

Crl.A(MD)Nos. 482 and 513 of 2017

**S.VAIDYANATHAN, J.
and
N.ANAND VENKATESH, J.**

It will be relevant to extract the order passed by this Court on 08.11.2019 as under:

“In our tenure, for the last two months, we noticed that in lots of cases, the list of hostile witnesses is getting bigger and bigger, resulting in acquittals. If this trend is allowed to be continued, people will loose faith in Criminal Justice System. We noticed that the Legislature had thought it fit to introduce the proviso to Section 161 of Criminal Procedure Code by Act 5 of 2009, which came into effect on 31.12.2009, whereby, the examination of the witnesses by Police can be recorded by audio/video electronic means. We found that this proviso has remained in the book for the last ten years and not once it has been resorted to. Recording the examination of witnesses by Police by audio/video electronic means will make it easier for the prosecution to confront witnesses before the Court when the witness wriggles out of the earlier

statement and is treated to be hostile. It will bring in an element of deterrence and make the witness think twice before he disowns the statement given to the Police. This will also enable the witness to substantiate before the Court that the statement shown before the Court was not actually given by him and it was a creation of the Police. Therefore, it will be of use both to the witness as well as to the prosecution and it will enable the Court to properly appreciate the evidence of such witness in dock.

2. We also notice that a similar proviso was added to Section 164 of Criminal Procedure Code which deals with recording of confessions and statements by the Metropolitan Magistrates or Judicial Magistrates, as the case may be. This proviso also came into force on the same date. Of course, in some of the cases while dealing with the POCSO Act, we find that the Special Courts are using audio/video electronic means for recording the statements of the victim girl and others. However, it is important to put to use audio/video electronic means to record the statements on a regular basis, so that the witness who disowns such a statement can be confronted by showing the audio/video recording and it will help the Court

to impeach the credit of the witnesses under Section 155 of the Indian Evidence Act and also to take appropriate action for perjury. Unless an element of deterrence is brought in the minds of witnesses, witnesses turning hostile is only going to continue and acquittals are going to pile up and it will ultimately end up in complete break down of the Criminal Justice System. We are living in era where the science has grown so much and it is hightime that electronic means is used extensively in the investigation and the effectiveness and quality of the investigation is substantially improved.

3. We, therefore, thought it fit to give certain directions in this case which could be implemented throughout the State in all future investigations. We thought it fit to take the assistance of the Bar in this regard so that we will be sufficiently appraised of the manner in which this could be effectively implemented.

*4. Post this case in the same caption on **13.11.2019 at 02.15 p.m.** We request the State Public Prosecutor and also the learned Additional Public Prosecutor to take necessary instructions from the Police in order to assist the Court. If required, a higher level Police official shall also be present before this Court so that we will be in a position to properly*

understand the practicality to implement it, by putting certain questions to the Police officer.

5. Registry is directed to mark a copy of this order to the Madurai Bench of Madras High Court Bar Association, High Court Complex, Madurai(MMBA), Madurai Bench of Madras High Court Advocate Association (MBHAA), High Court complex, Madurai and Women Advocates Association, High Court Complex, Madurai. We request the Bar to assist this Court in this regard.”

2. Pursuant to the order passed by this Court, there was a large scale participation by several counsel, either individually or by representing an Association, who assisted the Court in the deliberation that was called for in the earlier order passed by this Court. The State was represented by Mr.A.Natarajan, the learned State Public Prosecutor, who was effectively assisted by Mr.S.Chandrasekar, learned Additional Public Prosecutor and Mr.K.Dinesh Babu, learned Additional Public Prosecutor.

3. The following are the learned counsel, who made their submissions:

1.Mr. V.Kathirvelu, Senior Counsel,

- 2.Mr.Veerakathiravan, Senior Counsel,
- 3.Mr.N.Ananthapadmanabhan, Advocate
- 4.Mr.G.Mariappan, Advocate for MBA
- 5.Mr.M.Karunanithi, Advocate for MBHAA/MBA
- 6.Mr.R.Gandhi, Advocate, MMBA
- 7.Mr.R.Anand, Advocate, Member of the Bar
- 8.Mr.P.Ganapathi Subramanian, Advocate, Women
Lawyer's Association
9. Mr.Henry Tiphagne, Advocate
10. Mr.T.Senthilkumar, Advocate
11. Mr.KPS.Palanivel Rajan, Advocate
- 12.Mr.A.Thiruvadikumar, Advocate, Madurai
- 13.Mr.G.Karuppasamy Pandian, Advocate,
- and
14. Mr.R.R.Kannan, Advocate, MMBA.

Mr.N.Vijayaraghavan, Advocate and Mr.N.P.Vijayakumar, Advocate, had sent their written amicus brief from the Principal Bench.

4. The hearing was held on 13.11.2019 and 25.11.2019. Mr.K.P.Shanmuga Rajeswaran, Inspector General of Police (South Zone), Mr.S.Davidson Deva Asirvatham, Commissioner of Police, Madurai City were also present throughout the proceedings.

