, the revisional challenge having been repelled, the present petition was filed, the background and the contentions raised having been noted on 17.08.2018 as under:-

“The petition at hand raises serious questions as to the role of the advocate who was representing the petitioner before the court of Metropolitan Magistrate on 21.08.2013. The petitioner had been summoned by the said court to stand trial for offences punishable under Sections 279/338 of Indian Penal Code, 1860 (IPC). His plea of not guilty had been recorded on 12.09.2002 on the notice under Section 251 Cr.P.C. On 21.08.2013 he was represented by Mr. Manoj Tiwari, Advocate who moved an application for exemption from personal appearance. While granting exemption from personal appearance for that day, the Metropolitan Magistrate also took note of the submission of Mr. Manoj Tiwari, Advocate that he had “instructions” on behalf of the petitioner for submitting plea of guilt. The Metropolitan Magistrate accepted the said plea and thereupon proceeded to hold the petitioner guilty convicting him for the offences punishable under Sections 279/338 IPC passing an order of sentence thereagainst.

The petitioner had challenged the said order before the court of sessions by criminal revision no. 24/2015 but the same was dismissed by order dated 12.07.2016. The orders

of the Metropolitan Magistrate and of the revisional court are assailed by the petition at hand under Section 482 of Cr.P.C., the prime contention of the petitioner being that the advocate representing the petitioner had acted unauthorisedly.

A notice shall issue to Mr. Manoj Tiwari, Advocate, returnable for 15th November, 2018. Notice be taken dasti by the petitioner and shall be served by the petitioner on own responsibility. A copy of the petition with accompanying documents and a copy of this order shall also be served with the said notice.”

23. Mr. Manoj Tiwari Advocate, who represented the petitioner before the trial Court as the defence counsel, has filed his response dated 16.04.2019 which has come on record. In his response, he has set out at some length the proceedings which were recorded before the Metropolitan Magistrate in the criminal case against the petitioner, he having engaged the counsel (Mr. Manoj Tiwari) as his advocate by *vakalatnama* executed on 17.12.2009. He would, *inter alia*, state that the petitioner is a well qualified person, earning his livelihood as a businessman, who had had some reasons on several dates to be absent, exemption having been sought on his behalf, instructions having been received through Mr. Dinesh Sharma who had stood surety for him, a person who was not only an employee of the petitioner but also his *pairokar*. He would explain the submissions made leading to the plea of guilty being entered on 21.08.2013 as pursuant to the “instructions” received through the *pairokar* and also telephonically directly from the petitioner on 26.04.2013 when the consequences of such plea had been duly explained. Mr. Manoj Tiwari, Advocate, thus, refuted the

allegations of he having acted malafide or unauthorisedly. He also referred to the fact that Mr. Dinesh Sharma, the surety (also the *pairokar*), had been present at the time of submissions being made leading to the impugned order being passed on 21.08.2013, the said person having even deposited the fine which was imposed. He referred to ground (no. AA) taken in the petition (page 7) to submit that the real intent of the petitioner is to wriggle out of the criminal antecedents arising out of the conviction because the petitioner apprehends he may not be issued visa for travel to certain countries this likely to come in the way of such foreign visits as are required “quite often in connection with his business”. At the same time, he (Mr. Manoj Tiwari, Advocate) fairly conceded at the hearing that the procedure adopted leading to the conclusion of trial by impugned order was incorrect and impermissible.

24. The petitioner was called upon, by order dated 09.05.2019, to indicate, by affidavit, his clear position as to whether Mr. Manoj Tiwari had acted on instructions or otherwise, this in view of the response dated 16.04.2019 to above effect of the counsel. He filed an affidavit sworn on 15.05.2019 stating, *inter alia*, that he would not press the legal plea of Mr. Manoj Tiwari, Advocate having acted without any authorisation conceding that he had been engaged by *vakalatnama* formally executed and that he may have acted “in good faith and bonafide” entering the plea of guilty on his behalf on 21.08.2013 adding that the need to file criminal revision petition before court of sessions, and the petition at hand, had arisen because

of the confusion that had “*cropped up*” on account of he having been (earlier) acquitted for offence under Section 338 IPC and later convicted under Section 338 IPC, without charge being framed.

