

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

W.P. No.839/2023

Imran Ahmad Khan Niazi

Versus

Federation of Pakistan, etc.

Petitioner By : Mr. Salman Akram Raja, ASC through video link, Mr. Abuzar Salman Khan Niazi and Malik Ghulam Sabir, Advocates.

Respondents By : Barrister Munawar Iqbal Duggal, Additional Attorney General, Mr. Ahsan Raza Kazmi, Deputy Attorney General and Mr. Azmat Bashir Tarar, Assistant Attorney General alongwith Mr. Adnan Ali, Special Public Prosecutor on behalf of the State and Mr. Zohaib Hassan Gondal, State Counsel.
Muhammad Riaz, DSP (Legal), ICT Police.

Date of Hearing : 18.04.2023.

AAMER FAROOQ, C.J. – The petitioner is facing multiple inquiries/investigations and criminal cases pending mostly in Islamabad but also in other parts of the country. In the referred backdrop, he has filed the instant petition seeking the following prayer:-

"It is, therefore, most respectfully prayed that the Respondents may kindly be directed to make arrangements for the participation and appearance of the Petitioner in all cases within the jurisdiction of this Honourable Court or under the administrative arrangements of the State anywhere in the country through video-link. In the alternative, as regards cases in the Islamabad Capital Territory the Respondents may kindly be directed to conduct hearings at the Federal Judicial Complex at such times as are likely to cause minimal disruption to other judicial work. The Respondent State and the Inspector General of Police, Islamabad may kindly be directed to provide comprehensive security to the Petitioner within the Islamabad Capital Territory as

well as on the motorways and the national highways, particularly at the time of Court appearances.

Any other order deemed to be just and appropriate may also kindly be passed.”

Reading of the above-mentioned prayer shows that petitioner principally wants his attendance to be marked in various investigations and inquiries as well as criminal Courts through video-link and in the alternative to have hearings conducted at the Federal Judicial Complex and not at F-8 Kachehri, as the latter area poses security concerns.

2. Learned counsel for the petitioner, *inter alia*, contended that under the Code of Criminal Procedure, 1898 and Article 164 of Qanun-e-Shahdat Order 1984, modern devices can be used for marking attendance of the accused during the course of various stages of the trial as well as investigation. He submitted that the petitioner is a former Prime Minister and leader of one of the largest parties in Pakistan and has already survived an attempt to his life. In the said backdrop, for him to join investigation in every case and face trial and/or proceedings can be a serious security concern which leads to incurring of hefty expenses on his movement as well as security. Learned counsel contended that usage of video link or other similar devices for recording of evidence or marking presence is not unknown to the jurisdiction of Pakistan. In this regard, reference was made to decision of the Supreme Court of Pakistan in case reported as *Meera Shafi versus Ali Zafar (PLD 2023 SC 211)*. Learned counsel, in support of his arguments, also made reference to *The State of Maharashtra and P.C Singh versus Dr. Praful B. Desai and others (AIR 2003 SC 2053)* and *Basawaraj R. Patil and others versus State of Karnataka and others (AIR 2000 SC 3214)*. Learned counsel contended that provisions of the Code of Civil Procedure are to be given purposive interpretation in such a manner that they should meet the modern day requirements. Reference was made to *Cyberworks Audio Video Plaintiff*

Technology Limited versus MEI AH (HK) Company Limited [2020] HKCFI 347.

Learned counsel also in support of his contentions made reference to Birmingham City Council versus Oakley [2001] 1 All ER 385 as well as ZYN, R versus Walsall Metropolitan Borough Council [2015] 1 All ER 165.

3. Learned Additional Attorney General, *inter alia*, contended that virtual appearance ought not be provided in all cases, especially where there is possibility of arrest, for instant, while hearing bail before arrest; where remand of an accused is to be granted under section 167 Cr.P.C or where signature and thumb impression of an accused is required; where the Court is to ask questions directly from the accused for information or where final judgment is to be passed in a criminal case. He also contended that the issue of virtual presence be decided on case to case and hearing to hearing basis without passing a blanket order in the absence of Rules. Learned Additional Attorney General further contended that this Court has power to frame rules under the Code of Criminal Procedure and it would be appropriate that the same are formulated for the sack of convenience and certainty. Learned Additional Attorney General highlighted various sections of Cr.P.C, where presence of an accused may be required for various purposes. He also drew attention of the Court towards Lahore High Court Rules and Orders, Volume-III, Part-C, which rules are being followed by this Court as well. In support of his contentions, reference was made to cases reported as Meera Shafi versus Ali Zafar (PLD 2023 SC 211), Shahzaib and others versus the State (PLD 2021 SC 886), Munawar Hussain and another versus the State (2020 PCr.LJ 1184), Muhammad Israr versus The State and another (PLD 2021 Peshawar 105), Shah Nawaz versus the State (2001 PCr.LJ 1786), Muhammad Rafique versus the State (2002 YLR 2452), Dost Muhammad alias Dosso versus The State (PLD 1993 Lahore 388) and The State of Maharashtra and P.C Singh versus Dr. Praful B. Desai and others (AIR 2003 SC 2053).

