

HIGH COURT OF DELHI AT NEW DELHI

No. 72550 /Cr. Dated 23/12/23

Office of District & Sessions Judge
Patiala House Court, New Delhi
Diasy No. 4655
Dated 23/12/23
New Delhi District

From: The Registrar General,
Delhi High Court,
New Delhi.

To:

1. The Ld. Principal District & Sessions Judge, Central Distt., Tis Hazari Courts, Delhi.
2. The Ld. Principal District & Sessions Judge, North Distt., Rohini Courts, Delhi.
3. The Ld. Principal District & Sessions Judge, West Distt., Tis Hazari Courts, Delhi.
4. The Ld. Principal District & Sessions Judge, New Delhi, Patiala House Courts, Delhi.
5. The Ld. Principal District & Sessions Judge, East Distt., Karkardooma Courts, Delhi.
6. The Ld. Principal District & Sessions Judge, North-East Distt., Karkardooma Courts, Delhi.
7. The Ld. Principal District & Sessions Judge, Shahdara Distt., Karkardooma Courts, Delhi.
8. The Ld. Principal District & Sessions Judge, North-West, Distt., Rohini Courts, Delhi.
9. The Ld. Principal District & Sessions Judge, Outer Distt., Rohini Courts, Delhi.
10. The Ld. Principal District & Sessions Judge, South-West Distt., Dwarka Courts, Delhi.
11. The Ld. Principal District & Sessions Judge, South Distt., Saket Courts, Delhi.
12. The Ld. Principal District & Sessions Judge, South-East Distt., Saket Courts, Delhi.
13. The Ld. Principal District & Sessions Judge, CBI Distt., Rouse Avenue Courts, Delhi.
14. The Ld. ASJ (SFTC), New Delhi District, Patiala House Courts, New Delhi "Or" Successor Courts.
15. The Director (Academics), Delhi Judicial Academy, H2XF+QH2, Pocket 1, Sector 14, Dwarka, Dwarka Delhi, 110075.
16. The SHO/IO, Police Station: Vasant Kunj, (North), New Delhi.
17. The Director (Academics), Delhi Judicial Academy. (to be served Through IO).

CRL.M.C. 9100/2023 & CRL.M.A. 33976/2023

VINOD KUMAR & ANR.

.....Petitioner/s

V/s

STATE (NCT OF DELHI) & ANR.

.....Respondent/s

Petition under section 482 of the code of Cr.P.C. 1973, seeking quashing and setting aside of order dated 09.12.2023 passed by Ld. ASJ (SFTC), New Delhi, Patiala House Courts, New Delhi in SC No. 379/2019 titled 'State vs. Vinod Kumar & Ors.' & FIR No. 119/2019, dt. 21.05.2019, U/s. 376D/379 IPC, registered at P.S. Vasant Kunj (North), Delhi.

Sir/Madam,

I am directed to forward herewith for immediate compliance/necessary action a copy of judgment/order dated 22.12.2023 passed in the above case by Hon'ble Ms. Justice Swarana Kanta Sharma, of this Court.

Other necessary directions are contained in the enclosed copy of order.

Yours faithfully
[Signature] 23/12/23

Admin. Officer Judl. (Cri-II)
For Registrar General

Encl : Copy of order dated : 22.12.2023
and Memo of Parties.

OIC Court RW
HDD
23/12/23
P.D. 23/12/23
(old handwriting)

Be circulated amongst all the ld. Judicial
offices at PNC/ND for forwarding please.

OIC/General Branch,
NDD/PhC/New Delhi

02/1/24

IN THE HIGH COURT OF DELHI AT NEW DELHI
CRL. M.C. NO. _____ OF 2023

IN THE MATTER OF:
VINOD KUMAR & ANR.

... PETITIONERS

VERSUS

STATE (NCT OF DELHI) & ANR.

... RESPONDENTS

MEMO OF PARTIES

1. VINOD KUMAR
S/O RANDHIR SINGH
R/O RZ-151, A BLOCK,
MAHIPALPUR,
DELHI - 110037
... PETITIONER NO. 1

2. RAJESH KUMAR
S/O GANGA BISHAN
R/O VPO CHAWLA,
RADHA KRISHNAN MANDIR,
NEW DELHI - 110071
... PETITIONER NO. 2

VERSUS

1. STATE (NCT OF DELHI)
(THROUGH THE SHO,
PS VASANT KUNJ (NORTH))
dhcprosecutiondelhipolice@gmail.com
... RESPONDENT NO. 1

2. 'MS. X'
(THROUGH THE SHO,
PS VASANT KUNJ (NORTH))
dhcprosecutiondelhipolice@gmail.com
... RESPONDENT NO. 2

NOTE: IDENTITY DETAILS OF THE COMPLAINANT / VICTIM
CONCEALED IN ACCORDANCE WITH DIRECTIONS IN ORDER DATED
19.04.2023 IN BAIL APPLN. NO. 3635 / 2022 TITLED 'SALEEM VS. STATE'

NOTE: SERVICE OF THE COMPLAINANT / VICTIM EFFECTED THROUGH
THE SHO, PS VASANT KUNJ (NORTH) IN VIEW OF NON-AVAILABILITY
OF THE CORRESPONDENCE DETAILS OF THE COMPLAINANT / VICTIM

FIR NO. 119 / 2019 DT. 21.05.2019

U/S 376D / 379 IPC

PS VASANT KUNJ (NORTH)

CHARGE-SHEET DATED 16.08.2019

U/S 376D / 377 / 379 / 411 IPC

COGNIZANCE ORDER DATED 19.08.2019


1ST SUPPLEMENTARY CHARGE-SHEET DATED 01.09.2021

ORDER FRAMING CHARGE DATED 02.03.2022

U/S 376D & 379 / 411 IPC

NEW DELHI
11.12.2023

DRAWN & FILED BY:


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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 12.12.2023
Pronounced on: 22.12.2023

+ **CRL.M.C. 9100/2023 & Crl. M.A. 33976/2023**

VINOD KUMAR & ANR.

..... Petitioners

Through: Mr. Tanveer Ahmed Mir, Mr.
 Kartik Venu, Mr. Vaibhav Suri
 and Ms. Ariana Ahluwalia,
 Advocates

versus

STATE (NCT OF DELHI) & ANR.

..... Respondents

Through: Mr. Manoj Pant, APP for the
 State.

CORAM:**HON'BLE MS. JUSTICE SWARANA KANTA SHARMA****J U D G M E N T****INDEX TO THE JUDGMENT**

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SWARANA KANTA SHARMA, J.

1. The instant petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed on behalf of the petitioners, seeking quashing and setting aside of order dated 09.12.2023, passed by learned Additional Sessions Judge (SFTC)-New Delhi, Patiala House District Courts, New Delhi, in Sessions Case No. 379/2019.

2. The petitioners Vinod Kumar and Rajesh Kumar, who are facing trial in an alleged case of gang rape alongwith one another accused Anil Kumar, seek direction from this Court, to the learned Trial Court, to compel the physical presence of the prosecutix for her examination and cross-examination.



