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FOR FAST TRACK JUSTICE
DOCTRINE OF “NOLO CONTENDERE”
DOES IT NOT DESERVE A TRIAL?

1. It is well known that arraignment is the event occurring at the general trial Court level that formally initiates the trial process. As such, it is the first official occasion at which the accused is given an opportunity to answer the accusation. Here, at this stage, accused is required to enter a plea. Arraignment is held in open court and generally begins with a formal reading of the indictment or charge by which the accused is again formally advised of the charges against him. In U.S., at this stage, he is again advised of his constitutional guaranteed rights of counsel and protection against self-incrimination. Accused is, therefore, required to answer the charge by entering a plea at this juncture. No doubt, the plea may take one of the several forms.

2. Accused may plead guilty to the crime as charged or to a lesser offence. A plea of guilty to a lesser offence often results from plea bargain although the defence-attorney can never ethically tell his client how to plead, but he can advise him if it appears that the state's case against him is so strong that it is unlikely he will be found innocent by going to trial. On the original charge against him, he can admit, on behalf of the accused the bargain with the prosecutor to accept a guilty-plea in exchange for a reduced charge and save the time and expenses to the State of going to trial. More often than not, the prosecutor will accept the offer because it frees him from more rapidly to proceed with other important trial matters and also save the State the expenses of a trial. It will be interesting to mention at this stage that in many local courts, as many as 90% of the cases are settled in this way or in such a manner. Once bargained agreement has been reached, the prosecutor, the defence-attorney, and the defendant, will go to the Judge and ask him to accept the plea of guilty to the lesser charge. They must convince the Judge that the defendant, of his own initiative, desires to so plead and that there has been no plea-bargaining since the practice is not officially approved of. When the plea is voluntarily made and that no promises have been

made out that the sentence would be lighter, though if he is to choose to pursue his constitutional right to trial and was found guilty, if the Judge is satisfied that the plea is voluntary and in accord with the true wishes of the accused, he may accept the plea.

3. However, it may also be recalled that a plea of guilty, even to the crime charged in open court, need not be accepted by the Judge, if he believes that either the defendant was coerced into plead guilty, if he does not understand the significance of his plea, or if, really, he may not be guilty. If, guilt is accepted, the Judge then sets date and time for sentencing. It should be pointed out that under the law of some States in United States, trial is required and plea to guilty to a capital case may not be accepted. Of course, the case is required to be fixed for trial by the Judge if accused does not plead guilty.
4. In U.S., in some jurisdictions, the plea of “**Nolo Contendere**” is available. “**Nolo Contendere**” or ‘no contest’ is not an ‘admission of guilt’, but rather a ‘willingness to accept declaration of guilt’, rather than to go to trial. It is treated as a guilty plea to serve one purpose not served by a guilty plea in a subsequent civil suit possibly arising

out of some event. Guilty plea is admissible as evidence against the defendant but plea of “**Nolo Contendere**” is not. It may be stated that the expressing, “defendant” is used in India in the civil dispute against whom civil action is taken whereas in U.S., this expression is used in criminal trial also, and, thus, the defendant is an accused. David Gordon has observed that the latin word, ‘nolo’ means ‘I do not chose it’. This statement, variously, defined as ‘plea’ and ‘not a plea’ indicates that defendant will not fight the charges against him of the same immediate effect as a guilty plea. It admits the fact charged, but cannot be used as a confession of guilt in other proceedings. Acceptance by a Court is discretionary.

5. A judgment of conviction entered on a plea of “**Nolo Contendere**” may be used by the accused as the basis of plea of double jeopardy since conviction and punishment, after the nolo plea operate for the protection of the accused against subsequent proceedings, is as full as a formal conviction or acquittal after a plea of guilty or not guilty.
6. In recent years, there appears to be renaissance of the doctrine of “**Nolo Contendere**” in criminal proceedings. It is, particularly,

evident in the Federal Courts in the United States, where it is said, thousands of defendants-accused have entered the plea to indictments, notwithstanding that they are violating the entrusted and income-tax laws. The plea, which raises no issue of law or fact under the accusation, is not one of the pleas, generally or specially, open to the accused in the criminal prosecutions, and is allowable only on leave and acceptance by the Court. It has, also, been interpreted that, as such, it is not a plea in strict sense of the realm of criminal law, but rather to unanimously plead the presence of the defence. By this plea, the accused makes a formal declaration that he is not going to contend with the prosecuting agency under the charge as observed in State Exrel Clark Vs. Adams, 363 US 807.