5. Before this Court ventures to deal with the issue that has been raised, this Court appreciates the efforts put in by the respective counsel, who assisted this Court and thanks them for rendering their valuable time in deciding the issue. Only after hearing the counsel, who made their submissions regarding the various *pros and cons* that are involved in this issue, this Court was able to understand the entire gamut and enormity of implementing the practise of recording statements through audio-video electronic means. Two high level Police officers being present through out the proceedings and assisting the Court, as and when called for, showed the seriousness on the part of the State to improve the quality of investigation through audio-video electronic means. This Court places its appreciation to both the police officers for spending their valuable time and providing this Court with crucial inputs.

6. The problem of witnesses turning hostile has been a malaise that has afflicted the criminal justice system for long. In *Mahender Chawla v. Union of India* (W.P Criminal 156 of 2016 decided on 05.12.2018), the Supreme Court examined the role of

witnesses in the criminal justice system and observed as under:

*“Thus, witnesses are important players in the judicial system, who help the judges in arriving at correct factual findings. The instrument of evidence is the medium through which facts, either disputed or required to be proved, are effectively conveyed to the courts. This evidence in the form of documentary and oral is given by the witnesses. A witness may be a partisan or interested witness, i.e., a witness who is in a near relation with the victim of crime or is concerned with conviction of the accused person. Even his testimony is relevant, though, stricter scrutiny is required while adjudging the credence of such a victim. However, apart from these witnesses or the witnesses who may themselves be the victims, other witnesses may not have any personal interest in the outcome of a case. They still help the judicial system. In the words of **Whittaker Chambers**, a witness is “a man whose life and faith are so completely one that when the challenge comes to step out and testify for his faith, he does so, disregarding all risks, accepting all consequences.”*

The Court proceeded to identify the following factors that caused witnesses to turn hostile and retract their statements before the Court:

- (i) Threat/Intimidation.*
- (ii) Inducement by various means.*
- (iii) Use of muscle and money power by the accused.*

(iv) Use of stock witnesses.

(v.) Protracted trials.

(vi) Hassles faced by the witnesses during investigation and trial.

(vii) Non-existence of any clear-cut legislation to check hostility of witness.

45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: “witnesses are the eyes and ears of justice”. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty.”

7. In its 198th Report on Witness Identity Protection and Witness Protection Programmes (2006), the Law Commission of India took note of the grim realities of our criminal justice system and observed as under:

“4.2 Between 1958 and 2004, there has been a total change in the crime scene, inasmuch as, not only crime has increased and cases of convictions have drastically fallen, but there is more sophistication in the manner of committing offences for, today, the offender too has the advantages of advances in technology and science. There are now more hostile witnesses than before and the witnesses are provided allurements or are tampered with or purchased and if they remain firm, they are pressurised or threatened or even eliminated. Rape and sexual offence cases appear to be the worst affected by these obnoxious methods.”

8. Measures to check the scourge of witnesses turning hostile have been mooted by different commissions over the course of the past two decades. In 2003, the Malimath Committee on Reforms of Criminal Justice System headed by Chief Justice V.S Malimath examined various measures to reign in recalcitrant witnesses. Significantly, the committee recommended the use of audio-video electronic means to record the statements of witnesses and dying declarations as a method to resolve the issue. The Commission observed thus:

“7.24. Video/Audio Recording of Statements of Witnesses, Dying Declaration and Confessions:

7.24.1 Frequent changes in statements by the witnesses during the course of investigation and, more particularly, at the trial are really disturbing. This results in miscarriage of justice. Hence, modern science and technology should be harnessed in criminal investigation. Tape recording or video recording of statements of witnesses, dying declarations and confessions would be a meaningful and purposive step in this direction. Unfortunately, the existing law does not provide for it. It is understandable as these facilities did not exist at the time when the basic laws of the land were enacted. Now that these facilities are available to the investigating agency, they should be optimally utilised.

7.24.2 S. 32 of the Prevention of Terrorism Act, 2002, provides that a police officer of the rank of Superintendent of Police may record a confessional statement of an accused either in writing or on a mechanical or electronic devices like cassettes, tapes or sound tracks from out of which sound or images can be reproduced. Such evidence has been rendered admissible at the trial. A similar provision exists in S. 18 of the Maharashtra Control of Organised Crime Act, 1999.

7.24.3 The Committee is of the view that the law should be amended to provide for audio or video recording of

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statements of witnesses, dying declarations and confessions etc. and about their admissibility in evidence. A beginning may be made to use these modern techniques at least in serious cases."

9. This recommendation found a place in the Code of Criminal Procedure Amendment Bill 2006 which proposed changes to Section 161 and 164 of the Code to provide that the statements recorded under these sections could be recorded by audio-video means as well. The Bill was, however, referred to a Parliamentary Standing Committee in August 2006. Quite significantly, the Standing Committee, in its 128th Report submitted before the Rajya Sabha on 16.08.2007, was not in favour of implementing the recommendations of the Justice Malimath Committee. The observations and findings of the Committee, in so far as they are relevant to the present case, run as under:

"9. WITNESS TURNING HOSTILE –

MEASURES TO CURB

(i) The statement made by a person to police during investigation to be signed by the person making it and to be recorded by audio-video electronic means (clause 12).

