

(2001) 04 BOM CK 0058

In the Bombay High Court

Case No : Criminal Application No. 3193 of 1999

Dr. P.B. Desai and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-04-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 273, 284, 285, 286

Evidence Act, 1872 — Section 3

Penal Code, 1860 (IPC) — Section 109, 114, 228, 338, 379

Citation : (2001) 04 BOM CK 0058

Hon'ble Judges : S.S. Parkar, J

Bench : Single Bench

Advocate : S.B. Jaisinghani and Rashmi Chandrachud, instructed by Gagrath and Co, for the Appellant; D.M. Arekar, Special Public Prosecutor, Tejas H. Bhatt and R.Y. Mirza, APP, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : The State of Maharashtra and P.C. Singh Vs. Dr. Praful B. Desai and Another, AIR 2003 SC 2053 : (2003) CriLJ 2033 : (2003) 2 CTC 787 : (2003) 3 JT 382 : (2003) 3 SCALE 554 : (2003) 4 SCC 601 : (2003) 3 SCR 244 : (2003) 2 UJ 769 : (2003) AIRSCW 1885 : (2003) 3 Supreme 19

S.S. Parkar, J.—The short but important question that arises in this petition is whether the evidence of a prosecution witness can be recorded on video conferencing and whether it is permissible in law in a criminal trial in the face of Section 273 of the Code of Criminal Procedure.

2. The said question arises in the matrix of following facts:

The applicant is practicing as a consultant surgeon for last about 40 years. He along with another surgeon, who actually performed the surgery on the complainant's wife, are made accused in Case No. 82/P of 1991 pending in the

Metropolitan Magistrate's 28th Court, Esplanade, Bombay. Azad Maidan police station Bombay had registered C.R.No. 399/91 on 14/05/1991 on the FIR of one Mr. P.C. Singhi for offence of medical negligence u/s 338 read with Section 109 and 114 of the IPC allegedly committed by the Applicant, accused No. 1 and accused No. 2 Dr. A.K. Mukherji when the complainant's wife Mrs. Leela Singhi was operated on 22/12/1987. Dr. Earnest Greenberg of Sloan Kattering Memorial Hospital, New York (USA) who had previously examined Mrs. Leela Singhi had opined that her case was inoperable and she should be treated only with medication. In spite of that opinion the applicant advised surgery to remove her uterus and when she was operated unsuccessfully fistula developed causing suffering to the patient. The process was issued against both the accused by the learned Metropolitan Magistrate on 9/8/1992 after the charge-sheet was filed in the matter. The evidence of the first informant as well as other witnesses was recorded by the learned Metropolitan Magistrate. Thereafter application came to be filed on 29th June 1998 by the learned Special Public Prosecutor for examination of Dr. Greenberg from New York, USA by video conferencing on the ground that the said doctor had expressed his inability to personally come to India due to his old age and health problems. The said application was opposed on behalf of the accused. After hearing both the sides and considering the rival arguments advanced before him the learned Metropolitan Magistrate allowed the said application by his order dated 16/8/1999 which is impugned by this petition.

3. The said order is challenged mainly on the ground that recording evidence on video conferencing would not meet the requirements of Section 273 of Cr.P.C. under which all the evidence of the prosecution witnesses has to be recorded in the presence of the accused. It was further contended that under the code of Cr.P.C. there are certain safeguards laid down in the form of Sections 349 and 350 of the Cr.P.C. to ensure that the witnesses give evidence before the court with all sense of responsibility and do not either refuse to answer questions or refuse to produce documents if so required by the court. The provisions of section 228 of IPC are also pressed in service under which if any person intentionally offers any insult or causes any interruption to any public servant sitting in judicial proceeding he is liable to be punished under that provision. It is further argued that there may be possibility of witness being coached or tutored while giving evidence and in that case witness will not be subject to any control of the Court. Then practical difficulties were also mentioned in recording evidence by video conferencing, for instance the time difference between the two countries i.e. USA where the witness is to be examined on video conferencing and India i.e. the seat of the Court. It was further contended that in the case of recording evidence on video conferencing the advantages of having the proceedings in open court room as provided u/s 327 of Cr.P.C. where public may have access, will not be available. In support of the aforesaid contentions number of judgments of Indian Courts as well as U.S. Courts have been cited to which reference will be made hereafter.

