

2014 (0) AIJEL-HC 232363

GUJARAT HIGH COURT

Hon'ble Judges:M.R.Shah and S.H.Vora JJ.

Shahrukhkhan Abdulraufkhan Babankhan Pathan Versus Azaruddin Valiuddin Saiyed

SPECIAL CRIMINAL APPLICATION (QUASHING) No. 3770 of 2013 ; *J.Date :- JULY 11, 2014

- CONSTITUTION OF INDIA Article - 226 , 21
- CODE OF CRIMINAL PROCEDURE, 1973 Section - 273
- INDIAN PENAL CODE, 1860 Section - 302 , 324 , 506(2)

Indian Penal Code, 1860 - S. 302, 324, 506(2) - Constitution of India - Art. 21, 226 - Code of Criminal Procedure, 1973 - S. 273 - use of video conferencing - Trial Court passed order to conduct trial through Video Conferencing - apprehension that as accused persons are head strong persons and on the date of hearing more than 100 persons attend the trial - petition - contended that such trial violates Art. 21 of Constitution and there is no express provision to conduct trial by video conferencing - held, witnesses are likely to be influenced and they may not give the deposition fearlessly - use of video conferencing can be allowed in interest of society victim's right recognised vis-a-vis rights of accused - provisions of Art. 21 of the Constitution not violated - by use of video conferencing time of courts, Police Authority etc. can be saved - petition dismissed.

Imp.Para: [6][7][8][9][10]

Cases Referred To :

1. Krishna Gobe V/s. State Of Maharashtra, 1973 4 SCC 23
2. Sakshi V/s. Union Of India, 2004 5 SCC 518
3. Shakshi V/s. Union Of India, AIR 2004 SC 3566
4. State Of Maharashtra P.C.Singh V/s. Dr. Praful B.Desaid, 2003 4 SCC 601 : 2003 (2) GLH 447 : 2003 (3) GCD 1721 : 2003 (3) GHJ 1082 : 2003 CrLJ 2033
5. State Of Maharashtra V/s. Praful B Desai, AIR 2003 SC 2053 : 2003 (2) GLH 447 : 2003 (3) GCD 1721 : 2003 (3) GHJ 1082 : 2003 CrLJ 2033

Equivalent Citation(s):

2015 (1) GLH 566 : 2014 JX(Guj) 1035

JUDGMENT :-

M.R.SHAH, J.

1 Present Special Criminal Application has been preferred by the petitioner herein-original accused for appropriate writ, direction and order to quash and set aside the impugned order passed by the learned trial Court- learned 6th Additional Sessions Judge, Ahmedabad (Rural), Mirzapur, Ahmedabad passed below Exh.12 in Sessions Case No.25 of 2013 dated 15.11.2013, by which, learned trial Court has allowed the said application submitted by the original informant / complainant and has ordered the trial / case to be conducted through Video Conferencing.

2 The facts leading to the present application in nutshell are as under:

2.1. That the petitioner is an accused of an offence registered vide CR-I-28 of 2012 registered with Sarkhej Police Station for the offences punishable under Sections 302, 324, 506(2) and 34 of the Indian Penal Code. That respondent no.1 herein-original informant submitted the application before the learned trial Court vide Exh.12 requesting to conduct the trial / case via / through Video Conferencing alleging inter alia, that all the accused are very head strong persons and on every adjournment more than 100 persons come in the Court and are giving threats to the informant, his persons and witnesses. It was also alleged that there are all possibilities of danger to his life as well as life of the witnesses and due to such threats, it is likely that he and / or the witnesses may not be able to give evidence / deposition freely and independently and therefore, the same is likely to have ultimate effect on the trial. That the learned trial Court fixed the said application for hearing. That the said application was opposed by the petitioneroriginal accused by filing written reply at Exh.14. That by impugned order, the learned trial Court has allowed the said application Exh.12 and has directed that the case to be conducted via / through Video Conferencing and the accused who are in jail may not be brought to the Court.

2.2. Feeling aggrieved and dissatisfied with the impugned order of trial / case conducted through Video Conferencing, the petitioner herein-original accused / one of the accused has preferred present Special Criminal Miscellaneous Application under Article 226 of the Constitution of India.

3 Shri Umesh Trivedi, learned advocate appearing on behalf of the petitioner-accused that the learned Judge has materially erred in directing to conduct the trial through Video Conferencing and dispense with the presence of the accused in the Court at the time of recording of evidence before the Court. It is submitted by Shri Umesh Trivedi, learned advocate for the petitioner-accused that as such there is no provision under the Code of Criminal Procedure to conduct the trial / case through Video Conferencing. It is submitted that mere availability of Video Conferencing facility is no ground to unilaterally dispense with the presence of the accused in the Court at the time of recording evidence before the Court. It is submitted that trial / case cannot be ordered to be conducted via /

through Video Conferencing unless it is so specifically provided under the Code of Criminal Procedure, 1973.

