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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Misc. Petition No.444 of 2015

Order reserved on: 26-4-2019

Order delivered on: 13-5-2019

Harshad Gupta, S/o Bhagirathi Gupta, aged about 24 years, Occupation Service, R/o Village Baghbahar, P.S. Baghbahar, District Jashpur (C.G.)

---- Petitioner

Versus

State of Chhattisgarh, Through Police Station Baghbahar, District Jashpur (C.G.)

---- Respondent

For Petitioner:	Mr. Shakti Raj Sinha, Advocate.
For Respondent/State:	Mr. Chandresh Shrivastava, Deputy Advocate General and Mr. Aakash Pandey, Panel Lawyer.
Amicus Curiae:	Mr. Prasun Kumar Bhaduri and Mr. Gary Mukhopadhyay, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. The short but interesting question as to the competence of the succeeding Sessions Judge to hear the convicted accused person on the question of sentence under Section 235(2) of the Code of Criminal Procedure, 1973 on the basis of the judgment of conviction recorded and already pronounced by the Sessions Judge (his predecessor-in-office) is tasked upon to this Court in the instant petition on the following set of facts: -

2. The petitioner herein was charge-sheeted by the jurisdictional police for commission of offence punishable under Sections 376 & 506 of the IPC and that was the subject matter of S.T.No.72/2013 in the Court of Additional Sessions Judge, Kunkuri, District Jashpur. After full-fledged trial, Mr. J.R. Banjara, learned Additional Sessions

Judge posted the case for final argument on 28-4-2015 and after hearing the arguments, fixed the case for pronouncement of judgment on 30-4-2015. On that date, unfortunately, the petitioner / accused therein suffered accident that lead to filing of application under Section 317 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), that was granted and he was allowed to appear through his counsel representing him and ultimately, on that day, the judgment of conviction of the petitioner herein for offence punishable under Sections 376(1) & 506 of the IPC was pronounced. However, on the request of his counsel, the matter was adjourned for hearing on the question of sentence as well as for his appearance on 4-5-2015. Again on 4-5-2015, time was sought, that was granted for 15-5-2015. In between 4-5-2015 and 15-5-2015, Presiding Officer Mr. J.R. Banjara, who convicted the petitioner herein, was subjected to transfer by the High Court and the matter came-up for hearing before the new Presiding Officer / Additional Sessions Judge Mr. Mohd. Rizwan Khan on 15-5-2015 who fixed the case for hearing on the question of sentence. Thereafter, the petitioner herein approached this Court by way of this petition under Section 482 of the Code questioning the proceeding taken by Mr. Khan, Additional Sessions Judge, and seeking hearing afresh, as conviction stands vitiated since sentence was not awarded by the then learned Additional Sessions Judge, and to pass final judgment in accordance with Sections 353 & 354 of the Code in which the State of Chhattisgarh has filed a short reply and said that the petition deserves to be dismissed.

3. Mr. Shakti Raj Sinha, learned counsel appearing for the petitioner /

accused, would make two fold submissions: -

1. The petitioner having been convicted by Mr. J.R. Banjara, learned Additional Sessions Judge, on 30-4-2015 has already been transferred after pronouncement of the judgment of conviction and therefore the presiding officer who has taken over as Additional Sessions Judge, Kunkuri could not hear only on the question of sentence, but he has to hear also on the question of conviction as well, as he is jurisdictionally incompetent to hear only on the question of sentence in view of the provisions contained in Sections 235(2), 353 & 354(1)(c) of the Code.

2. The learned Additional Sessions Judge pronouncing the judgment on 30-4-2015 has failed to comply the provision contained in Section 353(1) & (3) of the Code, as the substance of the judgment was not explained to the counsel for the petitioner / accused and it was not signed and dated by the presiding officer in open Court, and he has not recorded in the order sheet dated 30-4-2015. As such, the judgment dated 30-4-2015 as well as the subsequent proceeding be set aside and the matter be remitted to the learned Additional Sessions Judge for hearing the arguments afresh and passing judgment in terms of Section 353(3) of the Code.

4. Mr. Sinha, learned counsel for the petitioner / accused, would rely upon the following decisions of various Courts to buttress his submissions:-

1. **Chinnayar v. Maung Mya Thi and others**[1].
2. **Mahomed Rafique v. King-Emperor**[2].
3. **Mahadeo Apparao Wale v. Isamiya Abdul Aziz**[3].
4. **Surendra Singh and others v. State of Uttar Pradesh**[4].
5. **Jitender alias Kalle v. State**[5].
6. **Santa Singh v. The State of Punjab**[6].