25. The Code of Criminal Procedure, 1973 (Cr.P.C.) regulates the process of investigation, inquiry, or trial pertaining to criminal offences. The objective of criminal law generally is to visit the offender with consequences envisaged in law for commission of a crime. He may be given opportunity to reform by release on probation (or after admonition), or made to suffer punishment, or make amends (may be in addition to punishment) by paying compensation to the victim. The law recognizes that it may not be desirable that punishment be meted out for every criminal offence particularly if the victim wishes to condone or forgive. It is necessary that peace and tranquillity prevails in the society, and, therefore, if the offender and the victim want to amicably resolve, notwithstanding the damage suffered, the law classifies certain crimes as compoundable. There are two broad categories of compoundable offences; first, where the resolution is left to the discretion of the parties and, the second, where the compounding is subject to permission granted in its discretion by the court (such offences generally being graver than the former). Section 320 Cr.P.C. prescribes the procedure which is followed by the criminal court for dealing with a request for compounding of an offence. It specifies the offences that may be compounded and the conditions subject to which such request may be entertained. It also indicates the person who has the authority to compound the offence

with the offender. The provision for compounding contained in section 320 Cr.P.C. is definitely not restricted to any particular stage of judicial process. Noticeably, sub-sections (5) and (6) of Section 320 Cr.P.C. permit the composition for the offence to be allowed even by the Court where the appeal against conviction is pending or while acting in exercise of power of revision.

26. The Code of Criminal Procedure lays down detailed provisions for holding trial of criminal cases of various classes and at different levels. The eighteenth chapter relates to trial before a court of Sessions. The nineteenth to twenty-first chapters relate to trials by the courts of Magistrate, the last pertaining to summary trials, the first of them governing the trial of warrant cases and the second the trial of summons cases. The trial procedure, whether for the court of Sessions or before the court of Metropolitan Magistrate, runs more or less similar course, it always beginning with the formal exercise of bringing to the notice of the person accused the allegations which he is expected to meet.

27. In summons cases (which involve offences attracting punishment of imprisonment that cannot exceed two years), the above-mentioned statutory requirement is complied with by putting the accused on notice by “*particulars of the offence of which he is accused*” being “*stated to him*” it being “*not necessary to frame formal charge*” [Section 251 Cr.P.C.]. Every offence that can be tried as a summons case under the relevant part (twentieth chapter) may instead be tried in summary way, by a Metropolitan Magistrate, by

virtue of the authorisation given in Section 260 (1) (i) Cr.P.C. The “*procedure for summary trials*” is similar to that specified “*for the trial of summons case*” by virtue of Section 262 Cr.P.C., the requirement of bringing to the notice of the accused “*substance of accusation*” being fulfilled through entries recorded in prescribed format [Section 263 Cr.P.C.]. It is trite that no formal charge is framed even in summary trials.

28. In contrast, the trial of a case before a court of Sessions (under eighteenth chapter) or trial of a warrant case before Magistrate (under nineteenth chapter) begin (with some variation in cases instituted otherwise than on police report) with consideration of the record to find as to whether a case is made out for “*framing of charge*” – an exercise of great import, one which is guided by detailed provisions of a separate chapter on the issue (seventeenth chapter).

29. But, regardless of the fact as to whether the case requires framing of formal charge (as in the case of court of Sessions or a warrant trial before a Magistrate), or the trial is to be held after substance of accusation is brought to the notice of the accused (as in summons cases or summary trials), the criminal court is invariably obliged to ascertain “*the plea*” of the accused in answer thereto. Reference may be made in this context to similar provisions contained in Sections 228(2), 240(2), 246(2), 251 and 263(g) Cr.P.C. If the accused enters “*the plea of guilty*”, the judge (or magistrate) presiding over the criminal court may, “*in his discretion*”, convict him thereon [see Sections 229, 241, 246 (3) and 252 Cr.P.C]. It is well settled,

though, that the criminal court may insist on proof to be adduced by the prosecution, even if the accused is pleading guilty, and hold a trial for determining the issue of guilt or innocence on the basis of evidence. The “*discretion*” is left to the criminal court in this regard, expected to be exercised judicially, because the law bears in mind the possibility of the plea of guilty being involuntary or stemming from oblique purposes.

