

CJ& SVSJ:
19.06.2020

W.P. No. 7338 of 2020

ORDER

By this order, we are firstly dealing with the issue of framing charge by procuring presence of accused through Video Conferencing (through electronic video linkage). There are two specific situations with which we are dealing. The first situation is where the accused is in judicial custody and the second situation is when accused is on bail. The second issue is whether the examination of the accused under Clause (b) of sub-section (1) of Section 313 can be recorded by procuring the presence of the accused by Video Conferencing. We are examining these issues in the context of situation prevailing due to pandemic of Covid-19.

2. Firstly, we deal with the issue of framing charge. Section 228 of the Code of Criminal Procedure 1973 (in short 'Cr.P.C') deals with framing of charge in a trial before a Court of Sessions. Section 228 read thus:

“228. Framing of Charge.- (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

- (a) is not exclusively triable by the Court of Sessions, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial magistrate or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;
- (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

(Underline added)

3. As regards warrant cases, the relevant provision is Section 240Cr.P.C., which reads thus:

“240. **Framing of Charge.** – (1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

(Underline supplied)

4. In summons triable cases, it is not necessary to frame a formal charge. However, Section 251 Cr.P.C is material which reads thus:

“251. **Substance of accusation to be stated.** – When in a summons-case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge.”

5. As far as the trial before the Court of Sessions and trial in warrant triable cases is concerned, if Sections 229, 230, 241 and 242 of Cr.P.C. are read with the provisions of Section 228 and 240 of Cr.P.C, it is crystal clear that in the Sessions triable cases and warrant triable cases, the charge framed by the learned Judge has to be read over and explained to the accused and the accused is required to be asked whether he pleads guilty or claims to be tried. The accused may plead guilty or he may claim to be tried. The accused may or may not plead anything after the charge is read over and explained to him or may refuse to plead. When the accused does not plead guilty, in all other contingencies, both in Sessions triable cases and warrant triable cases, a date for recording of evidence is required to be fixed. In case of both the categories of trials, the plea of the accused after charge is read over and explained is required to be recorded. In a summons triable cases, though it is not necessary to frame a charge, the particulars of the offence alleged shall be stated to the accused and he shall be asked whether he pleads guilty or whether he has a defence to the same. In summons triable cases, there is a specific provision in Section 252 mandating that in the event the accused pleads

guilty, the Magistrate shall record the plea as far as practicable in the words used by the accused.

6. Thus, it follows that in case of all three categories of trials, plea of the accused is required to be recorded. In summons triable case, the plea is to be recorded after explaining the offence and in two other category of cases, after framing the charge and after reading over and explaining the charge to the accused, the plea has to be recorded. It means that for recording plea, the presence of the accused before the Court is necessary. Now, the question is whether such presence can be procured through Video Conferencing. This issue need not detain us in view of the law laid down by the Apex Court in the case of ***State of Maharashtra v. Dr. Praful B. Desai***¹. The Apex Court considered Section 273 of Cr.P.C which mandates that all evidence taken in the Courts shall be taken in the presence of the accused. The issue was whether the words 'the presence' is used in the sense of physical presence. In paragraphs 19 and 20 of the decision, the apex Court resolved controversy. The Apex Court held thus:

¹(2003) 4 Supreme Court Cases 601

“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 exist. 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 the 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's 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 the 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 the presence of each other. The submissions of the 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 of the Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law".

20. 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 courtroom. They can observe his or her demeanour. In fact the facility to playback 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 playback 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.”

(Underline supplied)

7. The Video Conferencing Rules (in short ‘Video Conferencing Rules’), framed by this Court, a copy of which is annexed to the petition, lay down the procedure for recording of

evidence by Video Conferencing. Rule 8 contemplates the examination of persons including the witnesses through Video Conferencing. Rule 11 indicates that in certain circumstances, even for remand, an accused can be produced before the learned Magistrate through Video Conferencing. Rule 11.2 specifically permits recording of statement under Section 164 of Cr.P.C read with Rule 5 of Chapter 5 of Karnataka Criminal Rules of Practice 1968 (in short 'the Rules of Practice') by Video Conferencing. Rule 11.2 specifically permits recording of a statement of the accused under Section 313 through Video Conferencing. Thus, at the time of framing of charge and at the time of recording of plea, the presence of the accused before the Court can be procured through Video Conferencing. By procuring the presence of the accused through Video Conferencing in case of Sessions triable cases and in case of warrant triable cases, the charge can be read over and explained to the accused and his plea can be recorded. Rule 5 of the Video Conferencing Rules will apply for recording of the evidence by Video Conferencing. If the accused is in Judicial Custody, Video Conferencing facility can be provided at the prison and in such case, the remote point coordinator within the

meaning of Rule 5.3 will be the Jail Superintendent or the officer in-charge of the prison. In case the accused is on bail, any fit or proper person will have to be appointed as the coordinator to ensure that proceedings are conducted in a fair, impartial and independent manner.