It is further submitted by Shri Trivedi, learned advocate for the petitioner -accused that Section 273 of the Code provides that all evidence taken in the course of the trial of other proceedings shall be taken in presence of accused or, when his personal attendance is dispensed with, in presence of his pleader. It is submitted that Section 273 of the Code opens up with the words "except as otherwise expressly provided", that means unless and until conducting of the trial via Video Conferencing and taking down evidence through it, is permitted under the procedure expressly provided by 'the Code', no trial can be conducted via Video Conferencing in absence of personal presence of the accused while recording evidence.

3.1. It is submitted that personal presence of the accused while recording evidence was further envisaged and qualified by the words "when his personal attendance is dispensed with, in the presence of his pleader". It is submitted that thus Section 273 of the Code clearly requires personal presence of an accused while recording evidence in a case against him. It is submitted that thus, the statute has provided the procedure requiring his personal presence, at the time of recording evidence and it cannot be taken away. It is submitted that if the right of the accused to record the evidence in the presence of presence of accused is taken away, the same would be in breach of Article 21 of the Constitution of India. It is submitted that the life and personal liberty of the accused as provided under the statute cannot be taken away without the procedure established by law.

3.2. It is further submitted by Shri Trivedi, learned advocate for the petitioner -accused that under Section 167 of the Code, at precognizance stage, the accused of an offence is required to be produced in person before the Magistrate and he shall not be detained in custody without production for a term exceeding 15 days in a whole. It is submitted that thus, the accused is required to be produced before the Magistrate at pre-cognizance stage every 15 days but not beyond 15 days in a whole. It is submitted that whenever and wherever the Legislature wanted to permit production of an accused before the Magistrate via video conferencing, a conscious amendment is made w.e.f. 31.12.2009 substituting Section 167(2) proviso (b) of the Code. It is submitted that even there also discretion is given for the production of the accused either in person or through the medium of electronic video linkage at the post-cognizance stage under Section 309 of the Code. It is submitted that after the chargesheet is submitted and the cognizance is taken, accused can be remanded to the judicial custody under subPage Section(2) of Section 309 of the Code. However, first proviso to subsection(2) of Section 309 of the Code provides the accused cannot be remanded to the custody for a term exceeding 15 days at a time. It is submitted that if at all Legislature did not want the presence of an accused while recording evidence before the Court in a case against him, a suitable amendment could have been made in Section 309 of the Code that the presence shall be through the medium of electronic video linkage. It is submitted that therefore, a conscious departure has been made by the Legislature while amending / substituting Section 167(2) (b) of the Code not providing such similar production

through the medium of electronic video linkage under Section 309 of the Code. It is submitted that is the clear proof of the fact that the Legislature is conscious about existence of Section 273 of the Code which requires personal presence of an accused at the time of recording evidence before the Court. It is submitted that no one could have restrained the Legislature from making provision in Section 309 of the Code i.e. postcognizance stage production of an accused through the medium of electronic video linkage. It is submitted that thus, recording of evidence in presence of an accused as provided under Section 273 of the Code unequivocally exhibits personal presence of an accused at the time of recording evidence in a case against him.

3.3. It is further submitted by Shri Trivedi, learned advocate for the petitioner - accused that Chapter XXII of the Code which contains Section 263 to 271 of the Code requiring attendance of persons confined or detained in prisons. It is submitted that Section 267 of the Code empowers the Court securing personal presence of accused confined or detailed in prisons for answering to a charge of an offence or for the purpose of any proceedings against him. However, there is an exception to the said provision by way of Section 268 of the Code. It is submitted that Section 268 of the Code empowers the State Government either by special or general order to exclude certain persons from operation of Section 267 of the Code. It is submitted that thus, the accused who are confined in prison, in respect of whom the State Government has passed an order under Section 268 of the Code, on valid grounds, cannot be taken out of prison, irrespective of provision made in Section 267 of the Code. It is submitted that thus looking to the order passed by the learned Judge below Exh.12 is nothing but usurping power of the State Government as provided under Section 268 of the Code, ordering trial to be conducted via video conferencing which is not the procedure expressly provided for under the Code.

It is submitted that even presuming without admitting that there is no express prohibition in conducting trial through video conferencing, the Court is not empowered to conduct a trial through video conferencing because it is not a procedure expressly provided for under the Code.