7. As held in Fox V/s Schedib and in State Exrel Clark Vs. Adams, 363, US 807, the plea of “**Nolo Contendere**”, sometimes called, also, “Plea of Nolvult” or “Nolle Contendere” means, in its literal sense, “I do not wish to contend”, and it does not origin in early English Common Law. This doctrine is, also, expressed as an implied confession, a quasi-confession of guilt, a plea of guilty, substantially though not technically a conditional plea of guilty, a substitute for

plea of guilty, a formal declaration that the accused will not contend, a query directed to the Court to decide on plea-guilt, a promise between the Govt. and the accused, and a government agreement on the part of the accused that the charge of the accused must be considered as true for the purpose of a particular case.

8. It could, therefore, very well be seen from the aforesaid various observations and statements that it is difficult to define the process and exactly the nature of “**Nolo Contendere**”, but regardless of the label attached, it appears that for all practical purposes, a plea of “**Nolo Contendere**” is a plea of guilty and equivalent thereof.
9. A plea of “**Nolo Contendere**” is employed by the accused in criminal cases to avoid executing an admission, which could be used as an admission in other judicial litigation. However, it may be noted that in “United States V/s. Pannell, 339 US 927”, it has been observed that the plea, “**Nolo Contendere**”, was retained in the Federal Criminal Procedure (FCP), Rule 11, “to preserve and sometimes usefully devised by which a defendant may admit his liability to punishment without being importantly raised in other proceedings.” In many

jurisdictions in United States, the liability does not support a conditional plea of “**Nolo Contendere**”. At times, this plea is used by the accused with a view to avoiding trial to test attending expenses and adverse public suit in the event of conviction, or to protect in certain cases the respectable citizens, who may sometimes become technically guilty of a violation of law, but who should not be subjected to certain penalties, intended to apply to only those, who willfully or maliciously violate the law. It has also been decided that the plea of “**Nolo Contendere**” means a particular not entriasted by the prosecution.

10. The accused cannot, by qualifying the plea of “**Nolo Contendere**”, curtail the Courts discretionary power. The plea of “**Nolo Contendere**” is not recognized in any circumstances in some jurisdictions in US. The main ground assigned for refusing to recognize this plea is either that there is no provision for the plea in the criminal law statutes of the State or, therefore, by implication, it is not available to the accused, or that the plea has been outlawed by express statutory provisions. True is the fact that in some jurisdictions, in some of the States, either expressly or by implication,

such a plea is recognized as a part of their legal system. In some of these, it is stated that the act with statutes on criminal procedure has failed to make specific provisions for or it does not make it any appropriately.

11. In U.S. in the celebrated case in Hudson Vs. U.S. 363 U.S. 807, it has been observed that in the absence of statutes to the contrary, the Courts cannot accept a plea of “**Nolo Contendere**” for capital offence. It is, also, interesting to mention that in some Courts, this plea is not accepted where imprisonment is mandatory on conviction of the offence charged. In Federal Courts, a number of States jurisdictions accept the “**Nolo Contendere**” in a felony cases as well as in misdemeanor case. However, there are some jurisdictions, in which the plea is accepted in cases of misdemeanor exclusively punishable by a fine or for which imprisonment or fine are alternative punishments. In U.S., such plea has been accepted in great variety of cases; although in most of them, questions of the propriety of the plea has been decided in cases referred to earlier. However, it is important to note that such plea has been accepted in prosecutions for crimes against the persons, against the property, against the public peace,

public decency or good morals, public justice and in prosecutions for other offences and statutory violations.