FACTUAL BACKDROP

3. The sequence of events, prompting the filing of present petition before this Court, is that a complaint was received by the office of Senior Superintendent of Police, District Kangra, Dharamshala, Himachal Pradesh, by the prosecutrix 'X', aged about 23 years, a citizen of United States of America, who had disclosed that she had arrived in India, at the Indira Gandhi International Airport, Terminal 3, from Chicago, USA, on 15.05.2019 at 6:40 pm. It was further stated in the complaint that she had to catch a flight from Delhi to Dharamshala at 6:30 am on the next day i.e. 16.05.2019, and thus, she had slept overnight at the airport. However, the next morning, she had unfortunately missed her flight to Dharamshala. After receiving her luggage from the concerned airlines, the prosecutrix had stepped out of the Airport, where she had encountered two persons i.e. 'Lal Singh' and 'Kumar' (*as mentioned in the complaint*), who had represented themselves as taxi drivers and had offered to help her in getting a bus ticket for Dharamshala. The prosecutrix had accordingly sat in their vehicle, and after about 5-10 mins, they had stopped the car near a market and had got a bus ticket for her, for which she had paid them Rs.10,000/- and USD 20. Thereafter, these two persons had convinced the prosecutrix that since the bus was scheduled to leave from Kashmere Gate at 6:50 pm, she should stay in a hotel as it was 10:30 am in the morning. Thereafter, they had taken her to a hotel in Vasant Kunj New Delhi. It is alleged that these accused persons had entered the room of the prosecutrix, and had then committed rape upon her. One of these



accused had also taken the ring that was worn by the prosecutrix. Thereafter, in the evening, they had offered to drop the prosecutrix at Kashmere Gate, and on their way, the prosecutrix had contacted LHA Charitable Trust at Mcleodganj, Himachal Pradesh and had made accused namely 'Kumar' to talk to that person. Thereafter, the accused persons had dropped the prosecutrix near Patiala House Courts and from there, she had travelled in a taxi to Kashmere Gate. On boarding the bus, she had found that the bus ticket handed over to her by the accused persons was fake. It is stated that thereafter, she had to board an ordinary bus for Dharamshala, and she had reached her destination in the morning of 17.05.2019. On 20.05.2019, the prosecutrix had narrated this incident to the officials of U.S. Consulate and on their instructions, she had approached the office of SSP, Dharamshala and had lodged the present complaint.

4. Since the offence was allegedly committed within the jurisdiction of Delhi, the case was forwarded to Delhi, and the present FIR No. 0119/2019 was registered at Police Station Vasant Kunj North, under Sections 376D/379 of Indian Penal Code, 1860 ('IPC'). During investigation, the prosecutrix was medically examined at Safdarjung Hospital where she had given history of sexual assault by three persons.

5. As disclosed from the petition, the petitioners i.e. Vinod Kumar and Rajesh Kumar and third accused namely Anil Kumar, were all arrested in the present case on 21.05.2019, and after completion of investigation, charge-sheet dated 16.08.2019 was filed under Sections 376D/377/379/411 of IPC. Cognizance in the present



case was taken by the learned Trial Court on 19.08.2019 and the case was committed to the learned Sessions Court on 21.08.2019. The first supplementary chargesheet was filed on 01.09.2021 by the prosecution. Thereafter, *vide* order dated 22.03.2022, the learned Trial Court had framed charges against the three accused persons under Sections 376D/379/411 of IPC. Since the prosecutrix was not traceable, *vide* order dated 04.07.2022, the learned Trial Court had directed the concerned DCP to explore the possibility of examining the prosecutrix through video-conferencing and had called for a report. Thereafter, a report was filed, wherein it was mentioned that the prosecutrix had not been responding to the e-mails and messages of the concerned IO or to the summons served upon her by the Ministry of External Affairs. Thereafter, the learned Trial Court had issued fresh summons through MEA and had once again directed the concerned IO or SHO to contact the prosecutrix to either join physically or through video-conferencing. On 26.11.2022, the learned Trial Court had observed that ample opportunities had already been afforded to the prosecutrix to examine herself and thereafter, one last opportunity was granted to her. Eventually, on 13.12.2022, the right of prosecutrix to examine herself was closed by the learned Trial Court since she had failed to appear. On 17.02.2023, the prosecution evidence stood closed and on 02.03.2023, statement of all the accused persons had got recorded under Section 311 of Cr.P.C., and thereafter, final arguments were heard on 15.03.2023. It is stated that on 27.03.2023, the petitioners were granted regular bail in the present case by the learned Trial Court. *Vide* order dated 20.04.2023, the



learned Trial Court had once again directed the concerned IO and SHO to contact the prosecutrix for the last time.

6. Finally, on 11.09.2023, the prosecutrix had joined the proceedings before the learned Trial Court through video-conferencing and had stated that she could testify through video-conferencing since she is a resident of Chicago, Illinois, USA.

IMPUGNED ORDER

7. Thereafter, the petitioners had filed an application dated 29.11.2023 seeking appropriate direction from the learned Trial Court directing the physical presence of the prosecutrix 'X' for her examination and cross-examination in the present case. However, the learned Trial Court *vide* impugned order dated 09.12.2023 had dismissed the application filed by the petitioners seeking physical presence of the prosecutrix. The relevant portion of the order reads as under:

" ...While relying upon this rule, the applicant argued that recording of evidence of the witness through video conferencing requires consent of the accused. On this aspect, it is pertinent to note that vide order dated 02.03.2022, charges were framed against the accused persons. On 04.07.2022, the court directed the concerned DCP to explore the possibility of examining the prosecutrix through video conferencing, if she is not in a position to come to the court physically and the report was called from the concerned DCP.

Further, vide order dated 11.07.2022, the court has directed to serve summons to the prosecutrix and opportunity was given to her to appear either physically or through video conferencing to get her testimony recorded. The prosecutrix was summoned through Ministry of External Affairs and the court has taken pain to pass



detailed guidelines and directions to the concerned authorities for purpose of recording of evidence of the prosecutrix through video conferencing. Similar directions were passed by this court on 20.04.2023. The applicants / accused persons were very much aware that the court has passed directions for recording of evidence through video conferencing. The defence opted not to challenge the order of the court directing for recording of evidence of the prosecutrix through video conferencing. The last directions for recording of evidence of the prosecutrix through video conferencing were passed on 11.09.2023. The court has been directing to record evidence through video conferencing for the last more than one year. The accused persons has never objected to the directions of the court for recording of evidence through video conferencing and it shows that the accused persons has impliedly consented for recording of evidence by this mode.

Furthermore, the order of the court for recording of testimony of the prosecutrix through video conferencing remains unchallenged by the defence. Now, the legal question arises as to whether this court has power to recall its order directing recording of evidence by video conferencing. The application is seeking review of the order of this court, wherein the court had made it clear that the choice be given to the prosecutrix to get her statement recorded through video conferencing.

It is very settled proposition of law that criminal court has no power to recall its own order. In criminal law, there is no provision of review. Therefore, this application in the garb of compelling the prosecutrix to appear in physical for recording of her evidence is seeking review of the order passed by this court on 04.07.2022, 11.07.2022, 20.04.2023 and 11.09.2023 and hence, the same is not maintainable. Apart from the maintainability, I take this opportunity to observe that the complainant / prosecutrix is a victim of heinous offence gang rape and she is the resident of USA. It would be harassment for the prosecutrix / victim to insist or compel her to come to India for purpose of trial in this case. Moreover, it would be onerous burden on the state exchequer if the prosecutrix is compelled to come to India for recording of her evidence. There are high probabilities that the prosecutrix would opt not to appear if she was asked to come to India for recording of evidence. Moreover, in the age of



technological advancement, it would be convenient to record the testimony of the witness sitting in USA without compromising with the rights of the accused for fair trial. The court is of the considered opinion that there would be no obstacle in the fair trial while recording testimony of the prosecutrix through video conferencing..."