5. Mr. Chandresh Shrivastava, learned Deputy Advocate General appearing for the State/respondent, would submit that the learned Additional Sessions Judge on 30-4-2015 determined the guilt of the petitioner herein and finding him guilty, convicted the petitioner herein under Sections 376(1) & 506 of the IPC and fixed the case for hearing on sentence in accordance with Section 235(2) of the Code, but on the request of the petitioner, as he was not present on that day, and by virtue of the provision contained in Section 235 of the Code, new presiding officer who had taken over in place of Mr. J.R. Banjara, Additional Sessions Judge, is competent to hear the accused on the question of sentence. He would further submit that non-compliance of the provisions contained in Section 353(1) & (3) of the Code, if any, is of no consequence in view of the provisions contained in Section 465 of the Code and therefore the criminal miscellaneous petition deserves to be dismissed. He also placed strong reliance upon the judgment of the Supreme Court in **Surendra Singh** (supra).

6. Mr. Prasun Kumar Bhaduri, learned *amicus curiae* assisting the

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1 AIR 1939 Rangoon 249
2 AIR 1926 Cal 537
3 1958 SCC OnLine Bom 79
4 AIR 1954 SC 194
5 Crl.A.No.666/2010, decided on 2-11-2012
6 (1976) 4 SCC 190

Court, would bring to the notice of this Court the judgment rendered by the Supreme Court in the matter of **Ramdeo Chauhan v. State of Assam**[7] in which their Lordships have reiterated the legal position regarding the necessity to afford opportunity of hearing to the accused on the question of sentence. He would also invite the attention of this Court to the decision rendered by the Supreme Court in the matter of **Yakub Abdul Razak Memon v. State of Maharashtra Through CBI, Bombay**[8] (Bombay Blast Case) qua the method of sentencing. Lastly, he has brought to the notice of this Court the recent pronouncement rendered by their Lordships in the matter of **Accused 'X' v. State of Maharashtra**[9].

7. Mr. Gary Mukhopadhyay, learned *amicus curiae*, would draw the attention of this Court towards the decision rendered by the Supreme Court in the matter of **Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker**[10] to buttress his submission that the learned Additional Sessions Judge acting as a presiding officer was not the *persona designata* and therefore on his transfer, the Additional Sessions Judge / his successor-in-office is entitled to pick the thread of the proceedings from the stage where it was left by his predecessor and can function as an Additional Sessions Judge.

8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

9. In view of the submissions of learned counsel for the parties,

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7 (2001) 5 SCC 714
8 (2013) 13 SCC 1
9 2019 SCC OnLine SC 543
10 (1995) 5 SCC 5

following two questions arise for consideration: -

1. Whether, the successor-in-office of the Court of Sessions who tried the sessions trial, is empowered to hear only on the question of sentence under Section 235(2) of he Code and award sentence on the basis of conviction recorded and pronounced and signed & dated by his predecessor-in-office (Judge)?

2. Whether, non-compliance of the provision contained in Section 353(1)(c) of the Code would render the judgment pronounced by the learned Additional Sessions Judge invalid in law, as in the order dated 30-4-2015 it has not been recorded by the learned Additional Sessions Judge while pronouncing the judgment that the judgment of conviction is signed and dated?

10. As noticed herein-above, the petitioner herein was tried for offence under Sections 376 & 506 of the IPC and after hearing the submissions of both the parties, the learned Additional Sessions Judge on 30-4-2015, posted the case for pronouncement of judgment, but somehow, the accused could not present there as he is said to have suffered accident, but granting his application under Section 317 of the Code, the judgment was pronounced in presence of his counsel and the said judgment was signed and dated, which is available in the original record of Sessions Trial No.72/2013, though the fact of signing and dating the judgment was not recorded in the order sheet dated 30-4-2015 and thereafter, the case was adjourned from 4-5-2015 to 15-5-2015 and Presiding Officer Mr. J.R. Banjara, who convicted the petitioner herein, was

transferred and new incumbent Mr. Mohd. Rizwan Khan took over on 15-5-2015. For the sake of convenience, the order dated 30-4-2015 is reproduced herein-below: -

30/04/2015 राज्य की ओर से श्री बी०आर० यादव ए०जी०पी० उपस्थित । अभियुक्त हर्षद गुप्ता अनुपस्थित, द्वारा श्री दिवाकर गुप्ता अधिवक्ता उपस्थित ।