4. During the course of arguments, this Court had appointed Mr. Salman Safdar, ASC as an *Amicus Curiae*, even though he is representing the petitioner in various cases. Submissions made by learned *Amicus Curiae* are to the effect that under Article 164 of the Qanun-e-Shahadat Order, 1984, modern and scientific evidence can be used for criminal trials. He made reference to *Khawaja Anwar Majid versus National Accountability Bureau through Chairman NAB and another (PLD 2020 SC 635)*, *Meera Shafi versus Ali Zafar (PLD 2023 SC 211)*, *Ali Haider alias Papu versus Jameel Hussain, etc. (PLD 2021 SC 362)*, *Kalyan Chandra Sarkar versus Rajesh Ranjan (2005) 3 SCC 284* and *Sakshi versus Union of India (2004) 5 SCC 518*. It was submitted that it is the fundamental right of petitioner to have a fair trial and with multiple cases, it would not be possible that the said fundamental right is available to the petitioner.

5. Learned Special Public Prosecutor on behalf of the State adopted the arguments addressed by learned Additional Attorney General.

6. Submissions made by the parties have been heard and the documents placed on record as well as law cited at bar was examined minutely.

7. The controversy leading to filing of the instant petition has been spelt out hereinabove, which is hardly factual and has legal basis. Like other judicial systems, our present Criminal Justice System is in dire need of re-engineering its processes, optimizing the use of human resources and bringing about the changes in the law to utilize in the information and communications technology to its maximum. The changes in law and the rules with said purpose in mind will and can revolutionize the justice system and improve not only the quality of judgments but also the quantity and will enable the Courts in expeditious dispensation of justice. It is pertinent to observe that use of modern technologies for dispensation of justice is being put to use in various judicial systems, especially in the West and also has seen progress in leaps and bounds across the border where laws are quite similar to ours. It is unfortunate that to make laws

compatible with development in the modern technologies qua information and communications has failed to attract the attention of our legislature in general and even the Law and Justice Commission of Pakistan in particular. Availability of modern means of communications like internet at least in all major cities of Pakistan is readily available, however, is not being used potentially as it should be. We, as a country cannot remain ignorant of the fact that future lies in adoption of modern information and communications technologies, rather in days to come artificial intelligence can and would bypass human resources as well. The Government of the day and all the future governments as well as the Law and Justice Commission of Pakistan on urgent basis need to put all endeavors in making the judicial system in general and criminal justice system in particular compatible with modern technology. Our Criminal Justice System requires presence and attendance of an accused person at various stages, including pre-trial and during the course of trial. The salient provisions which mandate the presence of an accused from the stage of taking him into custody and/or involving him in investigation can be enumerated as follows:-

- (i) **Section 167 Cr.PC**:- Under this provision, where police arrests a person and detains him in custody, his custody is to be authorized by a Magistrate within 24 hours of the arrest and if custody of the accused is granted to the police, the same cannot be done in the absence of accused. In this regard, case reported as *Ghulam Sarwar and another versus the State (1984 PCr.LJ 2588)* emphasizes that a Judge shall not grant remand to the police authorities in the absence of the accused.
- (ii) **Section 265-C read with Section 241-A Cr.PC**:- The referred provisions provide for supply of statements and documents to the accused.

- (iii) **Section 265-D & E Cr.PC**:- It pertains to appearance of the parties.
- (iv) **Section 342 Cr.PC**:-The referred section provides for examination of the accused.
- (v) **Section 353 Cr.PC**:- This section deals with presence of accused in Court while recording evidence or in his absence in the presence of his Pleader.
- (vi) **Section 361 Cr.PC**:- Explanation to the accused or in his absence to his Pleader.
- (vii) **Section 363 Cr.PC**:- Remarks representing demeanor of witness.
- (viii) **Section 498-A Cr.PC**:- Grant of pre-arrest bail to an accused while he is present in the Court.
- (ix) **Section 503 Cr.PC**:- Power of Court to dispense with attendance of witness and issue commission to a Magistrate to record evidence.
- (x) **Section 512 Cr.PC**:- Recording of evidence in absence of accused.
- (xi) **Section 540-A Cr.PC**:- Provision for inquires and trial being held in the absence of accused.

