

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 103 OF 2018

State of Maharashtra
Through Superintendent of Police,
Ahmednagar, Dist. Ahmednagar.

..PETITIONER

VERSUS

1. Pravin Popat Kharchand
Age: Major, Occu.: Nil,
R/o Mula Colony, Newasa Phata,
Newasa, Dist. Ahmednagar.
2. Mohan Suresh Lashkare
Age: Major, Occu.: Nil,
R/o Gangasagar, Newasa,
Dist. Ahmednagar.
3. Abaji @ Rameshwar Bhagwan Gadhe
Age: Major, Occu.: Nil,
R/o Near Tukaram Maharaj Temple,
Newasa, Dist. Ahmednagar.
4. Chauranginath Gorakshnath Lashkare
Age: Major, Occu.: Nil,
R/o Gangasagar, Newasa,
Dist. Ahmednagar.
5. Pawan Somnath Narulla
Age: Major, Occu.: Nil,
R/o Near Mohaniraj Temple,
Newasa, Dist. Ahmednagar.
6. Sachin Chandrakant Chavan
Age: Major, Occu.: Nil,
R/o Chavan Galli, Newasa,
Dist. Ahmednagar.
7. Sadik Bashir Shaikh
Age: Major, Occu.: Nil,

R/o Gangasagar, Newasa,
Dist. Ahmednagar.

8. Ashok Jalindar Jagtap
Age: Major, Occu.: Nil,
R/o Gangasagar, Newasa,
Dist. Ahmednagar.
9. Satyawar Dhanraj @ Sonu Lashkare
Age: Major, Occu.: Nil,
R/o Jewali, Tq. Lohar,
a/p R/o Newasa, Dist. Ahmednagar.
10. Vilas Popat Jire
Age: Major, Occu.: Nil,
R/o Vivekanandnagar, Newasa,
Dist. Ahmednagar.
11. Sopan Bhagwan Gadhe
Age: Major, Occu.: Nil,
R/o Near Tukaram Maharaj Temple,
Newasa, Dist. Ahmednagar.

..RESPONDENTS

Ms. R.P. Gaur, A.P.P. for petitioner – State.

Mr. G.R. Syed, Advocate for Assist to A.P.P.

Mr. S.G. Ladda, Advocate for respondent nos.1 to 5, 8 & 9.

CORAM : SANGITRAO S. PATIL, J.
RESERVED ON : 25th JUNE, 2018
PRONOUNCED ON : 04th JULY, 2018

JUDGMENT :-

Rule, returnable forthwith. With the consent of the learned A.P.P. and the learned Counsel for the respondents, heard finally.

2. By this petition under Article 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure ("Code" for short), the petitioner/ State has challenged the vires of the common order dated 19th December, 2017 passed by the learned Additional Sessions Judge, Shrirampur below applications Exh.263 and Exh.269 in Sessions Case no. 25 of 2016, whereby he rejected the claim of the petitioner to record evidence of the witnesses through Video Conferencing ("V.C." for short), in the absence of the respondents before the Court.

3. The respondents are facing trial for the offences punishable under Sections 302, 143, 147, 148, 120-B read with Section 149 of the Indian Penal Code ("I.P.C." for short) and also under Section 3 punishable with Section 25 of the Arms Act.

4. The learned A.P.P. submits that the respondents are the supporters of one Anna Lashkare, who is a hardcore criminal. They are very dangerous and are having criminal antecedents. Respondent nos. 1 and 11 had escaped from

the custody of the Police after commencement of trial, when they were being produced before the Court for hearing. They were rearrested from outside the State of Maharashtra. Looking to the conduct of the respondents, they have been detained in Yerwada Jail. The learned A.P.P. submits that it has become risky to produce the respondents physically in the Court for hearing of the case. Whenever they are produced in the Court, a number of their supporters come to the Court premises. They threaten the informant and the Investigating Officer. A case has been registered against the respondents for threatening the witnesses. They create law and order problem. There is facility of V.C. in Yerwada Jail and in the Trial Court at Shrirampur as well. The learned A.P.P. submits that a considerable time is required to produce the respondents from Yerwada Jail to the Court at Shrirampur. There is every apprehension that the respondents may flee away from the custody of the Police. Therefore, for smooth trial of the case, it is immensely necessary to record the evidence of the witnesses through V.C.