4. As against that it is contended on behalf of the prosecution that dr. Greenberg

from USA has expressed his inability to attend the Court in Bombay to give evidence because of his old age and ill health and there is no provision under the Code of Criminal Procedure to enforce or compel the presence of this witness, who is an American citizen, in Court in India. It is further submitted that the said witness is a key witness and the prosecuting agency cannot avoid his evidence. It is further submitted that the witness will be subject to cross-examination on behalf of the accused on video conferencing. Invoking Section 3 of the Indian Evidence Act where the definition of the word "evidence" is given, it is contended on behalf of the prosecution that evidence includes all statements which the Court permits or requires to be made before it by witnesses and therefore, the evidence recorded on video conferencing also would amount to evidence within the meaning of Section 3 of the Evidence Act. Reliance was placed on the order date 8/11/94 passed by Justice Variava presiding over the Special Court constituted under the provisions of the Special Court (Trial of Offences etc.) Act, 1992 whereby permission was given to record the evidence of a witness in U.S.A. in the Special Case pending before him on video conferencing, which has yet remained to be implemented.

5. The perusal of the impugned order shows that the learned Magistrate was impressed by the literature on video conferencing by Videsh Sanchar Nigam Ltd. which was produced before him. Quoting from the brochure he observed that the sound system of the device is audible and natural and that the video conferencing produces many of the features of physical meeting and the word "presence" used in Section 273 of Cr.P.C. has to be given wide import and cannot be attached a narrow meaning and should be construed widely to include the recording of evidence by way of video conferencing of an expert witness who is residing outside the country. He further observed that the evidence of Dr. Greenberg will be based on medical science who would be proving his written opinion which the Court may or may not accept. The learned Metropolitan Magistrate has also quoted from the letter of Dr. Greenberg expressing his inability to travel to India or go abroad and has observed that the said letter shows that he is cooperating in the matter of giving evidence and would not insult the Court or refuse to answer and will also not interrupt the trial. The trial Court, therefore, was of the opinion that the evidence of the expert witness recorded on video conferencing would not contravene any of the provisions of the Cr.P.C. and the Evidence Act and, therefore, allowed the application and passed the impugned order.

6. I was, during the course of hearing, impressed by the arguments advanced on behalf of the prosecuting agency by the learned Special Public Prosecutor and wished that the recording of evidence on video conferencing should be allowed which would facilitate the recording of the evidence in cases of this kind where the doctor, because of his old age and health grounds, is unable to travel such a long distance from USA to India and would also save time and assuage and alleviate the heavy financial cost which may be involved in examining the witness on commission or even in compelling the presence or appearance of the witness

in the Court room.

7. But the question is not whether it is possible or practicable to record the evidence on video conferencing or the feasibility thereof or the choice either of the Judge or of the parties but the question is whether the law permits the recording of the deposition of a witness on video conferencing and whether such recording of evidence would be in consonance with the procedure laid down in the Code. In this respect firstly I have to consider whether the provisions of the Code, mainly Section 273 of the Code would permit adoption of such a course of action which requires that in criminal trial evidence must be taken in the presence of the accused. Section 273 of Cr.P.C. reads as follows:

"273. Evidence to be taken in the presence of accused.--Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

Explanation. - In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."

8. Section 273 of the Code thus mandates that all evidence in a criminal trial must be recorded in the presence of the accused except as otherwise expressly provided. Therefore two questions arise, firstly whether the recording of the evidence on video conferencing would amount to taking evidence in the presence of the accused, if not, whether taking evidence on video conferencing is otherwise expressly provided by the Code itself. To deal with the second question first, undoubtedly there are express provisions under the Code for recording of the evidence on commissions as provided under Sections 284 and 290 of the Code. The second exception can be found under Sections 295 and 296 of the Code under which the affidavit evidence can be given respecting a public servant or by a person whose evidence is of formal character. There is no other mode provided under the Code for recording the evidence at a criminal trial by way of exception to Section 273 of the Code. It is not in dispute that there is no provision in the Code allowing the evidence to be recorded on video conferencing.

9. As regards the first question, it was submitted by the learned Special Public Prosecutor that the recording of the evidence on video conferencing would also amount to taking evidence in the presence of the accused as according to him though the witness may be far away from the seat of the Court i.e. in this case New York, USA, yet the accused can remain present along with his Advocate in the conference room from where he will be able to observe and see the witness deposing from the other part of the world. In this respect Mr. Arekar cited an example from Australia where the arguments were heard by an Australian Court consisting of three judges. At that time in Adelaide only two Federal Court Judges were available. Due to the exigency of time Full Court was constituted with one Judge sitting in Sydney which heard the arguments on teleconference from counsel in Adelaide and the judgment was delivered refusing leave to appeal.