It is pertinent to observe that the provisions mentioned above requiring the presence of accused are not exhaustive and have been mentioned purely to cite as examples.

8. In any criminal investigation, it is not essential for the police or investigating agency to arrest an accused. Summons/warrants for appearance can be issued to any person for his attendance to cooperate in the investigation. Under the law, it is only when sufficient material is available, which justifies the arrest of an accused person, the investigating agency may arrest an accused

without warrants if the offence is cognizable and after obtaining warrants if it is non-cognizable.

9. The problem the petitioner faces is that in most of the cases, he is being investigated and has applied for bail before arrest in a large number of cases. The relevant provision of law, which deals with bail before arrest is section 498-A Cr.PC. For ease of convenience, the relevant provision is reproduced below:

"498-A Cr.PC:- No bail to be granted to a person not in custody, in Court or against whom no case is registered, etc.: *Nothing in section 497 or section 498 shall be deemed to require or authorize a Court to release on bail, or to direct to be admitted to bail any person who is not in custody or is not present in Court or against whom no case stands registered for the time being and an order for the release of a person on bail, or direction that a person be admitted to bail shall be effective only in respect of the case that so stands registered against him and is specified in the order or direction."*

In the said provision, the presence of accused is a *sine qua non* for him to be admitted to bail in a case registered against him. In a recent case reported as *Shahzaib and others versus the State (PLD 2021 SC 886)* the effect of absence of a person in the Court who was facing criminal charges and had applied for bail before arrest was considered by the Supreme Court of Pakistan. The august Supreme Court observed that section 498-A Cr.PC creates a statutory fetter or a statutory precondition requiring the presence of the accused in person in Court for the exercise of jurisdiction by the Court for granting pre-arrest bail. It was observed that in case the petitioner is not personally present in Court, the Court is not authorized to grant him bail and the petition is to be dismissed for his lack of presence in the Court. It was added that in case some explanation is furnished for non-appearance, the Court may, if it found that explanation to be satisfactory, exempt his presence for that day and adjourn the hearing of the petition for a short period. The Supreme Court deprecated the decision of bail before arrest on

merit in the absence of accused. The Supreme Court emphasized that addition of section 498-A in the Code of Criminal Procedure mandates the presence of accused.

10. The question of using modern technology in Criminal Justice System was considered exhaustively by the Supreme Court of India in case reported as *The State of Maharashtra and P.C Singh versus Dr. Praful B. Desai and others (AIR 2003 SC 2053)*. In the said case, the Supreme Court interpreted section 273 of the Indian Code of Criminal Procedure, which provides for taking down evidence in the presence of accused and when personal attendance of the accused is dispensed with, in the presence of his Pleader. The Court by adopting the purposive approach observed that since presence of the accused can be dispensed with, Pleader can be appointed, means his presence is not required in all the circumstances and that means physical presence in flesh and blood can be dispensed with, whereas constructive presence by way of video link shall suffice. The relevant paragraphs from the judgment are reproduced below:-

"13. One needs to set out the approach which a Court must adopt in deciding such questions. It must be remembered that the first duty of the Court is to do justice. As has been held by this Court in the case of Sri Krishna Gobe versus State of Maharashtra [(1973) 4 SCC 23] Courts must endeavour to find the truth. It has been held that there would be failure of justice not only by an unjust conviction but also by acquittal of the guilty for unjustified failure to produce available evidence. Of course the rights of the Accused have to be kept in mind and safeguarded, but they should not be over emphasized to the extent of forgetting that the victims also have rights.

14. It must also be remembered that the Criminal Procedure Code is an ongoing statute. The principles of interpreting an ongoing statute have been very succinctly set out by the leading jurist Francis Bennion in his commentaries titled "Statutory Interpretation", 2nd Edition page 617:

"It is presumed the Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own

time, is nevertheless to be construed in accordance with the need to treat it as a current law.

.....

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials".

15. *At this stage the words of Justice Bhagwati in the case of National Textile Workers' Union v. P.R. Ramakrishnan, (1983) 1 SCC 228, at page 256, need to be set out. They are:*

"We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind."