श्री दिवाकर अधिवक्ता ने आरोपी की ओर से उपस्थिति ज्ञापन पेश किया ।

श्री दिवाकर अधिवक्ता ने आरोपी की ओर से आज की अनुपस्थिति माफी बाबत् आवेदन पत्र धारा 317 द०प्र०सं० पेश कर निवदन किया कि कुनकुरी आते समय आरोपी हर्षद गुप्ता की मोटर सायकल में दुर्घटना हो गई है, जिसके कारण उसे गंभीर चोंटे आयी है । उसे उपचार हेतु पत्थलगांव के अस्पतला ले जाया गया है, जिसके कारण आज वह उपस्थित हो पाने में असमर्थ है । इसी आधार पर समय दिये जाने का निवेदन किया । विचारोपरांत दर्शित कारण को ध्यान में रखते हुए आरोपी हर्षद गुप्ता की उपस्थिति क्षम्य किया जाता है तथा उनकी ओर से उसके अधिवक्ता की उपस्थिति स्वीकार किया जाता है ।

प्रकरण आज अंतिम निर्णय हेतु नियत है । अतः पृथक से निर्णय टंकित कर आरोपी को उनके अधिवक्ता के माध्यम से निर्णय सुनाया गया । निर्णयानुसार आरोपी के विरूद्ध धारा 376 (1), 506 भा०दं०वि० के तहत अपराध सिद्ध होना पाया गया है । आरोपी अधिवक्ता के निवेदन पर दण्ड के विषय पर सुनवाई हेतु समय दिया जाता है तथा निर्देशित किया जाता है कि आगामी तिथि पर आरोपी चिकित्सा प्रमाण–पत्र के साथ स्वयं उपस्थित रहें ।

प्रकरण वास्ते आरोपी की उपस्थिति एवं दण्ड के प्रश्न पर सुनवाई हेतु दिनांक–04/05/2015

सही/–
(जे०आर० बंजारा)
अपर सत्र न्यायाधीश कुनकुरी
जिला जशपुर (छ०ग०)

11. On 4-5-2015, again the matter was adjourned at the request made on behalf of the accused / petitioner and the case was adjourned for 15-5-2015, and by then, new Additional Sessions Judge took over the trial who passed following order which states as under: -

15/05/2015 राज्य द्वारा अपर लोक अभियोजक श्री बी०आर० यादव उपस्थित ।

अभियुक्त हर्षद गुप्ता अनुपस्थित, द्वारा श्री दिवाकर गुप्ता अधिवक्ता उपस्थित ।

अभियुक्त की ओर से इस आशय का आवेदन पत्र प्रस्तुत किया गया है कि उसकी एक्सीडेंट हो गया है तथा उसके उपचार में समय लगने की संभावना है । अतः उसकी हाजिरी अधिवक्ता के माध्यम से सामुदायिक स्वास्थ्य केंद्र पत्थलगांव की उपचार पर्ची दिनांक 13/05/2015 के साथ प्रस्तुत किया गया है ।

दण्ड के प्रश्न पर अभियुक्त को सुना जाना है । चूंकि अभियुक्त के उपचार में समय लगने की संभावना है । अतः उक्त आवेदन पत्र स्वीकार किया जाता है ।

प्रकरण वास्ते दण्ड के प्रश्न पर सुनवाई हेतु दिनांक– 28/05/2015

सही/–
(मोहम्मद रिजवान खान)
अपर सत्र न्यायाधीश कुनकुरी
जिला जशपुर (छ०ग०)

12. The aforesaid quotation of two orders of that Court would show that firstly, Mr. J.R. Banjara, the then ASJ – Presiding Officer, adjourned the matter for hearing on the question of sentence in compliance with the legislative provision contained in Section 235(2) of the Code and thereafter, since he was subjected to transfer, new incumbent Mr. Mohd. Rizwan Khan on the request made on behalf of the petitioner / accused, adjourned the matter facilitating him to make submission on the question of sentence which has been questioned herein.

13. In order to answer the question, it would be appropriate to notice certain statutory provisions contained in the Code of Criminal Procedure, 1973. Section 2(g) of the Code defines “inquiry” as every inquiry, other than a trial, conducted under this Code by a Magistrate or Court. Section 6 of the Code inter alia provides that

there shall be, in every State, the following classes of Criminal Courts, namely:—

(i) Courts of Session;

(ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates;

(iii) Judicial Magistrates of the second class; and

(iv) Executive Magistrates.