8. Though there is no specific provision in Cr.P.C to that effect, there is a practice followed by various Courts of taking the signature of the accused on the plea. If by way of abundant precaution, the learned Judges desire that the signature of the accused is necessary on the plea, in case of accused in judicial custody, a copy of the charge framed and plea recorded thereon can be send by e-mail to the coordinator who will be an officer of the concerned prison. He can be directed to download the same, take print and obtain the signature of the accused in his presence and send it to the Court. In case of an accused on bail, the coordinator can be directed to follow the same procedure. While recording the plea, the Judicial Officer will be well advised to record a statement of the accused that the Judge was clearly audible and visible to him while the charge was read over and explained to him and while his plea was recorded.

9. As far as the examination of the accused under Clause (b) of sub-section (1) of Section 313 Cr.P.C is concerned, it is necessary to make a reference to Section 313 which reads thus:

“313. Power to examine the accused - (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court –

- (a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;
- (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry

into, or trial for, any other offence which such answers may tend to show he has committed.

(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.”

(underlines supplied)

10. Sub-section (5) provides for filing of written statement of the accused which will be treated as sufficient compliance of the requirements under Section 313 of Cr.P.C.

11. On this aspect, it is necessary to refer to the decision of the Apex Court in the case of **Basavraj R. Patil and others v. State of Karnataka and others**². It is a decision by a Bench of three Hon'ble Judges. The majority decision was rendered by Thomas, J., for himself and Variava, J. The question arose before the Apex Court is recorded in the majority decision, which reads thus:

“2. When a criminal Court completes prosecution evidence (other than in summons cases) is it indispensably mandatory that the accused himself should be questioned? Cannot the Court

²(2000) 8 SCC 740

allow the advocate to answer such questions on behalf of the accused at least in some exigent conditions?”

12. The Apex Court considered the object of examination of accused under Section 313 of Cr.P.C. In paragraph 19, it was held that the provision is mainly intended to benefit the accused and it also helps the Court in reaching the final conclusion. In paragraph 21, the Apex Court held thus:

“21. But the situation to be considered now is whether, with the revolutionary change in technology of communication and transmission and the marked improvement in facilities for legal aid in the country, is it necessary that in all cases the accused must answer by personally remaining present in court. We clarify that this is the requirement and would be the general rule. However, if remaining present involves undue hardship and large expense, could the court not alleviate the difficulties. If the court holds the view that the situation in which he made such a plea is genuine, should the court say that he has no escape but he must undergo all the tribulations and hardships and answer such questions personally presenting himself in court. If there are other accused in the same case, and the court has

already completed their questioning, should they too wait for long without their case reaching finality, or without registering further progress of their trial until their co-accused is able to attend the court personally and answer the court questions? Why should a criminal court be rendered helpless in such a situation?”

(underline supplied)

The issue is answered in paragraphs 24 to 27, which read thus:

“24. We think that a pragmatic and humanistic approach is warranted in regard to such special exigencies. The word “shall” in clause (b) to Section 313(1) of the Code is to be interpreted as obligatory on the court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the court should, in appropriate cases, e.g., if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How could this be achieved?”

25. If the accused (who is already exempted from personally appearing in the court) makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:

- (a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.
- (b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.
- (c) An undertaking that he would not raise any grievance on that score at any stage of the case.

26. If the court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the court to supply the questionnaire to his advocate (containing the questions which the court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a

properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire (as a matter of precaution the court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for an answer). If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning.

27. In our opinion, if the above course is adopted in exceptional exigency it would not violate the legislative intent envisaged in Section 313 of the Code”.

13. In the present situation created by the pandemic, the Apex Court in Suo Motu Writ Petition (C) No. 1 of 2020 (**In Re: Contagion of Covid 19 Virus in Prisons**)³, has issued a direction which reads thus:

“xxx Taking into consideration the possibility of outside transmission, **we direct that the physical**

³ 2020 SCC Online SC 344

presence of all the undertrial prisoners before the Courts must be stopped forthwith and recourse to video conferencing must be taken for all purposes. Also, the transfer of prisoners from one prison to another for routine reasons must not be resorted except for decongestion to ensure social distancing and medical assistance to an ill prisoner. Also, there should not be any delay in shifting sick person to a Nodal Medical Institution in case of any possibility of infection is seen”.

(emphasis added)

The aforesaid direction is issued in exercise of powers under Article 142 of the Constitution of India, which is binding on all the Courts. Therefore, no undertrial prisoner can be produced before the Court for recording his plea and for recording his examination under clause (b) of sub-section (1) of section 313 of Cr.P.C. during the period of pandemic.