3.4. It is further submitted by Shri Trivedi, learned advocate for the petitioner - accused that proviso to Section 273 of the Code came to be inserted w.e.f 3.2.2013 whereby the Legislature being conscious about requirement of personal presence of an accused at the time of recording evidence in a case against him, made provision when the evidence of person below the age of 18 years who is alleged to have been subjected to sexual assault or any other sexual offence is to be recorded, the Court may take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross examination of the accused. It is submitted that therefore, even if in a serious case of sexual assault or sexual offence personal presence of the accused at the time of recording of evidence is secured but at the same time, the Courts are empowered to take appropriate measures to ensure that such person is not confronted by the accused. It is submitted that if at all the Legislature wanted dispensing personal presence of an accused in cases of sexual assault or sexual offences of the

production of the accused through the medium of electronic video linkage, nothing could have prevented the Legislature from making suitable provision that the trial against the accused of a sexual assault or any other sexual offences shall be conducted through the medium of electronic video linkage. It is therefore, submitted that insertion of the said proviso strengthens the argument that presence, provided under Section 273 of the Code, at the time of recording of the evidence before the Court is nothing but a personal presence of an accused before the Court. It is submitted that said provision of recording evidence before the Court in the presence of the accused might have been made so that the accused can instruct his advocate while evidence being recorded against him in case on an issue that may arise at that time. It is submitted that furthermore, though his liberty is curtailed, he is not to be cut-off from seeing the outside world. It is submitted that may be one of the reasons providing for personal presence of an accused at the time of recording evidence in the Court against him. It is submitted that at times, while witnesses being examined before the Court they may give an evidence on issue which is not even mentioned in his statement recorded under Section 161 of the Code for which either accused may be required to give instructions to his advocate regarding that issue or the advocate may require instructions of an accused for the cross-examination of witnesses. It is submitted the possibly keeping in mind of this situation, the Code might have provided recording of evidence against the accused in his personal presence before the Court.

It is submitted that if at all these are not the reasons for providing personal presence of all the accused at the time of recording evidence against him then also evidence before the Court in the course of trial against the accused cannot be taken except as otherwise expressly provided.

3.5. It is further submitted by Shri Trivedi, learned advocate for the petitioner - accused that the learned Judge while passing order at para 7 has recorded that when the complainant or witnesses have fear from accused and during the course of trial when persons from both the sides remain present before the Court, law and order situation and the security and the security may not be maintained in such circumstances, there is an availability of conducting trial via video conferencing. It is submitted that as such on the aforesaid ground, the trial cannot be ordered to be conducted via video conferencing and the presence of the accused in the Court at the time of recording evidence cannot be dispensed with. It is submitted that if at all the complainant and / or witnesses feel fear from accused they can be provided with sufficient police protection and for maintaining law and order situation, there is a police force in the State. It is submitted that at any rate, if the complainant or any witnesses feel threat to their lives, they may apply before the Court for examining themselves via video conferencing. It is submitted that instead of that the complainant wants the Court to pass an order that the accused may not be brought from the jail while recording their evidences before the Court which is in breach of Section 273 r/w Section 309 of the Code. It is submitted that if at all there is any genuine apprehension or fear, a person would request the Court that his evidence may be recorded via video conferencing. It is submitted that therefore, the intention of the first informant in seeking conduct of trial via video conferencing appears to

be personal vengeance which reflects that genuinely he has no fear from the accused side. It is submitted that otherwise he would have sought for police protection or else he would request the Court to examine him or his witnesses while he or they remains / remain at video conferencing facility at his cost.

It is further submitted that the learned Judge while passing the impugned order has further observed and held that if during the course of trial via video conferencing any issue arise which requires instruction either from the client or from the advocate, the proceedings can be adjourned to next date. It is submitted that to come to such a finding, the learned Judge has accepted the arguments advanced by learned Public Prosecutor in the trial Court that the charge sheet is provided to the accused and every aspect of the matter can be ascertained from the accused from jail.

3.6. It is further submitted by Shri Trivedi, learned advocate for the petitioner-accused that even otherwise the learned Judge has materially erred in passing the impugned order that on the application submitted by the informant. It is submitted that the allegation in the application Exh.12 with respect to giving threats etc. as such have no substance at all. It is submitted that the apprehension on the part of the first informant so stated in the application Exh.12 has also no substance. It is submitted that as such the date on which application Exh.12 is given i.e. 9.12.2013, no witness summons was issued either to the first informant or to any of the witnesses to the case. It is submitted that therefore, the first informant or witnesses are not required to be remained present before the Court prior to they are issued witness summons as the present accused is no adversarial litigation. It is submitted that therefore, assertion on each adjournment date a mob of nearly 100 to 200 persons come to the Court is nothing but an excuse. It is submitted that even if some persons come on the date of adjournment, it cannot be ascertained those persons are on behalf of whom or on behalf of both the parties, at this stage.