14. Section 26 of the Code, under Chapter III, provides, Courts by which offences are triable, which states as under: -

> "**26. Courts by which offences are triable**.—Subject to the other provisions of this Code,—
>
> (a) any offence under the Indian Penal Code (45 of 1860) may be tried by—
>
> (i) the High Court, or
>
> (ii) the Court of Session, or
>
> (iii) any other Court by which such offence is shown in the First Schedule to be triable;
>
> Provided that any offence under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code (45 of 1860) shall be tried as far as practicable by a Court presided over by a woman.
>
> (b) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by—
>
> (i) the High Court, or
>
> (ii) any other Court by which such offence is shown in the First Schedule to be triable."

15. Section 28 of the Code provides sentences which High Courts and Sessions Judges may pass. Sub-section (2) of Section 28 provides that a Sessions Judge or Additional Sessions Judge may pass any

sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court. Section 35 provides, powers of Judges and Magistrates exercisable by their successors-in-office, which states as under: -

> "**35. Powers of Judges and Magistrates exercisable by their successors-in-office**.—(1) Subject to the other provisions of this Code, the powers and duties of a Judge or Magistrate may be exercised or performed by his successor-in-office.
>
> (2) When there is any doubt as to who is the successor-in-office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor-in-office of such Additional or Assistant Sessions Judge.
>
> (3) When there is any doubt as to who is the successor-in-office of any Magistrate, the Chief Judicial Magistrate, or the District Magistrate, as the case may be, shall determine by order in writing the Magistrate who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor-in-office of such Magistrate."

16. By virtue of Section 35 of the Code and it is also well settled that the powers and duties of a Judge or Magistrate may be exercised or performed by his successor-in-office, as the powers under the Code having been conferred on courts, they could be exercised by the successor-in-office.

17. The Supreme Court in the matter of **Ajaib Singh and another v. Joginder Singh and another**[11] while dealing with Section 559 of the old Code i.e. the Code of Criminal Procedure, 1898, which is *pari materia* to Section 35 of the present Code, has clearly held that a successor-in-office of a Magistrate can file a complaint under Section 476 of the CrPC, 1898 (old Code) in respect of an offence under Section 195 of the IPC committed before his predecessor-in-

11 AIR 1968 SC 1422

office.

18. The Delhi High Court in the matter of **M.L. Gulati and others v. J.L. Birmani**[12] while considering the powers of succeeding Magistrate to issue process in a complaint of which cognizance had earlier been taken by his predecessor-in-office, has held that power and jurisdiction of the Code has been conferred to the Court and made out a distinction between "Court" and "*persona designata*" as under: -

> "7. As was pointed out in the referring order, there is a clear and definite distinction between a "Court", properly so-called, and a "persona designata". When seizin is taken of a matter by a persona designata, it is a decision or cognizance of a matter by a designated person, authorised to do so in that behalf. Where, however, a matter, whether of a civil nature, or of criminal nature, is filed in a Court, properly so-called, cognizance or seizin is taken by the court and there is a distinction between the "Court" and Judicial Officer, who, for the time being, presides over it. When a persona designata, who has taken seizin of a matter ceases to exercise jurisdiction, for any reason, his successor is perhaps incapable of exercising jurisdiction unless specifically designated as such. Where, however, a Court is properly seized of a matter, the change in its Presiding Officer does not make any difference, and since the Court had taken seizin of the matter, no further cognizance or seizin, by the succeeding Presiding Officer, is necessary until there is a specific provision or a known principle of law in that behalf, which may necessitate such a course. Court is the institution and the seat of judicial power, the presiding officers are the human instrumentality through whom the Court functions and exercises the power. Presiding Officers come and go, the Court, until abolished, survives the movement of the presiding officers."

19. Their Lordships highlighting the importance of trial to be decided by the Judge who had dealt with the matter, had held as under: -

> "8. Ordinarily, it is the policy of law, in civil, criminal and other proceedings, that a matter before a Court is decided, as far as possible, by the Presiding Officer, who had dealt with the matter, at the earlier stages because the Presiding Officer, who has for example, examined