8. Aggrieved by the aforesaid events, the petitioners have approached this Court.

CONTENTIONS RAISED BEFORE THIS COURT

9. Learned counsel for the petitioners, while assailing the impugned order, argues that the learned Trial Court has erroneously held that the petitioners had impliedly consented to the recording of evidence of the prosecutrix through video-conferencing, by virtue of not challenging the previous procedural orders dated 04.07.2022, 11.07.2022, 20.04.2023 and 11.09.2023, and the Court had failed to consider that all these orders were passed only in consultation with the prosecution and completely without the consent or the opportunity of hearing being given to the accused. It is also stated that a perusal of these orders would reveal that they were passed only to afford the prosecutrix an opportunity to either appear physically or appear through video-conferencing, and the Court had not finally directed the prosecutrix to appear through video-conferencing for the purpose of recording of her evidence. It is argued by the learned counsel that Rule 5.3.11 of the Delhi High Court Video-Conferencing Rules 2021 mandates that where a witness examination is to take place in a criminal case of a person located outside India, the Court



can exercise its discretion in allowing the examination of such witness *via* video-conferencing, however, the consent of accused in such cases has to be obtained, which has not been obtained in the present case. It is argued that the impugned order erroneously holds that calling the witness physically would amount to harassment and financial burden on the state exchequer, however, considering the gravity of the offence alleged and the importance of the testimony of prosecutrix in such cases, the examination of prosecutrix through video-conferencing would not be in the interest of justice, and the same would rather unfairly curtail the sacrosanct right of cross-examination by an accused. It is also submitted that effective cross-examination on behalf of the accused, without interruptions which can arise through means of video-conferencing, is an important right of the accused which is to be protected by the courts of law. It is argued that if the petitioners are convicted in the present case, the punishment can be extended up to 20 years for the offence in question and thus, the consequent duty of the Trial Court is to balance the rights of accused with the right of victim. It is further submitted that the Courts have the power to record the reactions, tone and demeanour of the witnesses, which is important to be considered during cross-examination of a witness. In this regard, reliance has been placed upon several judgments by the learned counsel for the petitioners. In these circumstances, it is prayed that the impugned order be set aside and the prosecutrix in the present case be directed to appear physically before the learned Trial Court for the purpose of



recording of evidence and for cross-examination by the counsel for accused.

10. Learned APP for the State, while opposing the grant of relief as prayed by the petitioners, argues that the present case pertains to sexual assault of a foreign citizen in the year 2019 when she was on a visit to India. It is stated that the Video Conferencing Rules framed by this Court as well as several other judgments of the Hon'ble Apex Court have laid down directions and have always permitted a foreign national in a sexual assault case to be examined through video-conferencing. It is stated that the learned counsel for the accused has not been able to satisfy that the recording of evidence through video-conferencing is against the principles of criminal justice. It is also stated that the argument of the learned counsel that the parties and the court will not be able to observe the demeanor of the witness should be rejected as the truthfulness of the statement does not entirely depend on the demeanor of the witness, which can even otherwise be noted through video-conferencing by the defence counsel and the learned Judge. It is also stated that this Court may also direct the learned Trial Court to issue a Commission as per Section 284 of Cr.P.C. for the purpose of recording of evidence, to ensure fairness of trial proceedings. Therefore, it is argued that the present petition be dismissed and the evidence of prosecutrix may be allowed to be recorded through video-conferencing.

11. The arguments addressed before this Court by learned counsel for the petitioner as well as by the learned APP for the State have been heard, and the material placed on record has been perused.



**WHETHER THE IMPUGNED ORDER VIOLATES THE
MANDATE OF 'HIGH COURT OF DELHI RULES FOR
VIDEO CONFERENCING FOR COURTS 2021'?**

12. The first argument advanced by the learned counsel for the petitioner was that the directions given by the learned Trial Court are against Rule 5.3.11 of the Delhi High Court Video-Conferencing Rules 2021, and no consent of the accused had ever been obtained by the Court before passing such directions.

13. This Court has gone through the 'High Court of Delhi Rules for Video Conferencing for Courts 2021' and the relevant rules read as under:

"5. Preparatory Arrangements

5.1 There shall be a Coordinator both at the Court Point and at the Remote Point from which any Required Person is to be examined or heard. However, Coordinator may be required at the Remote Point only when a witness or a person accused of an offence is to be examined.

5.2 In the civil and criminal Courts falling within the purview of the district judiciary, persons nominated by the High Court or the concerned District Judge, shall perform the functions of Coordinators at the Court Point as well as the Remote Point as provided in Rule 5.3.

5.3 The Coordinator at the Remote Point may be any of the following:

Sub-Rule	Where the Advocate or Required Person is at the following Point:-	The Remote Point Coordinator shall be:-
5.3.1	Overseas	An official of an Indian Consulate /the relevant Indian Embassy / the relevant



		High Commission of India
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5.3.11 Notwithstanding the provisions of Clause 5.3.1, where witness examination is to take place in a criminal case of a person located outside the country, the provisions of the "Comprehensive Guidelines for investigation abroad and issue of Letters Rogatory (LRs) / Mutual Legal Assistance (MLA) Request and Service of Summons / Notices/ Judicial documents in respect of Criminal Matters" (available at http://164.100.117.97/WriteReadData/userfiles/ISI_ComprehensiveGuidelinesMutualLegal_Assistance_17122019.pdf) will be followed to the extent they comport with the provisions of the CrPC and the Evidence Act. Furthermore, before the Court employs its discretion to carry out witness examination via video conference, it will obtain the consent of the accused..."

14. Thus, it can be noted that Rule 5.3.11 provides that in case the Court allows the recording of evidence of a witness via video-conferencing, who is located overseas i.e. out of India, the consent of accused in such cases will be obtained.

15. With regard to the aforesaid, this Court notes that a similar argument was raised before the learned Trial Court and was dealt with in the impugned order dated 09.12.2023, wherein it was observed by the Court that there was an implied consent on part of the accused persons, since the learned Trial Court had been giving directions for the production of prosecutrix through video-conferencing, for the purpose of recording of evidence, and no objection had been raised by the accused persons, till the filing of application on 29.11.2023.



16. Having perused the orders sheets of the learned Trial Court placed on record, this Court observes that in the order dated 04.07.2022, the learned Trial Court had directed the concerned DCP “to explore the possibility of examining the prosecutrix through Video conferencing, if she is not in a position to come to the court physically”. This order was passed in the presence of all three accused persons and the learned counsel for the accused Vinod Kumar. Thereafter, on 11.07.2022, the learned Trial Court had issued fresh summons to the prosecutrix through the Ministry of External Affairs and while noting that the prosecutrix may tender her evidence through means of video-conferencing, the Court had passed exhaustive directions regarding how such testimony of the prosecutrix would be recorded through video-conferencing. This order was also passed in presence of all the accused persons and counsel for accused Vinod Kumar. The directions issued in this order are reproduced hereunder for reference:

- “1. The Ministry of Home Affairs is accordingly directed to issue a letter on request to the Consulate General of India by Embassy of India for USA to coordinate their government to make necessary arrangements at their end for recording of evidence of prosecutrix through video conferencing and also to forward this directive for arrangement of video conferencing as per rules.
2. Testimony shall be recorded during the court hours i.e. between 10:30 am to 4:00 pm.
3. The Consulate to also make arrangement of interpreter at his end.
4. The Consulate General to make necessary arrangement to detain the staff for video conferencing during the Indian court hours.
5. DCP concerned is directed to provide to the Ministry of Home Affairs the complete detail of video conferencing



system including IP detail of the remote point and will also share the details of the IP details of the court point with all necessary information.

I) DCP concerned is directed to take necessary approval of NICNET system facility during the evidence be also taken in favour NIC so as to make the connection between videoconferencing system of Patiala House Complex at a distant end i.e. remote point.

II) DCP concerned shall also ensure that the coordinators at both the points conduct a test two days prior to the date of hearing between both the points to resolve any technical problem so that the testimony be recorded without any interruption.