(ii) Material witnesses in crimes having punishment of more

than 10 years imprisonment to be produced before the Magistrate for recording of statement (clause 15).

(iii) Summary trial of witnesses deposing contrary to statement made under Section 164B and punishment up to 2 years for the offence (clause 36).

VIEWS OF THE COMMITTEE

9.1 The Committee wishes to reiterate its earlier recommendations made in its One Hundred and Eleventh Report on the Criminal Law (Amendment) Bill, 2003 wherein it had expressed the view that evidentiary value of the recorded statement before Police Officer does not change even after it is signed by the witness. In the present Bill the statement is proposed to be recorded by audio-video electronic means. Even that does not change the evidentiary value of the statement. Therefore its earlier recommendation that in a given situation it may violate the Fundamental Right of a person enshrined under Article 20(3) as some of the potential witnesses can be accused also and thus there is an apprehension that the provision can be misused by the police which could increase corruption, still holds good. The Committee is also of the view that presence of an advocate of the accused of an offence while recording confession by audio-video electronic means is likely to expose him as a witness in the trial and thus may cause breach of professional ethics which prescribe that an advocate should not accept a brief where he is likely witness. On the issue of recording of statement before the Magistrate, under section 164B and limiting the offences punishable with imprisonment

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for ten years or more in the Bill the Committee still feels that the Magistrates are already overburdened and by making the recording of statement mandatory will increase their burden.

9.2 The Committee once again deliberated on this aspect and came to the conclusion that there were no compelling circumstances that warrant a review of the recommendation made by the Committee in its One Hundred and Eleventh Report. Hence, the Committee opposes the provision again, as it is not a workable proposition.”

10. It appears that the recommendations of the Standing Committee did not find favor with Parliament. The Criminal Procedure Amendment Act, 2008 (Act 5 of 2009) substantially incorporates the recommendations of the Malimath Committee providing for recording of Section 161 and 164 statements by electronic means. The only difference between the two, it appears, is that a statement under Section 164 Cr.P.C can be recorded by audio-video means only in the presence of an Advocate, which is not necessary in case of a statement under Section 161 Cr.P.C. Notably, a proviso was also inserted in Section 275 of the Cr.P.C enabling the Court to record the statement of all witnesses, in warrant cases, by audio-video means.

11. It is important to take note of the Judgment of the Hon'ble Supreme Court in ***Shafhi Mohammad v. The State Of Himachal Pradesh***, [2018(5) SCC 311], wherein it has issued the following direction:

“5. We have now taken up the issue for further consideration.

An affidavit dated 21st March, 2018 has been filed by the Director, Ministry of Home Affairs (MHA) annexing thereto Report of the Committee constituted by the MHA about use of videography in police investigation dated 22nd November, 2017. The Committee considered various issues including the present infrastructure and usage, concerns/problems raised by various States for use of videography during investigations, admissibility of electronic evidence in absence of a certificate under [Section 65B\(4\)](#) of the Evidence Act, operational difficulties, lack of training, funding, forensic facilities. The Committee observed that though crime scene videography was a “desirable and acceptable best practice”, the mandatory videography required major issues being addressed. Videography may be done on “Best Effort” basis. The timeline should be different for different States and the Central Investigating Agencies. The Committee suggested two alternative timelines. The

second option i.e. Option-B suggested by the Committee is as follows:

“7.3 Option-B: Centrally Driven Plan of Action:

The second approach suggested is for implementation of the directions in a phased manner with milestone based review mechanism.

a. Phase-I: Three Months: Concept, Circulation and Preparation.

** The concept for videography of the recommended categories of tasks, preparations for pilot project launch in*

*i) Cities of 50 lakhs population or more; and, ii) at least one district of every remaining State/Union Territory; within three months of the orders of the Hon'ble Supreme Court. In the selected district(s), at least five police stations may be identified for implementation of the scheme on best effort basis as a pilot project * Capacity Building by organizing training programme for personnel in the police station on the Videography Techniques for them to be qualified as the Trained Police Videographer by the end of three months. Each selected Police Station should identify personnel for Trained Police Videographer qualification, at the rate of two (2) Trained Police Videographer for every 25 heinous/grave crime cases reported in that police station in a year.*

** Selected Districts be enabled/provided finances to procure the equipment required for use by the Trained Police Videographer.*

** A representative of the FSL trained in handling digital evidences should be identified by each of the states to mentor and hand hold the Pilot Project implementation district Trained Police Videographers. Where FSL has no resources to offer, the SP/DCP of the concerned district should be authorized to hire a private technical person proficient in digital imaging and back-up technologies to handhold/mentor the Trained Police Videographers.*

** Preparation of Trainer Police Videographer Training Modules and Training of Trainers courses by BPR&D/CDTS/State Police Academies.*

*b. Phase-II: Six Months: Pilot Project Implementation * After the three months of Concept, Circulation and Preparation stage, the pilot project should be launched in the selected police stations of the shortlisted Districts of the States.*

** The concerned District Superintendent of Police / Deputy Commissioner of Police, shall designate an officer of the rank of Deputy Superintendent of Police/Assistant Commissioner of Police, to supervise the implementation of the Pilot Project and to chronicle the Pilot implementation. Any implementation issues shall immediately be flagged and brought to the notice of the SP / DCP concerned. The officer designated will be*

responsible for the uninterrupted implementation of the Pilot.