12 1986 Cri.L.J. 770

> evidence, has had first hand impression of the witnesses, the conduct of the parties, as indeed, the demeanour of the witnesses, and would, therefore, be in the best position to decide the questions in controversy between the parties. This is, particularly, so on the criminal side as an essential emanation of the requirement of a "just and fair trial". It is, however, not always possible to follow this practice, either on the civil or the criminal side, and the matters have invariably to be decided by Presiding Officers, who have not recorded evidence, or where the evidence was recorded, and other stages of the proceedings were conducted, partly by such Presiding Officers, and partly by one or more of his predecessors-in-office. The enabling provisions of Section 35 and Section 326 of the Cr.P.C. with certain additional safeguards built into the proviso to sub-section (1) of Section 326 of the Cr.P.C. are based on the legislative recognition of such eventualities. Section 326, however, on one reckoning, if due weight is given to the head-note, would appear to be inapplicable to any inquiry, other than an inquiry in committal proceedings, although the body of the section does not appear to admit of such a limitation, particularly, having regard to the fact that the expression "inquiry" has been defined by Section 2(g) of the Code to mean, "every inquiry, other than a trial, conducted under this Code by a Magistrate or Court" and would, therefore, be wide enough to include an inquiry by a Court, seized of a complaint under Chapter XV thereof. On general principle, therefore, there could be no bar to a succeeding Magistrate continuing the proceedings in an inquiry or a trial from the stage where the succeeded Magistrate left them off."

20. In light of the above, the submission of learned counsel for the petitioner that the Presiding Judge, who had convicted the petitioner, ought to have heard on the question of sentence under Section 235(2) of the Code, deserves to be rejected, as the power and jurisdiction is conferred to the Court and the Presiding Judge who had convicted the petitioner herein was not *persona designata*. It is well settled that an authority can only be styled to be persona designata if powers are conferred on a named person or authority and such powers cannot be exercised by anyone else.

21. The Supreme Court in the matter of **Central Talkies Ltd. v.**

Dwarka Prasad[13] held that a persona designata is 'a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character'. The decision rendered in **Dwarka Prasad's** case (supra) has been followed by the Supreme Court in **Mukri Gopalan** (supra). In the matter of **SBP & Co. v. Patel Engineering Ltd. and another**[14], it has been held by the Supreme Court that persona designata are the persons selected to act in their private capacity and not in their capacity as Judges.

22. Therefore, the submission of the learned counsel for the petitioner that the learned Additional Sessions Judge – Mr. J.R. Banjara, who convicted the petitioner / accused, ought to have heard him necessarily on the question of sentence under Section 235 of the Code, otherwise conviction rendered by him sans merit and deserves to be rejected as against the public policy.

23. At this stage, it would be appropriate to notice Section 235(2) of the Code, which reads as follows: -

> "**235. Judgment of acquittal or conviction.**—(1) xxx xxx xxx
>
> (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."

24. The object of Section 235 (2) of the Code is to give a fresh opportunity to the convicted person to bring to the notice of the court such circumstances as may help the court hearing on the question of sentence in awarding an appropriate sentence having

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13 AIR 1961 SC 606
14 (2005) 8 SCC 618

regard to the personal, social and other circumstances of the case. (See **Tarlok Singh v. State of Punjab**[15].)

25. The Supreme Court in the matter of **Narpal Singh and others v. State of Haryana**[16] in which the case triable by the court of session was not heard on the question of sentence after the judgment was delivered, Their Lordships while considering the provisions contained in sub-section (2) of Section 235 of the Code, at the end, while confirming conviction, the order awarding sentence was set aside and the matter was remitted to the trial Court for passing judgment after hearing the accused and indicated two stages in the trial refuting de novo trial by observing as under: -

> "Once the Judge who hears the evidence delivers a judgment of conviction, one part of the trial comes to an end. The second part of the trial is restricted only to the question of sentence and so far as that is concerned, when a case is remitted by Appellate Court (Supreme Court) to the Sessions Court for giving a hearing on the question of sentence under Section 235(2), there would be fresh evidence and the principle that the Sessions Judge may not act on evidence already recorded before his predecessor and must conduct a de novo trial would not be violated.
>
> When the case was thus remitted to the Sessions Judge to give an opportunity to both sides to lead fresh evidence only on the question of sentence, it was not necessary for the Sessions Judge to hold a de novo trial."

26. In **Santa Singh** (supra), the Supreme Court has clearly held that it is incumbent on the Sessions judge delivering a judgment of conviction to stay his hands and hear the accused on the question of sentence and give him an opportunity to lead evidence which may also be allowed to be rebutted by the prosecution.

27. Thus, it is quite vivid that trial comes to an end, only after the

15 AIR 1977 SC 1747
16 AIR 1977 SC 1066

sentence is awarded to the convicted person. It is also clear that after the court records a conviction, the accused has to be heard on the question of sentence and it is only after the sentence is awarded, judgment becomes complete and can be appealed against under Section 372 of the Code, as such, there are two stages up to recording of conviction and stage post conviction up to imposition of sentence. A judgment becomes complete after both these stages are covered.