III) DCP concerned shall ensure the person is to be examined or heard is available at the room earmarked for the video conferencing at least 30 minutes before the scheduled time.

IV) DCP concerned in coordination with Embassy of India for USA directed to ensure regulated entry into the video conferencing room.

V) Incharge video conference Patiala House New Delhi, directed to make necessary arrangements as per the schedule in coordination with the concerned agencies.

Since during the course of recording of the testimony as stated by the Ld. Addl. PP, documents are also required to be put to the witness, therefore, DCP shall ensure that a complete set of documents which are to be put to the witness are prepared in advance with appropriate pagination and one set of the same be sent to the witness through e-mail/and post well before the date of hearing. Ahlmad/IO is directed to prepare and provide a set of these documents to the Consulate General.

The testimony of prosecutrix through video conferencing shall be recorded during the court hours i.e. 10.30 am to 4 pm on 27.10.2022, 28.10.2022 and 29.10.2022.

It is made clear that in addition to above mentioned, video conferencing rules vide Notification No.325/Rules/DHC dated 01.06.2020 of Hon'ble High Court be followed in this regard."

17. Again on 20.04.2023, similar detailed directions for recording of testimony of prosecutrix were passed, while issuing fresh summons to the prosecutrix. Like the previous orders, this order was



also passed in the presence of accused persons and counsel for accused no. 2. On similar lines, the directions for recording of evidence through video-conferencing were again issued by the learned Trial Court on 11.09.2023, when the prosecutrix had appeared before the Court through video-conferencing. The accused persons and their counsels were also present on this day before the learned Trial Court.

18. Therefore, in light of such facts and circumstances, the learned Trial Court did not commit any error while observing that the counsels for accused persons had never objected to the Court issuing summons to the prosecutrix for her to appear either physically or virtually and even depose *via* video-conferencing, for which exhaustive directions were issued from time to time.

19. However, having observed so, this Court even otherwise takes note of Rule 18 of the 'High Court of Delhi Rules for Video Conferencing for Courts 2021', which provides as under:

"18. Power to Relax

The High Court may if satisfied that the operation of any Rule is causing undue hardship, by order dispense with or relax the requirements of that Rule to such extent and subject to such conditions, as may be stipulated to deal with the case in a just and equitable manner."

20. Rule 18, thus, grants this Court, the discretion to relax or dispense with the requirements of any specific rule, when it is clear that strict application of such a rule will cause undue hardship, or may lead to injustice or create an unwarranted burden on the parties involved. The key intent behind incorporation of Rule 18, as it



appears, is to provide a mechanism to act as a safeguard against the adverse consequences that may arise due to the inflexible application of rules.

21. Thus, in the discussion that follows, this Court will examine as to whether in the given set of facts and circumstances, the prosecutrix can be allowed to testify through video-conferencing, though the accused have objected to the same.

WHETHER PERMITTING THE PROSECUTRIX TO TESTIFY VIA TWO-WAY VIDEO-CONFERENCING WILL VIOLATE THE ACCUSED'S RIGHT TO FAIR TRIAL?

22. Learned counsel for the accused/petitioners has asserted repeatedly that it will be against all tenets of criminal law and justice system to permit virtual recording of the testimony of the prosecutrix in a case of alleged sexual assault.

23. This Court, though agrees that there is nothing more fundamental to the concept of principle of open court trial process and the witness testifying orally in an open Court in the presence of accused, the defence counsel and the judge, however, in India, an exception has been carved out in cases of vulnerable witnesses including witnesses of sexual assault.

24. It will be crucial, for the proper adjudication of the present petition, to first look into the material aspects of who a 'vulnerable witness' is and how the testimonies of such witnesses are to be recorded.



A. Judicial Precedents And Directions of the Hon'ble Apex Court Qua Vulnerable Witnesses: How the Journey Started

25. The initiation of debate on the idea of 'vulnerable witnesses' goes back to the year 1996, when the Hon'ble Apex Court in case of *State of Punjab v. Gurmit Singh (1996) 2 SCC 384* had stressed upon conducting the trial of rape cases *in camera*, as envisaged by Section 327 of Cr.P.C. The relevant observations are extracted hereunder for reference:

"24. These two provisions are in the nature of exception to the general rule of an open trial. In spite of the amendment, however, it is seen that the trial courts either are not conscious of the amendment or do not realise its importance for hardly does one come across a case where the inquiry and trial of a rape case has been conducted by the court in camera. The expression that the inquiry into and trial of rape "shall be conducted in camera" as occurring in sub-section (2) of Section 327 CrPC is not only significant but very important. It casts a duty on the court to conduct the trial of rape cases etc. invariably "in camera". The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327(2) and (3) CrPC and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. The High Courts would therefore be well-advised to draw the attention of the trial courts to the amended provisions of Section 327 CrPC and to impress upon the Presiding Officers to invariably hold the



trial of rape cases in camera, rather than in the open court as envisaged by Section 327(2) CrPC. When trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the court as envisaged by Section 327(3) CrPC. This would save any further embarrassment being caused to the victim of sex crime. Wherever possible, it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial courts would take recourse to the provisions of Sections 327(2) and (3) CrPC liberally. Trial of rape cases in camera should be the rule and an open trial in such cases an exception...”

26. In *Sakshi v. Union of India* (2004) 5 SCC 518, the Hon'ble Apex Court had issued further directions in addition to the directions issued in *Gurmit Singh* (*supra*), and had also observed that evidence of a victim in sexual assault case can also be recorded through video-conferencing, and that mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses. These observations can be gainfully referred to, as under:

“31. The whole inquiry before a court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 CrPC merely requires the evidence to be taken in the presence of the



accused. The section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses. Recording of evidence by way of video-conferencing vis-à-vis Section 273 CrPC has been held to be permissible in a recent decision of this Court in *State of Maharashtra v. Dr. Praful B. Desai*. There is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are handmaidens of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties.

32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of subsection (2) of Section 327 CrPC should also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

33. In *State of Punjab v. Gurmit Singh*, this Court had highlighted the importance of provisions of Sections 327(2) and (3) CrPC and a direction was issued not to ignore the mandate of the aforesaid provisions and to hold the trial of rape cases in-camera. It was also pointed out that such a trial in-camera would enable the victim of the crime to be a little comfortable and answer the questions with greater ease and



thereby improve the quality of evidence of a prosecutrix because there she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of the public. It was further directed that as far as possible trial of such cases may be conducted by lady judges wherever available so that the prosecutrix can make a statement with greater ease and assist the court to properly discharge its duties, without allowing the truth to be sacrificed at the altar of rigid technicalities.

34. The writ petition is accordingly disposed of with the following directions:

(1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

These directions are in addition to those given in *State of Punjab v. Gurmit Singh*.

35. The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and rape are increasing at an alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.

27. Moving further, in the year 2018, the Hon'ble Apex Court in case of *State of Maharashtra v. Bandu @ Daulat (2018) 11 SCC*



163, had taken note of the special centres set up in Delhi for recording evidence of vulnerable witnesses and had issued directions for setting up “special centres for examination of vulnerable witnesses” in criminal cases so as to facilitate a conducive environment for recording the statements of vulnerable witnesses. The relevant portion of this decision reads as under:

“10. Before parting with this order we may deal with the suggestion of the learned Amicus that there should be special centres for examination of vulnerable witnesses in criminal cases in the interest of conducive environment in Court so as to encourage a vulnerable victim to make a statement. Such centres ought to be set up with all necessary safeguards. Our attention has been drawn to guidelines issued by the Delhi High Court for recording evidence of vulnerable witnesses in criminal matters and also the fact that four special centres have been set up at Delhi for the purpose.