30. The fact, however, remains that if the accused pleads not guilty, or the plea of guilty is not acted upon to record conviction thereon, the court calling upon the prosecution to adduce its evidence in support of its case, the trial proceeds in the manner prescribed in law, it ordinarily culminating in a judgment setting out, *inter alia*, “*the points for determination*”, “*the decision thereon*” and the “*reasons for the decision*”, as indeed the final conclusions resulting in acquittal or conviction [see Sections 235, 248, 255 and 264 read with section 354 Cr.P.C.]. The prescribed criminal procedure does not conceive of the exercise of recording the plea of the accused (in answer to the charge or notice of accusation) being held more than once. Undoubtedly, the chapter (no. XXI-A) on “*plea bargaining*” permits a person accused of an offence to move an application “*for plea bargaining*”. But then, Section 265 B (1) Cr.P.C. makes it clear that such application is to be made to the Court in which such offence is “*pending for trial*”, it being implicit in the said expression that the case in which such application for plea bargaining is to be entertained cannot be one which is “*pending trial*”. Thus, the application for plea-bargaining is

entertained at a stage anterior to framing of charge or serving of notice of accusation.

31. The Criminal Procedure Code also contains a provision permitting formal proof to be dispensed with in respect of documentary evidence the genuineness of which is not disputed, in the case of admission to such effect, *inter alia*, by accused (Section 294 Cr.P.C.). The criminal trial procedure invariably also includes a stage when the accused is called upon to explain the incriminating circumstances appearing in the evidence against him, the trial court having been empowered to examine him in such regard “*at any stage*” and “*without previous warning*”, particularly “*after the witnesses for the prosecution have been examined*” and before he is called upon to adduce evidence in his defence, if any (Section 313 Cr.P.C.). Though sub-section (3) of Section 313 Cr.P.C. makes it clear that refusal to answer the questions by giving “*false answers*” to them at the stage of such examination by the court does not expose the accused to liability for punishment, sub-section (4) permits that the answers given by him “*may be taken into consideration*” in such trial.

32. It is well settled that the admission of genuineness of a documentary evidence (under Section 294 Cr.P.C.) or of certain circumstances (as brought out through the evidence) in his statement (under Section 313 Cr.P.C.) by the accused may form the basis of conclusions on facts leading to conviction for a criminal offence (see *State of UP vs. Lakhmi*, (1998) 4 SCC 336; *Dharnidhar vs. State of UP & Ors.* (2010) 7 SCC 759; *Sanatan Naskar & Anr. Vs. State of*

West Bengal (2010) 8 SCC 249; Brajendra Singh vs. State of MP (2012) 4 SCC 289; Munna Kumar Upadhyay vs. State of A.P. (2012) 6 SCC 174; and Raj Kumar Singh vs. State of Rajasthan (2013) 5 SCC 722. But, the application or use of such provisions as are contained in Sections 294 or 313 Cr.P.C. is not to be confused with the permissibility of recording a revised plea of the accused in answer to the charge or (notice of accusations).

33. In *State of Maharashtra vs. Sukhdev Singh @ Sukha & Ors.*, (1992) 3 SCC 700 (General A.S. Vaidya murder case), the accused having initially pleaded not guilty had admitted his guilt by filing a written statement, midway the trial, expressing dis-inclination to “*contest*” and such written statement containing admission of guilt was also put to him during his statement under Section 313 Cr.P.C. The case resulted in conviction and award of death sentence which was eventually brought to challenge before the Supreme Court. It is against the said backdrop that the court observed that there was nothing in the relevant chapter (on trial before the court of Sessions) which prevented the accused from pleading guilty “*at any subsequent stage of trial*”.