** Launch of Trained Police Videographer Training Programmes/ Training of Trainer Course by BPR&D/CDTS/ State Police Academies.*

*c. Phase-III: Three Months: Pilot Implementation Review * The Phase –II Pilot implementation should be reviewed by an independent consultant and, suggestions for seamless implementation on a wider scale should be prepared.*

** The report of the independent consultant to be considered by MHA and select group of officers regarding Pilot implementation and review report preparation.*

** The review and findings by MHA to be placed before the Hon'ble Supreme Court for incorporating necessary changes as required regarding the Videography during Investigation and obtain necessary instructions.*

** During this phase, each state should prepare detailed plans for the launch of the next phase of Videography in Investigations project extending it to*

i) all cities with a population of 10 lakhs and more; b) in all districts with a population of 20 lakhs and more, during Phase-IV.

** A representative of the FSL trained in handling digital evidences should be identified for each of the new unit to*

mentor and hand hold the district Trained Police Videographers, where roll out is proposed in Phase-IV.

Where FSL has no resources to offer, the SP/DCP of the concerned district should be authorized to hire a private technical person proficient in digital imaging and back-up technologies to handhold/mentor the Trained Police Videographers.

** Each state to submit plans for strengthening the Forensic Sciences Laboratories for handling increased Cyber Forensics/Digital Media analysis units. MHA to consider the requirements for this purpose under the MPF scheme.*

** During Phase-III, the Pilot implementation districts/cities will continue with the Videography in Investigations project and extend them to all their Police Stations.*

*d. Phase-IV: One Year: Coverage extension from Pilot Implementation * Implementation of the Videography in Investigations project to Cities of 10+ lakhs population/Districts of 20+ lakhs population identified during Phase-III.*

** During this phase, each state should prepare detailed plans for the launch of the Videography in Investigations project in all remaining districts/cities, which were not covered during Pilot Phase (Phase-II) and Phase-III.*

** A representative of the FSL trained in handling digital evidences should be identified for each of the remaining units to mentor and hand hold the district Trained Police*

Videographers, where roll out is proposed in Phase-V. Where FSL has no resources to offer, the SP/DCP of the concerned district should be authorized to hire a private technical person proficient in digital imaging and back-up technologies to handhold/mentor the Trained Police Videographers.

** MHA to work on extending the financial support for implementation of the project for remaining cities and districts during Phase-V.*

*e. Phase-V: One Year: Coverage extension to remaining Cities and Districts * Implementation of the Videography in Investigations project in all remaining districts and cities.*

** Review of Phase-IV implementation learning based on independent consultant's report by MHA and submission of status report to the Supreme Court for modifications/suggestions for improvement of the Videography in Investigations project."*

6. Apart from above, the Committee suggested that a group of experts may be set up at the level of Government of India comprising:

(i) One head of Central Investigation agencies (CBI, NIA, NCB) as Chairperson;

(ii) One head of State Police;

(iii) One head of CFSL or Senior Forensic Scientist with expertise in the area;

(iv) A Senior Legal Professional (LA of CBI or NIA or comparable from Ministry of Law); and

(v) A senior representative from MHA as members.

7. The group should have the freedom to co-opt members and private experts. The group could periodically issue guidelines/advisories. It is further suggested that each State Police and the Central Investigating Agency may create a Steering Committee under HOPF/Head of CPO within the organization to spearhead this drive. Each State Police/Central Investigating Agency may also designate a senior officer in the rank of IG/ADG as Nodal Officer for spearheading the massive expansion of photography and videography in investigation. Such an officer should be given authority/responsibility to review the progress at periodic intervals and take/propose necessary measures.

8. After considering the report of the Committee, the MHA prepared an action plan on the use of videography in the police investigation stipulating capacity building in terms of training, equipment, forensic facilities, a scheme for requisite funds, preparation of Standard Operating Procedure (SOP). For this purpose, the timeline suggested is as follows:

“All Central Agencies will be asked to prepare and submit Annual Action Plan on “photography and videography in Investigation for 2018 within three months.

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The Ministry will scrutinize the plans and prepare a consolidated requirement and send a formal proposal/scheme to the Ministry of Finance for concurrence and obtaining budget within two months from the finalization/approval of the consolidated action plan, insofar as Central Agencies are concerned.

Efforts will be made to obtain the budget from Ministry of Finance within the financial year 2018-19.

Similar action will have to be taken by States/UTs with respect to their forces.”

9. We are in agreement with the Report of the Committee of Experts that videography of crime scene during investigation is of immense value in improving administration of criminal justice. A Constitution Bench of this Court in Karnail Singh versus State of Haryana (2009) 8 SCC 539 noted that technology is an important part in the system of police administration 1. It has also been noted in the decisions quoted in the earlier part of this order that new techniques and devices have evidentiary advantages, subject to the safeguards to be adopted. Such techniques and devices are the order of the day. Technology is a great tool in investigation². By the videography, crucial evidence can be captured and presented in a credible manner.