12. Be it noted that raising of plea of “**Nolo Contendere**” is not ipso facto, a matter of right of the accused. It is within the particular discretion of the Court concerned to accept or reject such a plea. However, if the Court accepts such plea, it must do so unqualifiedly. It is, therefore, clear that in such plea once accepted, by the Court, the accused may not be denied, his right to raise such plea. The Court cannot accept such plea having rights of the accused and determination of facts on any questions of law. Of course, the discretion of the Court, if plea is accepted, has to be exercised in light of special facts and circumstances of the given case. It is, also, held at times that such discretion vested in the Court has to be used only when special considerations are present. It is, also, important to mention at this stage that in the absence of statutory provisions to the contrary, consent of the prosecutor is not required as a condition for refusing the plea of “**Nolo Contendere**” by the Court. And the fact that the prosecutor’s consent is not generally required would not tantamount to non-consideration of his version or attitude. The Court

is required to consider the prosecutor's version as an important factor in influencing the Court in deciding whether such plea should be accepted or not.

13. Upon the acceptance of a plea of "**Nolo Contendere**" for the purpose of the case in which such a plea is made, it becomes an implied confession of the guilt equivalent to a plea of guilty; that is, the incidence of plea. So far as a particular criminal action in which the plea is offered is concerned, rather than the same, has of a plea of guilty. Of course, it is not necessary that there should be adjudication by the Court that the party whose plea is accepted is guilty, but the court may immediately impose sentence. This proposition is very well elucidated in United States Vs. Risfeld 340 US 914. However, it may be noted a new dimension was evolved in Lott Vs. United States 367 US 421 where the Court, after stating that the plea is tantamount to an admission of a guilt for the purposes of the case, added that the plea itself, does not constitute a conviction and hence, is not a determination of guilt. As found from some of the judicial pronouncements, it is beyond the purview of the Court once a plea of

Nolo Contender is needed to make in adjudication to the guilt of the accused.

14. The plea of “**Nolo Contendere**”, like a demurer, admits, for the purpose of the case, all facts, which are well pleaded, and when the plea is accepted by the Court, there would not survive any issue or fact. It, therefore, follows that the Court cannot, after having decided to accept such a plea, go on hearing the sentence to decide the fact of the guilt of the accused. No doubt, it is open for the Court to hear the evidence for a limited purpose of deciding the quantum of sentence upon punishment. Equally true is the fact that the prosecutor has no right to make any agreement or promise as to the sentence, which could bind the Court, and the fact that such a plea has been entered in reliance on an agreement or promise of a prosecutor. As to the sentence that could be imposed, standing alone, does not also restrict the power of the court to impose sentence in accordance with the law. It will be interesting to note that where the punishment provided for an offence is both, imprisonment or a fine, a plea of “**Nolo Contendere**” does not preclude a Court from imposing the sentence of imprisonment. There is also restriction on the Court to impose a fine

only. However, there are some Courts, which have taken view that when plea is accepted by the Court, the punishment will be limited to fine only and not the imprisonment. On this question, unfortunately, I have not been able to lie on authoritative pronouncement of the US Supreme Court (Federal).

15. Be it also mentioned that raising of such a plea would also result into waiver of all formal defects and also the right of the accused to go to a trial. Upon entering a plea of “**Nolo Contendere**”, an accused waives all defences other than that the indictment charges. No offence, as held in *Crolich V/s. United States* 344 US 830, of such a plea to a non-existent crime is not binding and a motion to affect judgment and sentence, obviously, would, therefore, lie. Such a plea, except under extraordinary circumstances, leaves open for review, but for one thing, namely, the sufficiency of an indictment. This principle is also very well upheld in *United Brotherhood of Carpenters V/s. United States* 330 US 395. An accused, therefore, can raise the objection that the accusatory pleading did not charge a crime despite entering into a plea of “**Nolo Contendere**” and acceptance thereof by the Court.

16. There is a fine distinction between a plea of “**Nolo Contendere**” and a plea of guilty. A plea of guilty has a confession that binds in other proceedings, but the plea of “**Nolo Contendere**” has no effect except in a particular case, in which it has been raised. Such a plea cannot be utilized against the accused in a civil suit for the same act, and it cannot be used as an admission of guilt even in any other criminal case. The accused is entitled to raise a plea of double jeopardy, in a case, when conviction is founded upon “**Nolo Contendere**”, since both conviction, after the Nolo plea operate for the protection of the accused against subsequent proceedings, is as full as a formal conviction or acquittal after a plea of guilty or not guilty.
17. It is, of course, within the discretion of the Court concerned to permit the plea to be withdrawn and replaced by another form of plea or to refuse to permit its withdrawal. Having been accepted by the Court, it is only the discretion of the Court to consider the request for the withdrawal upon the insistence of the accused. A rejection of the withdrawal, if not abused of judicial discretion, obviously, would not violate the constitutional rights of an accused. It would, also, be noticed that a Court, that has accepted the plea of “**Nolo**