34. Something similar happened during the trial leading to the judgment which was under challenge before the Supreme Court in *Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid vs. State of Maharashtra (2012) 9 SCC 1* (Mumbai Terrorist Attack case). Midway the stage of prosecution evidence, the prime accused had addressed the Court stating that “*he was accepting his guilt*”. The

prosecution had objected to plea of guilty being entertained on the ground that the stage of Section 229 Cr.P.C. (*“conviction on plea of guilty”*) was already over. The trial court over-ruled the objection and allowed the accused *“to make a statement”* which was recorded after giving him due caution. The Supreme Court, in this context, approved of the objection being over-ruled observing, *inter alia*, that *“though structurally and sequentially the statement made in the court is completely different from the confessional statement made before the Magistrate, it has broadly the same contents”*. It was, however, noted that the statement made midway the trial by the said accused was *“very diluted and partial admission of only some of the charges”* and, therefore, not acted upon.

35. It is apparent that both in *Sukhdev Singh* (supra) and *Mohammed Ajmal Mohammad Amir Kasab* (supra), the statements containing admissions of certain facts *“constituting guilt”* were more in the nature of statements under Section 313 Cr.P.C.. The fact remains, however, that in both cases, conviction was recorded not on the basis of such admissions but on the basis of evidence adduced by the prosecution bringing home the guilt, not the least on a revised plea of guilty.

36. There are other weighty reasons to take the view against recourse to plea of accused being revised and recorded again in the course of on-going trial. In the event of charge being altered, by addition or modification (in terms of Section 216 Cr.P.C.), the process continues (unless a case of prejudice is made out necessitating *“new*

trial” or discontinuance), “*after such alteration or addition*”, the court proceeding further with the trial “*as if the altered or added charge had been the original charge*” [Section 216(3) Cr.P.C.]. Noticeably, Section 216 Cr.P.C., which is to be read with Section 217 Cr.P.C. (guiding as to how the court is expected to act after alteration or addition to the charge) does not provide for fresh plea of accused being recorded, the exception applicable only in the event of “*new trial*” being ordered- under Section 216 (4).

37. Two judgments of learned single judges of Madras High Court can be referred to with advantage in the present context. The first of them *In re: M. Kuppuswamy*, 1966 SCC Online Mad 265, 1968 CrL LJ 416 related to a case under Madras Prohibition Act for offence of possession of alcoholic substance without permit committed on 14.09.1965 and thus governed by the provisions of the Code of Criminal Procedure, 1898 (“old Cr. PC”) which preceded the extant Code of Criminal Procedure, 1973 (“new Cr. PC”). The procedure adopted was that of summons trial and the accused had been questioned under Section 242 of old Cr. PC (corresponding to Section 251 of new Cr.PC), in answer to which he had pleaded not guilty. The Magistrate thereafter had called upon the prosecution to produce its witnesses. Before any witness could be examined, a memo was submitted by the accused through his counsel admitting the offence. The Magistrate accepted the said plea and convicted the accused thereon though extending to him the benefit of Probation of Offenders Act. Later, the accused himself challenged the said conclusion by

filing an affidavit claiming that a fraud had been played upon him by the advocate who had been engaged and that he had been made to sign on certain papers, he not having pleaded guilty at all.

38. The Madras High Court examined the above-said contention by seeking responses from the Magistrate and also from the concerned advocate. The revision petition was allowed and the order of conviction set aside, the case directed to be retried, the court observing thus :-