3.7. It is further submitted by Shri Trivedi, learned advocate for the petitioner-accused that possibility of another offence may be committed as held by the learned Judge is based on conjectures and surmises. It is submitted that the arguments made on behalf of the complainant that the persons who remained present in the mob threaten the complainant and the witnesses, is without substance and / or not supported by any contemporaneous record. It is submitted that even the argument of learned DGP as recorded in the order that on last adjourned date, there was some dispute, is also not borne out from the record. It is submitted that at the same time, said judgment is also not supported by any contemporaneous record from which even it can be presumed.

3.8. It is further submitted by Shri Trivedi, learned advocate for the petitioner-accused that for passing an order conducting trial through video conferencing, the learned Judge has considered that it saves escort expenses and it relieves arranging police bandobast. With due respect to the learned Judge, it is submitted that when the State acts as loco parenti which is authorized to conduct prosecution in a police case under the Code, cannot be heard to say that conducting trial via

video conferencing saves escort expenses. It is submitted that if at all that is the ground nothing can prevent the State from making suitable amendment in the Code by expressly providing conduct of a trial via video conferencing. It is submitted that but so long as there is no express provision for conducting trial via video conference dispensing with personal presence of an accused, the learned Judge is not empowered to pass such an order.

3.9. It is further submitted by Shri Trivedi, learned advocate for the petitioner-accused that in the case of *Shakshi vs. Union of India* reported in AIR 2004 SC 3566 wherein the Hon'ble Supreme Court has considered providing protection to a victim of sexual abuse at the time of recording his statement in the Court and suggestions made by the petitioner on the writ petition for incorporating special provision for such sexual abuse cases were formulated which is enumerated in para 27. However, as recorded in para 28, the Law Commission, in its response did not accept the said request in view of Section 273 of the Code as in its opinion the principle of the said Section which is founded upon natural justice, cannot be done away in trials and inquiries concerning the sexual offences. The recommendations made by the Law Commission have been recorded in para 28. Even the Law Commission has also not deviated from the provision made in Section 273 of the Code and even in a serious case of sexual assault or sexual abuse. Though, by way of provision inserted w.e.f. 3.2.2013 the recommendations made by Law Commission has been provided into a statute, still however it does not suggest that the personal presence of the accused is dispensed with at the time of recording evidence against him in a case.

3.10. It is further submitted by Shri Trivedi, learned advocate for the petitioner-accused that in the case of *State of Maharashtra vs. Praful B Desai* reported in AIR 2003 SC 2053 wherein the Hon'ble Supreme Court has no occasion to consider Section 273 of the Code from the point of view of the accused. Since there the witness was over the video conferencing and the advocate of the accused was by his side at the time of recording evidence it was considered to be in the presence of an accused. The Hon'ble Supreme Court had no occasion to consider compliance of Section 273 of the Code from the point of view of an accused. At the same time substitution of Section 167(2)(b) of the Code permitting, at pre-cognizance stage, production of accused through medium of electronic video linkage w.e.f. 31.12.2009 and conscious departure by the Legislature in not making such amendment in Section 309 of the Code i.e. post-cognizance stage even much after the aforesaid decision of the Hon'ble Supreme Court is suggestive of the fact that the presence of referred to in Section 273 of the Code, of an accused is nothing but personal presence of the accused while taking down evidence in a case against him before the Hon'ble Court. It is submitted that in the life and liberty of the an accused to be effectively defended before the Court cannot be taken away without the procedure prescribed by law. It is sought to be done it would be in breach of Article 21 of the Constitution of India. It is submitted that in the aforesaid case the Hon'ble Supreme Court has held that as a matter of prudence evidence by video conferencing in open Court should be only if the witness is in a country which has an extradition treaty with India and under whose laws Contempt of Court and perjury are punishable.

By making above submissions and relying upon the above decisions, it is requested to allow the present petition and quash and set aside the impugned order passed by the learned trial Court ordering to conduct the trial / case via video conferencing and dispensing with the presence of the accused in the Court.

4 Present petition is opposed by Ms. C.M. Shah, learned Additional Public Prosecutor appearing on behalf of the respondent State as well as Shri B. B. Naik, learned Senior Advocate appearing with Shri Ansari, learned advocate appearing on behalf of the respondent no.1- first informant.

4.1. It is submitted by Shri Naik, learned Senior Advocate for the respondent no.1-first informant that the impugned order passed by the learned trial Court ordering the trial to be conducted through video conferencing is absolutely just and proper and in consonance with the provision of the Statute and none of the rights of the petitioner-accused have been violated and / or infringed.