Contendere”, might also set it aside without any request from the accused, if the Court is convinced about the innocence of the accused. In Federal Courts in United States, the extent of Courts in United States, the extent of Courts power in regard to the withdrawal of such a plea is circumscribed by a statutory provision – generally the plea, may be permitted to be withdrawn only before sentence is imposed or imposition of sentence is suspended, but that the Court may permit withdrawal of such a plea even after such a plea is based on suspicion in order to correct latent, patent or manifest-injustice ensued to the accused.

18. It will be interesting to refer Rule 32(d) of Federal Rules of Criminal Procedure, which is applicable to withdrawal of such a plea. After sentencing in a criminal case, in providing with motions to withdraw, a plea of guilty or “**Nolo Contendere**” may be made only “before sentence is imposed or the imprisonment of sentences is suspended”. However, it provides a qualification that after sentence has been imposed the Court may set aside a judgment of conviction and permit accused to withdraw suitably if so action is required “to get manifest injustice”. The motion to withdraw a plea of “**Nolo Contendere**” in

this federal rule has to be addressed to the Trial Court's discretion. The Trial Court, being moved may reverse only if it is satisfied that the discretion was misused or abused. Although the federal rule does not impose a limitation on the withdrawal of plea after sentence, it has to be exercised in the rarest of rare case and it may be resorted to only upon making out of a case of "grave and manifest-injustice". The burden of establishing the allegation rests upon the person making the motion. In case of conflict of testimony of hearing of the motion, results of the conflict, obviously will be within the judicial discretion and the domain of the trial court.

19. The plea of "**Nolo Contendere**", barring a few percentages of cases, has been recognized in the administration of criminal justice in many countries, including the United States, and has resulted into substantial reduction in the workload of the criminal justice system. Such a plea, it has been stated, has a success of practical aspect over the technical one. In the criminal justice delivery system, should India not consider the introduction and employment of such a plea when Courts are flooded with astronomical arrears, the trial life-span is inordinately long and the expenditure is very heavy, as an effective

alternative dispute resolution in certain identified criminal cases? This issue, undoubtedly, requires serious consideration at this juncture. When we are at the crossroads and Courts are obliged to engage itself in early, easy, less-expensive and simple way of disposal of criminal cases in the criminal justice system.

20. A plea by the accused or equivalent of one is a general requisite for a proper criminal trial. Even from the angle of due process of law, it requires that an accused shall plead or be ordered to plead, or in the proper case that the plea of not guilty be filed for him before his trial can conveniently proceed. As such, plea is not a mere formality. There is a purpose and policy behind it and it is to make an issue. A plea is an integral segment of the commencement of criminal trial process and trial. There are certain kinds of pleas, which could be articulated here as under:

1. Plea in abetment.
2. Plea of formal jeopardy.
3. Plea of “**Nolo Contendere**”.

21. The plea of “**Nolo Contendere**” in our country is not used in strict sense in absence of any statutory provision or necessary enactment. However, this plea plays a very important role in many jurisdictions in United States, Scotland and other European and non-European Courts.
22. When in India the Courts are flooded with astronomical arrears of cases and reduction of backlog of cases is very important and out of the pending cases, almost 70% - 80% of the cases are arising from criminal jurisdiction, and again, reportedly, the rate of conviction is below 6 out of 100 cases, could it be not said that it is opportune time to, at least, consider such a plea which has been usefully and successfully employed as an effective ADRM in some parts of the world and that too, in petty matters and minor penalty cases in which only individuals interest is concerned, and that too on experimental basis for a short period, as one of the means and methods to reduce the unbreakable backlog of cases in India and particularly in Criminal Courts. I have selected this jurisprudential Doctrine of “**Nolo Contendere**” for discussion, debate and deliberations with a view to find out whether in certain type of criminal cases and in certain type of identified and earmarked criminal trials, it will prove to be an

effective ADR or not, which, hitherto, in many jurisdictions, in foreign countries, has been gainfully and successfully used, in the realm of Criminal Justice System. Does it not deserve a Trial?

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