“6. Section 244 says that if the accused does not admit the offence, the Magistrate shall proceed to hear the complainant if any and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take evidence in his defence. Section 245 says that if the Magistrate upon taking the evidence referred to in S. 244 and such further evidence desired by the Magistrate and if he thinks fit, examining the accused, finds the accused not guilty, he shall record an order of acquittal. But if he finds him guilty he may pass sentence upon him according to law. Thus, there is no provision contemplating the filing of a memorandum by the accused admitting his guilt after the initial stage under S. 243, Criminal P.C. The decision of Somasundram J. in In re Kadan Kunhikannan, 1957 1 Mad LJ 151 : (AIR 1957 Mad 795) is distinguishable, because there the prosecution witnesses were examined as required by S. 244, Criminal P.C., and it was only when the accused was further questioned under S. 245, Criminal P.C., they admitted the offence and the learned Judge held that the court was justified in accepting the prosecution evidence and acting, on the admission of the accused at that stage. Sri Sreeramulu appearing for the learned Public Prosecutor is not able to cite any authority to justify the procedure which was adopted in this case. On this ground I set aside the conviction and sentence and direct the case to be retried by some other magistrate.”

39. The judgment in *Aravinda vs. Ravindra Singh and Anr.*, 1980 SCC Online Mad 188, 1981 CrL LJ 155 referred with approval to the above quoted decision in *Kuppuswamy* (supra). The factual matrix was slightly different. The case founded on police report initially involved accusations of offence punishable under Section 326 IPC (*voluntarily causing grievous hurt by dangerous weapons or means*). It was thus put on trial as a warrant case by the Magistrate, the charge having been framed and the plea of the accused having been recorded under Section 240(2) Cr. PC, he opting not to plead guilty and thus claiming to be tried. It appears that after recording the plea, the prosecution was called upon to lead evidence and the complainant (the victim) was examined (as PW1). Before other witnesses could be examined, the court deemed it fit to alter the charge, in exercise of its powers under Section 216 Cr. PC. The charge was modified from one for the offence under Section 326 IPC to that for the offence under Section 324 IPC (*voluntarily causing hurt by dangerous weapons or means*). In answer to this altered charge, the accused entered the plea of guilty. The court proceeded to hold him guilty for the offence under Section 324 IPC on the basis of such plea, also recording conviction for the offence under Section 341 IPC for which no formal charge had been framed.

40. The above procedure was challenged by the victim (PW1) before the Madras High Court. The revision petitions were allowed, *inter alia*, taking note of the fact that it was not a case where the criminal court had directed a “new trial” in terms of Section 216(4)

Cr. P, nor had it acted upon the evidence in as much as the power under Section 313 Cr. PC to question the accused at any stage or after the witnesses for prosecution have been examined was not put to use. The judgment of conviction based on such fresh plea, after alternation of charge, was set aside on the following reasoning :-

“4. In the present case, the accused refused to plead guilty and hence the case has proceeded in accordance with Section 242 Cr. P.C. It is true the Court has got the power to alter or add to the charge already framed under S. 216, Cr. P.C. There is no indication that the Court wanted to exercise the powers, and in fact, exercised the powers under Section 216(4), Cr. P.C. with reference to directing a new trial so that it can be stated that a fresh contingency for resorting to Section 240(2), Cr. P.C. had arisen. This is also not a case where the court has exercised the powers under S. 313, Cr. P.C. which enables the court to question the accused at any stage or to question him after the witnesses for the prosecution have been examined and before he is called on for his defence. In the instant case, the accused has chosen to put in a petition voluntarily admitting the offence under S. 324, I.P.C. after the charge has been altered. It is not possible to spell out any such power for the court to accept such a statement at that stage from the accused and pass orders of conviction and sentence on the plea of the accused in a case arising under S. 243, Cr. P.C., Venkataraman, J. in Kuppaswami in re, 1967 Mad LW Cri 1 : (1968 Cri LJ 416), discountenanced such a procedure and found a warrant for setting aside the conviction and sentence and directing a re-trial. The ratio adopted by the learned Judge applies with equal force to the facts of the present case. The judgment of the court below for the reasons set out above, cannot be sustained and has got to be set aside. Accordingly these two revisions are allowed and the judgment of the court below is set aside and the matter will stand remitted back to the file of the court below, for it to proceed on with the examination of

the witnesses that may be produced by the prosecution and disposal of the case in accordance with law.”