The learned Special Public Prosecutor also placed reliance on the Paper presented by Chief Justice M.E.J. Black of the Federal Court of Australia at the First Worldwide Common Law Judiciary Conference. While mentioning the benefits of the Court-based video-conferencing network the said Chief Justice had mentioned about the advantages of the Court having its own network to promote the use of video conferencing whenever need arises which would also maintain the courtroom environment even when the submissions or the evidence are taken from remote locations. It is, however, pertinent to note that the learned Chief justice has at the same time in the next paragraph pointed out the obvious limitations on its use in criminal cases stating as under:

"Of course the advantages should not be overemphasised. Whilst its value for expert witnesses and for relatively sort and uncontroversial evidence in civil cases is undoubted, there are obvious limitations on its use in criminal cases, or where the credibility of a witnesses is seriously in issue in civil cases, or where the evidence is lengthy." (Underlining supplied)

10. The prosecution has also relied on the portion of the paper read by the Chief Justice Black where he has mentioned about the use of video conferencing made in the Australian Courts but the learned counsel for the prosecution fairly conceded that in Australia the law has been amended so as to make use of video conferencing for the purpose of recording evidence. As stated earlier the learned Chief Justice has in the passage quoted above expressly observed that the advantages of video conferencing should not be overemphasised and highlighted the value of video conferencing for recording of evidence of expert witnesses for relatively short and uncontroversial evidence in civil cases only and has spoken about the "obvious limitations" on its use in criminal cases.

11. This leads me to consider whether recording of evidence on video conferencing would amount to recording the evidence of witnesses in the presence of the accused within the meaning of Section 273 of the Cr.P.C.

12. The perusal of Section 273 shows that there is a mandate to take evidence of the witnesses in a criminal trial in the presence of the accused. The said provision has been judicially held to be mandatory. Few cases may be mentioned here. In the case of Ram Shankar Rai Vs. The State of Bihar, while considering the corresponding Section 353 of the old Code of 1898 it was observed in para 6 of the judgment that non-compliance with the said provision vitiates the entire trial. That was a case where personal attendance of the accused was dispensed with and the evidence of the witnesses was recorded in the absence of his pleader. The conviction and sentence recorded against the accused was quashed and set aside on the ground that the trial was vitiated as two prosecuting witnesses were examined in the absence of accused as well as his pleader. The reliance was placed on the earlier Division Bench decision of Patna High Court in the case of Bigan Singh v. King Emperor reported in (1928)Cri.L.J. 260. Similar view was taken by the Orissa High Court as recently as in the year 1990 in the case of Banchhanidhi Singh alias Nani Singh Vs. State of Orissa, . That was a

case where the accused was facing trial for offence u/s 379 of IPC and the personal attendance of the accused was dispensed with. During the examination of the prosecution witnesses the lawyer representing the accused was also not present and, therefore, the High Court held that the examination of the witnesses was made in gross violation of the mandatory provisions of Section 273 of Cr.P.C. and on that score alone the entire trial was held vitiated. The next recent decision to which reference may be made is the decision of the Division Bench of Madhya Pradesh High Court in the case of State of Madhya Pradesh Vs. Budhram, where also the conviction of the accused u/s 302 of IPC and the death sentence imposed on him was set aside on the ground that the trial was vitiated as the evidence of witnesses was recorded in the absence of the accused. The case was remanded back for retrial. In the case of Bigan Singh Vs. Emperor, it was held that waiver of mandatory provision of Section 353 of the old Code by the accused's pleader would not be taken to condone the non-compliance of the mandatory provision. It was held that non-compliance with the said provision amounted to disobedience to an express provision as to a mode of trial and therefore is not merely an irregularity but vitiated the trial. Similarly in the case of Bishnath v. Emperor reported in AIR 1935 Oudh 488 relying on the similar provisions in the old Code, it was held that when the examination in chief of the witness was made in the absence of the accused the trial was a nullity although witnesses had proved the case of the prosecution against the accused in cross-examination which had taken place in the presence of the accused. Similar was the view expressed in the case of (Thalanki) Nagayya and Another Vs. Thommandra Yerrikalappa, wherein the Madras High Court had held that the committal order based on the evidence recorded in the absence of the accused was illegal. Thus such evidence was not relied even for the purpose of committal of the accused to Sessions Court.