14. Another *suo motu* Writ Petition (Civil) No. 5 of 2020 was initiated by the Apex Court (**In Re: Guidelines for Courts functioning through Video Conferencing during COVID 19 pandemic**). There is an order dated 6th April, 2020 passed in the said case which is relevant. Paragraph-5 of the said order reads thus:

“5. Faced with the unprecedented and extraordinary outbreak of a pandemic, **it is necessary that Courts at all levels respond to the call of social distancing and ensure that court premises do not contribute to the spread of virus. This is not a matter of discretion but of duty.** Indeed, Courts throughout the country particularly at the level of the Supreme Court and the High Courts have employed video conferencing for dispensation of Justice and as guardians of the Constitution and as protectors of individual liberty governed by the rule of law. **Taking cognizance of the measures adopted by this Court and by the High Courts and District Courts, it is necessary for this Court to issue directions by taking recourse to the jurisdiction conferred by Article 142 of the Constitution.**”

(emphasis added)

Clauses (i) and (ii) of paragraph 6, which are the part of the directions, specifically issued under Article 142 are material which read thus:

“6(i) All measures that have been and shall be taken by this Court and by the High Courts, to reduce the need for the physical presence of all stakeholders within court

premises and to secure the functioning of courts in consonance with social distancing guidelines and best public health practices shall be deemed to be lawful;

(ii) The Supreme Court of India and all High Courts are authorized to adopt measures required to ensure the robust functioning of the judicial system through the use of video conferencing technologies; and”

(emphasis added)

15. Under Rule 11.2 of the Video Conferencing Rules, it is specifically provided that in exceptional circumstances, for the reasons to be recorded in writing, the Courts can record the statement of the accused under Section 313 of Cr.P.C through Video Conferencing.

16. The Court in its discretion can take recourse to subsection (5) of Section 313 of Cr.P.C and permit the accused to file his written statement with reference to the questions formulated. The questions can be sent to Jail and the accused can be directed to file his written statement duly signed by him before the Jailor or the Superintendent of Jail. The Court can

always direct the Jail authorities to allow the Advocate of the accused to meet the accused for the purposes of preparation of written statement. If accused is on bail, he can be called upon to answer the questions in writing by handing over the same to his Advocate by directing that written statement of the accused shall be countersigned by him by identifying the signature of his client. The other option is of recording the statement by procuring presence of the accused by Video Conferencing Hearing. The concerned Jail superintendent or the officer-in-charge of the prison will be the coordinator at the remote point of the prison. Before recording the statement and in the midst of recording the statement, the learned Judge can put questions to the accused to ascertain whether he is clearly audible and whether the accused understood the questions posed to him. The learned Judge may record this in the statement to that effect. If the signature of the accused is required, a copy of the written statement recorded can be sent by e-mail to the Jail authorities with an instruction to the Jail authorities to obtain signature of the accused on the statement and then forward the statement to the Court. In case of accused on bail, similar procedure can be followed. The only difference being a fit and

proper person appointed by the Court will be the coordinator at the remote point where the accused is sitting.

17. We must note here that we are deciding the issue only in the context of an exceptional situation created in which due to spread of COVID-19, the Courts are not able to function normally. As observed by the Apex Court in *suo motu* Writ Petition (Civil) No. 5 of 2020, it is the duty of every Court to ensure that the Court premises do not contribute to the spread of virus. Moreover, in *suo motu* Writ Petition (Civil) No. 1 of 2020, the Apex Court has categorically directed that in the present situation, the presence of all the undertrial prisoners before the Courts must be stopped forthwith and recourse to Video Conferencing Hearing must be taken for all purposes. This direction issued by the Apex Court will have to be read with the directions issued on 6th April, 2020 in *suo motu* Writ Petition (Civil) No. 5 of 2020. The course adopted by the Courts while recording the plea of the accused and recording the statement of the accused under Section 313 of Cr.P.C through video conferencing hearing will be a step taken to reduce the physical presence of the stakeholders in the Courts precincts to meet the exceptional situation and to secure the functioning of the Courts

by following the best possible health practice. Therefore, such a course adopted by the Courts shall be deemed to be lawful, in view of the directions contained in clause (i) of paragraph-6 of the aforesaid order dated 6th April, 2020 issued in *suo motu* Writ Petition (Civil) No.5 of 2020. The directions of the Apex Court in paragraph 6 are specifically under Article 142 of the Constitution of India, which will apply during the epidemic of COVID-19.

Accordingly, the questions which are set out earlier stand answered.

**Sd/-
CHIEF JUSTICE**

**Sd/-
JUDGE**

Mr/Vr