41. Similar view was taken by Calcutta High Court in *Lalji Ram vs. Corporation of Calcutta*, AIR 1928 Cal.243: 1924 SCC Online Cal. 494; by Travancore –Cochin High Court in *Daveed Chellayan vs. State* AIR 1957 Travancore-Cochin 89; by Madhya Pradesh High Court in *Shivnarayan vs. State*, 1960 JIJ 1015 and by Gujarat High Court in two decisions viz. *Jayanti Luxman vs. State of Gujarat*, 1964 (2) Cri. L. J. 86 and *Kishorchandra Bhanushanker vs. Bhavnagar Municipality and Anr.* AIR 1969 Guj. 290: 1969 CriLJ 1248.

42. This Court is conscious of the fact that Patna High Court, Allahabad High Court and Kerala High Court have taken opposite view in their decisions reported as *Shyama Charan Bharthuar & Ors. vs. Emperor*, AIR 1934 Patna 330; *Ram Kishun vs. State of U.P.* 1996 Cri. L.J. 440: 1994 SCC Online All 950 and *Santhosh vs. State of Kerala* 2003 SCC Online Ker. 93. The said decisions have treated the revised plea of guilty tendered by the accused (after having earlier pleaded not guilty) as “*withdrawal*” of the earlier claim to be tried. Interestingly, Patna High Court, at the same time, accepted that such procedure may be an “*irregularity*” but termed it as one which was “*curable*”. The above-mentioned judgments in case of *Ram Kishun* (supra) and *Santhosh* (supra) justified the approach on the reasoning that there is “*no prohibition*” in the Criminal Procedure Code for such (revised) plea of guilty to be tendered at subsequent stage.

43. In the considered view of this Court, the above approach is inadvisable as it provides scope for tinkering with the prescribed procedure, a view that leads to slippery slope. Such view is in the teeth of well-settled principle that criminal law (both substantive and procedural) must be construed, applied and enforced strictly. Though observed in a different context in *Subramaniam Sethuraman vs. State of Maharashtra & Anr.* (2004) 13 SCC 324, the Supreme Court ruled that once plea of the accused is recorded (under Section 252 Cr.P.C. in that case), the procedure contemplated (for trial) has to be followed for the case to be taken to its logical conclusion. Framing of charge and the recording of plea of accused are not mere rituals, they are fundamental part of the procedure of criminal trial as statutorily prescribed. Such procedure cannot be ignored or tinkered with for, to borrow the words of Supreme Court in *Willie (William) Slaney vs. The State of Madhya Pradesh*, AIR 1956 SC 116 : 1956 Cr.LJ 291, to do so is “to replace the provisions of the Code by a procedure unwarranted by the statute itself”.

44. It bears repetition to say that the Code of Criminal Procedure does not provide for recording the plea of the accused (in answer to the charge framed against, or notice of accusations put to, him) more than once. If the accused pleads not guilty (or if his plea of guilty is not acted upon) and the prosecution is called upon to furnish proof of guilt, the procedure prescribed for trial resulting eventually in judgment based on evidence is to follow. This holds good even if the charge is altered in terms of Section 216 Cr. PC. If after the addition

or alteration of charge, the court is of the opinion that prejudice is likely to be caused to the accused in his defence on account of such alteration or addition, it may direct “*a new trial*” in terms of Section 216(4) Cr. PC. It is inherent in this that the procedure applied and the proceedings recorded anterior to such stage stand effaced on account of direction for *de-novo* trial. Necessarily, in such event, the charge, or notice, will have to be framed afresh. If in such new trial, the charge is framed or notice of accusation served, the accused will have the liberty to enter a fresh plea which may be plea of guilty or not guilty. But generally speaking, in the trial that continues, even after alteration or addition of charge [under Section 216(3) Cr. PC], the case cannot revert to the stage of recording the plea of the accused.