16. *This Court has approved the principle of updating construction, as enunciated by Francis Bennion, in a number of decisions. These principles were quoted with approval in the case of Commissioner of Income Tax, Bombay versus M/s Podar Cement Pvt. Ltd. [(1997) 5 SCC 482]. They were also cited*

with approval in the case of State versus S. J. Chowdhury [(1996) 2 SCC 428]. In this case it was held that the Evidence Act was an ongoing Act and the word "handwriting" in Section 45 of that Act was construed to include "typewriting". These principles were also applied in the case of SIL Import USA versus Exim Aides Silk Exporters [(1999) 4 SCC 567]. In this case the words "notice in writing" in Section 138 of the Negotiable Instruments Act, were construed to include a notice by fax. On the same principle Courts have interpreted, over a period of time, various terms and phrases. To take only a few examples:- "stage carriage" has been interpreted to include "electric tramcar"; "steam tricycle"; to include "locomotive"; "telegraph"; to include "telephone"; "bankers books" to include "microfilm"; "to take note" to include "use of tape recorder"; "documents" to include "computer database's."

17. *These principles have also been applied by this Court whilst considering an analogous provision of the Criminal Procedure Code. In the case of Basavaraj R. Patil v. State of Karnataka [(2000) 8 SCC 740] the question was whether an Accused needs to be physically present in Court to answer the questions put to him by Court whilst recording his statement under Section 313. To be remembered that under Section 313 the words are "for the purpose of enabling the accused personally to explain" (emphasis supplied). The term "personally" if given a strict and restrictive interpretation would mean that the Accused had to be physically present in Court. In fact the minority Judgment in this case so holds. It has however been held by the majority that the Section had to be considered in the light of the revolutionary changes in technology of communication and transmission and the marked improvement in facilities for legal aid in the country. It was held, by the majority, that it was not necessary that in all cases the Accused must answer by personally remaining present in Court.*

18. *Thus the law is well settled. The doctrine "Contemporanea exposition est optima et fortissim" has no application when interpreting a provision of an ongoing statute/act like the Criminal Procedure Code."*

Following the said judgment in case of recording of evidence through video link in a civil matter, the Supreme Court of Pakistan interpreted Order XVIII Rule 4 CPC and allowed the recording of evidence in Meera Shafi versus Ali Zafar (PLD 2023 SC 211). The relevant paragraphs are reproduced below:-

"13. *The "virtual attendance" of a witness in court through the medium of video conferencing enables the judge and other persons present in court to see*

the witness and hear what he says, and vice versa. Such an attendance is thus, in effect, in open court, and his evidence is also recorded under the personal superintendence of the judge. The judge under whose superintendence the evidence through video conferencing is recorded can satisfy himself about the free will of the witness present on screen as he does about the witness present physically in court by questioning him in this regard and ensuring that he is not under the immediate influence of any other person. Needless to say that a court can ensure the independence of a witness only from the immediate influence, not from any covert influence, of any other person in both situations whether he is physically present or virtually present in court. In the latter situation, the court can ensure that there is no other person in the room where the witness is sitting, while his evidence is being recorded, by asking him to provide a full view of that room on the screen. The identity of the witness, if disputed, can also be verified by the judge through appropriate means. The witness can be confronted on screen with documents produced or sought to be produced in court by any of the parties or, if needed, the scanned copies of such documents can be sent to him through modern means of communication. In all such necessary matters as to the recording of evidence, the physical attendance and the virtual attendance of a witness in court do not differ. The virtual attendance of a witness in court, thus, appears to be the species of the genus of "attendance" required under Rule 4 and fulfills the legislative purpose and policy in requiring the attendance of a witness in court for recording his evidence. Therefore, we can legitimately conclude that the word "attendance" used in Rule 4 can be extended to "virtual attendance" and the word "attendance" mentioned in this Rule does not mean only "physical attendance" but includes "virtual attendance" made possible by the modern technology of video conferencing.