4.2. It is submitted by Shri Naik, learned Senior Advocate for the respondent no.1-first informant and Ms. Shah, learned APP for the State that Section 273 of the Code provides that except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or when his personal attendance is dispensed with, in the presence of his pleader. It is submitted that this does mean that physical presence of the accused in the Court while taking evidence in the course of trial in the Court but it can also be done through video conferencing. It is submitted that Section 273 of the Code merely requires the presence of the accused which does not mean that physical presence is absolutely necessary for taking evidence in the Court and the accused can participate in taking the evidence through video conferencing. It is submitted that Section 317 of the Code provides that when the Magistrate or the Judge is satisfied for reasons to be recorded, the personal attendance of the accused before the Court is not necessary in the interest of justice or that the accused persistently disturbs the proceedings in the Court the Judge or the Magistrate may if accused is represented by a pleader dispense with his attendance and proceed with such inquiry or trial in his absence and at any subsequent stage of proceedings direct the personal attendance of such accused.

4.3. It is submitted that in the present case, the accused is represented by the pleader and it is categorically come on record that the relatives and supporters of the accused are creating unmanageable situation in the Court premises, and therefore, the learned Judge has ample powers under Section 317 of the Code to dispense with the presence of the accused while taking the evidence and accused can be permitted to participate in the same via video conferencing.

4.4. Shri Naik, learned Senior Advocate for the respondent no.1-first informant has heavily relied upon the decision of the Hon'ble Supreme Court in the case of State of Maharashtra P.C. Singh vs. Dr. Praful B. Desaid reported in (2003) 4 SCC 601, more particularly para 12, 13, 14 and 17 of the said decision. It is submitted that in the aforesaid case, the Hon'ble Supreme Court has categorically held in para 12 of the

judgment after considering the provisions of Section 273 for dispensation for personal attendance of the accused and in such cases evidence can be recorded in the presence of the pleader held that presence of the accused and thus Section 273 contemplates constructive presence and this shows that actual physical presence is not the must. It is submitted that it is further held in the said decision that the term "presence" as used in this Section, is not used in the sense of actual physical presence. It is held that on plain reading of Section 273 does not support the restrictive meaning sought to be placed by the respondent on the word "presence". It is further submitted that it is further held by the Hon'ble Supreme Court in the said decision that it must be remembered that the first duty of the Court is to do justice and as has been held by this Court in the case of Krishna Gobe vs. State of Maharashtra reported in (1973) 4 SCC 23 Courts must endeavour to find the truth. It is submitted that it is also observed by the Hon'ble Supreme Court that rights of the accused have to be kept in mind and safeguarded but they should not be over emphasized to the extent of forgetting that the victims also have right.

4.5. It is further submitted by Shri Naik, learned Senior Advocate for the respondent no.1-first informant that even the said judgment in the case of Praful B Desai (supra) is subsequently approved by Hon'ble Supreme Court in the case of Sakshi vs. Union of India reported in (2004) 5 SCC 518 (para 31). It is therefore, submitted that recording of evidence by way of video conferencing vis-a-vis Section 273 of the Code has been held to be permissible in the case of Praful B Desai (supra).

4.6. It is further submitted that there is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. It is submitted that rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice. It is submitted that therefore, it is permissible for the Court to expand or enlarge the meaning of such provisions in order to elicit the truth and do justice with the parties.

4.7. It is further submitted by Shri Naik, learned Senior Advocate for the respondent no.1-first informant that in the present case as it was apprehended by the first informant looking to the circumstances and presence of so many persons at the time of each date of adjournments on which date the accused were produced and as it was seriously apprehended that first informant, his relatives and even the witnesses may not be able to depose before the Court freely and / or independently, if the accused remained present in the Court at the time of recording their evidence / deposition and ultimately it may affect the trial, when considering the aforesaid, the learned Judge has passed the impugned order, which is not required to be interfered with by this Court. It is submitted that therefore, the findings recorded by the learned Judge while passing the order to conduct the trial through video conferencing and dispensing the presence of the accused at the time of recording of the evidence is not required to be interfered with.

4.8. It is submitted by Shri Naik, learned Senior Advocate for the respondent no.1-first informant as well as Ms. Shah, learned Additional Public Prosecutor appearing

on behalf of State that as such while passing the impugned order learned Judge has also taken care of interest of the accused also and has observed that in case at any time during the recording of deposition of the witnesses any question arise to be asked to the accused, the pleader can make an application for adjournment and he may ask the question to the accused and thereafter recording of the evidence may proceed further. It is therefore, submitted that as such no error has been committed by the learned Judge while allowing the application Exh.12 and ordering the trial to be conducted through video conferencing.