45. To put it simply, once the trial has commenced, the prosecution having been called upon to adduce its witnesses (in the wake of accused having pleaded not guilty or notwithstanding the plea of guilty entered by him), the case must result in the judgment (of conviction or acquittal) only on the basis of evidence. Without doubt, the admission of evidence or of facts showing complicity in acts that constitute the guilt of an accused as appearing in proceedings held under Section 294 Cr.P.C. or his statement under Section 313 Cr. PC can be basis of the final judgment of conviction. But then, it is inherent in this that such admission(s) would be read as confirming the credibility of the evidence formally adduced at the trial and, therefore, the decision would essentially be founded on evidence and not (merely) on admission(s) or plea of guilty.

46. Tested on the touchstone of the above principles, the procedure followed by the Metropolitan Magistrate in the proceedings recorded on 21.08.2013 cannot be countenanced or approved of.

47. The notice of accusations (under Section 251 Cr.P.C.) had been served on 12.09.2002 in answer to which the petitioner had pleaded not guilty. Whilst it must be added that the notice framed required improvement, in that there was no reference to the injuries suffered by other two persons (Manoj and a child), the stage of recording the plea of accused was over with the petitioner having informed the court that he intended to contest and was not pleading guilty. In this view, there would be no occasion in the subsequent proceedings for a revised plea to be entertained. The petitioner's objection is correct that he had not "*formally*" authorised Mr. Manoj Tiwari, Advocate to enter the fresh plea of guilty for purposes of proceedings recorded on 21.08.2013. But, there is no reason why the explanation of the counsel about the instructions given by the petitioner to such effect – telephonically and through his *paikar* – ought to be disbelieved. As has been noted earlier, the petitioner had been scrupulously and consistently avoiding appearance in person. He was virtually contesting the case through his *paikar* and/or his counsel, seeking exemption from personal appearance at will. His *paikar* was present at the time of the impugned proceedings and had even deposited the fine amount which was imposed, this fact having been duly noted in the order dated 21.08.2013. It is inconceivable that the *paikar*, employee of the petitioner (also his surety), would take such interest in the proceedings

offering to even pay the monetary penalty, without any instructions. But since the recording of revised plea of guilty was impermissible in law, the final decision rendered by order dated 21.08.2013 not being based on any evidence that had been adduced, the conclusion of the criminal case by the impugned order is vitiated and will have to be set aside.

48. In his challenge to the impugned order dated 21.08.2013, the petitioner has taken the grounds, *inter alia*, of no prosecution witness having been examined for eleven years, the accusation against him being false because the crucial witnesses (Pateshwar Prasad and Divik Kashyap) being reluctant to depose “falsely” the negligence leading to the motor vehicular accident being attributable to the said Divik (he being 16 years in age at the relevant point of time as against wrong mention of 19 years’ age), and the petitioner being entitled to acquittal. These submissions cannot be accepted at this stage of the judicial process as nothing has been brought on record till date in support. Whilst it is true that the statement of the crucial witnesses have not been recorded as prosecution evidence by the trial court, there is nothing before the court from which it could be inferred that the statements of such witnesses (when taken) would not be truthful or that a false case has been set up against the petitioner, or that the accident occurred due to negligence of the person named Divik.

49. On the contrary, the proceedings recorded in the trial court show not only lack of control by the presiding judicial officer (s) over the trial but also elusive and dilatory conduct on the part of the

petitioner. At the cost of repetition, reference needs to be made to the numerous adjournments taken by him or on account of reasons attributable to him. Substantial part of blame for the inordinate delay which had occurred in the prosecution of the criminal case, till it was disposed of by order dated 21.08.2013, will have to be shared by the petitioner and his counsel. In these circumstances, it does not lie in his mouth to refer to the delay for relief in the nature of acquittal order to be accorded to him since it will not be fair justice to let him get away with the benefit of his own wrongs, particularly when the trial Magistrate was misled (which the Magistrate should have been wary against) by him into adopting a wholly impermissible procedure in bringing curtain on the prosecution case.