13. On behalf of the defence decisions of the U.S. Courts were also cited before me and it would be worth referring to them since they are quite relevant on the point in issue. In U.S.A. there is provision in the criminal jurisprudence which is on the lines of Section 273 of our Code. Rule 43 of the Federal Rules of Criminal Procedure mandates the presence of the defendant (accused) at every stage of the trial which reads as follows:

"Rule 43. Presence of the Defendant:

(a) PRESENCE REQUIRED. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at the trial, or having pleaded guilty or nolo contendere.

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial),

(2) in a non-capital case, is voluntarily absent at the imposition of sentence, or

(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

(c) PRESENCE NOT REQUIRED. A defendant need not be present:

(1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. 18;

(2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial and imposition of sentence in the defendant's absence;

(3) when the proceeding involves only a conference or hearing upon a question of law; or

(4) when the proceeding involves a reduction or correction of sentence under Rule 35(b) or (c) or 18 U.S.C. 3582."

14. This principle is incorporated even in the U.S. Constitution by Amendment VI generally known as Confrontation Clause under which the witnesses should be available for actual and physical confrontation against the accused. The said amendment reads as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence."

15. The question is, therefore, can the words "in the presence of the accused" in Section 273 of the Cr.P.C. include or cover the evidence recorded through the medium of video conferencing. It would not be out of place here to see the dictionary meaning of the word "presence". According to the Concise Oxford Dictionary Ninth Edition the word "presence" has been defined or described as follows:

"1. the state or condition of being present (your presence is requested). 2. a place where a person is (was admitted to their presence). 4. a person or thing that is present (the royal presence: there was a presence in the room). 5. representation for reasons of political influence (maintained a presence). in the

presence of in front of:"

As per the Black's Law Dictionary (Sixth Edition) the word "presence" is defined as follows:

"Presence, Act fact or state of being in a certain place and not elsewhere, or within sight or call, at hand, or in some place that is being thought of. The existence of a person in a particular place at a given time particularly with reference to some act done there and then."

Similarly as per the Webster's Third New International Dictionary (Millennium Edition) the word "presence" has been defined as follows:

"1. a: the fact or condition of being present : the state of being in one place and not elsewhere : the condition of being within sight or call, at hand, or in a place being thought of : the fact of being in company, attendance, or association : the state of being in front of or in the same place as someone or something.... 2 a: the part of space within one's ken, call, or influence: the vicinity of or the area immediately near one: the place in front of or around a person (he came into the ____ of the king) (in her ____ he could scarcely speak) (removed his hat in the ____ of ladies) b: a person present in the flesh; specific; one having a dignified, noble, or impressive appearance c: something present of a visible or concrete nature...."

16. The aforesaid meanings of the word "presence" in three leading dictionaries indicate that by presence what is meant is a state of being in a certain place and not elsewhere or within sight or call at hand or in the same place that is being thought of. It means the existence of a person in a particular place at a given time with reference to some act done there and then. It means the state of being in one place and not elsewhere and the state of being in front of or in the same place as someone or something. In other words it means the presence of a person in flesh specific is visible or is in concrete nature.

17. In video conferencing the witness can be seen and talked to but his existence is not in the same place where he is supposed to be. He is certainly not present at a given place or at a particular place in flesh but only his image is seen on the TV screen. No doubt he can be heard and his facial expression can be observed. In my view the words "in the presence of the accused" embodied in Section 273 of the Code would not cover the evidence recorded through the medium of video conferencing. It is fairly conceded by the counsel for the prosecution that the presence on the screen or the recording of the evidence through the medium of video conferencing was not in contemplation at the time when Section 273 of the Cr.P.C. was enacted. The Chief Justice of the Federal Court of Australia, whose paper has been relied on by the prosecution, has himself stated about the "obvious limitations" of the use of video conferencing in criminal cases.

18. Even the Courts in USA in the context of the similar provision as Section 273 of the Code have held that recording evidence on video conferencing does not

satisfy the requirement of examining the witness in the presence of the accused. It would be appropriate, at this juncture, to refer to some of the US decisions on the point.