11. We find merit in the above suggestion. In *Sakshi v. Union of India*, this Court, after due consideration of the above issue, issued the following directions: (SCC p. 545, para 34)

12. The directions of the Delhi High Court and setting up of special centres for vulnerable witnesses as noted above are consistent with the decision of this Court and supplement the same. We are of the view that all High Courts can adopt such guidelines if the same have not yet been adopted with such modifications as may be deemed necessary. Setting up of one centre for vulnerable witnesses may be perhaps required almost in every district in the country. All the High Courts may take appropriate steps in this direction in due course in phases. At least two such centres in the jurisdiction of each High Court may be set up within three months from today. Thereafter, more such centres may be set up as per decision of the High Courts. A copy of this order be sent to all the High Courts for necessary action.”

28. Most recently, a landmark progress has been made in the scheme of recording evidence of vulnerable witnesses, and the



Hon'ble Apex Court in case of *Smruti Tukaram Badade v. State of Maharashtra* 2022 SCC OnLine SC 78, while expanding the scope of term 'vulnerable witness', has issued the following directions and guidelines:

3. The fairness of the process of trial as well as the pursuit of substantive justice are determined in a significant measure by the manner in which statements of vulnerable witnesses are recorded. The dignity of person, which is an intrinsic element of Article 21 of the Constitution, cannot be left to the vagaries of insensitive procedures and a hostile environment. Access to justice mandates that positive steps have to be adopted to create a barrier free environment. These barriers are not only those which exist within the physical spaces of conventional courts but those which operate on the minds and personality of vulnerable witnesses. There is a pressing need to facilitate the salutary purpose underlying the creation of a barrier free environment where depositions can be recorded freely without constraining limitations, both physical and emotional. This requires not just the creation of infrastructure but sensitizing all stakeholders.

4. This Court issued notice to all the High Courts in pursuance of which they have appeared through Counsel. Based on the material which has been placed before the Court, Ms. Vibha Datta Makhija, amicus curiae, has prepared a tabulated statement of the position of infrastructure in various High Courts as of 25 October 2021. A copy of the tabulated statement is annexed as a broad indicator at Annexure 'A' to this order. Based on the deliberations which have taken place during the course of proceedings in the Court, the suggestions which have been proposed by the amicus curiae and the responses of some of the Counsel who have appeared on behalf of the High Courts, the following directions are issued under Article 142 of the Constitution in furtherance of the earlier decisions of this Court. These are intended to facilitate the implementation of the directions which were rendered on 24 October 2017 in *Bandu (supra)* and earlier in other decisions.

5. The directions are enumerated below:

(i) The definition of "vulnerable witness" contained in Clause 3(a) of the 'Guidelines for recording evidence of



vulnerable witnesses in criminal matters' of the High Court of Delhi shall not be limited only to child witnesses who have attained the age of 18 years and should be expanded to include, inter alia, the following categories of vulnerable witnesses:

(a) Age neutral victims of sexual assault read with Sections 273 and 327 of the Code of Criminal Procedure 1973 and Section 354 of the Penal Code, 1860;

(b) Gender neutral victims of sexual assault read with Section 2(d) of the Protection of Children from Sexual Offences Act 2012;

(c) Age and gender neutral victims of sexual assault under Section 377 of the Penal Code, 1860 read with paragraph 34(1) of the decision in Sakshi (supra);

(d) Witnesses suffering from "mental illness" as defined under Section 2(s) of the Mental Healthcare Act 2017 read with Section 118 of the Indian Evidence Act 1872;

(e) Any witness deemed to have a threat perception under the Witness Protection Scheme 2018 of the Union Government as approved by this Court in Mahender Chawla v. Union of India;

(f) Any speech or hearing impaired individual or a person suffering from any other disability who is considered to be a vulnerable witness by the competent court; and

(g) Any other witness deemed to be vulnerable by the concerned court.

(ii) The High Courts shall adopt and notify a Vulnerable Witnesses Deposition Centres Scheme within a period of two months from the date of this order unless a scheme is already notified. The High Courts which already have existing VWDC Schemes in place may consider making suitable modifications in conformity with the guidelines which are indicated in the present order. **In formulating the VWDC Scheme, the High Courts shall have due regard to the scheme which has been formulated by the High Court of Delhi, which has been duly approved in the judgment of this Court in Bandu (supra);**

(iii) Every High Court should set up an in-house permanent VWDC Committee for continuously supervising the implementation of the present directions and making a periodic assessment of the number of VWDCs required in each district proportionate to the time required for recording



- evidence of vulnerable witnesses and to coordinate the conduct of periodic training programmes;
- (iv) Every High Court is requested to make an estimation of costs towards manpower and infrastructure required to set up at least one permanent VWDC in every establishment of the District Court (or additional Sessions Court establishments) and estimate the optimal number of VWDCs required for the entire State within a period of three months;
- (v) Having due regard to the importance of conducting periodic training programmes for manning and managing the VWDCs and sensitizing all stake holders, including judicial officers, members of the Bar and the staff of the court establishment, we constitute a Committee chaired by Justice Ms. Gita Mittal, former Chief Justice of the Jammu and Kashmir High Court. The Committee shall devise and implement an All India VWDC Training Programme, besides engaging with the High Courts on the creation of infrastructure for VWDCs. The initial tenure of the Chairperson shall be for a period of two years. All High Courts or concerned role assignees shall facilitate and give full cooperation in conducting training programmes in terms of the module which may be prepared by the Chairperson;
- (vi) Upon the estimation of costs prepared by the VWDC Committee of each High Court, the State Government shall expeditiously sanction the requisite funds within a period of three months from the date of the submission of the proposal or the end of the financial year, whichever is earlier; and disburse the funds to the High Court in accordance with the project plan. The State Government shall nominate a nodal officer of the Finance Department who shall be associated ex officio with the work of the VWDC Committee of the High Court, to facilitate the implementation of the proposal submitted by the High Court in terms of these directions;
- (vii) The High Courts shall ensure that at least one permanent VWDC is set up in every District Court establishment (or additional Sessions Court establishments) within a period of four months. The Registrars General of the High Courts shall file compliance reports before this Court;
- (viii) In many States, ADR Centres have been set up by the High Courts in close proximity to the court establishments in the districts. Where such ADR Centres are in place, the High Courts would be at liberty to ensure that the VWDC is made available within the premises of the ADR Centre so as to



secure a safe, conducive and barrier free environment for recording the depositions of vulnerable witnesses;

(ix) The National Legal Services Authority as well as the State Legal Services Authorities have a vital stake and role, particularly in devising and implementing sensitization and training programmes. The Chairperson of the Committee appointed by this Court is requested to engage with NALSA and SLSAs (subject to the directions which may be issued by the Hon'ble Executive Chairperson of NALSA) so as to provide an effective interface for implementing the scheme for training;

(x) The Hon'ble Chief Justices of the High Courts would be at liberty to take all appropriate steps either on the administrative side or on the judicial side in furtherance of the present directions and to monitor compliance on a periodic basis;

(xi) The Chief Justice of the High Court of Delhi is requested to make available a work space/room for the office of the VDW Committee Training Centre and requisite staff, preferably personnel who have previously assisted in the development and implementation of the Training Modules of the Delhi High Court and to designate a Coordinator of the programme in consultation with the Chairperson. Appropriate secretarial and logistical support staff and equipment may be made available to the Committee on a reasonable remuneration as fixed by the Chairperson. The expenses in that regard, including the honorarium payable to the Chairperson shall be defrayed by the Ministry of Women and Child Development to the Director of the Delhi Judicial Academy. The Chairperson may fix a reasonable honorarium for the work assigned to her under the terms of this order. In the event that any further directions are necessary, the Chairperson may seek them before this Court and any communication in that regard shall be placed for further directions; and

(xii) The Ministry of Women and Child Development of the Union Government shall designate a nodal officer for coordinating the implementation of these directions and for providing all logistical support to Justice Ms. Gita Mittal, the Chairperson of the Committee appointed by this Court. This would include the payment of honorarium to the Chairperson in terms as fixed by the Chairperson and meeting the expenses, including those towards engaging domain experts



for training programmes. The Union Ministry of Women and Child Development and all Ministries of Women and Child Development in the States shall coordinate with the Chairperson and extend logistical support. The High Courts shall, in consultation with the Chairperson of the Committee, enlist experts in the field to facilitate proper training and development of all stake holders...”