10. Thus, we are of the considered view that notwithstanding the fact that as of now investigating agencies in India are not fully equipped and prepared for

*the use of videography, the time is ripe that steps are taken to introduce videography in investigation, particularly for crime scene as desirable and acceptable best practice as suggested by the Committee of the MHA to strengthen the Rule of Law. We approve the Centrally Driven Plan of Action prepared by the Committee and the timeline 1 Para 34 – (2009) 8 SCC 539 2 [Ram Singh and Ors. vs. Col. Ram Singh](#) 1985(Supp) SCC 611, *R. vs. Maqsd Ali* (1965) 2 All ER 464, *R vs. Robson* (1972) 2 All ER 699, *Tukaram S. Dighole vs. Manikrao Shivaji Kokate* (2010) 4 SCC 329, *Tomaso Bruno and anr. vs. State of Uttar Pradesh* (2015) 7 SCC 178, *Mohd. Ajmal Amir Kasab vs. State of Maharashtra* (2012) 9 SCC 1 and *State (NCT of Delhi) vs. Navjot Sandhu* (2005) 11 SCC 600, as mentioned above. Let the consequential steps for implementation thereof be taken at the earliest.*

11. We direct that with a view to implement the [Plan of Action](#) prepared by the Committee, a Central Oversight Body (COB) be set up by the MHA forthwith. The COB may issue directions from time to time. Suggestions of the Committee in its report may also be kept in mind. The COB will be responsible for further planning and implementation of use of videography. We direct the Central Government to give full support to the COB and place necessary funds at its disposal. We also direct that the COB may issue appropriate directions so as to ensure that use of videography becomes a reality in a phased manner and in first phase of implementation by 15th July, 2018 crime scene videography must be

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introduced at least at some places as per viability and priority determined by the COB.

12. We place on record the suggestion of the learned amicus that funding for this project may be initially by the Centre to the extent possible and a central server may be set up. These suggestions may be considered by the COB. We also note that law and order is a State subject.

13. We may also refer to a connected issue already dealt with by this Court in D.K. Basu versus State of West Bengal and ors. (2015) 8 SCC 744. This Court directed that with a view to check human rights abuse CCTV cameras be installed in all police stations as well as in prisons. There is need for a further direction that in every State an oversight mechanism be created whereby an independent committee can study the CCTV camera footages and periodically publish report of its observations. Let the COB issue appropriate instructions in this regard at the earliest. The COB may also compile information as to compliance of such instructions in the next three months and give a report to this Court.”

12. The above case was again heard by the Hon'ble Supreme Court on 03.10.2018, 12.02.2019, 07.03.2019, 02.05.2019 and 18.07.2019. On 18.07.2019, the Hon'ble Supreme Court passed the following order:

“Pursuant to the orders dated 12.02.2019 and 07.03.2019 passed by this Court in the present matter, the concerned Experts and the learned Amicus Curiae have had deliberations and submissions have been made by the learned Amicus Curiae. The submissions dated 29.04.2019 are taken on record.

The response by the Ministry of Home Affairs on the submissions made by the learned Additional Solicitor General. Said response is also taken on record.

According to the response, the Central Academy of Police Training (CAPT) and Bureau of Police Research and Development (BPR&D), Bhopal have developed a Mobile Phone application which would act as a tool in the hands of officers investigating the crime scene. It is stated that National Crime Records Bureau (NCRB) has also provided assistance for coordination and effective implementation

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of this Mobile Application. The response further states that this application has already been tested in six States, namely, Maharashtra, Himachal Pradesh, Gujarat, U.P., Delhi and Madhya Pradesh, whereafter various suggestions have also been taken care of by effecting requisite modifications and the updated version has now been finalized by BPR&D.

The Application is presently under security vetting and the learned ASG submitted that the process would be completed within a month's time.

According to the response, this Mobile Application will be implemented in one district of Delhi NCR, namely, South Delhi District on "Pilot basis". Thus all the Police Stations in South Delhi District would be utilizing this Application which would then give complete idea about the practical implementation of the Mobile Application. The learned ASG

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submitted that for about three months the Mobile Application would be tested on "pilot basis" in all the police stations in South Delhi District, Delhi NCR.

We are happy to note that steps are being taken in right direction so that the Mobile Application could be implemented at an early date. We direct Delhi Police and Union of India to ensure that all the police stations in south Delhi District, utilize this Mobile Application and the results of such use shall be presented before this Court on the next occasion.

Let an affidavit in that behalf along with relevant data be filed soon after the period of three month is over. We may also say that in case the practical implementation of this mobile application is found to be useful, scientifically correct and proper and without any shortcomings, the Union of India may think of putting the Mobile Application to use

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and implementation in at least those six states where the application was initially tested, at an early date.

The submissions made by the learned Amicus Curiae may also be considered for response by the relevant authorities and specially in relation to the points as under:

Sl. No.	Content
9.	Photographing crime scene and physical exhibits.
10.	Photographing/Picking up Trace evidence
11.	Scanning of Documents and Scams
12.	Recovery of Digital evidence
17.	Portal for Collecting from the Public
24.	State Body (Back Office)- to Support and Guide

List the matter on 26.11.2019."