50. Before concluding, it is necessary to place on record strong disapproval of this Court to the manner in which the trial in the above-mentioned criminal case has been regulated by such senior judicial officer as holding the rank of Additional Chief Metropolitan Magistrate (ACMM). To recapitulate, the defect and deficiency in the notice under Section 251 Cr.PC. tells poorly on the comprehension of the prosecution case by the presiding judge. The record demonstrates that for seven years, no effort was made to secure the presence of material witnesses, which is unacceptable. Crucial witnesses were present on 26.04.2013 but no interest was shown by the Magistrate in securing their evidence. Matter was adjourned because the ACMM was informed that there is a possibility of settlement. The ACMM should have borne in mind that offence under Section 279 IPC was not

compoundable. Before sending away the eye-witness (Pateshwar Prasad), without his evidence being recorded, the ACMM should have remembered that even if the offence under section 338 IPC were to be compounded by the victim(s), he would still need the testimony of the said eye-witness for the offence (under section 279 IPC) the charge of which would remain pending for adjudication. Only, one of the two victims (of offence under Section 338 IPC) had compounded the offence qua him by receiving Rs. 2 lakhs as compensation. In the opinion of the ACMM, ends of justice would stand satisfied with fine of Rs. 500/- only with regard to the charge under Section 338 IPC which had survived qua other similarly placed victim Mikki. A total disparity in the approach, even in the matter of sentencing in the same case, is also a matter of concern and discomfort. It smacks of a whimsical approach which the criminal system justice can only ill-afford.

51. As concluded earlier, the impugned proceedings recorded on 21.08.2013 suffered from illegality and consequently are liable to be set aside. While the main prayer in the petition to that effect is bound to be granted, this Court cannot shut its eye to the reality that it is the petitioner at whose instance and on whose account the misdirected and miscued procedure was applied.

52. In the given fact-situation, there is no question of the result of the case being upturned so as to give the benefit of acquittal of the petitioner. He must face the criminal case insofar it relates to the accusations of the offence under Section 279 IPC as indeed of the

offence under Section 338 IPC insofar as the other victim(s) are concerned.

53. Given the fact that the petitioner had taken the trial court for a ride and also had the cheek and temerity or gall to accuse his own counsel of misconduct, the ends of justice will not be met unless he is burdened with costs so that there is deterrence against indulgence in such unscrupulous behaviour affecting the criminal justice administration in future.

54. For the foregoing reasons, and in the circumstances, the impugned order dated 21.08.2013 of the Additional Chief Metropolitan Magistrate, and order dated 12.07.2016 of the revisional court, are set aside, the petitioner being burdened with costs of Rs. 1,00,000/- (Rupees one lakh), which he is directed to deposit with concerned District Legal Services Authority prior to the date he appears next in the court of Additional Chief Metropolitan Magistrate in terms of directions that follow. The Additional Chief Metropolitan Magistrate shall take up the criminal case against the petitioner for further proceedings in accordance with law on 02.09.2019, on which date the petitioner will be duty bound to appear with counsel engaged by him as per his choice. The trial court will consider and effect suitable corrections in the notice under Section 251 Cr.PC. in light of the observations recorded above before fixing the case for further evidence of the prosecution. Given the fact that the case has suffered unreasonable delay, it is essential that the trial is concluded at the earliest. Therefore, it is directed that this case shall be taken up on

day-to-day basis till the judgment is rendered on conclusion. The trial court will make all necessary endeavour in accordance with law to secure the presence of all relevant witnesses and ensure that they are examined on the day they appear. It will be the responsibility of the petitioner to remain present in person with counsel, duly briefed, ready to assist on the first call of the case. No pass over, deferment or adjournment will be allowed. If the costs, as imposed above, are not deposited, the trial court will issue necessary process in accordance with law to recover the same in the manner of recovery of fine, taking the assistance of police authorities, and coordinating with Secretary of the concerned District Legal Services Authority.

55. A copy of this judgment shall also be sent to Director (Academics) of the Delhi Judicial Academy.

R.K.GAUBA, J.

JULY 22, 2019

Vk/yg/nk