

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRREF No.2 of 2018 (O&M)
Date of Decision: January 25, 2019

Court on its own Motion

...Petitioner

VERSUS

U.T. of Chandigarh

...Respondent

CORAM: HON'BLE MR. JUSTICE INDERJIT SINGH

Present: Mr.P.S.Ahluwalia, Amicus Curiae.

Mr.Deepender Brar, APP,
for U.T. Chandigarh.

INDERJIT SINGH, J.

This reference has been received through E-mail sent by learned District and Sessions Judge, Chandigarh for imparting guidance for recording statement under Section 164 Cr.P.C. of the prosecutrix through video conferencing. Along with the E-mail, learned District and Sessions Judge, Chandigarh has also sent two attachments i.e. letter No.70 dated 14.03.2018 of learned JMIC, Chandigarh addressed to Registrar General of this Court and copy of order dated 12.03.2018 passed by learned Addl. Sessions Judge, Chandigarh.

Vide letter No.70 dated 14.03.2018, Presiding Officer has submitted as under:-

FIR No.109 dated 14.11.2016, was registered under Section 328, 342, 366, 376, 392, 34 IPC, P.S. Women Police Station, Sector-17, Chandigarh titled as 'State vs. Baldev Singh' are being carried in the court of undersigned. Briefly the facts of the case are that the said case has been registered on the basis of email sent by Ms.Robyn Allen, resident of USA alleging therein that she is a citizen of USA and had travelled to Chandigarh on 17th April, 2015. She arrived at Sector 17, Bus Stand at around 9.00 p.m. and got into a rickshaw having upper No.87 and lower No.177. The driver of the said rickshaw told his name as Monu. He drove her outside the city to a house owned by another rickshaw driver. Thereafter, she had been raped by both of them. On the basis of said e-mail, formal FIR was registered at Chandigarh.

Furthermore, the investigating agency moved an application before the undersigned for recording the statement under Section 164 Cr.P.C. of complainant and identification parade of accused through Video Conferencing, however, the said applications of the investigating agency was partly allowed by the undersigned vide order dated 02.02.2018 in which the Chandigarh Police was directed to get in touch with the complainant and make arrangements in Indian Embassy/Consulate for the purpose of arranging Video Conferencing or any other mode for recording statement under Section 164 Cr.P.C. They were further directed to intimate the complainant that she should be properly identified and thereafter intimate the same to the Court on receiving the said information.

It is further submitted that aggrieved from the said order of undersigned, State had preferred Revision with the grounds to record the statement under Section 164 Cr.P.C. through video conferencing and get the test identification parade of the accused conducted without involvement of the Embassy to complete the proceedings within a period of 90 days from the

date of arrest of accused so that he does not get bail under Section 167(2) Cr.P.C. The said Revision Petition was allowed by the Id. Additional District & Sessions Judge, Chandigarh and the Investigating Agency has been allowed to get the statement of prosecutrix recorded under Section 164 Cr.P.C. and conduct test identification parade through video conference without intervention of the Embassy in case they have access to the complainant and she is in touch with them because she is not here and is abroad as if the proceedings conducted with the intervention of the Embassy in that eventuality, the statutory period of 90 days for presenting the challan shall expire and the accused shall be released on bail. The said permission was granted to the prosecution subject to the condition that they shall ensure that prosecutrix is duly identified and the said statement shall be recorded without prejudice to the right of the accused to challenge the identity of the prosecutrix during trial.

It is pertinent to mention here that the investigating agency has also placed on record e-mails dated 02.03.2018 and 13.03.2018 received from e-mail Id i.e. freestylefrequency@gmail.com In the e-mail dated 02.03.2018, the prosecutrix has stated that her address is 5705 W, Country Ave, Visalia, California, 93277, however, in the e-mail dated 13.03.2018, she has stated that she lives in Hawaii. Copies of the said e-mails are attached herewith for the kind perusal.

Now, this trial Court is facing difficulty in complying with the directions of the order passed in the said revision petition, as such, necessary guidance please be imparted as to how and in what manner the statement under Section 164 Cr.P.C. of the prosecutrix can be recorded and the test identification parade of the accused can be conducted through video conferencing.”