B. Recording of Evidence of Vulnerable Witnesses: Scheme of Delhi High Court

29. This Court, in case of *Virender v. State of (NCT of Delhi) 2009 SCC OnLine Del 4413*, had issued numerous guidelines, including some relating to having a separate room in Courts from where the child witness can depose, and using video conferencing facilities or by way of a close circuit television, to minimize the trauma of a child witness/victim.
30. Pursuant to the aforesaid directions, the '*Guidelines For Recording Of Evidence Of Vulnerable Witnesses In Courtrooms*' was designed by this Court, which stands approved by the Hon'ble Apex Court.
31. As per these Guidelines issued by this Court, the 'vulnerable witness' was defined as a child who has not completed 18 years of age. However, while examining the provisions of this scheme, the Hon'ble Apex Court in para 5(i) of judgment in case of *Smruti Tukaram Badade (supra)*, had expanded the scope of the term 'vulnerable witness', which has already been taken note of in the preceding discussion. What is important to keep in mind is that an



adult woman, who is a victim of offence of rape or gang rape, would also be now included in the category of 'vulnerable witness'

32. Though this Court does not intend to delve deep into the intricacies of the scheme, yet it will be useful to take a brief overview of how video-conferencing is used through the vulnerable witness rooms, for the purpose of recording evidence. Some of the relevant provisions have been extracted hereunder for reference:

“3(k). Live Link – ‘Live link’ means and includes a live television link, audio-video electronic means or other arrangement whereby a witness, while absent from the courtroom is nevertheless present in the court room by remote communication using technology to give evidence and be cross-examined.

* * *

24. Duty to provide comfortable environment

It shall be the duty of the court to ensure comfortable environment for the vulnerable witness by issuing directions and also by supervising, the location, movement and deportment of all persons in the courtroom including the parties, their counsel, child witnesses, support persons, guardian ad litem, facilitator, and court personnel. The child may be allowed to testify from a place other than the witness chair. The witness chair or other place from which the child testifies may be turned to facilitate his testimony but the opposing party and his counsel must have a frontal or profile view of the child even by a video link, during the testimony of the child. The witness chair or other place from which the child testifies may also be rearranged to allow the child to see the opposing party and his counsel, if he chooses to look at them, without turning his body or leaving the witness stand. While deciding to make available such environment, the judge may be dispensed with from wearing his judicial robes.

* * *

27. Measures to protect the privacy and well-being of child victims and witnesses.

(1) At the request of a child victim or witness, his or her parents or guardian, his or her lawyer, the support person,



other appropriate person designated to provide assistance, or the court on its own motion, taking into account the best interests of the child, may order one or more of the following measures to protect the privacy and physical and mental well-being of the vulnerable witness child and to prevent undue distress and secondary victimization:

(e) efforts to conceal the features or physical description of the child giving testimony or to prevent distress or harm to the child, including testifying:

- (i) behind screen;
- (ii) using image- or voice-altering devices;
- (iii) through examination in another place, transmitted simultaneously to the courtroom by means of video link;
- (iv) through a qualified and suitable intermediary, such as, but not limited to, an interpreter for children with hearing, sight, speech or other disabilities;
- (f) holding closed sessions;

30. Live-link television testimony in criminal cases where the vulnerable witness is involved -

- (a) The prosecutor, counsel or the guardian ad litem may apply for an order that the testimony of the child be taken in a room outside the courtroom and be televised to the courtroom by live-link television.
- (b) In order to take a decision of usage of a live-link the judge may question the child in chambers, or in some comfortable place other than the courtroom, in the presence of the support person, guardian ad litem, prosecutor, and counsel for the parties. The questions of the judge shall not be related to the issues at trial but to the feelings of the child about testifying in the courtroom.
- (c) The court on its own motion, if deemed appropriate, may pass orders in terms of (a) or any other suitable directions for recording the evidence of a vulnerable witness.

C. Judicial Precedents Qua Recording of Evidence of Witnesses Through Video-Conferencing

33. At this juncture, this Court deems it apposite to analyse as to whether the statutory law and judicial precedents of the Hon'ble



Apex Court allow a victim of sexual assault, who is a foreign citizen for the purpose of recording evidence through video-conferencing in a criminal trial.

34. An examination of the legal framework in this regard reveals that this issue was considered, at length, by the Hon'ble Apex Court in case of *State of Maharashtra v. Dr. Praful B. Desai* 2003 4 SCC 601. The broad propositions laid down by the Hon'ble Apex Court were as under:

- a) Recording of evidence via video-conferencing satisfies the object of Section 273 of Cr.P.C., that the evidence must be recorded in the presence of the accused, and no prejudice is caused to the accused.
- b) In video-conferencing, both the victim and the accused are in the presence of each other, and except for touching, one can see, hear and observe as if the party is in the same room.
- c) Demeanour of a witness can be clearly observed when the witness testifies through video-conferencing.
- d) Since the equipment used in facilitating video-conferencing can be set up in the Court room, the judge can record the evidence himself or through dictation in open court room.
- e) If the equipment cannot be set up in court, provisions of Sections 284 to 289 of Cr.P.C. can be resorted to, and commissions can be issued for examination of witnesses.



35. The relevant portions of the decision in case of *Dr. Praful B. Desai (supra)*, including the guidelines issued for recording of evidence of a witness, who was a resident of USA, read 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 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 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 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.

21. Reliance was then placed on Sections 274 and 275 of the Criminal Procedure Code which require that evidence be taken down in writing by the Magistrate himself or by his dictation in open court. It was submitted that video-conferencing would have to take place in the studio of VSNL. It was submitted that this would violate the right of the accused to have the evidence recorded by the Magistrate or under his dictation in open court. The advancement of science and technology is such that now it is possible to set up video-conferencing equipment in the court itself. In that case evidence would be recorded by the Magistrate



or under his dictation in open court. If that is done then the requirements of these sections would be fully met. To this method there is, however, a 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.

22. 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:

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, h 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 a 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-off 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 b place where the witness is. However, advancement in science and technology has now made it possible to record such evidence by way of videoconferencing 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.

24. In this case we are not required to consider this aspect and therefore express no opinion thereon. The question whether commission can be issued for recording evidence in a country where there is no arrangement, is academic so far as this case is concerned. In this case we are considering whether



evidence can be recorded by video-conferencing. Normally, when a commission is issued, the recording would have to be at the place where the witness is. Thus Section 285 provides to whom the commission is to be directed. If the witness is outside India, arrangements are required between India and that country because the services of an official of the country (mostly a judicial officer) would be required to record the evidence and to ensure/compel attendance. However, new advancement of science and technology permit officials of the court, in the city where videoconferencing is to take place, to record the evidence. Thus where a witness is willing to give evidence an official of the court can be deputed to record evidence on commission by way of video-conferencing. The evidence will be recorded in the studio/hall where the video-conferencing takes place. The court in Mumbai would be issuing commission to record evidence by video- h conferencing in Mumbai. Therefore the commission would be addressed to the Chief Metropolitan Magistrate, Mumbai who would depute a responsible officer (preferably a judicial officer) to proceed to the office of VSNL and a record the evidence of Dr Greenberg in the presence of the respondent. The officer shall ensure that the respondent and his counsel are present when the evidence is recorded and that they are able to observe the demeanour and hear the deposition of Dr Greenberg. The officers shall also ensure that the respondent has full opportunity to cross-examine Dr Greenberg. It must be clarified that adopting such a procedure may not be possible if the witness is out of India and not willing to give evidence .