28. At this stage, it would be appropriate to notice the decision of the Supreme Court rendered in **Surendra Singh** (supra) in which Their Lordships have clearly held that as soon as the judgment is delivered, that becomes the operative pronouncement of the Court and further held that the final operative act is that which is formally declared in open court with the intention of making it the operative decision of the Court. What constitutes the "judgment" is indicated in paragraphs 4, 10, 11, 12 and 14 of the report which are pertinent and are reproduced herein: -

> "4. Delivery of judgment is a solemn act which carries with it serious consequences for the person or persons involved. In a criminal case it often means the difference between freedom and jail, and when there is a conviction with a sentence of imprisonment, it alters the status of a prisoner from an under-trial to that of a convict; also the term of his sentence starts from the moment judgment is delivered. It is therefore necessary to know with certainty exactly when these consequences start to take effect. For that reason rules have been drawn up to determine the manner in which and the time from when the decision is to take effect and crystallise into an act which is thereafter final so far as the court delivering the judgment is concerned.
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> 10. In our opinion, a judgment within the meaning of these sections is the final decision of the Court intimated to the parties and to the world at large by formal "pronouncement" or "delivery" in open court. It is a

judicial act which must be performed in a judicial way. Small irregularities in the manner of pronouncement or the mode of delivery do not matter but the substance of the thing must be there; that can neither be blurred nor left to inference and conjecture nor can it be vague. All the rest – the manner in which it is to be recorded, the way in which it is to be authenticated, the signing and the sealing, all the rules designed to secure certainty about its content and matter – can be cured; but not the hard core, namely the formal intimation of the decision and its contents formally declared in a judicial way in open Court. The exact way in which this is done does not matter. In some Courts the judgment is delivered orally or read out, in some only the operative portion is pronounced, in some the judgment is merely signed after giving notice to the parties and laying the draft on the table for a given number of days for inspection.

11. An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the Court as it is at the time of pronouncement. We lay no stress on the mode or manner of delivery, as that is not of the essence, except to say that it must be done in a judicial way in open Court. But, however, it is done it must be an expression of the mind of the Court at the time of delivery. We say this because that is the first judicial act touching the judgment which the Court performs after the hearing. Everything else up till then is done out of Court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open Court with the intention of making it the operative decision of the Court. That is what constitutes the "judgment".

12. Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of 'locus paenitentiea' and indeed last minute alterations often do occur. Therefore, however, much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the Court. Only then does it crystallise into a full fledged judgment and become operative. It follows that the Judge who "delivers" the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the Court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be

> physically present in court but he must be in existence as a member of the Court and be in a position to stop delivery and effect an alteration should there be any last minute change of mind on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views it can be assumed that those are still his views at the moment of delivery if he is alive and in a position to change his mind but takes no steps to arrest delivery. But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A Judge's responsibility is heavy and when a man's life and liberty hang upon his decision nothing can be left to chance or doubt or conjecture; also, a question of public policy is involved. As we have indicated, it is frequently the practice to send a draft, sometimes a signed draft, to a brother Judge who also heard the case. This may be merely for his information, or for consideration and criticism. The mere signing of the draft does not necessarily indicate a closed mind. We feel it would be against public policy to leave the door open for an investigation whether a draft sent by a Judge was indended to embody his final and unalterable opinion or was only intended to be a tentative draft sent with an unwritten understanding that he is free to change his mind should fresh light drawn upon him before the delivery of judgment.
>
> 14. As soon as the judgment is delivered, that becomes the operative pronouncement of the Court. The law then provides for the manner in which it is to be authenticated and made certain. The rules regarding this differ but they do not form the essence of the matter and if there is irregularity in carrying them out it is curable. Thus, if a judgment happens not to be signed and is inadvertently acted on and executed, the proceedings consequent on it would be valid because the judgment, if it can be shown to have been validly delivered, would stand good despite defects in the mode of its subsequent authentication."

29. From the aforesaid judgment, it is quite vivid that once the judgment is shown to have validly delivered, it would stand good and effective between the parties even if it has any defect of authentication in delivering the judgment.