This application has been taken as criminal reference suo moto. After receiving this reference, notice has been issued to U.T. Chandigarh. Mr.P.S.Ahluwalia, Advocate has been appointed Amicus Curiae.

I have learned APP for U.T. Chandigarh as well as Amicus Curiae and have gone through the record.

The perusal of provisions of Section 164 Cr.P.C. shows that statement under Section 164 Cr.P.C. can be recorded by Audio Video electronic means. Section 164 Cr.P.C. provides as under:-

Section 164 in The Code Of Criminal Procedure, 1973

164. Recording of confessions and statements.

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence;

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the

confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-

“I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

*(Signed) A.B.
Magistrate.”*

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(5A)(a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police;

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement;

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be video graphed.

(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 (1 of 1982) such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.”

The perusal of above-said Section shows that in this Section a proviso has been added through amendment that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence.

The Hon'ble Supreme Court has further laid down the law for recording evidence by way of video conferencing, where the witness is residing in foreign country and not willing to come to India but willing to give evidence, in ***State of Maharashtra vs. Dr.Praful B. Desai and another, 2003(2) RCR (Criminal) 770***, wherein it is 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 person 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 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 drawback. 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.

20. However even if the equipment cannot be set up in Court the Criminal Procedure Code contains provisions for examination of witnesses on commissions. Sections 284 to 289 deal with examination of witnesses on commissions. For our purposes Sections 284 and 285 are relevant. They read as under:

"284 WHEN ATTENDANCE OF WITNESS MAY BE DISPENSED WITH AND COMMISSION ISSUED.

(1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court or Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter:

Provided that where the examination of the President or the Vice-President of India or the Governor of a State or the Administrator of a Union Territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.

(2) The Court may, when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader's fees, be paid by the prosecution.

285 COMMISSION TO WHOM TO BE ISSUED.

(1) If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief

Metropolitan Magistrate or Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to, be found.

(2) If the witness is in India, but in a State or an area to which this Code does not extend, the commission shall be directed to such Court or officer as the Central Government may, by notification, specify in this behalf.

(3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such Court or officer, and sent to such authority for transmission, as the Central Government may, by notification, prescribe in this behalf."

Thus in cases where the witness is necessary for the ends of justice and the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable, the Court may dispense with such attendance and issue a commission for examination of the witness. As indicated earlier Dr. Greenberg has refused to come to India to give evidence. His evidence appears to be necessary for the ends of Justice. Courts in India cannot procure his attendance. Even otherwise to procure attendance of a witness from a far of country like USA would generally involve delay, expense and/or inconvenience. In such cases commissions could be issued for recording evidence. Normally a commission would involve recording evidence at the place where the witness is. However advancement in science and technology has now made it possible to record such evidence by way of video conferencing in the town/city where the Court is. Thus in cases where the attendance of a witness cannot be procured without an amount of delay, expense or inconvenience the Court could consider issuing a commission to record the evidence by way of video conferencing."

Further, learned Amicus Curiae has relied upon the guidelines framed by the Hon'ble Supreme Court in ***Sujoy Mitra vs. State of West Bengal, 2016(1) RCR (Criminal) 594***, as under:-

"4. We have heard learned counsel for the rival parties at some length, and are satisfied, that the following procedure should be adopted, in addition to the steps and safeguards provided in the impugned order, while recording the statement of PW5:

I) The State of West Bengal shall make provision for recording the testimony of PW5 in the trial Court by seeking the services of the National Informatic Centre (NIC) for installing the appropriate equipment for video conferencing, by using “VC Solution” software, to facilitate video conferencing in the case. This provision shall be made by the State of West Bengal in a room to be identified by the concerned Sessions Judge, within four weeks from today. The NIC will ensure, that the equipment installed in the premises of the trial Court, is compatible with the video conferencing facilities at the Indian Embassy in Ireland at Dublin.