25. It was then submitted that there would be practical difficulties in recording evidence by video-conferencing. It was submitted that there is a time difference between India and USA. It was submitted that a question would arise as to how and who would administer the oath to Dr Greenberg. It was submitted that there could be a video image/audio interruptions/ distortions which might make the transmission inaudible/indecipherable. It was submitted that there would be no way of ensuring that the witness is not being coached/tutored/prompted whilst evidence was being recorded. It is submitted that the witness sitting in USA would not be subject to any control of the court in India. It is submitted that the witness may commit perjury with impunity and also insult the court without fear of punishment since he is not d amenable to the jurisdiction of the court. It is



submitted that the witness may not remain present and may also refuse to answer questions. It is submitted that commercial studios place restrictions on the number of people who can remain present and may restrict the volume of papers that may be brought into the studio. It was submitted that it would be difficult to place textbooks and other materials to the witness for the purpose of cross-examining him. Lastly, it was submitted that the cost of video-conferencing, if at all permitted, must be borne by the State.

26. To be remembered that what is being considered is recording evidence on commission. Fixing of time for recording evidence on commission is always the duty of the officer who has been deputed to so record evidence. Thus the officer recording the evidence would have the discretion to fix up the time in consultation with VSNL, who are experts in the field and who will know which is the most convenient time for video-conferencing with a person in USA. The respondent and his counsel will have to make it convenient to attend at the time fixed by the officer concerned. If they do not remain present, the Magistrate will take action, as provided in law, to compel attendance. We do not have the slightest doubt that the officer who will be deputed would be one who has authority to administer oaths. That officer will administer the oath. By now science and technology has progressed enough to not worry about a video image/audio interruptions/distortions. Even if there are interruptions they would be of temporary duration. Undoubtedly, an officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded who would remain present when the evidence is being recorded and who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded. That officer will ensure that the witness is not coached/tutored/prompted. It would be advisable, though not necessary, that the witness be asked to give evidence in a room in the Consulate/Embassy. As the evidence is being recorded on commission that evidence will subsequently be read in court. Thus no question arises of the witness insulting the court. If on reading the evidence the court finds that the witness has perjured himself, just like in any other evidence on commission, the court will ignore or disbelieve the evidence. It must be remembered that there have been cases where evidence is recorded on commission



and by the time it is read in court the witness has left the country. There also have been cases where a foreign witness has given evidence in a court in India and then gone away abroad. In all such cases the court would not have been able to take any action in perjury as by the time the evidence was considered, and it was ascertained that there was perjury, the witness was out of the jurisdiction of the court. Even in those cases the court could only ignore or disbelieve the evidence. The officer deputed will ensure that the respondent, his counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that the respondent is not prevented from bringing into the studio the papers/ documents which may be required by him or his counsel. We see no substance in this submission that it would be difficult to put documents or written material to the witness in cross-examination. It is now possible, to show to a party, with whom video-conferencing is taking place, any amount of written material. The officer concerned will ensure that once video-conferencing commences, as far as possible, it is proceeded with without any adjournments. Further, if it is found that Dr Greenberg is not attending at the time(s) fixed, without any sufficient cause, then it would be open for the Magistrate to disallow recording of evidence by video-conferencing. If the officer finds that Dr Greenberg is not answering questions, the officer will make a memo of the same. Finally, when the evidence is read in court, this is an aspect which will be taken into consideration for testing the veracity of the evidence. Undoubtedly, the costs of video-conferencing would have to be borne by the State. 27. Accordingly the impugned judgment is set aside. The Magistrate will now proceed to have the evidence of Dr Greenberg recorded by way of video-conferencing. As the trial has been pending for a long time, the trial court is requested to dispose of the case as early as possible and in any case within one year from today. With these directions the appeals stand disposed of. The respondent shall pay to the State and the complainant the costs of these appeals..."

(Emphasis supplied)

36. Similarly, in a case involving commission of offence under Section 376 of IPC, where the complainant was a citizen of Ireland and resident of Dublin, the Trial Court had accepted to record the



testimony of complainant through video-conferencing. The Hon'ble Apex Court in *Sujoy Mitra v. State of West Bengal (2015) 16 SCC 615*, while allowing the recording of evidence of complainant through video-conferencing, had also issued further directions to be followed, which are reproduced hereunder:

“3. We have heard the 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 PW 5:

3.1. The State of West Bengal shall make provision for recording the testimony of PW 5 in the trial court by seeking the services of the National Informatics 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 Sessions Judge concerned, 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.

3.2. Before recording the statement of the prosecutrix, PW 5, 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 the recording of the said testimony.

3.3. The officer deputed to have the statement recorded shall also ensure that there is no other person besides the witness concerned, in the room, in which the testimony of PW 5 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. o

3.4. 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.



3.5. 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, PW 5 (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.

3.6. 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.

3.7. 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.

3.8. 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, PW 5, for all intents and purposes.

4. We are satisfied, that the aforesaid parameters will meet the ends of justice, and that no further inputs are required. Needless to mention, that the procedure for recording the



statement of PW 5, as noticed above, was finalised with the invaluable assistance of the learned counsel for the rival parties.

7. The instant appeal is accordingly disposed of. The trial court shall fix the date of hearing, as and when the video-conferencing facilities have been provided for in the premises of the trial court, and after the same have been synchronised with the facilities available at the Indian Embassy in Ireland at Dublin..."

D. Embracing the Technology while Balancing the Rights of Accused and Victim in a Criminal Trial

37. In view of the preceding discussion, it stands adequately clarified that the fundamental law regarding open court hearings and the presence of the witness, has been modified by judicial precedents, as discussed, and with the consequent adoption of vulnerable witness schemes, which are being followed in the entire country. This Court also notes that these schemes also provide an option for the examination of vulnerable witnesses, including witnesses of sexual assault, by means of technology, rather than recording their evidence in person.

38. There can be no denying that the technology in today's world is so advanced that the testimony of a witness can be recorded by electronic means and the same can be easily accomplished without compromising with the fundamental principles of criminal law and justice.

39. The use of video-conferencing facility, in lieu of physical appearance, for recording of testimony of a victim of sexual assault



has been allowed by the Hon'ble Apex Court, in cases as discussed above, and the same is rather one of the procedures laid down in the cases involving vulnerable witnesses, as per the '*Guidelines For Recording Of Evidence Of Vulnerable Witnesses In Courtrooms*' issued by this Court.

40. There is history and purpose of use of vulnerable witnesses rooms and recording their testimony through such different procedures, instead of a physical face-to-face confrontation of the victim and the accused, at the time of trial.

41. This Court is of the view that the facility of video-conferencing through which the testimony of the prosecutrix can be allowed to be recorded, in the present case also, **is not a one way facility of video-conferencing, but a two-way video-conferencing facility**, which includes the element of participation of the accused, the victim, the learned prosecutor, learned defence counsel and the learned Trial Court Judge and following all the principles of criminal justice system, such as:

- (a) administrating of rule to the witness;
- (b) recording of testimony of the witness in the presence of the learned Judge of Trial Court, the learned defence counsel and the learned APP for the State, who all will be able to see the witness;
- (c) cross-examination of the witness by the learned defence counsel.