14. *Next, we proceed to examine under which provision of the C.P.C. can a court make an order for the virtual attendance of a witness as there is no such provision in Order XVI of the C.P.C., which relates to 'Summoning and Attendance of Witnesses'. Learned counsel for the petitioner has referred to section 151 of the C.P.C., in this regard; therefore, we need to see whether a court can make such an order, in the exercise of its inherent powers under section 151 of the C.P.C.*

15. *Admittedly, the C.P.C. is silent on the matter of evidence recording through video conferencing: there is no express provision either allowing or prohibiting such procedure of recording evidence. And regarding the procedural law, it is a well-settled principle that the courts are not to act upon the principle that every procedure is to be taken to be prohibited unless it is expressly provided for by the Code [of Civil Procedure], but on the converse principle that*

every procedure is to be understood as permissible till it is shown to be prohibited by law. As a matter of general principle, prohibition cannot be presumed. The provisions of section 151, which empowers the civil courts to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, are intended to preclude the possibility of the civil courts being stuck in a situation for any omission in the C.P.C. The inherent powers of the civil courts saved by section 151 are thus supplementary to their powers stated expressly in the C.P.C. and are to be exercised where the situation is not covered by any provision of the C.P.C. It hardly needs lengthy arguments to establish that when in the circumstances of a case, requiring physical attendance of a witness in court will incur an unnecessary amount of delay, expense or inconvenience, the order of the court allowing virtual attendance of a witness through video conferencing is for the ends of justice, and the rejection of an unjustifiable insistence of the opposing party on securing physical attendance of such witness in court is to prevent abuse of the process of the court. An order allowing virtual attendance of the witness in such circumstances thus squarely falls within the scope of section 151 of the C.P.C.”

In light of the above judgment, indeed purposive approach is to be given to the statute which was framed almost 140 years ago especially when the legislature has failed to update the law keeping in view the advancement in technology. The purposive interpretation can be granted to the statute just to accommodate and keep the balance between technology and the words of the statute. This approach is not unprecedented and was followed in the above-mentioned case law as well as other cases. However, the dilemma this Court faces is that in adopting the purposive approach one should not lose sight of the statute as well and the very fabric of Criminal Justice System. The purpose of presence of accused at various pre-trials and during the trial as well as post-trial processes is to bring about transparency. Likewise, presence of the accused being *sine qua non* for adjudication of bail before arrest is where the investigating agency requires the physical custody of the accused, he should be present in the Court and, upon dismissal of the same, he could be arrested accordingly, which otherwise the investigating agency was not able to because of bail order.

Obviously for the purposes of investigation, an accused cannot record his statement or join investigation through video link, he is to be physically present inasmuch as he might be confronted with documentary or other material evidence. Insofar as pre-trial requirement of handing over of documents is concerned, that also requires signature of the accused (section 265-C Cr.PC), hence his physical presence cannot be dispensed with. Similarly, at the time of pleading to the charges, his presence is required in flesh and blood so that he can sign the plea he has taken. Insofar as recording of evidence during the course of trial is concerned, that of course can take place in the absence of the accused and his presence through constructive means shall be sufficient in light of the aforementioned judgment of the Supreme Court as well as *PLD 2023 SC 211 supra* but naturally his statement under section 342 Cr.PC need to be recorded in his presence in the Court as it requires signatures. With respect to bail before arrest, the same cannot be adjudicated without physical presence of the accused. At the time of admission or initial order of ad-interim bail before arrest, presence of the petitioner is absolutely necessary. In the dates/proceedings other than final adjudication, presence of accused may be marked through video link but that is only if the Court so allows as this may be used as a ploy to delay the adjudication. Physical presence of the accused while hearing an application under section 498-A Cr.PC can be dispensed with or exempted; likewise, his presence can be marked through video link but if the Court hearing the matter requires physical presence of the accused that is to be ensured in order for the Court to facilitate the passing of the final order in terms of necessary conditions of presence of the accused under section 498-A Cr.PC.

11. This Court does have jurisdiction to frame rules under sections 365 and 554 of Cr.P.C and the same should be done in order to bring the mannerism of recording of evidence at par with modern needs and also bringing certainty in this field as the matter should not be left to the whims of the presiding officer. To

sum up above discussion, it is reiterated that presence of accused can be marked through video link in bail before arrest with prior permission of the presiding officer/Court for hearings not meant for final adjudication and in case of initial filing of the application and final adjudication, presence of the accused/petitioner is a must. Likewise, evidence of the prosecution can be recorded and the presence of the petitioner can be marked through video link but his statement under section 342 Cr.PC can only be recorded by physical presence.

12. The instant petition stands **disposed of** in light of the above observations and law. The Registrar of this Court shall place the matter before the competent authority for framing of the rules on recording of evidence through video link and/or utilization of modern techniques by the Courts where necessary.

(CHIEF JUSTICE)

Announced in open Court this 20th day of July, 2023.

(CHIEF JUSTICE)

M.Shah/.

Approved for Reporting.