13. It is clear from the above orders passed by the Hon'ble Supreme Court that the Hon'ble Supreme Court is

attempting to bring about detailed guidelines with regard to the usage of audio-video electronic means at the stage of investigation. The Hon'ble Supreme Court is closely looking into the various issues including the present infrastructure and usage problems in putting to practice videography during investigation, viz., admissibility of electronic evidence in the absence of a certificate under Section 65-B(4) of the evidence Act, funding, lack of training, etc. Eventhough the usage of videography during investigation is a desirable and acceptable best practice, it requires major issues that needs to be addressed. Without addressing those issues, if it is directed to be implemented during investigation, it may worsen the present situation. Therefore, it requires to be implemented in a phased manner.

14. It was brought to the notice of this Court regarding the Judgment passed by the Punjab and Haryana High Court in ***Abhijeet Singh alias Ankur Likhari v. State of Punjab.***

15. The Punjab-Haryana High Court has taken into consideration the entire issue and has issued directions to all the investigating officers in the state of Punjab to record the statement

under Section 161 of Cr.P.C., by audio-video electronic means.

16. The prosecution has given written submissions and certain practical difficulties have been expressed in the implementation of the audio-video electronic means during investigation. The main apprehension that has been raised by the prosecution is with regard to the likelihood of the audio-video recorded statements, being tampered, without providing for necessary centralised protection of such recordings. One other apprehension that has been raised is that the audio-video recordings, if it is given to the accused, the same may be circulated in social media and it is possible that it will cause more danger to the witnesses. Consequently, it will affect the witness protection scheme, which has been directed to be implemented by the Hon'ble Supreme Court in ***Mahender Chawla case***. For the present, the prosecution wants to start this practise with serious crimes, crimes against women and children, etc.

17. Mr.A.Natarajan, learned State Public Prosecutor made it clear that the investigating agency wants to improve the standard of investigation and the same can be done only in a phased

manner.

18. One set of counsel argued that the proviso that has been added to Section 161(3) Cr.P.C., is only an enabling provision and it cannot be made mandatory for the prosecution to adopt it in all cases. It was submitted that the legislature had only given an option to the prosecution to also adopt audio-video electronic means in the course of investigation, in appropriate cases. This option given to the investigation agency cannot be made compulsory and the same is clear from the wordings used in the proviso “may”.

19. It was also submitted that even if the statement is recorded through audio-video electronic means, there is no legal sanction for the statements and it can be used only for contradiction. If it has to be contradicted with the help of the audio-video electronic means, the effect of Section 65 (B) of the Indian Evidence Act, will come into play. Certification under this provision has already been referred to a larger Bench by the Hon'ble Supreme Court in ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and others***, by order, dated 26.07.2019. Even if a witness turns hostile, the 161 statement recorded by audio-video

electronic means cannot be relied upon to prosecute the witness for perjury.

20. The other set of counsel submitted that this issue cannot be viewed only from the angle of the accused and the prosecution and it must also be viewed from the angle of a victim. It was submitted that all these amendments were brought forth only with a laudable object of recognizing the right of a victim in criminal prosecution. The learned counsel submitted that the legislation intends to avoid manipulation of statements recorded from witnesses and it ensures transparency. When the entire world is moving towards electronic means, it is high time that the criminal prosecution must also take advantage of this development and it will strike a balance between the rights of the accused and the rights of the victim. Practical difficulties that are pointed out by the prosecution cannot be a ground to stop the implementation of these provisions. At some stage, the audio-video electronic means must be used widely during investigation and it has been effectively implemented in many foreign countries.

21. This Court has carefully considered the submissions made by the various counsel and also the submissions made by the learned State Public Prosecutor.

22. This exercise is being carried out by this Court, since this Court was astonished at the manner in which witnesses were turning hostile and accused persons were going scot-free in many murder cases. The whole exercise is to find out as to whether the audio-video electronic means can be effectively used in the process of investigation and some sort of accountability can be brought in for witnesses, who were turning hostile at the drop of the hat and dislodging the entire case of the prosecution.

23. This Court noticed that the following provisions have been added to the Code of Criminal Procedure, wherein audio-video electronic means is being provided for recording of statements and recording of evidence.

(a) Section 161 examination of witnesses by police:

3. The Police officer may reduce into writing any statement made to him in the course

of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records:

[Provided that statement made under this sub-section may also be recorded by audio-video electronic means;]

(b) 164 recording of confessions and statements:

[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 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 videographed.

(c) Section 275 of Cr.P.C., record in warrant cases:

Provided that evidence of a witness under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the

offence.

24. The legislature has thought it fit to bring in audio-video electronic means to record the statements of witnesses and the evidence of witnesses in order to bring in an authenticity and permanent record and ensure that the witnesses do not easily go back on their statements. The legislature took into consideration the modern science and technology that is available and wanted to put it to use to ensure a fair investigation and to build up the quality in the Criminal Justice System. It is natural that various apprehensions are raised at the time of its initial implementation. However, mere apprehension and difficulties expressed, cannot stop the implementation of the provisions in the Code of Criminal Procedure, which provides for audio-video electronic means. Only if the provision is implemented, it can be fine tuned and made perfect over a period of time. Any new method to start with will have its own problems in implementation and that should not deter the prosecution to start the process. Law has to update itself according to the changing times and it cannot remain static.