19. The decision of the Superior Court of Connecticut, Judicial District of New Haven, at New Haven 1999 CSL 786 in the case of Howard R. Eldridge Jr. v. Zurich American Insurance Co. was brought to my notice. In that case the prosecution had applied to the Court to record the deposition of the witness on video conferencing which application was turned down because such methodology would constitute a change or modification of the Rules codified in the Practice Book for recording testimony at a deposition as the concerned rules did not contemplate a deposition by video conferencing which provided for recording the testimony at a deposition by stenographic means.

Again in the case of Stoner v. Sowders 1997 FRS 209 the evidence was not allowed to be recorded on video conference at it would have violated the Confrontation Clause quoted above which assures the right of the accused to be confronted in all criminal prosecutions with the witnesses against him. The argument in support of video deposition was turned down by the Court by observing as follows:

"The State suggests that video depositions are almost as good as live testimony and not much is lost by not having first hand, face-to-face presence in court. That may be true in many cases, but still the jury and the judge never actually see the witness. The witness is not confronted in the courtroom situation. The immediacy of a living person is lost. In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact. Video tape is still a picture, not a life, and it does not come within the rule of the confrontation clause which insists on real life where possible, not simply a close approximation."

20. Similarly in the case of USA v. Navapro, U.S. 5th Circuit Court of Appeals did not allow sentencing of the accused by video conferencing. That was a case where the Judge was in Beaumont, Texas and the prosecutor and the defendants and their Attorneys were in court in Sherman, Texas approximately at a distance of 300 miles. One of the accused had consented for sentencing by video conferencing but not the other accused. The judges overruled the objection raised by one of the accused and passed sentence on video conferencing. When the same was challenged before the U.S. 5th Circuit Court of Appeals, the appeal was allowed and the sentences was set aside in view of the aforesaid Rule 43 which provides for presence of the defendant at all stages of the trial. Referring to the dictionary meaning of the word "presence" the appeal Court held that the term "present" suggests physical existence in the same location as the Judge and that the word "presence" means defendant's physical presence in court. Referring to the decision of the U.S. Supreme Court in the case of Lewis 146 U.S. 373, it was held that the "presence" means right to be personally present. It was further observed in that case as follows:

"...The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the fact finder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is convenient for the witness to attend the trial." (Underlining supplied)

The Court also made reference to the Notes of the Advisory Committee and observed as follows:

"The Note indicates a clear preference for live in-court testimony. Based on the Note, it is unlikely that the drafters of the Rules would agree that a person is "present" for the purposes of Criminal Rule 43 because that person is on a video screen. Civil Rule 43 also indicates that, where the drafters believe that video conferencing is appropriate, the drafters will make provision in the Rules for the use of the technology."

21. Significantly in the case of *Valenzuela-Gonzalez v. U.S.D.C. FOR D., Ariz*, (915 F. 2d 1276 (9th Cir. 1990) even arraignment for closed circuit TV was held to be illegal by the US, 9th Circuit Court of Appeals. In that case reference was made to Rule 10 and the above quoted Rule 43. Rule 10 provided that the arraignment must take place in an open court as u/s 327 of our Code, while Rule 43 provides for recording of the evidence in the presence of the accused on the lines of Section 273 of our Code. It was held as follows:

"Similarly, there is no provision for arraignment by closed circuit television. Under Rule 43, the defendant must be present at arraignment. Under Rule 10, the arraignment must take place in open court. We hold that these rules together require that the district court must arraign the accused face-to-face with the accused physically present in the courtroom." (Underlying supplied)

22. In the aforesaid case also the provision viz. Rule 43 which is on par with Section 273 of our Code was construed to mean that the accused must be arraigned face-to-face to the witness with the physical presence of the accused in the court room. It was further observed that allowing the use of close circuit television at arraignment without the consent of the accused would amount to the Court's tacit approval of its use at other stages of criminal proceeding as well. It cannot be disputed that Rule 10 of the Federal Rules of Criminal Procedure in U.S. is alter ego of Section 327 of our Code which requires the holding of the criminal proceedings, enquiries and the trials for any offence in an open court, to which the public generally may have access, so far as the same can conveniently contain them.