5. Relying on the judgment in the case of **State of Maharashtra Vs. Dr. Praful B. Desai** 2003 All MR (Cri) 1406 (S.C.), the learned A.P.P. contends that recording of evidence by V.C. satisfies the object of Section 273 of the Code and is tantamount to recording of evidence in the presence of the accused. The learned A.P.P. further relied on the judgments in the cases of **Asha Ranjan Vs. State of Bihar and Ors.** 2017 (4) SCC 397, **State of Maharashtra and Ors. Vs. Saeed Sohail Sheikh etc.** 2013 CRI.L.J. 214 (S.C.), **Haseen Siddiqui alias Jahangir Vs. State of U.P. and Ors.** 2014 CRI.L.J. 1207 (Allahabad High Court), **Abdul Karim Telgi and Ors. Vs. State** 2008 CRI.L.J. 532 (Madras High Court) and an unreported order dated 20th September, 2010 passed by the Division Bench of this Court in **Confirmation Case no. 2 of 2010** in the matter of **State of Maharashtra Vs. Mohd. Ajmal Mohd. Amir Kasab @ Abu Mujahid** in support of her contentions. The learned A.P.P. submits that the learned Trial Judge did not appreciate the facts of the case correctly and properly and wrongly rejected the applications Exh.263 and Exh.269. She, therefore, prays that the impugned order dated 19th

December, 2017 may be quashed and set aside and evidence of the witnesses may be directed to be recorded through V.C. by dispensing with physical presence of the respondents before the Court.

6. The learned Counsel for the respondents strongly opposed the petition. He submits that the trial is going on in the Court at Shrirampur, Dist. Ahmednagar. The respondents have been detained in Yerwada Jail near Pune. He is defending the respondents before the Trial Court also. His ordinary place of practice is at Aurangabad. According to him, it is immensely necessary to get instructions from the respondents in order to defend them effectively when the witnesses are being examined before the Court. Unless the respondents hear the witnesses and then give necessary instructions to him, it would not be possible for him to defend them effectively. It would not be possible for him to openly take instructions from the respondents through V.C. or by any other mode of communication during the course of recording of evidence of the witnesses in the Court. The communication between the respondents and their Advocate, being privileged

communication, cannot be made public. In the circumstances, if the respondents are ordered to be detained in Yerwada Jail, even at the time of recording of evidence of the witnesses in the Court, it would be difficult for them to defend themselves properly and effectively. Recording of evidence of the witnesses through V.C., in the circumstances, would not be a fair trial. It would be against Article 21 of the Constitution of India. The learned Counsel submits that the applications (Exh.263 and Exh.269) made by the Superintendent of Police, Ahmednagar for recording of evidence of the witnesses through V.C. have no substance. The informant also had filed application (Exh. 185) for the same relief. It was supported by the present petitioner as well. It was rejected by the learned Trial Judge on 01st April, 2017. The said order has not been challenged either by the informant or the petitioner. Consequently, the applications filed by the Superintendent of Police, Ahmednagar, subsequently for the same relief, were not at all maintainable. The learned Counsel further submits that the case has already been directed to be disposed of expeditiously. However, the petitioner is

trying to prolong the hearing of the case on the same ground or other.

7. Relying on the judgments in the cases of **Mohd. Javed Noor Hasan Khan and Anr. Vs. State of Maharashtra 2015 SCC Online Bom 1049** and an unreported order dated 22nd December, 2015 passed by this Court in **Criminal Application no. 515 of 2015 in Bail Application no. 126 of 2015** in the matter of **Suresh Maruti Kamble Vs. State of Maharashtra**, the learned Counsel for the respondents submits that physical presence of the respondents at the time of recording of evidence of the witnesses is necessary for fair trial. He, therefore, supports the impugned order and prays that the petition may be dismissed.

8. As per Section 273 of the Code, 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. Thus, the general rule is to record evidence in the presence of the accused or his pleader, if his

presence is dispensed with. In the case of **State of Maharashtra Vs. Dr. Praful B. Desai** (supra), it has been observed that recording of evidence by V.C. satisfies the object as provided in Section 273 of the Code that the evidence should be recorded in the presence of the accused. It is further observed that so long as the accused and/or his pleader are present when evidence is recorded by V.C., that evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of Section 273 of the Code and recording of such evidence would be as per "procedure established by law". The same view has been taken by the Allahabad High Court in the case of **Haseen Siddiqui alias Jahangir Vs. State of U.P. and Ors.** (supra) and by Madras High Court in the case of **Abdul Karim Telgi and Ors. Vs. State** (supra).