II) Before recording the statement of the prosecutrix-PW5, the Embassy shall nominate a responsible officer, in whose presence the statement is to be recorded. The said officer shall remain present at all times from the beginning to the end of each session, of recording of the said testimony.

III) The officer deputed to have the statement recorded shall also ensure, that there is no other person besides the concerned witness, in the room, in which the testimony of PW5 is to be recorded. In case, the witness is in possession of any material or documents, the same shall be taken over by the officer concerned in his personal custody.

IV) The statement of witness will then be recorded. The witness shall be permitted to rely upon the material and documents in the custody of the officer concerned, or to tender the same in evidence, only with the express permission of the trial Court.

V) The officer concerned will affirm to the trial Court, before the commencement of the recording of the statement, the fact, that no other person is present in the room where evidence is recorded, and further, that all material and documents in possession of the prosecutrix-PW5 (if any) were taken by him in his custody before the statement was recorded. He shall further affirm to the trial Court, at the culmination of the testimony, that no other person had entered the room, during the course of recording of the statement of the witness, till the conclusion thereof. The learned counsel for the accused shall assist the trial Court, to ensure, that the above procedure is adopted, by placing reliance on the instant order.

VI) The statement of the witness shall be recorded by the trial Court, in consonance with the provisions of Section 278 of the Code of Criminal Procedure. At the culmination of the recording of the statement, the same shall be read out to the witness in the presence of the accused (if in attendance, or to his pleader). If the witness denies the correctness of any part of the evidence, when the same is read over to her, the trial Court

may make the necessary correction, or alternatively, may record a memorandum thereon, to the objection made to the recorded statement by the witness, and in addition thereto, record his own remarks, if necessary.

VII) The transcript of the statement of the witness recorded through video conferencing(as corrected, if necessary), in consonance with the provisions of Section 278 of the Code of Criminal Procedure, shall be scanned and dispatched through email to the embassy. At the embassy, the witness will authenticate the same in consonance with law. The aforesaid authenticated statement shall be endorsed by the officer deputed by the embassy. It shall be scanned and returned to the trial Court through email. The statement signed by the witness at the embassy, shall be retained in its custody in a sealed cover.

VIII) The statement received by the trial Court through email shall be re-endorsed by the trial Judge. The instant statement endorsed by the trial Judge, shall constitute the testimony of the prosecutrix-PW5, for all intents and purposes.”

In ***Sakshi vs. Union of India and others, 2004(3) RCR (Criminal) 702***, the Hon'ble Apex Court has held the recording of evidence by way of video conferencing vis-a-vis Section 273 Cr.P.C. is permissible. Further, the Hon'ble Supreme Court in ***Gopalakrishnan vs. Sadanand Naik, 2005(1) RCR (Criminal) 224***, has held regarding test identification through video identification and also held as under:-

“7. There are no statutory guidelines in the matter of showing photographs to the witnesses during the stage of investigation. But nevertheless, the police is entitled to show photographs to confirm whether the investigation is going on in the right direction. But in the instant case, it appears that the investigating officer procured the album containing the photographs with the names written underneath and showed this album to the eye-witnesses and recorded their statements under Section 161 Cr.P.C. The procedure adopted by the police is not justified under law as it will affect fair and proper investigation and may sometimes lead to a situation where wrong persons are identified as assailants. During the course of the investigation, if the witness had given the identifying features of the assailants, the same could be confirmed by the investigating officer by showing the photographs of the suspect

and the investigating officer shall not first show a single photograph but should show more than one photograph of the same person, if available. If the suspect is available for identification or for video identification, the photograph shall never be shown to the witness in advance.

In view of the law laid down by the Hon'ble Apex Court and in view of the provisions of Section 164 Cr.P.C., which allows recording of statement through video conferencing, this reference is replied. The guidelines have already been provided by the Hon'ble Supreme Court in the above-cited judgments and the question raised in the reference, has already been answered by the Hon'ble Supreme Court. The Court can proceed as per law on the basis of above-cited judgments.

This reference stands answered accordingly.

January 25, 2019
Vgulati

(INDERJIT SINGH)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No