25. Insofar as the recording of the statement of

witnesses by audio-video electronic means as provided by proviso to sub-section 3 of Section 161 of Cr.P.C., this Court does not want to give any mandatory directions or issue any guidelines, for the present, in view of the fact that the Hon'ble Supreme Court is already dealing with this issue in greater detail in ***shafhi Mohammad case*** and this Court wants to await the final decision of the Hon'ble Supreme Court in this regard. In the meantime, this Court leaves it to the discretion of the prosecution to adopt audio-video electronic means in heinous crimes punishable with imprisonment of ten years and above and in offences involving women and children. The written submissions that have been made by the prosecution indicates that in heinous cases and important cases, the police department is already recording 161 statements by audio-video electronic means. This would suggest that a process has already started and it requires to be taken forward. The enabling provision under proviso to sub-section 3 of Section 161 of Cr.P.C., gave the prosecution an additional means to record statements of witnesses. It does not require a direction from this Court to implement this and the police department by itself should have started this process long back. This provision is available in the Code for the last ten years and it remains to be a dead letter without being implemented. That is the reason why this Court was

forced to get into this process of implementing this provision by giving appropriate directions. This Court wants to give three months time to the prosecution to place a report before this Court giving a definite action plan to implement the provision for using audio-video electronic means during the course of investigation. In the meantime, this Court will also await the final orders of the Hon'ble Supreme Court in ***Shafhi Mohammed case***.

26. While formulating the guidelines, the Police Department shall take into consideration certain guidelines that have been given by the Delhi High Court in ***Ramesh Kumar v. State of Delhi***. The guidelines are extracted hereunder:

“146. Certain further aspects which would lend much efficiency to investigations have been brought to our notice. We set down hereafter these aspects which deserve to be considered by the authorities to ensure efficiency, expediency and accuracy in investigations as well as in procedural aspects of trials:

(i) The biggest problem in trials is the attributed unreliability of statements of witnesses recorded under Section 161 of

Cr.P.C. When the witnesses are later confronted with their statements recorded by the police, the witnesses claim either that they had disclosed the materials which do not find mention in Section 161 Cr.P.C., statement or that they had never stated the pointed out aspects. As a result objections of improvements in testimony over the statements under Section 161 Cr.P.C., are sustained by courts.

(ii) Similarly, the investigating agencies face allegations that disclosures are compelled and extorted. While witnesses go hostile, courts often accept the complaints of extorted disclosures against the investigating agencies on behalf of the defence.

(iii) In order to obviate this, urgent steps need to be explored with regard to the interrogation rooms.

(iv) Some countries have interrogation rooms which video recordings. Information is available that in Hong Kong, interrogation rooms are triangular in shape. One complete wall has been fitted with a mirror; the second side of the triangle has the door to the room while on the third wall, the video recording camera is fitted. As such while the interrogation is conducted in private, but it

is under strict scrutiny and is recorded contemporaneously which would prevent any allegation of compulsion and force and would obviate any allegation of padding or tampering. Adequate number of such interrogation rooms have to be provided.

(v) Scientific evidence is being subjected to contamination and destruction. This could be avoided by providing Mobile Forensic Vans so that blood samples, fingerprints etc., could be taken and examined at the place of the incident itself.

(vi) Given the advancements in technology and science, there can be increased dependence on such tools and evidence which would reduce the period of indictment and also induce objectivity into the prosecution evidence.

(vii) Given available technology, there is no reason why the chargesheet as well as accompanying records are not filed in digital format by the use of internet with a centralized filing system in the courts.

(viii) The court, the investigating agency and jail can maintain an electronic linkage for this purpose with the prisons. After filing in electronic format and its marking to a court, the same can be conveyed over the

internet to the central prisons which would download the same and hand over hard copies as well as digital formats to the accused person. The prisons should have facilities for downloading the electronic material.”

27. Insofar as recording the Statements by audio-video means under Section 164 of Cr.P.C, is concerned, the Hon'ble Supreme Court has already dealt with this issue in ***Doongar Singh and Others v. The State of Rajasthan***. The relevant portions of the judgment is extracted hereunder:

“12. It is also necessary that the statements of eye-witnesses are got recorded during investigation itself under [Section 164](#) of the Cr.P.C. In view of amendment to [Section 164](#) Cr.P.C. by the Act No.5 of 2009, such statement of witnesses should be got recorded by audio-video electronic means.

13. To conclude:

*(i) The trial courts must carry out the mandate of [Section 309](#) of the Cr.P.C. as reiterated in judgments of this Court, inter alia, in *State of U.P. versus Shambhu Nath Singh and Others [(2001) 4 SCC 667]*, *Mohd. Khalid versus State of W.B. [(2002) 7 SCC 334]* and *Vinod Kumar versus State of Punjab [(2015) 3 SCC 220]* .*

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(ii) The eye-witnesses must be examined by the prosecution as soon as possible.

(iii) Statements of eye-witnesses should invariably be recorded under [Section 164](#) of the Cr.P.C. as per procedure prescribed thereunder.¹⁴ The High Courts may issue appropriate directions to the trial courts for compliance of the above.