9. In the case of **State of Maharashtra Vs. Mohd. Ajmal Mohd. Amir Kasab @ Abu Mujahid** (supra), the Division Bench of this Court considered peculiar facts of the case that bringing the accused — Kasab to the Court was a security hazard and that there was a great threat perception. The Court opined that considering the

seriousness of the crime in question and its ramifications, it would not be possible to produce the accused – Kasab in the Court. Bringing him everyday to the Court would lead to traffic congestion. Possibility of an untoward incident taking place could not be ruled out. In such a situation, the Court held that it would be appropriate to make arrangement for V.C. There is reference of the judgment in the case of **Kalyan Chandra Sarkar Vs. Rajesh Ranjan Alias Pappu Yadav and Anr. (2005) 3 SCC 284**, wherein it is observed in paragraph 43 of the judgment as under :-

“43. It is true in a normal trial [the Criminal Procedure Code](#) requires the accused to be present at the trial but in the peculiar circumstances of this case a procedure will have to be evolved, which will not be contrary to the rights given to an accused under [the Criminal Procedure Code](#) but at the same time protect the administration of justice. Therefore, as held by this Court in the case of [State of Maharashtra vs. Dr. Praful B. Desai](#), (2003 (4) SCC 601) and [Sakshi vs. Union of India & Ors.](#) (2004 (5) SCC 518), we think the above requirement [of the Code](#) could be met by directing the trial by video-conferencing facility. In our opinion, this is one of those

rare cases wherein a frequent visit from the place of detention to the court of trial in Bihar would prejudice the security of both the respondent and others involved in the case, apart from being a heavy burden on the State exchequer."

10. It may be noted that in the case of **State of Maharashtra Vs. Dr. Praful B. Desai**(supra), the witness Dr. Greenberg had expressed his willingness to give evidence, but had refused to come to India for that purpose. It was noticed that there was no provision in the Code to compel Dr. Greenberg to come to India to give evidence. In the peculiar circumstances, it was held that the evidence of Dr. Greenberg could be recorded through V.C.

11. In the case of **Asha Ranjan Vs. State of Bihar and Ors.** (supra) cited by the learned A.P.P., the accused therein had been booked in 75 cases, out of which he was convicted in 10 cases, he was facing life imprisonment in two cases which include murder of two sons of the petitioner therein and 10 years of rigorous imprisonment in one case. Out of 45 pending cases against him, at least 21 were those where maximum sentence was 7 years and

more, including 9 for murder and 4 for attempt to murder. There were at least 15 out of total 45 pending cases which were registered against him while he was in jail and out of those 15 pending cases, one was for the murder of the third son of the petitioner therein and two were for attempt to murder. He had been declared as history sheeter Type "A" (who is beyond reform). In the peculiar facts of that case, the Hon'ble Apex Court directed that the evidence of the witnesses should be recorded through V.C. and it would not be necessary to produce the accused before the Court physically.

12. Considering the above referred cases, in which under the peculiar and exceptional facts physical presence of the accused before the Court was dispensed with and the evidence of the witnesses was ordered to be recorded through V.C., the facts of the present case will have to be scrutinized in order to see whether any peculiar facts exist which would call for deviation from the normal rule of recording evidence of the witnesses in the presence of the respondents/accused vide Section 273 of the Code.

13. The applications (Exh. 263 and 269) were addressed by the Superintendent of Police, Ahmednagar to the learned Sessions Judge, Ahmednagar and the copies thereof were referred to the learned Additional Sessions Judge, Shrirampur. The contents of these applications are the same. It is alleged that the respondents are of revengeful nature and they are likely to escape from the custody of the Police. It was, therefore, requested that they may be transferred from the Central Jail, Ahmednagar to the Central Jail, Nashik and from the security point of view, the hearing of the case may be taken through V.C. In the present matter, I am not concerned with the transfer of the accused from one jail to another.

14. As per Section 225 of the Code, in every trial before the Court of Session, the prosecution shall be conducted by a Public Prosecutor. The applications (Exh. 263 and 269) have been signed by the Superintendent of Police, Ahmednagar. They are not addressed to the Trial Court. Moreover, they do not even bear the signature of the prosecutor, who is conducting the case, to indicate that they were presented through him. Apart from this

technical fault, the contents of applications (Exh. 263 and 269), prima facie, are very vague and general and do not make out any special case to call for deviation from the general rule of recording evidence in the presence of the respondents vide Section 273 of the Code and directing it to be recorded through V.C. in the absence of the respondents before the Court.