Making above submissions and relying upon the above decisions, it is requested to dismiss the present application.

5 Heard the learned advocates for the respective parties at length. At the outset, it is required to be noted that what is challenged in the present Special Criminal Application by the accused is impugned order passed by the learned trial Court directing to conduct the trial against the accused through Video Conferencing. That the said order has been passed on the application submitted on behalf of the complainant apprehending that if the accused nos. 2 and 4 who are in judicial custody are brought to the Court at the time of trial, it is apprehended that the same is likely to affect the trial as the witnesses are likely to be influenced and they may not give the deposition fearlessly. The said order is challenged by one of the accused mainly on the ground that if the trial is ordered to be conducted through Video Conferencing and the petitioner is not brought to the Court at the time of trial and the deposition of the witnesses are recorded in his absence his rights conferred under the provision of the Code of Criminal Procedure shall be affected and the same shall be even contrary to Section 273 of the Code of Criminal Procedure. It is the case on behalf of the accused that Section 273 of the Code provides that all evidence taken in the course of trial or other proceedings shall be taken in presence of the accused or when his personal attendance is dispensed with, in presence of his pleader. It is also the case on behalf of the accused that as such there is no provision under the Code to conduct the trial via Video Conferencing and that in absence of the personal presence of the accused while recording the evidence.

6 On the other hand, it is the case on behalf of the prosecution as well as on behalf of the complainant / victim that the impugned order passed by the learned trial Court directing to hold / conduct the trial through Video Conferencing is just and proper and with a view to avoid any possibility of threatening the witness so that witness can depose freely and fearlessly and without undue influence of the accused, as the accused is very head strong persons. It is submitted that as such the impugned order cannot be said to be contrary to Section 273 of the Code of Criminal Procedure. It is submitted that the Hon'ble Supreme Court in the case of Praful B Desai (supra) has categorically held that while considering the provision of Section 273 of the Code of Criminal Procedure that there may be constructive presence and at the time of recording of the evidence physical presence is not must. Therefore, the short question which is posed for consideration of this Court is whether can there be a trial via Video Conferencing and deposition of the witness can be recorded in the presence of the pleader of the accused and whether at that time the physical presence of the accused in the Court is must or not and / or whether such an order of directing to conduct the trial through Video

Conferencing is contrary to Section 273 of the Code of Criminal Procedure or not. While considering the very provision i.e. Section 273 of the Code of Criminal Procedure and the question with respect to recording of the evidence by Video Conferencing and the evidence so recorded i.e. by Video Conferencing is being recorded in "presence" of the accused would fully meet the requirements of Section 273 of the Code, the Hon'ble Supreme Court has specifically observed and held that recording of such evidence would be as per the "procedure established by law". In the said decision, the Hon'ble Supreme Court has reversed the decision of the Bombay High Court which took view that "presence" in Section 273 means actual physical presence of the accused in Court. In the said decision Hon'ble Supreme Court also dealt with and considered the submission on behalf of the accused that Video Conferencing could not be allowed as rights of the accused under Article 21 of the Constitution of India shall be violated while permitting the evidence to be recorded by Video Conferencing and same shall cause prejudice to the accused, the Hon'ble Supreme Court has observed and held that so long as accused and his pleader are present when evidence is recorded by Video Conferencing that evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of Section 273 and recording of such evidence would be as per "procedure established by law". In the said decision, the Hon'ble Supreme Court has also observed that no prejudice, of whatsoever nature would be caused to the accused if the accused is recorded by Video Conferencing. While holding so, in para 19 the Hon'ble Supreme Court has observed and held as under:

"19. At this stage we must deal with a submission made by Mr. Sundaram. It was submitted that video-conferencing could not be allowed as the rights of an accused, under Article 21 of the Constitution of India, cannot be subjected to a procedure involving "virtual reality". Such an argument displays ignorance of the concept of virtual reality and also of video conferencing. Virtual reality is a state where one is made to feel, hear or imagine what does not really exists. In virtual reality one can be made to feel cold when one is sitting in a hot room, one can be made to hear the sound of ocean when one is sitting in the mountains, one can be made to imagine that he is taking part in a Grand Prix race whilst one is relaxing on one sofa etc. Video conferencing has nothing to do with virtual reality. Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place. To take an example today one does not need to go to South Africa to watch World Cup matches. One can watch the game, live as it is going on, on one's TV. If a person is sitting in the stadium and watching the match, the match is being played in his sight presence and he/she is in the presence of the players. When a person is sitting in his drawing-room and watching the match on TV, it cannot be said that he is in presence of the players but at the same time, in a broad sense, it can be said that the match is being played in his presence. Both the persons sitting in the stadium and the person in the drawing-room, are watching what is actually happening as it is happening. This is not virtual reality, it is actual reality. One is actually seeing and hearing what is happening. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact

he/she is present before you on a screen. Except for touching one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other. The submissions of respondents counsel are akin to an argument that a person seeing through binoculars or telescope is not actually seeing what is happening. It is akin to submitting that a person seen through binoculars or telescope is not in the "presence" of the person observing. Thus it is clear that so long as the accused and/or his pleader are present when evidence is recorded by video conferencing that evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of Section 273, Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law".