23. Similarly in the case of *U.S.A. v. Christopher Hamilton* the Seventh Circuit Court of Appeals while considering the issue of use of telephonic testimony held that the face-to-face confrontation ensures the reliability of the evidence allowing the trier to observe the demeanour, nervousness, expressions and other body language of the witness. It was observed that in-court testimony also impresses

upon the witness the seriousness of the matter and ensures that the statements are given under oath. Reference was made to the decision of the U.S. Supreme Court in *Coy v. Iowa*, 1988 487 U.S. 1012 where the U.S. Supreme Court interpreted the Confrontation Clause of the VI Amendment to guarantee face-to-face meeting with the witnesses appearing before the trier of fact and held that the deposition of a witness on video conferencing would not meet the requirement of face-to-face meeting (of the accused) with the witness appearing before the trier of fact. It was further observed that the personal appearance also helps to assure the identity of the witnesses and that the witness is not being coached or influenced during testimony and that the witness is not referring to documents improperly.

24. Aforesaid decisions of the U.S. Courts interpreting similar provisions as embodied under Sections 273 and 327 of the Code lend support to the view that recording of deposition on video conferencing is not within the contemplation of the said provision. It is well settled that the mandatory provision should be strictly construed and therefore, it would not be feasible or proper to bring within the fold of Section 273 the recording of deposition through a medium of video conferencing by any liberal interpretation of the said provision.

25. The prosecution has placed reliance on the Amendment made by State of Andhra Pradesh vide Ordinance dated 6th December 2000 to Section 167(2) of the Cr.P.C. with the object of providing for use of video conferencing for the purpose of remand applications. Sub-section (2) of Section 167 makes reference to the accused being forwarded to the Magistrate and Clause (b) of the proviso to the said sub-section requires the production of the accused before the Magistrate for the purpose of remand. When the State of Andhra Pradesh wanted to introduce video conferencing for the purpose of remand applications it thought it fit to amend the provisions as it was felt that production of the accused before the Magistrate or forwarding the accused to the Magistrate would mean that he should be physically brought before the Magistrate. It is further significant to refer to the object of the said Ordinance whereby it is made clear that the medium of electronic video linkage would be used for production of the accused persons for the purpose of remand only and not for the purpose of recording evidence of witnesses which has been expressly excluded. The relevant portion of the Ordinance reads as follows:

"And whereas, it has been decided that production of accused persons, other than those against whom evidence is being recorded, through the medium of electronic video linkage before the respective Magistrates for the purposes of remand extension would be an effective alternative in solving the incessant problem."

26. I am told that similar steps are proposed to be taken in the State of Maharashtra also where video conferencing is contemplated for the purpose of remand applications only by carrying amendment to the provisions in that regard. IF in order to introduce video conferencing for the purpose of remand

applications, which do not at all affect the accused, the amendment of the provisions is required, surely the deposition on video conferencing cannot be allowed unless Section 273 of the Code is amended. Even in most of the advanced countries where due to the advanced technology use of video conferencing has become common in other spheres of life the Courts in those countries are not reconciled to the use of the video conferencing for the purpose of recording evidence in criminal trial where the presence of the accused is made mandatory. As pointed out earlier even the Chief Justice of Australia was not optimistic about the use of video conferencing in criminal trials though Australia has video-conferencing network based in Courts themselves.

27. The reference to the case of the Special Court constituted under the provisions of the Special Court (Trial of Offences etc.) Act, 1992, allowing the evidence to be recorded on video conferencing, would not, in my view, be a proper guide for interpretation of Section 273 of the Cr.P.C. Firstly the provisions of Cr.P.C. are not binding on the Special Court even in criminal cases. Secondly the case in which video conferencing was allowed was a civil case. Thirdly both the parties had given consent. Apart from that the Learned Judge had expressly stated the reason for allowing the evidence to be recorded on video conferencing because if the evidence were to be recorded on commission the defendant in that case, who was a notified party under the provisions of the said enactment, would have to be permitted to leave India and go to USA, at the risk of his not returning to face the proceedings pending against him in that Court. Thus though it was a civil case the learned Judge felt that the physical presence of the party in the U.S.A. was necessary in case the evidence was recorded against him on commission there for the purpose of instructing his Advocate. I am told that the order of 8th November 1994 is yet to be implemented.

28. In the aforesaid circumstances, I am of the view that the trial magistrate was in error in allowing the application of the prosecution to examine Dr. Greenberg through video conferencing.

29. In the result this criminal application is allowed and the impugned order dated 16/8/1999 passed by the learned Metropolitan Magistrate's 28th Court. Esplanade, Mumbai is quashed and set aside. Rule is made absolute accordingly.

30. I must record my appreciation of the invaluable assistance ably rendered to me by both the senior counsel appearing in the matter, of course assisted industriously by their junior counsel.