15. The learned Trial Judge has referred to application (Exh.185) filed by the informant for the similar relief, which was rejected on 01st July, 2017. The learned A.P.P. has produced the copy of the said order. It is quite a speaking order. That order has not been challenged either by the informant or the petitioner. Consequently, the subsequent applications made by the Superintendent of Police, Ahmednagar that too addressed to the learned Sessions Judge on the vague and general grounds, which indirectly tend to seek review of the order dated 01st July, 2017 passed by the learned Trial Judge, were not maintainable.

16. It is submitted at the bar that the examination

of the informant is already over. Now the remaining witnesses have to be examined. There is nothing on record to show that the informant was any way pressurized or threatened by the respondents when he was being examined before the Trial Court. There is nothing on record to show that because of the presence of the respondents in the Trial Court at the time of recording of evidence of the informant, he was disturbed or discouraged in giving evidence effectively. Thus, presence of the respondents at the time of recording evidence of the informant has not disturbed or interfered the fair trial.

17. The apprehension raised in this petition that there would be problem of law and order, in case the respondents are allowed to be produced before the Court from jail, has no basis. Moreover, it is the duty of the Police to take necessary precaution to maintain law and order. If the relatives or friends of the respondents assemble, as submitted by the learned A.P.P., within the Court premises, whenever they are produced in the Court and cause any nuisance, necessary prohibitory order could be proclaimed to avoid such nuisance. Sufficient security

measures should be taken so as to rule out the possibility of happening of any untoward incident. The respondents can be brought from the prison and taken back with sufficient security. They could be detained in nearest prison to save time for their production in the Court. In this context, it would be appropriate to reproduce here the following observations in the order dated 22nd December, 2015 passed by this Court in Criminal Application no. 515 of 2015 in Bail Application no. 126 of 2015 :-

- i) It would be the responsibility of the Police department to ensure production of under trial prisoners before the court. The blame attempted to be put, in that regard, on the Prison administration, is not justified and proper.
- ii) Whenever a case is for the purpose of framing of Charge or recording of evidence, physical production of the under trial prisoners before the court would be essential, and deemed production through video conferencing ought not be resorted to.

18. In the case of **Mohd. Javed Noor Hasan Khan and Anr. Vs. State of Maharashtra** (supra) cited by the learned

Counsel for the respondents, the accused were not being produced before the Court and were being kept present only through V.C. for the reason that the Police were not having adequate force to secure their production under the safe and sure custody. This Court did not accept that reason and observed that it would be the duty of the State to ensure that the applicants (accused) are produced before the Court on the date of hearing of the case, particularly when evidence is to be recorded. Only the evidence of formal nature can be permitted to be recorded through V.C. and not vital and important evidence.

19. As stated above, the petitioner did not make out a case warranting indulgence of this Court in the matter of recording evidence of the witnesses through V.C. There are no exceptional or peculiar facts and circumstances to deviate from the normal rule of recording evidence in the physical presence of the accused as contemplated under Section 273 of the Code. The present petition contains so many grounds which were not raised before the learned Trial Judge in the applications (Exh. 263 and 269). Such grounds cannot be taken up

for the first time before this Court.

20. It has to be noted that use of the facility of V.C. is a supplement and not a substitute for recording evidence before the Court. As observed by the Hon'ble the Apex Court in para 43 of the judgment in **Kalyan Chandra Sarkar**, referred to above, in a normal trial, the Code requires the accused to be present at the trial but in the peculiar circumstances of the case, there could be the trial through V.C.

21. In the present case, there are 11 respondents facing the trial. They have been detained in Yerwada Jail at Pune. Their Advocate is practising at Aurangabad. The trial is going on at Shrirampur. It would be difficult for the learned Advocate of the respondents to go to Yerwada Jail from Aurangabad on each effective date of hearing to take instructions in respect of the witness or witnesses proposed to be examined before the Trial Court at Shrirampur. It is common knowledge that many times, during the course of examination of the witnesses, it becomes essential to take certain instructions from the

accused in the dock. If the learned Advocate of the respondents does not get this opportunity, in the absence of any exceptional or peculiar facts to deny the same, it would hamper fair trial infringing the right of the respondents guaranteed under Article 21 of the Constitution of India. At least on the effective dates of hearing of the case, it would be immensely necessary to produce the respondents before the Trial Court.

22. Considering all these facts and circumstances of the case, I am not inclined to disturb the order passed by the learned Trial Judge. The trial has already been ordered to be held expeditiously. In the result, I pass the following order :-

ORDER

- (i) Criminal Writ Petition is dismissed.
- (ii) Trial Court shall decide the case expeditiously as directed earlier.
- (ii) Rule is discharged.

[**SANGITRAO S. PATIL**]
JUDGE