30. Reverting to the facts of the present case in light of the above-stated discussion, it is quite vivid that the judgment of conviction duly recorded by the Additional Sessions Judge was pronounced in

the presence of counsel for the petitioner / accused on 30-4-2015 as noticed herein-above by reading out the judgment and it was signed and dated by the learned Additional Sessions Judge who authored it and available on record, though it was not formally recorded in the order sheet dated 30-4-2015 that the judgment after pronouncement is signed and dated, and the learned Additional Sessions Judge adjourned the matter for hearing the petitioner / accused on the question of sentence recording the reasons as mandated in the Code and in the meanwhile, he has been transferred. As such, since the accused / petitioner was not present by then, conviction of the accused is not vitiated and would stand valid. Even otherwise, hearing of the accused in compliance of Section 235(2) of the Code is the statutory requirement and there has to be an effective hearing on the question of sentence. There is no legislative mandate requiring the Presiding Judge who had convicted the accused to hear on the question of sentence on the date on which he was convicted and it can be adjourned to secure full and effective compliance of the provision contained in Section 235(2) of the Code. If the interpretation as suggested by learned counsel for the petitioner is accepted, the opportunity enumerated in Section 235(2) of the Code would remain an idle formality which is against the legislative wish.

31. In the matter of **Ramdeo Chauhan alias Raj Nath v. State of Assam**[17], the Supreme Court has reiterated the legal position regarding the necessity to afford opportunity for hearing to the accused on the question of sentence and it has been observed in

17 (2001) 5 SCC 714

paragraph 33 of the report as under: -

> "33. xxx xxx xxx
>
> *(1)* When the conviction is under Section 302 IPC (with or without the aid of Section 34 or 149 or 120-B IPC) if the Sessions Judge does not propose to impose death penalty on the convicted person it is unnecessary to proceed to hear the accused on the question of sentence. Section 235(2) of the Code will not be violated if the sentence of life imprisonment is awarded for that offence without hearing the accused on the question of sentence.
>
> *(2)* In all other cases the accused must be given sufficient opportunity of hearing on the question of sentence.
>
> *(3)* The normal rule is that after pronouncing the verdict of guilty the hearing should be made on the same day and the sentence shall also be pronounced on the same day.
>
> *(4)* In cases where the Judge feels or if the accused demands more time for hearing on the question of sentence (especially when the Judge proposes to impose death penalty) the proviso to Section 309(2) is not a bar for affording such time.
>
> *(5)* For any reason the court is inclined to adjourn the case after pronouncing the verdict of guilty in grave offences the convicted person shall be committed to jail till the verdict on the sentence is pronounced. Further detention will depend upon the process of law."

32. Recently, in **Accused 'X'** (supra), Their Lordships have summed up the conclusion qua the opportunity of hearing to accused under Section 235(2) of the Code, as under: -

> "38. As noted above, many cases have grappled with the question as to the choice between the two. The approach of this Court needs to be rationalized and understood in the light of cautionary approach discussed above. From the aforesaid discussion, following *dicta* emerge-
>
> i. That the term 'hearing' occurring under Section 235 (2) requires the accused and prosecution at their option, to be given a meaningful opportunity.
>
> ii. Meaningful hearing under Section 235 (2) of CrPC, in the usual course, is not conditional upon time or

number of days granted for the same. It is to be measured qualitatively and not quantitatively.

iii. The trial court need to comply with the mandate of Section 235 (2) of CrPC with best efforts.

iv. Non-compliance can be rectified at the appellate stage as well, by providing meaningful opportunity.

v. If such an opportunity is not provided by the trial court, the appellate court needs to balance various considerations and either afford an opportunity before itself or remand back to trial court, in appropriate case, for fresh consideration.

vi. However, the accused need to satisfy the appellate courts, *inter alia* by pleading on the grounds as to existence of mitigating circumstances, for its further consideration.

vii. Being aware of certain harsh realities such as long protracted delays or jail appeals through legal aid etc., wherein the appellate court, in appropriate cases, may take recourse of independent enquiries on relevant facts ordered by the court itself.

viii. If no such grounds are brought by the accused before the appellate courts, then it is not obligated to take recourse under Section 235(2) of CrPC."