15. A copy of this order be sent by the Secretary General to the Registrars of all the High Courts for being forwarded to all the presiding officers in their respective jurisdiction.”

28. In view of the above Judgment of the Hon'ble Supreme Court, it is now mandatory for the prosecution to examine the eyewitnesses as early as possible and their statements must be recorded under Section 164 of Cr.P.C., and it should also be recorded by audio-video electronic means. This judgment of the Hon'ble Supreme Court is now the law of the land and it should be implemented in its letter and spirit.

29. The Hon'ble Supreme Court has directed the High Courts to issue appropriate directions to the trial Courts for

compliance of the order of the Hon'ble Supreme Court. In compliance with the order of the Hon'ble Supreme Court, the following directions are issued by this Court to all investigating officers:

(I) *In all crimes, particularly, offences affecting the human body covered under Chapter XVI of IPC and punishable with imprisonment of 10 years and above, the statements of eyewitnesses, the injured witnesses and the complainant shall be recorded during investigation under Section 164 of Cr.P.C., and through audio-video electronic means, wherever it is available.*

(II) *In all crimes against women and children under various special enactments, the same procedure shall be followed.*

(III) *The State Government shall ensure that audio-video recording facilities are provided to all Magistrate Courts, Mahalir Courts and Sessions Courts throughout Tamil Nadu, within a period of three months from the date of receipt of copy of this order.*

and

(IV) *The State Government shall also make arrangements to facilitate the storage and safe*

keeping of the electronic data in the respective Courts.

30. The Code of Criminal Procedure has now specifically provided for recording of evidence of a witness in a Court through audio-video electronic means. By recording evidence in this manner, the appellate Court will also have the advantage of looking into the demeanor of the witness. This will bring a lot of authenticity to the process of trial and particularly in Sessions trial, which involves grave crimes. The appeal is only a continuation of the original proceedings and therefore, it will help the appellate Court to appreciate the evidence in a more effective manner. This can be implemented in all cases involving serious crimes, which are punishable with imprisonment of 10 years and above.

31. It is seen that the process of recording the evidence of witness through audio-video electronic means is provided under Section 275 of Cr.P.C., in warrant cases. However, a similar provision is not found for trial in cases before Court of Sessions. This, in the view of this Court, is only a *casus omissus*. It is a settled

principle of interpretation of statute that a matter which should have been provided, but has not been provided for in a statute, cannot be supplied normally by the Courts. It will be appropriate to lend the words of Lord Denning in this regard; "When a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written words so as to give 'force and life' to the intention of the Legislature. A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

32. The legal position prevalent in this country is not much different from the law as stated in England. It is now a settled law that where there is a clear necessity and when reason for it is found in the four corners of the statute itself, the Court can always supply *casus omissus*. It will defy logic, if the legislature has provided for recording evidence through audio-video electronic means only in warrant cases and not in Sessions trials. Such an

interpretation will lead to illogical and absurd consequences. Therefore, this Court has to necessarily read into Section 276 of the Code of Criminal Procedure, such recording of evidence of a witness by audio-video electronic means.

33. In cases involving heinous offences punishable with imprisonment of ten years and above and also offences against women and children, evidence that is recorded in the Court must also be recorded through audio-video electronic means. Such recorded version can form part of the Court records. This facility is not available in all Courts, which are dealing with such grave offences.

34. In all those Courts, where there is no audio-video electronic means of recording, the State Government shall immediately take steps to provide for the same and also facilitate the storage and safe keeping of such electronic data. The status in this regard should be provided to this Court during the next date of hearing.

35. It is important for the State Government to implement the witness protection scheme that has been directed by Hon'ble Supreme Court in ***Mahender Chawla and Others v.***

Union of India and Others, and it is the law of the land as on today. Unless, the witness protection scheme is implemented, the audio-video electronic means cannot be effectively brought into force, since it may expose the witnesses to a larger threat. The Hon'ble Supreme Court has directed the scheme to be implemented within a period of one year, i.e., by the end of 2019. The State Government is directed to implement this scheme as per the directions given by the Hon'ble Supreme Court and a status report shall also be filed in this regard.

36. The directions given by this Court shall be implemented and a status report shall be filed by the State Government in the next date of hearing.

37. Post this case for recording compliance and for passing further orders on 01.04.2020. The Registry is directed to post this case before the same Bench after getting appropriate orders from the Hon'ble Chief Justice/Administrative Judge.

[S.V.N.,J.] & [N.A.V., J.]

29.11.2019

Index : Yes/No

Internet : Yes/No

PJL

To

1. The Secretary to Government (Home Department),
Secretariat,
Fort Saint George,
Chennai.
2. Director General of Police, Chennai.
3. The Inspector General of Police of all Zones.
4. The commissioners of all cities.

Copy to:

The Registrar Judicial,
Madurai Bench of Madras High Court,
Madurai.

Crl.A(MD)Nos.482 and 513 of 2017

S.VAIDYANATHAN, J.
AND
N.ANAND VENKATESH, J.

PJL

Crl.A(MD)Nos.482 and
513 of 2017

29.11.2019