Recording of evidence by video conferencing also satisfies the object of providing in Section 273, that evidence be recorded in the presence of the accused. The accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded Court room. They can observe his or her demeanour. In fact the facility to play back would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of play back would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in Court. All these objects would be fully met when evidence is recorded by video conferencing. Thus no prejudice, of whatsoever nature, is caused to the accused. Of course, as set out hereinafter evidence by Video Conferencing has to be on some conditions.

Reliance was then placed on Sections 274 and 275 of the Criminal Procedure Code which require that evidence be taken down in writing by the Magistrate himself or by his dictation in open Court. It was submitted that video conferencing would have to take place in the studio of VSNL. It was submitted that this would violate the right of the accused to have the evidence recorded by the Magistrate or under his dictation in open Court. The advancement of science and technology is such that now it is possible to set up video conferencing equipment in the Court itself. In that case evidence would be recorded by the Magistrate or under his dictation in open Court. If that is done then the requirements of these Sections would be fully met. To this method there is however a draw back. As the witness is now in Court there may be difficulties if he commits Contempt of Court or perjures himself and it is immediately noticed that he has perjured himself. Therefore as a matter of prudence evidence by video-conferencing in open Court should be only if the witness is in a country which has an extradition treaty with India and under whose laws Contempt of Court and perjury are also punishable."

6.1. In para 24, the Hon'ble Supreme Court while permitting recording of the deposition / evidence by Video Conferencing has observed and held as under:

"24.To be remembered that what is being considered is recording evidence on commission. Fixing of time for recording evidence on commission is always the duty of the officer who has been deputed to so record evidence. Thus the officer recording the evidence would have the discretion to fix up the time in consultation with VSNL, who are experts in the field and who, will know which is the most convenient time for video conferencing with a person in USA. The respondent and his counsel will have to make it convenient to attend at the time fixed by the concerned officer. If they do not remain present the Magistrate will take action, as provided in law, to compel attendance. We do not have the slightest doubt that the officer who will be deputed would be one who has authority to administer oaths. That officer will administer the oath. By now science and technology has progressed enough to not worry about a video image/audio interruptions/distortions. Even if there are interruption they would be of temporary duration. Undoubtedly an officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded who would remain present when the evidence is being recorded and who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded. That officer will ensure that the witness is not coached/tutored/prompted. It would be advisable, though not necessary, that the witness be asked to give evidence in a room in the Consulate/Embassy. As the evidence is being recorded on commission that evidence will subsequently be read into Court. Thus no question arises of the witness insulting the Court. If on reading the evidence the Court finds that the witness has perjured himself, just like in any other evidence on commission, the Court will ignore or disbelieve the evidence. It must be remembered that there have been cases where evidence is recorded on commission and by the time it is read in Court the witness has left the country. There also have been cases where foreign witness has given evidence in a Court in India and that then gone away abroad. In all such cases Court would have been able to take any action in perjury as by the time the evidence was considered, and it was ascertained that there was perjury, the witness was out of the jurisdiction of the Court. Even in those cases the Court could only ignore or disbelieve the evidence. The officer deputed will ensure that the respondent, his counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that the respondent is not prevented from bringing into the studio the papers/documents which may be required by him or his counsel. We see no substance in this submission that it would be difficult to put documents or written material to the witness in cross-examination. It is now possible, to show to a party, with whom video conferencing is taking place, any amount of written material. The concerned officer will ensure that once video conferencing commences, as far as possible, it is proceeded with without any adjournments. Further if it is found that Dr. Greenberg is not attending at the time/s fixed, without any sufficient cause, then it would be open for the Magistrate to disallow recording of evidence by video conferencing. If the officer finds that Dr. Greenberg is not answering questions, the officer will make a memo of the same. Finally when the evidence is read in Court, this is an aspect which will be taken into consideration for testing the veracity of the

evidence. Undoubtedly the costs of video conferencing would have to be borne by the State."