33. In my considered opinion, considering the solemn object of granting opportunity of hearing to the accused under Section 235(2) of the Code as mandated by the Legislature, the matter was adjourned and meanwhile, the Presiding Judge was transferred on administrative side by administrative order of the competent authority and thus, it cannot be held that conviction already recorded is vitiated requiring setting aside of that order and directing fresh opportunity of hearing to the petitioner / accused and granting such an opportunity would even otherwise be extending premium to the petitioner for his own wrong as he did not appear on 30-4-2015, the date fixed for pronouncing judgment though he claimed to be medically unwell, but no document has been filed to demonstrate that he suffered accident and was not in a position to

attend the Court. In sum and substance, it cannot be held that the learned Additional Sessions Judge is unjustified in adjourning the matter giving opportunity to the accused for hearing on the question of sentence under Section 235(2) of the Code and his subsequent transfer and fixing the case for hearing on the question of sentence by his successor-in-office would invalidate the conviction already recorded and the matter do not require de novo trial / question of hearing the matter afresh by the ASJ now holding and presiding the said Court.

34. Lastly, it has been contended by learned counsel for the petitioner that order sheet dated 30-4-2015 nowhere states that the then Presiding Officer Mr. J.R. Banjara, after pronouncement of judgment in open court, signed and dated as mandated by Section 353(3) of the Code. Therefore, the judgment, if any, is not at all, cannot be said to be a judgment pronounced. Section 353(3) of the Code provides as under: -

> "**353. Judgment**.—(1) xxx xxx xxx
>
> (2) xxx xxx xxx
>
> (3) Where the judgment or the operative part thereof is read out under Clause (b) or Clause (c) of sub-section (1), as the case may be, it shall be dated and signed by the presiding officer in open Court, and if it is not written with his own hand, every page of the judgment shall be signed by him."

35. True it is that the then Presiding Officer Mr. J.R. Banjara pronounced the judgment in open court as per Section 353(1) of the Code, signed and dated the judgment as original judgment is available on record, but did not record in the order dated 30-4-2015 that he has signed and dated; but that is saved by Section 465 of the Code, as the petitioner has failed to demonstrate that failure of

justice has in fact been occasioned thereby. In the matter of **Iqbal Ismail Sodawala v. The State of Maharashtra and others**[18], Their Lordships of the Supreme Court appropriately observed as under: -

> "8. … The Code of Criminal Procedure is essentially a code of procedure and like all procedural law, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. At the same time it has to be borne in mind that it is procedure that spells much of the difference between rule of law and rule by whim and caprice. The object of the Code is to ensure for the accused a full and fair trial in accordance with the principles of natural justice. If there be substantial compliance with the requirements of law, a mere procedural irregularity would not vitiate the trial unless the same results in miscarriage of justice. ..."

36. Falling back to the facts of the case; and in view of the provision contained in Section 465 of the Code and the principle of law laid down in **Iqbal Ismail Sodawala** (supra), since the Presiding Judge after pronouncing the judgment on 30-4-2015 not only signed the judgment of conviction, but also dated it and it is very well available on record, merely because, it is not so recorded in the order sheet of that court on 30-4-2015, it cannot be held that it has resulted in miscarriage of justice vitiating the conviction warranting setting aside of the judgment of conviction.

37. The judgments relied upon by Mr. Sinha, learned counsel for the petitioner, in **Chinnayar** (supra), **Mahomed Rafique** (supra) and **Mahadeo Apparao Wale** (supra) are clearly distinguishable to the facts of the present case. In these cases, succeeding Magistrate delivered the judgment written by his predecessor. Likewise, in Jitender alias Kalle (supra), the judgment dictated and signed by Additional Sessions Judge-II Mr. Bharat Parashar was pronounced

18 (1975) 3 SCC 140

by succeeding Additional Sessions Judge Dr. Kamini Lau, which is not the case here. As such, the above-stated judgments are quite distinguishable.

38. As a fallout and consequence of the aforesaid discussion, the petition deserves to be and is accordingly dismissed. The learned Additional Sessions Judge, Ambikapur is directed to hear the accused on the question of sentence as mandated under Section 235(2) of the Code and thereafter to proceed further in accordance with law.

39. This Court appreciates the assistance rendered by Mr. Prasun Kumar Bhaduri and Mr. Gary Mukhopadhyay, learned *amicus curiae*.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Misc. Petition No.444 of 2015

Harshad Gupta

Versus

State of Chhattisgarh

Head Note

The accused can be heard on the question of sentence under Section 235(2) of the Code of Criminal Procedure, 1973, either by Sessions Judge convicting him for the offences or by the succeeding Sessions Judge.

दंड प्रक्रिया संहिता, 1973 की धारा 235(2) के अंतर्गत अभियुक्त को दंड के प्रश्न पर, या तो उसे अपराध हेतु दोषसिद्ध किये जाने वाले सत्र न्यायाधीश द्वारा या उत्तरवर्ती सत्र न्यायाधीश द्वारा सुना जा सकेगा।