E. Evidence via Video-Conferencing viz.-a-viz Recording of Demeanour of Witness

42. One of the concerns raised in this petition, is that whether the learned Trial Court will be able to make assessment of the credibility of the witness if the witness/prosecutrix is allowed to testify through video-conferencing, since the judge will not be able to assess the demeanour of the witness. As far as this contention is concerned, this Court is of the opinion that the physical demeanour of the witness cannot be the sole criteria or determinative of the credibility of the witness. However, at the same time, the demeanour of the witness will also be visible to the judge as when evidence is being recorded through video-conferencing, as also in cases where testimony of the witnesses is recorded in vulnerable witness rooms. The witness will be visible to the learned Trial Court, learned Prosecutor and learned defence counsel on the screen.

43. Even the 'High Court of Delhi Rules for Video Conferencing for Courts 2021' take into consideration the importance of noting demeanour, and in Rule 8.6, provides as under:

"8. Examination of persons

8.6 The Court would be at liberty to record the demeanour of the person being examined..."

44. As also held by the Hon'ble Apex Court in case of *Dr. Praful B. Desai (supra)*, in cases where evidence is recorded via video-conferencing, the accused may be able to see the witness better than



he would have in the courtroom and would also enable better observation of demeanour.

45. This Court is also of the opinion that the learned Trial Court's ability to assess and appreciate the evidence of the witness will be as per law and the facts of the case, and it will not be affected negatively by the fact of prosecutrix testifying through video-conferencing. If the witness is allowed to appear on a large monitor, the learned Trial Judge, the defence counsel as well as the learned prosecutor and accused will be able to see the witness while she will be testifying and will be cross-examined. The test of credibility, reliability and quality of her evidence will, therefore, depend on the testimony i.e. the examination-in-chief and the cross-examination by the learned defence counsel, and other factors which have to be taken into account while adjudicating a criminal case.

F. Whether an 'Educated Woman Hailing From Developed Country' Cannot Be Covered Under the Definition of 'Vulnerable Witness'?

46. Before parting with this case, this Court notes that one of the grounds raised in the present petition, while assailing the impugned order, is that since the prosecutrix herein is a mature and educated woman, hailing from a developed country, she cannot be equated with a vulnerable child witness.

47. While appreciating such pleas, it will be relevant to understand the meaning of term 'vulnerable'. As per Cambridge dictionary,



'vulnerable' means "able to be easily physically or mentally hurt, influenced, or attacked". The Merriam Webster defines 'vulnerable' as "capable of being physically or emotionally wounded". As per Black's Law Dictionary, the term 'vulnerability' refers to "degree of people, resources, property, environments are susceptible to be harmed, degrade, destroyed or exposed to hostile factors".

48. Significantly, in a case of sexual assault, the vulnerability of the witness is not in relation to her financial or educational background or her being from a developed or undeveloped country, but the vulnerability is in relation to her mental and physical trauma, which makes her vulnerable to the atmosphere and presence of the accused, which will make her undergo and re-live the traumatic experience of having been sexually violated by the accused, by his sheer presence.

49. The impact of sexual assault is universally devastating, but for a victim who is a foreign citizen seeking justice in another country, the emotional toll can be particularly acute. The act of recounting the traumatic experience in a foreign courtroom can be a distressing and traumatizing process, and the Courts must acknowledge and address such challenges. Thus, in the pursuit of justice, it is important for the Courts to consider the unique circumstances that surround cases involving victims of sexual assault, who are foreign citizens. In instances where a woman experiences a traumatic event on a foreign soil, such as in India as in the present case, the Court must remain aware of the potential re-traumatization that may result from requiring the



victim's physical presence on such foreign land, for the purpose of trial.

50. The Courts while deciding such cases have to keep in mind the psychological impact of incidents of sexual assault on the victim, and asking the victim to repeatedly travel back to the country where the assault occurred has the potential to inflict further emotional trauma on the victim. Thus, the Courts must recognize the potential re-victimization that can occur each time the victim is compelled to visit the country where she was sexually assaulted. Therefore, in light of this discussion, this Court holds that the vulnerability of the witness in this case is in relation to her re-victimization and re-traumatization in case she is forced to travel and be present in person to India and depose in the presence of accused persons.

51. In such circumstances, it becomes crucial for the Courts to explore alternative mechanisms that can ensure a fair trial without unduly burdening the victim, who is a foreign citizen and, therefore, the contention of the learned counsel in this regard is rejected.

CONCLUSION

52. This Court is cognizant of the fact that the court has to ensure that all the parties before it are accorded fair treatment and fair trial, but at the same time, it also has to ensure that it has to encourage the vulnerable witnesses to not be deterred or hide behind their fears and trauma, which will discourage effective administration of justice and enforcing rule of law. The concept of fairness though undoubtedly require that the counsel for the accused should be in a position to



effectively defend his client, however, the two-way video-conferencing facility and recording of testimony of the witness in today's technological era cannot be held as deprivation of fair trial to the accused.

53. The victim in this case is a material witness and the two-way video-conferencing facility is capable of preserving, adhering and following all the crucial elements of a fair criminal trial. The issue of vulnerability of the witness cannot be clouded by the argument of the learned counsel for the accused that it was the right of the accused to cross-examine the witness effectively which will be possible only in a physical Court appearance.

54. Recording of evidence of the prosecutrix, in the present case, through means of two-way video-conferencing, while following the directions and guidelines laid down by the Hon'ble Apex Court in judicial precedents mentioned above, and by this Court in 'High Court of Delhi Rules for Video Conferencing for Courts 2021', will effectively and adequately ensure that the testimony of the victim is recorded as per law and is subjected to rigorous adversarial testing by way of cross-examination.

55. The trauma of testifying in a sexual assault case of a foreign citizen in another country, in this Court's opinion, is a sufficiently critical factor to justify the use of video conferencing facility instead of face-to-face confrontation. The two-way video conferencing assisted testimony is not adverse nor does it amount to denial of accused's right to effective cross-examination. This Court also lays emphasis on the fact that the two-way video-conferencing facility and



recording of testimony of the victim through the same will still have to be subjected to the tradition parameters of reliability and will be tested on the touchstone of credibility on the basis of cross-examination.

56. In cases as the present one, it is not the mere convenience of the victim or the accused which is to be the deciding factor to allow or disallow testimony of the victim to be recorded by way of two-way video conferencing. The adjudication of these pleas and the findings and the conclusions of such orders have to go beyond the mere convenience of the parties and are dependent upon the factual setting of each case. Similarly, the conclusion of this order and its findings which have resulted in conclusion of justifying the recording of testimony of the victim through two-way video-conferencing facility is additionally based on the fact that it will be similar to the facility as in use in India through vulnerable witness rooms video-conferencing facility.

57. Thus, it can be safely held that allowing the recording of evidence of the prosecutrix through two-way video-conferencing would not amount to denying the petitioners' right to fair trial, however denying the same may amount to denial of fair right of access to justice to the victim.

58. Therefore, in these circumstances, this Court finds no infirmity in the order impugned before this Court. However, the learned Trial Court is directed to ensure that the guidelines laid down in the cases of *Dr. Praful B. Desai (supra)* and *Sujoy Mitra (supra)* are followed while recording statement of the prosecutrix.



59. Accordingly, the present petition is disposed of, alongwith pending application.
60. Copy of this order be forwarded to Director (Academics), Delhi Judicial Academy for taking note of its contents. The same be also circulated among the Judicial Officers of Delhi through their concerned Principal District & Sessions Judges.
61. The judgment be uploaded on the website forthwith.

Sd/-
SWARANA KANTA SHARMA, J

DECEMBER 22, 2023/zp

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