6.2. In view of the aforesaid direct decision of the Hon'ble Supreme Court, none of the submissions made by the learned advocate for the accused deserve consideration as all the submissions are covered against the accused by the decision of the Hon'ble Supreme Court in the case of Praful B Desai(Supra). Under the circumstances, as such no error has been committed by the learned trial Court in ordering the trial to be conducted by Video Conferencing. Even otherwise, in view of the advance in Science and Technology and facilities available, we are of the firm opinion that the Courts must take the advantage of Science and Technology and facilities of Video Conferencing etc available. It will save the time of the Courts, Police Authority who are required to even bring the accused who are in judicial custody before the Court every 15 days. The same can save the energy, expenses and even avoid other malpractice. Therefore, we are of the view that even the facility of Video Conferencing can be used by the Courts wherever it is possible and permissible subject to availability of the facilities, even for the purpose of recording the presence of the accused for the purpose of making presence who is in judicial custody, who is required to be produced before the Court on every 15 days. It is required to be noted that many times the accused are not produced before the Court due to shortage of police staff and / or Japta not available and due to so many such other reasons, trial is delay. Therefore, if such course of conducting trial / recording evidence by Video Conferencing is permitted and / or used even the same shall be in the larger interest of the society and even same can avoid delay in conducting the trial. Therefore, as such recording evidence by Video Conferencing and / or even marking presence of the accused who is judicial custody by Video Conferencing on every 15 days is the need of the day. Everybody inclusive of judiciary must take the benefit / use of advancement in science and technology, more particularly, when the same will be in advancement of justice, speedy trial and in a given case fair trial.

7 The State Government also to provide sufficient facilities like broadband connectivity facility for Video Conferencing from Jail, Court etc. so that the aforesaid purpose and object can be achieved.

8 Under the circumstances, in the present case no error has been committed by the learned trial Court directing to conduct the trial by Video Conferencing. However, whatever is observed by the Hon'ble Supreme Court in the case of Praful B Desai (supra) in para 24 is required to be considered by the learned trial Court while recording the evidence by Video Conferencing and conducting the trial by Video Conferencing accordingly.

9 Now, so far as contention on behalf of the accused that in the present case on merits the learned trial Court is not justified in ordering to conduct the trial by Video Conferencing and / or recording the evidence by Video Conferencing as the apprehension on the part of the victim are absolutely baseless and there was no occasion and nothing has happened earlier on the basis of which there can be such

apprehension. It is also the case on behalf of the accused that learned Judge ought not to have passed the impugned order on the application given by the victim. The aforesaid cannot be accepted. When the victim submitted the application apprehending that if the accused are produced in the Court and they remained present at the time of recording of the evidence of the witnesses, the witnesses are likely to be influenced and they may not be in a position to give the deposition on uninfluenced or fearlessly and when on facts the learned trial Court has accepted the same, no error has been committed by the learned trial Court. It is required to be noted that even the rights of the victim are also now well recognized vis-a-vis the rights of the accused.

10 Learned advocate Mr. Trivedi gave much emphasize upon the opening words used in Section 273 of the Code, namely "accept as otherwise expressly provided." According to him, unless and until conducting of trial via video conferencing and taking down through it is permitted under the procedure expressly provided by the Code, no trial can be conducted via video conferencing in absence of personal presence of the accused persons while recording evidence. He has also given much emphasize upon the expression used in section 273 namely "when his personal attendance is disposed with in presence of his pleader". According to him, section 273 of the Code clearly requires personal presence of an accused while recording evidence in a case against him. While elaborating this contention further, his submission is that Legislature wanted to permit production of an accused before the Magistrate via video conferencing and therefore, amendment is made w.e.f. 31.12.2009 by substituting section 167(2) proviso (b) of the Code at pre-cognizance stage, but while permitting production through medium of electronic video linkage at the post-cognizable stage, the Legislature has not permitted production through the medium of electronic video linkage under section 309 of the Code. In other words, it is emphasized by him that a conscious departure has been made by the Legislature while substituting/amending section 167(2)(b) of the Code for providing such similar production through the medium of electronic video linkage under section 309 of the Code. Thus, submission made at bar though seems to be attractive, but is without any substance. The submission made learned advocate Mr. Trivedi appearing for the petitioner that mere availability of Video Conference Facility is no ground to unilaterally dispense with the presence of the accused in the Court at the time of recording of evidence before the Court has no substance.

So, we are of the opinion that if any Court chooses to record evidence through video conferencing keeping in mind the facts and circumstances of given case, it cannot be said that the Court has deviated any procedure prescribed by law and thus, it amounts to breach of Article 21 of the Constitution of India.

11 In view of the above and for the reasons stated above, present applicant fails and same deserve to be dismissed and is accordingly dismissed. Rule is discharged. Ad-interim relief granted earlier, if any, stands vacated forthwith. As the trial is sufficiently delayed, learned trial Court to conclude the trial at the earliest.